

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

LA SPECIALTY PRODUCE COMPANY

and

Case 32-CA-207919

**TEAMSTERS LOCAL 70, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

I. Overview¹

On June 28, 2018, Administrative Law Judge Amita Tracy (the ALJ) issued her Decision and Recommended Order in the above-captioned matter. The ALJ found that LA Specialty Produce Company (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining a Media Contact rule and a Confidentiality & Non-Disclosure rule in its LA & SF Specialty Employee Manual (the Manual). Respondent's Media Contact rule states:

Employees approached for interview and/or comments by the news media cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization.

(GC Exh. 2). In pertinent part, Respondent's Confidentiality & Non-Disclosure rule reads:

Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of L.A. Specialty Produce including but not limited to client vendor lists. . . . Any breach to this policy will not be tolerated and will be subject to disciplinary and legal action.

¹ References in this Reply Brief shall be designated by page and line number as follows: References to the Decision of the ALJ will be "ALJD [page]:[line]." References to the record will be designated as follows: Tr. for transcript; GC Exh. for General Counsel Exhibits; R Exh. for Respondent Exhibits; and Jt. Exh. for Joint Exhibits.

(GC Exh. 2).

On August 9, 2018, Respondent filed exceptions to the ALJ's Decision and Order and supporting brief contending that the ALJ erred in concluding that Respondent violated Section 8(a)(1) of the Act. Essentially, Respondent argues that the Media Contact rule and the Confidentiality & Non-Disclosure rule are facially neutral, have not been applied to restrict Section 7 activity, and the ALJ misapplied the Board's decision in *The Boeing Company*, 365 NLRB No. 154 (2018).

As noted more fully below, Counsel for the General Counsel asserts that the ALJ correctly analyzed Respondent's Media Contact rule, which violates Section 8(a)(1) of the Act. However, it is now the position of the General Counsel that Respondent's Confidentiality & Non-Disclosure rule is lawful under *Boeing*, supra.²

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Series 8 as amended, Counsel for the General Counsel files this answering brief in response to Respondent's exceptions. As discussed below, the ALJ properly concluded that Respondent's Media Contact rule is facially unlawful under *Boeing*.

II. The Boeing Framework³

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of rights guaranteed by Section 7 of the Act.

² In this regard, it is the General Counsel's position that employees would not reasonably read the Confidentiality & Non-Disclosure rule, in its context, as prohibiting the sharing of information regarding wages or other terms and conditions of employment. Although the ALJ found that a prohibition on sharing "client/vendor lists" would prohibit disclosure of customer and vendor names, and employees unquestionably have a right to share that kind of information with third-parties such as unions, it is unlikely that employees would interpret the rule in this manner. The theme of the rule is to protect proprietary information regarding customers and vendors (as well as other clearly proprietary information). Accordingly, the General Counsel now asserts that the Confidentiality & Non-Disclosure rule is a lawful Category 2 rule and no longer violates Section 8(a)(1) of the Act.

³ References to the record are as follows: Tr. for transcript; GC Exh. for General Counsel Exhibits; R Exh. for Respondent's Exhibits; Jt Exh. for Joint Exhibits; and R. Exc. For Respondent's Brief in Support of Exceptions

29 U.S.C. § 158(1). In turn, Section 7 of the Act protects an employee's right to engage in concerted activities for the mutual aid and protection of all employees. 29 U.S.C. §157. Thus, employees' rights to discuss their wages and terms and conditions of employment with each other, third-parties, and to publicize their labor disputes are all at the very heart of the rights guaranteed by Section 7 of the Act, and Section 8(a)(1) of the Act makes it an unfair labor practice to interfere with those rights. Notably, discriminatory intent is not necessary to find a Section 8(a)(1) violation. The Board has recognized that Section 8(a)(1) does not depend on an employer's motive or the successful effect of the coercion; rather, the illegality of an employer's conduct is determined by whether the conduct may reasonably have a tendency to interfere with employees' free exercise of the rights protected by Section 7 of the Act. *Waco, Inc.* 273 NLRB 746, 748 fn. 12 (1984) (citing *Daniel Construction Co.*, 264 NLRB 569 (1982)); see also *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).

