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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

THE BOEING COMPANY,

Employer,

and

SOCIETY OF PROFESSIONAL
ENGINEERING EMPLOYEES IN
AEROSPACE, affiliated with
INTERNATIONAL FEDERATION OF
PROFESSIONAL & TECHNICAL
ENGINEERS, LOCAL 2001,

Union.

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, DISTRICT COUNCIL
15, LOCAL 159, AFL-CIO,

Intervenor.

No. 19-CA-090932; 19-CA-090948;
19-CA-095926

MOTION FOR RECONSIDERATION

1. The Board's Decision compounds the due process problem. The majority expressly holds that *Boeing* "... overruled *Rio All-Suites* to the extent the Board has found the maintenance of the above no camera rules unlawful." This, the three person majority has now established that it views *Boeing* as having expressly overruled *Rio All-Suites* on the camera issue. This leaves no room for the Charging Party to argue on remand.

2. This is a Decision on the merits without review of the record in *Rio All-Suites*. No evidence was presented by the employer to establish the basis of its no camera rule. Indeed, anyone who's ever been to a casino knows that everyone is always taking pictures all the time. Selfies and everything else are taken continuously. Employees are often being asked to take pictures of guests. There is no business justification for the rule and none was offered. Nonetheless, without allowing the Charging Party to address any asserted business justification, the Board has now held effectively that that a no camera rule is always lawful in every workplace.

Keep in mind that in the *Boeing* case, Boeing took extraordinary precautions to establish the need for the no picture rule. There was proprietary information all over the facilities all the time. Perhaps that made sense. Note, moreover, that it wasn't a no camera rule, it was only a no picture taking rule. None of that evidence exists here.

The Board majority's repeating of its Decision to overrule *Rio All Suites* is wrong and reconsideration should be granted.

3. Reconsideration should be granted because the Board's majority made a decision without establishing the factual basis in the record. Footnote 1 claims that the Designated Agency Ethics Official has made a determination. That determination is not in the record. The factual information provided to the Designated Agency Ethics Official is not in the record. This motion for reconsideration should be granted to allow the record to be completed to establish the basis upon which Members Ring and Emanuel have determined that they may ethically participate in this case.

Let's just briefly repeat our position. How would anyone in his or her right mind want to have a case decided by a judge who's firm (albeit a large firm) had represented the very client (in

this case, Boeing and Rio-All Suites' parent corporations) in other litigation. No one would consider this not to "cause a reasonable person with knowledge of the relevant facts to question his impartiality." 5 C.F.R. § 2635.502. No one could believe that an adjudicator or Board member could fairly decide a case involving his firm's former and current client.

4. The Board's Notice, issued on August 1, in *Caesars Entertainment d/b/a Rio All-Suites*, Case 28-CA-060841 further complicates this. In that Notice, the Board now seeks (over the dissent of two Board members) to reconsider the validity of one of the rules which was subject to the litigation in *Rio All-Suites*. Neither Member Emanuel nor Chairman Ring should have participated in it, given the conflicts raised in this case.

The various rules that Rio-All Suites maintains, which are still at issue in that case, relate to the rule which is at issue in the Notice to the public. Although the Notice to the public focuses upon the computer usage rule, all the rules affect the computer usage rule:

Do not disclose or distribute outside of [Rio's] any information that is marked or considered confidential or proprietary unless you have received a signed non-disclosure agreement through the Law Department. In some cases, such as with Trade Secrets, distribution within the Company should be limited and controlled (e.g., numbered copies and a record of who has received the information). You are responsible for contacting your department manager or the Law Department for instructions.

Computer resources may not be used to:

- Commit, aid or abet in the commission of a crime
- Violate local, state or federal laws
- Violate copyright and trade secret laws
- *Share confidential information with the general public, including discussing the company, its financial results or prospects, or the performance or value of company stock by using an internet message board to post any message, in whole or in part, or by engaging in an internet or online chatroom*
- *Convey or display anything fraudulent, pornographic, abusive, profane,*

offensive, libelous or slanderous

- *Send chain letters or other forms of non-business information*
- Seek employment opportunities outside of the Company
- Invade the privacy of or harass other people
- *Solicit for personal gain or advancement of personal views*
- *Violate rules or policies of the Company*

Do not visit inappropriate (non-business) websites, including but not limited to online auctions, day trading, retail/wholesale, chat rooms, message boards and journals. Limit the use of personal email, including using streaming media (e.g., video and audio clips) and downloading photos. (Emphasis in Board Decision)

The particular computer usage rule at issue concerns not only “sending non-business information” but also allows the personal use of the company’s computer resources.

Additionally, the rules at issue concern the confidentiality provision which, in part, governs what information can be shared on the computer resources.

The Board’s Notice is not limited simply to email, but invites briefing on all sorts of electronic communications.

The fact that the Board majority is using *Rio All-Suites* case as the one on which to raise issues involving electronic communications will create further entanglements. It is certain that Morgan Lewis and Littler Mendelson have cases before the Board involving these issues. We haven’t researched where they are or in what stage. It is likely that Chairman Ring and/or Member Emanuel, and certainly others in the firm, worked on these cases. To use that case as the one to question an important precedential decision of the former Board just raises further questions of self-dealing and conflict. The decision will have an impact on other cases in which Member Emanuel or Chairman Ring were involved. This was the same problem the Board encountered in *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 26 (2018). Because Member Emanuel and Chairman Ring are likely recused from participating in rules cases which will be encompassed by a Board decision I *Rio All Suites*, the Decision in *Boeing* should be reconsidered.

Finally, the *Boeing* case may have a direct impact upon the outcome of the Board’s

invitation in ruling on the *Rio All-Suites* case. The Board may apply the analytical structure it established in *Boeing* to the particular computer usage rule. If it does, it will require *Rio All-Suites* to put on evidence of its business justification for the particular rule. *Rio All-Suites* presented no such evidence on remand. As a result, there is no record upon which to make a decision regarding whether the computer usage policy is justified.

In summary, then, the Board has simply compounded the ethical issues raised by the participation of Member Emanuel and Chairman Ring in the *Boeing* case because of the issuance of the Notice and Invitation to Brief in *Rio All-Suites*.

5. For these reasons, the Motion for Reconsideration should be granted. Chairman Ring and Member Emanuel should not continue to compound their “participation [which] would ‘cause a reasonable person with knowledge of the relevant facts to question [their] impartiality.’”

Dated: August 14, 2018

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
 DAVID A. ROSENFELD

Attorneys for Intervenor, INTERNATIONAL
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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On August 14, 2018, I served the following documents in the manner described below:

MOTION FOR RECONSIDERATION

- (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld’s electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 14, 2018, at Alameda, California.

/s/ Karen Kempler
Karen Kempler