

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION**

NOVELIS CORPORATION,

AND

**UNITED STEEL, PAPER AND
FORESTRY, RUBBER
MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE
WORKERS, INTERNATIONAL UNION,
AFL-CIO.**

**CASES: 03-CA-121293
 03-CA-121579
 03-CA-122766
 03-CA-123346
 03-CA-123526
 03-CA-127-24
 03-CA-126738**

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FORESTRY, RUBBER
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AFL-CIO.**

CASE: 03-CA-120447

**NOVELIS CORPORATION'S STATEMENT
OF POSITION FOLLOWING REMAND**

I. INTRODUCTION

Respondent Novelis Corporation (“Novelis” or “the Company”) respectfully submits this statement of position on the appropriate disposition of this matter, which returns to the Board on remand from the U.S. Second Circuit Court of Appeals. Per the Board’s request, Novelis submits this position statement with regard to two workplace rule determinations remanded by the Second Circuit to the Board involving Novelis’ email use rule and social media rule, in light

of the Board's December 2017 issuance of *The Boeing Company*, 365 NLRB No. 154 (2017). The Board subsequently accepted remand on June 22, 2018.¹

Initially, Novelis notes that the Section 10(j) Order from the Northern District of New York specifically enjoined Novelis from maintaining or giving effect to the rules and the policies at issue. Consequently, they have not been in effect for nearly four years. *Ley v. Novelis Corp.*, 2014 WL 4384980, at *7 (N.D.N.Y. Sept. 4, 2014). Novelis has no intention to re-implement the particular policies as written. Given these facts, the amount of time that this case has been pending, and Novelis' desire to conserve its and the Board's resources, Novelis submits that the Board should remand this case to the Region so that the parties can explore a possible resolution of this case with respect to the only remaining issue - the two policies.²

II. NATURE OF REMAND

Through its August 26, 2016 Order, the Board found that a *Gissel* bargaining order was warranted against Novelis and that the Company engaged in unlawful conduct related to an election in which a majority of the voting employees declined union representation. Included in the Board's order were findings that Novelis maintained unlawful email use and social media rules (which the Board analyzed under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)). Upon Novelis' petition for review of the Board's order to the U.S. Court of Appeals for the Second Circuit (and the Board's cross-petition for enforcement), the Court denied

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² Novelis has been fully cooperative with the Region during the compliance process and fully complied with its compliance obligations.

enforcement of the bargaining order, holding that after review of the record and fully-briefed issues, there was no basis to issue a bargaining order. *See Novelis Corp. v. Nat'l Labor Relations Bd.*, 885 F.3d 100, 111 (2d Cir. 2018). Among other things, the Second Circuit reviewed the changed circumstances factors that it ruled the Board should have analyzed (remedial actions, employee turnover, management turnover, and passage of time) and held that such mitigating circumstances obviated the need for a bargaining order against Novelis. *Id.* Upon denying the bargaining order, the Second Circuit remanded to the Board such that two issues needed to be resolved: 1) compliance with the enforced portions of the Board's order; and 2) consideration of the lawfulness of Novelis' former email use and social media rules due to the Board's December 2017 issuance of *The Boeing Company*, 365 NLRB No. 154 (2017). *Id.*

To be clear, the Second Circuit did not remand consideration of the bargaining order to the Board; rather, it outright rejected it. Indeed, the Second Circuit specifically stated that “we deny enforcement of the portion of the Board's order which directs Novelis to bargain with the Union,” (*Novelis Corp.*, 885 F.3d at 11).³ The Second Circuit's directive was clear and included no invitation for the Board to consider issuing a bargaining order again, whether that would be through the consideration of the changed circumstances factors or any other basis for a bargaining order. Rather, it simply stated that it was remanding the decision consistent with its ruling, which was a rejected bargaining order.

The Board's counsel never made any motion or gave any indication that it interpreted issues related to the denied bargaining order to be remanded to the Board. Indeed, the Second Circuit's remand of the two work rules was triggered by the Board's own request to the Second Circuit (on February 9, 2018) to sever and remand only the two work rules in light of *The Boeing*

³ Further, the Board itself in its decision dismissed the petition which serves as the legal basis for any potential bargaining unit. *See Novelis Corp.*, 364 NLRB No. 101 (Aug. 26, 2016)).

Company decision issued just over a month earlier. *See Board's February 9, 2018 Motion for Severance and Partial Remand* attached hereto as Exhibit A.⁴ It is clear beyond doubt that the issuance of a bargaining order at this point by the Board would be wholly inconsistent with the Second Circuit's disposition of this case.

