

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

NICHOLSON TERMINAL & DOCK COMPANY,

Respondent

and

Case 07-CA-187907

STEVE LAVENDER, AN INDIVIDUAL,

Charging Party

**GENERAL COUNSEL’S ANSWERING BRIEF IN RESPONSE TO THE
RESPONDENT’S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE
LAW JUDGE**

Pursuant to Section 102.46 of the Board’s Rules and Regulations, the current General Counsel, through attorney Renée D. McKinney, respectfully files this Answering Brief to Respondent’s June 13, 2018 Exceptions to the May 16, 2018 Decision of Administrative Law Judge Elizabeth M. Tafe.¹

On June 13, 2018, Judge Elizabeth M. Tafe issued her decision finding, as alleged in General Counsel’s Complaint, that Respondent violated Section 8(a)(1) of the Act by maintaining work rules that would reasonably tend to chill employees in the exercise of their Section 7 rights either by expressly prohibiting or restraining the exercise of NLRA rights, or by potentially impacting the exercise of those rights where Respondent’s justifications for its work rules did not outweigh the potential impact on Section 7 rights. (ALJD 14:19-23.)

¹ In this Brief, the Administrative Law Judge will be referred to as “the Judge,” the National Labor Relations Board will be referred to as the “Board,” and Nicholson Terminal & Dock Company will be referred to as “Respondent.”

The current General Counsel agrees with the Judge that Respondent's rule against recording devices is a lawful Category 1 rule under *The Boeing Company*, 365 NLRB No. 154, slip op. (2017). However, the current General Counsel disagrees with the Judge's decision in regard to the illegal strike rule and the moonlighting rule.

Respondent operates a commercial dock, and employs 46 employees represented by the International Association of Machinists Local Lodge 698 ("Union"), as well as four unrepresented employees. Respondent and the Union are parties to a collective-bargaining agreement and have a mature bargaining relationship dating back to at least the 1970s.

Illegal strike rule: Respondent's handbook states that it considers "inappropriate" behavior to include "Calling, participating, or encouraging others to call or participate in an illegal slowdown, strike (including sympathy strike), or walkout." The Respondent's defense is that the rule only bans "illegal" activity, and is in accord with the CBA's no-strike clause.

The Judge found the rule unlawful. The Judge found that since the rule explicitly applied to Section 7 activity, and was not facially neutral, *Boeing* did not apply. The Judge further found that the term "illegal" was ambiguous, both because the question of whether any given strike or job action is protected is complex, and because the actual term "illegal" was only put in front of "slowdown" and not the other job actions in the list. Finally, the Judge determined that the no-strike clause of the collective-bargaining agreement ("CBA") did not render the rule lawful, since the rule covered non-unit employees as well, was not linked to the CBA, and because unfair labor practice strikes are not waived by a contractual, no-strike clause.

The current General Counsel disagrees. Regardless of whatever ambiguity the phrase "illegal strike" might have to the layperson, its meaning would likely be clear in a unionized workplace where the vast majority of employees are covered by a valid no-strike clause. Unlike

solicitation and distribution rights, which cannot be waived by the union, unions regularly waive the right to economic strike, and represented employees are expected to understand this waiver. Thus, employers should be allowed to expect employees to understand a rule tracking such a waiver. Indeed, it is in employees' interest that they know their right to economic strike has been waived. "Illegal strike" is a term of art used by attorneys, unions, and the Board to describe a class of thing that would otherwise be difficult to define. It therefore may be impossible to more narrowly tailor a rule dealing with illegal strikes.

Moreover, the Judge failed to consider the Respondent's legitimate business interests. Even if the rule is considered an explicit restriction of Section 7 activity, there should be a balancing of the Section 7-rights involved and the employer's legitimate business interests. See *Boeing*, 365 NLRB No. 154, slip op. at 7-8 (2017) and cases holding that an employer may ban all distribution in working areas. Here, the Respondent is signatory to a contract with a no-strike clause, and thus has a significant legitimate interest in ensuring employees do not violate that clause with a wildcat or other illegal strike. While the no-strike clause appears in the CBA, not all employees may have a copy of the CBA, and employers should not have to rely on the union to publicize to employees that they are forbidden from wildcat or other unlawful strikes.

Moonlighting rule: Employees are expected to devote their primary work efforts to the Company's business. Therefore, it is mandatory that they do not have another job that:

- Could be inconsistent with the Company's interests.
- Could have a detrimental impact on Company's image with customers or the public.
- Could require devoting such time and effort that the employee's work would be adversely affected.

Before obtaining any other employment, you must first get approval from the Company Treasurer. Any change in this additional job must also be reported to the Company Treasurer.

The Judge found this rule an unlawful Category Three rule under *Boeing*, and the Respondent-filed exceptions.

The current General Counsel disagrees with the Judge that this rule is unlawful under *Boeing*. See GC Guideline Memo 18-04, Guidance on Handbook Rules Post-*Boeing* (June 6, 2018). The rule does not ban all conduct that is against the Respondent's interest, or that would be detrimental to its reputation, but merely prohibits accepting a second job that could be inconsistent with the Respondent's interests or have a detrimental impact on its reputation. Taking a job with a competitor or related company is a common conflict of interest, and many employers, including the U.S. Government, require permission before an employee may take on any outside employment. While such a rule could affect employees' Section 7 right to work for a union, that impact is dampened here where the CBA contains a provision explicitly allowing employees to work for the Union. This is a good example of the kind of rule where the Board should not expect employers to make cutouts and exceptions in otherwise valid rules just to avoid impact on a very narrow set of Section 7 activity. See *Boeing*, 365 NLRB No. 154, slip op. at 9–10.

Finally, with regard to the Respondent's "business use only" email policies, such policies are unlawful under current Board law, and the Judge found them to be so. The current General Counsel refers the Board to his upcoming brief in *Caesars Entertainment Corp., d/b/a All-Suites Hotel & Casino*, 28-CA-060841.

Respectfully submitted on Behalf of the Current General Counsel,

/s/ Renée D. McKinney
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Dated at Detroit, Michigan
this 20th day of August 2018

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CERTIFICATE OF SERVICE

I certify that I have caused a true and correct copy of the foregoing GENERAL COUNSEL'S ANSWERING BRIEF IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE to be served upon the following via the NLRB's e-filing system on August 20, 2018:

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W., Room 11602
Washington, D.C. 20570

I further certify that I have caused a true and correct copy of the above-referenced documents to be served on the following by e-mail or U.S. Mail on August 20, 2018:

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Dated at Detroit, Michigan
this 20th day of August 2018