In *Boeing*, 365 NLRB No. 154, the Board adopted a new framework to evaluate a facially neutral rule that potentially interferes with Section 7 rights. Under *Boeing*, the Board will evaluate (1) the nature and extent of the potential impact the rule has on Section 7 rights and (2) the employer's legitimate justifications associated with the rule in question. *Id.*, slip op. at 3. Notably, this new test is still undertaken from the perspective of employees when evaluating facially valid rules. See *id.*, slip op. at 3, 16.⁴

⁴ Although not part of the balancing test itself, the *Boeing* Board also discussed three categories of potentially unlawful rules. *Id.*, slip op. at 3. The Board explained that Category 1 rules are those that are lawful to maintain, either because (1) the rule, when reasonably interpreted, does not prohibit/interfere with Section 7 rights; or (2) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. *Id.*, slip op. at 4, 15. The Board classified Category 2 rules as those that warrant individual scrutiny as to whether the rule would prohibit or interfere with Section 7 rights, and if so, whether any adverse impact on protected conduct is outweighed by the employer's legitimate justifications. *Id.* Finally, Category 3 rules are designated as unlawful because they would prohibit or limit Section 7 rights and the adverse impact on Section 7 rights is not outweighed by justifications associated with the rule. *Id.* In her decision, the ALJ did not classify the rules in question noting that it was not within her purview until the Board made such classifications. (ALJD 6: footnote 7).

A. The ALJ Correctly Found that the Media Contact Rule Violates The Act Because the Plain Language of the Rule Explicitly Prohibits Speaking with the Media If Approached and the Purported Qualifying Language Fails to Cure that Blanket Restriction

Section 7 protects employee efforts to improve terms and conditions of their employment through channels outside the immediate employee-employer relationship. *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007). Thus, Section 7 protects employee communications to the public that are part of, and related to, an ongoing labor dispute. See, e.g., *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980), *enfd. mem.* 636 F.2d 1210 (3d Cir. 1980). This includes talking about labor disputes to newspaper reporters to publicize the dispute. See, e.g., *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995). The Section 7 right to talk to the press is not limited to labor disputes as Section 7 of the Act protects employees' right to communicate with the news media about wages, benefits, and other terms and conditions of employment. See, e.g., *Trump Marina Associates*, 355 NLRB 585 (2010). As such, rules prohibiting employees from exercising their Section 7 right to communicate with the media are unlawful. See *Crowne Plaza Hotel*, 352, NLRB 382, 386 (2008). This proposition is hardly new. Rather, the Board, with approval from Circuit Courts of Appeal, has long held that Section 7 of the Act protects employees' right to discuss working conditions with the media. See *Roure Bertrand Dupont*, 271 NLRB 443 fn. 1 (1984); see also *Automobile Club of Michigan v. NLRB*, 610 F.2d 438 (6th Cir. 1979); *Community Hospital of Roanoke Valley v. NLRB*, 538 F.2d 607, 610 (4th Cir. 1976).

As the ALJ noted in her decision, Respondent's Media Contact rule directly restricts employees' Section 7 right to discuss working conditions with the media and is unlawful under

Section 8(a)(1) of the Act.⁵ (ALJD 8:33 - 36; 9: 2 - 10). This is because employees must be free to discuss working conditions with members of the press in an effort to put pressure on their employer to improve working conditions. This is not a theoretical need. And although *Boeing* does not place a burden on the General Counsel to introduce evidence to establish the importance of the Section 7 right at issue here or evidence of the potential harm caused by the restriction of this core Section 7 right, Union testimony confirmed that employees frequently speak to the press in an effort to shed light on their mistreatment at work or to bring light to an employer's misconduct. (Tr. 18: 9-13). In doing so, employees seek the assistance of the public-at-large to pressure their employer into improving their working conditions.