Further, after the issuance of the Second Circuit mandate (which did not include a bargaining order), the Board made no indication that it wished the Court to reconsider the remedies provided in the mandate and treated the mandate as a final judgment and required Novelis to comply with the remedy as enforced by the Second Circuit. The Board's Counsel could have taken steps under Federal Rule of Appellate Procedure 41 to stay the Second Circuit's mandate, or sought a writ under 28 USC §1254(1). Yet, no such efforts were made. Simply put, the judgment which the mandate enforces is final. *See SEIU Local 250, AFL-CIO v. NLRB*, 640 F.2d 1042, 1044 (9th Cir. 1981) (holding that NLRB was without jurisdiction to reconsider merits of a claim, which was not addressed or remanded by appellate court in its adjudication of union's case; therefore, the court's implied determination that claim was without merit was final); *Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C. Cir. 2006) ("under 29 U.S.C. § 160(e), it is obvious that the Board cannot modify an order over which the court has exclusive jurisdiction or that the court has enforced in a final judgment"); *Dupuy v. NLRB*, 806 F.3d 556, 563-64 (D.C. Cir. 2015) ("Scepter and those other appellate decisions [holding that only a court may modify its mandate] have a lot of company. For almost four decades, and in at least nine

⁴ Additionally, after the Second Circuit opinion, the Board, on April 9, 2018, sent a letter to all counsel stating that the Court "granted enforcement of the Board's order, except for the portion which concerns Novelis' social media policy, which the Court stated would be reconsidered on remand. The Court further denied enforcement of the portion of the Board's order which directed Novelis to bargain with the Union, and the Court remanded the case to the Board for further proceedings consistent with its opinion." *April 9, 2018 Board Letter* attached hereto as Exhibit B.

separate decisions, the Board has taken the position that it ‘has no jurisdiction to modify a court-enforced order.’”)

The General Counsel cannot now make arguments that it failed and *refused* to make before the Court of Appeals under the well-recognized doctrine of “the law of the case.” Here, the Board flatly stated in its order and in its briefing to the Second Circuit that it does not consider changed circumstances when issuing a bargaining order. This previously articulated position on changed circumstances when issuing a bargaining order and the Second Circuit’s denial of the bargaining order on that basis (among others) is “the law of the case” of these proceedings. *See Hanson Cold Storage Co. of Indiana*, 2018 WL 1082556, at *2 (Feb. 26, 2018) (accepting the appellate court’s order as the law of the case on remand from the Seventh Circuit); *Southcoast Hosps. Grp., Inc.*, 365 NLRB No. 140 (Oct. 6, 2017) (same on remand from the First Circuit); *LaShawn A v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) (under the law of the case doctrine, “the same issue presented a second time in the same case in the same court should lead to the same result”). Again, the Board could have sought reconsideration, appealed or requested remand to consider these issues. However, it took none of these steps and instead affirmatively required Novelis to comply with the mandate as issued by the Second Circuit (which Novelis did in full). Thus, any assertion that the Second Circuit’s remand included issues beyond the two work rules at issue flies in the face of the not only the language of the Second Circuit opinion, but the acts *and* omissions of the Board before *and* after the issuance of the Second Circuit opinion.

Finally, it is worth noting Novelis’ undisputed compliance with the Section 10(j) Order for over four years and the lack of any unfair labor practices committed by Novelis since those found by the Board in the instant case. Any attempt by the General Counsel to shoe-horn other

alleged issues that occurred four years ago before the Board would be a blatant attempt to improperly expand the scope of the Second Circuit's remand and should be rejected by the Board.

III. APPLICATION OF *THE BOEING COMPANY* TO THE WORK RULES AT ISSUE

A. Legal Framework and Language of Remanded Work Rules

The policies at issue (which have been in effect for nearly four years) are lawful under the Board's current standard for analyzing workplace rules established in *The Boeing Company*. In examining a facially neutral rule, the Board will find unlawful a facially neutral rule that falls on the wrong side of a balancing test which evaluates: 1) the nature and extent of the potential impact of the rule on Section 7 rights, and 2) legitimate justifications associated with the rule. *The Boeing Company*, 365 NLRB No. 154 (2017).

Here, Novelis' email use policy prohibits "solicitation and distribution in working areas of its premises and during working time (including company email or any other company distribution lists)" while the social media rule provides that "[a]nything that an employee posts online that potentially can tarnish the Company's image ultimately will be the employee's responsibility" and that "taking public positions online that are counter to the Company's interest might cause conflict and may be subject to disciplinary action." These policies had a slight, if any, potential impact on Section 7 rights while being support by substantial legitimate justifications.

B. Email Use Rule

With regards to the email use rule, the justifications for the rule far outweigh any potential impact on employees' Section 7 rights. First, the nature and extent of the potential impact of the rule on Section 7 rights is slight, at most, given that the rule unambiguously applies

to activity “during working time.” The assertion that the rule could possibly prevent employees from engaging in Section 7 activity during non-working time is not a legitimate interpretation of the language, given the direct reference to “working time” in the policy’s language. Further, even if employees were limited from sending Section 7 related emails under the rule, employees would be free to express those rights in myriad other ways, which may certainly be more effective than email.

In terms of legitimate justifications, the email use rule is justified by Novelis’ need to protect its confidential and proprietary information while ensuring that employees are not engaging in personal, non-work related activities during working hours. These justifications are particularly significant given that 1) Novelis’ business operates on significant trade secret and proprietary information pertaining to materials and manufacturing processes and 2) many of Novelis’ employees work in dangerous manufacturing facilities where life and death depend on strict attention to safety practices. Specifically, many of Novelis’ facilities operate a large amount of complex machinery within proprietary processes and materials, several of which are very dangerous or life-threatening to untrained or distracted employees. As a result, the email use rule is not unlawful as the legitimate justifications for the rule significantly outweigh the non-existent impact on Section 7 rights.