B. Respondent's Exceptions are Without Merit Because The Intent Behind a Rule is Irrelevant, Does Not Cure an Explicit Prohibition on Section 7 Activity, and the ALJ Properly Balanced the Rule's Infringement on Important Section 7 Activities With the Employer's Proffered Business Justification

In its exceptions, Respondent argues that the ALJ erred in not reading the Media Contact rule in its entirety, the rule does not impact Section 7 rights, the Media Contact rule lawfully limits employees from speaking on behalf of Respondent, the intent of the rule is lawful, and the ALJ failed to engage in a balancing test under *Boeing*. These arguments are without merit and the exceptions should be denied.

In its entirety, the Media Contact rule states,

Employees approached for interview and/or comments by the news media cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization.

(GC Exh. 2). The clear and unambiguous language of the rule clearly states that employees approached by the news media "cannot provide [the media] with any information." There are

⁵ As noted above, the ALJ did not categorize the Media Contact rule as a Category 1, 2, or 3 rule under *Boeing*. It is the General Counsel's position that the Media Contact rule should be designated a Category 2 rule..

many occasions when the press would approach employees, especially during times of labor strife when employees are most actively engaging in Section 7 activities. Thus, if an employee cannot provide the press with *any* information, employees' Section 7 right to discuss working conditions and labor disputes is infringed. See *Crowne Plaza Hotel*, 352, NLRB at 386; see also, e.g., *Trump Marina Associates*, 355 NLRB 585; *Roure Bertrand Dupont*, 271 NLRB at fn. 1; see also *Automobile Club of Michigan*, 610 F.2d 438; *Community Hospital of Roanoke Valley*, 538 F.2d at 610. Such a blanket prohibition clearly infringes on important Section 7 rights.

Contrary to Respondent's assertions, a plain reading of the entirety of the rule further rebuts Respondent's argument that the Media contact rule only limits employees from speaking to the media on behalf of Respondent. In this regard, the ALJ correctly analyzed the two sentence rule by stating that it does not "clarify that employees may speak to the media on their own behalf but clearly states that employees may not speak to the media about Respondent when approached." (ALJD 8: 43 – 45). The ALJ further correctly surmised that the Media Contact rule's second sentence does not make clear that employees can speak to the media on their own behalf; rather, the second sentence of the Media Contact rule clearly informs employees that they may not speak to the media about Respondent's policies, which clearly impacts and chills Section 7 rights. (ALJD. 8 – 9).

Any argument as to the ALJ's alleged failure to credit the testimony of Respond Director of Human Resources Wesley Wong (Mr. Wong) regarding the intent of the Media Contact rule is not only baseless, but irrelevant. As noted above, a violation of Section 8(a)(1) does not depend on an employer's intent, rather, the illegality of the employer's conduct is determined by whether the conduct may reasonably have a tendency to interfere with employees' free exercise of the rights protected by Section 7 of the Act. *Waco, Inc.* 273 NLRB at 748 fn. 12 (citing *Daniel Construction Co.*, 264 NLRB 569); see also *Textile Workers Union v. Darlington Mfg. Co.*, 380

U.S. at 269. As such, any testimony about the intent or true meaning of the words is of no import compared to the actual language of the rule. Even assuming intent mattered, Mr. Wong's testimony misstated the explicit language of the Media Contact rule. Mr. Wong testified that the rule did not prohibit employees from speaking to the press, but rather provided that only Respondent's president could make authorized statements on behalf of Respondent. (Tr. 34-35). This interpretation of Respondent's intent behind the rule ignores the plain and unambiguous language of the Media Contact rule, which states that employees "approached for interview and/or comments by the news media cannot provide them with any information." This absolute restriction hinders employees' Section 7 rights and there is no qualifier present in the language. While the rule further states that only Respondent's president is "authorized and designated to comment on company policies or any event that may affect our organization," the language does not state that employees can speak to the media in their individual capacities. Further yet, and contrary to Mr. Wong's alleged first-hand knowledge of the intent behind this rule, Mr. Wong testified that he was neither involved in the drafting of the Media Contact rule, nor was he present when the rule was written. (Tr. 34: 20-23). As such, he lacks first-hand knowledge of the intent of the Media Contact rule, and Respondent did not present witnesses who drafted this rule.