C. Social Media Rule

The legitimate justifications of the social media rule similarly outweigh any potential impact on Section 7 rights. First, the nature and extent of the potential impact of the rule on Section 7 rights is slight, given that the rule’s prohibition is narrowly limited to social media platforms and to content that would damage Novelis’ image or interest. Even assuming that employees would be subject to any slight restrictions in exercising Section 7 rights on social media (and there is no evidence that the rule was promulgated for that purpose), this does not

impact employees' ability to exercise full Section 7 rights elsewhere. Further, the rule's application to content that can damage Novelis' image or interest does not necessarily include Section 7 content. The assumption that the exercise of Section 7 rights or unionization likely damages company image and that such conduct will necessarily lead to discipline jumps to a conclusion that is unlikely to be true, particularly in light of the evidence that Novelis has a long history of productive relationships with unions.

As to legitimate justifications, considering the ease in which individuals are able to post content (often incendiary to manufacture outrage) on social media and the ability of such content to spread quickly, Novelis has legitimate justifications to ensure that its brand, image, and goodwill are protected and that its confidential and proprietary information is not disseminated through improper and intractable channels like social media. Considering the vast amount of people on social media, including Novelis' employees, customers, stakeholders, and other interested individuals, the reputational risk on such platforms is substantially elevated and justifies a rule to control the content implicating the Company's name. Accordingly, the social media rule's legitimate justifications outweigh any slight impact of the rule on Section 7 rights.

Respectfully submitted this 20th day of July, 2018.

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Attorneys for Respondent
NOVELIS CORPORATION

CERTIFICATE OF SERVICE

I certify that on this 20th day of July, 2018, I caused the foregoing to be electronically filed with the National Labor Relations Board at <http://nrlrb.gov> and a copy of same to be served by e-mail on the following parties of record:

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/s/ Kurt A. Powell
Kurt A. Powell

EXHIBIT A

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C. Social Media Rule

The legitimate justifications of the social media rule similarly outweigh any potential impact on Section 7 rights. First, the nature and extent of the potential impact of the rule on Section 7 rights is slight, given that the rule’s prohibition is narrowly limited to social media platforms and to content that would damage Novelis’ image or interest. Even assuming that employees would be subject to any slight restrictions in exercising Section 7 rights on social media (and there is no evidence that the rule was promulgated for that purpose), this does not

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As to legitimate justifications, considering the ease in which individuals are able to post content (often incendiary to manufacture outrage) on social media and the ability of such content to spread quickly, Novelis has legitimate justifications to ensure that its brand, image, and goodwill are protected and that its confidential and proprietary information is not disseminated through improper and intractable channels like social media. Considering the vast amount of people on social media, including Novelis' employees, customers, stakeholders, and other interested individuals, the reputational risk on such platforms is substantially elevated and justifies a rule to control the content implicating the Company's name. Accordingly, the social media rule's legitimate justifications outweigh any slight impact of the rule on Section 7 rights.

Respectfully submitted this 20th day of July, 2018.

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Attorneys for Respondent
NOVELIS CORPORATION

CERTIFICATE OF SERVICE

I certify that on this 20th day of July, 2018, I caused the foregoing to be electronically filed with the National Labor Relations Board at <http://nrlb.gov> and a copy of same to be served by e-mail on the following parties of record:

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/s/ Kurt A. Powell
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EXHIBIT B

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Brian H. LaClair, Esq. Kenneth L. Wagner, Esq.

Richard J. Brean, Daniel M. Kovalik, Anthony P. Resnick



United States Government

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1015 HALF STREET SE
WASHINGTON, DC 20570**

April 9, 2018

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Re: Novelis Corp., 03-CA-121293, et al.

Dear Counsels:

On March 15, 2018, the United States Court of Appeals for the Second Circuit issued a decision regarding the above-referenced case in which it denied in part and granted in part Novelis' petition for review and the Board's cross-petition for enforcement. In particular, the Board granted enforcement of the Board's order, except for the portion which concerns Novelis' social media policy, which the Court stated would be reconsidered on remand. The Court further denied enforcement of the portion of the Board's order which directed Novelis to bargain with the Union, and the Court remanded the case to the Board for further proceedings consistent with its opinion.

After a court of appeals issues a formal notice of decision remanding a case to the Board, the NLRB's General Counsel makes a recommendation to the Board as to whether it should accept the remand or seek certiorari before the Supreme Court. Should the Board vote to accept the remand, the Executive Secretary will issue a letter to the parties advising them of the Board's decision regarding the remand and whether briefs will be entertained, and if so, their due date. Be advised that if the Board asks for briefs on the remanded issue(s), it usually does not allow answering briefs.

Very truly yours,

/s/ Farah Qureshi
Associate Executive Secretary

Cc: Parties
Region 3