Finally, Respondent's argument that the ALJ failed to engage in a proper balancing test under *Boeing* is equally without merit. Under *Boeing*, the Board will evaluate (1) the nature and extent of the potential impact the rule has on Section 7 rights and (2) the employer's legitimate justifications associated with the rule in question. *Id.*, slip op. at 3. Contrary to Respondent's position, the ALJ engaged in a proper balancing test. Specifically, she wrote that the Media Contact rule, as written, precludes employees from engaging in Section 7 activity. The ALJ correctly noted that while Respondent has an interest in who speaks on its own behalf to the

media, the Media Contact rule outright prohibits employees from speaking with the media—a protected Section 7 right. Since Respondent possesses no legitimate business justification in precluding employees from speaking with the media, the scale is tipped in employees’ favor. (ALJD. 8: 27 – 36). The ALJ correctly concluded based on the record evidence that employees’ Section 7 rights far outweigh Respondent’s interest in precluding employees from speaking with the media when approached or not. As noted above, employees have the right to unfettered access to the media in order to seek outside assistance in improving their working conditions. This is true regardless of whether employees are represented, organizing, or merely trying to gain public support to pressure their employer to improve working conditions. Allowing Respondent to maintain the Media Contact rule essentially grants Respondent the authority to mute employees’ complaints and restrict their ability to seek outside assistance and support in improving their working conditions. Given that the Media Contact rule clearly prohibits employees from engaging in Section 7 activity, the ALJ correctly ruled that the Media Contact rule is unlawful given Respondent’s failure to present evidence of a legitimate business justification.⁶

Since the Media Contact rule explicitly prohibits employees from engaging in a core Section 7 right, the ALJ correctly found that the Media Contact rule violates Section 8(a)(1) of the Act and Respondent’s exceptions should be denied.

⁶ Respondent failed to present any evidence during the hearing of actual harm that Respondent has ever suffered, or may suffer, as result of employees speaking with the media. (Tr. 34-35). Further yet, Respondent has never undertaken any studies in an effort to determine the potential impact of employees speaking with the media about wages, working conditions, or other matters concerning Respondent. (Tr. 35: 15-17). This lack of evidence clearly buttresses the ALJ’s determination that any alleged business justification Respondent may have in maintaining the Media Contact rule is outweighed by the rule’s restriction on employees’ Section 7 rights.

IV. Conclusion

For the reasons set forth above, it is respectfully submitted that the ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by maintaining the Manual's Media Contact rule and Respondent's exceptions to this ruling should be denied.

DATED AT Oakland, California this 6th day of September 2018.

Respectfully submitted,

_____/s/ Noah J. Garber_____
Noah J. Garber
Counsel for the General Counsel
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

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Date: September 6, 2018

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Richard S. Zuniga
James A. Bowles
Hill Farrer & Burrill LLP
One California Plaza
300 S Grand Avenue, 34th Floor
Los Angeles, CA 9007
VIA Email: rzuniga@hillfarrer.com
VIA Email: jbowles@hfbllp.com

Andrew Baker
Susan K. Garea
Beeson, Tayer & Bodine
483 Ninth Street, Suite 200
Oakland, CA 94607
VIA Email: abaker@beesontayer.com
VIA Email: sgarea@beesontayer.com

Office of the Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
VIA E-FILE

September 6, 2018

Date

Ida Lam, Designated Agent of NLRB

Name

/s/ Ida Lam

Signature