

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 4, 2013

TO: Ronald K. Hooks, Regional Director
Region 19

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The Boeing Company 512-5012-0125
Cases 19-CA-90932 and 19-CA-90948 512-5018-0100
512-5024-3300

These cases were submitted for advice on the issues of whether (1) the Employer engaged in unlawful surveillance when it photographed Union solidarity marches on the Employer's property; (2) the Employer's rule limiting the use of photographic or camera-enabled devices on its premises is overbroad, either as to employees' cameras or Employer-issued cameras; (3) the Employer unlawfully required employees to delete photographs from the Employer-issued cameras pursuant to the above rule; and (4) the Employer disparately enforced the rule limiting the use of photographic or camera-enabled devices.

We agree that the Employer engaged in unlawful surveillance. We further agree that its rule limiting photography is overbroad as applied to employees' personal camera-enabled devices, but not as applied to Employer-issued cameras. Thus, the Employer did not violate the Act by requiring deletion of photographs from the Employer-issued cameras. Finally, we agree that the Employer did not disparately enforce the rule.

The Boeing Company ("Boeing" or "Employer") manufactures commercial and military aircraft throughout the world. The Society of Professional Engineering Employees in Aerospace, Local 2001 ("SPEEA" or "Union") has represented over 23,000 employees at the Employer's facilities in Washington and Oregon for more than 60 years. The instant cases arise out of Union-represented employees' solidarity marches that took place at the Employer's facilities during breaks and lunch periods to show support for the Union's negotiating team.

First, the Employer engaged in unlawful surveillance when it photographed Union solidarity marches on the Employer's property. The Board has long held that

photographing or videotaping employees engaged in protected activity violates Section 8(a)(1) because “it has a tendency to intimidate.”¹ Further, photographing in the “mere belief” that something might happen does not justify an employer’s conduct. Rather, the employer must “provide a solid justification” for resorting to “anticipatory photographing.”² Here, the Employer asserts that its surveillance of the Union’s protected activity was justified because it reasonably anticipated a substantial potential for disruption, interference with operations and egress, and pedestrian and traffic safety violations. The Employer bases this assertion on purported problems that occurred during prior union marches at the facility. However, when asked to present evidence of those prior marches, or problems relating to them, it did not do so. Indeed, with respect to the one march (occurring in 2000) that either the Union or employees could recall, the Employer never complained that it impacted traffic, work, or safety.³ Further, although the marchers in September and October, at times, did not stay within the pedestrian walkways, there is no credible evidence to conclude that the latest marches disrupted and interfered with operations and egress, or caused pedestrian and traffic safety violations—indeed, the Union provided evidence to the contrary. Thus, the Employer has not demonstrated that it had a reasonable expectation of misconduct when it surveilled employees at its facilities on September 19, or, lacking evidence of misconduct on that date, again on September 26 and October 3.

Second, the Employer’s rule limiting employees from using personal camera-enabled devices on the Employer’s premises violated Section 8(a)(1). Photographing

¹ *F.W. Woolworth*, 310 NLRB 1197, 1197 (1993).

² *National Steel & Shipbuilding Co.*, 324 NLRB 499, 499, 499 fn. 4 (1997) (employer’s subjective belief that there would be misconduct cannot alone justify anticipatory surveillance), citing *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir.1976).

³ See *Snap-On Tools, Inc.*, 342 NLRB 5, 5 fn. 5 (2004) (employer failed to establish proper justification for videotaping its employees where there were no prior instances of trespassing or misconduct); *Robert-Orr Food Service*, 334 NLRB 977, 978 (2001) (same). Compare *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1217–18 (2004) (no violation where employer monitored protected activity because of a reasonable concern about the safety of its employees and equipment and a recurrence of trespassing); *Town & Country Supermarkets*, 340 NLRB 1410, 1415 (2004) (employer had reasonable basis to anticipate further misconduct because of undisputed misconduct during prior picketing); *Saia Motor Freight Line, Inc.*, 333 NLRB 784, 784 (2001) (reasonable concern about traffic safety and liability arose after employer was dissatisfied with police effort).

co-workers engaged in Section 7 activity is itself protected concerted activity.⁴ Here, the Employer's rule is overbroad as it pertains to employees' personal camera-enabled devices because it clearly precludes the use of personal camera-enabled devices for all Section 7 activity and is not narrowly drawn so as to protect any legitimate Employer interest, such as proprietary information or classified areas.⁵

However, the Employer's rule limiting employees' use of the Employer-issued cameras to business-related purposes was not unlawfully overbroad. The Board has long held that an employer has the right to regulate and restrict employee use of employer property and that there is no Section 7 right to use an employer's equipment as long as the restrictions are nondiscriminatory.⁶ Thus, the Employer did not violate the Act by limiting the use of the Employer-issued cameras to work purposes. Applying the same reasoning, the Employer also did not violate the Act by requiring employees to delete their photographs, which were made on Employer-issued cameras.

Finally, the Employer did not disparately enforce its rule, either as to limiting the use of employees' own camera-enabled devices, or the Employer-issued cameras. As to the personal camera-enabled devices, other than one isolated instance in which

⁴ See *Giant Food, LLC*, Case 05-CA-064793, et al., Advice Memorandum dated March 21, 2012 at p. 13 (photographing or recording employees is protected activity, including taking photographs of co-workers engaged in picketing or other concerted activities), citing *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991), enforced 976 F.2d 743 (11th Cir. (1992)). See also *White Oak Manor*, 353 NLRB 795, 795 (2009), *adopted by a three-member panel*, 355 NLRB No. 211 (2010) (employee photographing other employees was protected concerted activity). See also *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 13 (2011) (dissenting opinion) (“[P]hotography—like solicitation, distribution, and audio recording—is protected by Section 7 if employees are acting in concert for their mutual aid or protection”).

⁵ This is not the kind of ambiguous rule that requires analysis under the third prong of the *Lutheran Heritage* test. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Although it does not explicitly restrict Section 7 activities, a rule prohibiting all use of personal camera-enabled devices clearly would prohibit their use for Section 7 activity.

⁶ See *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000) (no statutory right to use the television in the employer's breakroom to show a pro-union campaign video), enforced 269 F.3d 1075 (D.C. Cir. 2001); *Champion International Corp.*, 303 NLRB 102, 109 (1991) (stating that an employer has “a basic right to regulate and restrict employee use of company property” such as a copy machine).

a security guard shook his head at an employee when he held up his personal cell phone, there is no evidence that the Employer prohibited personal camera-enabled devices for Section 7 or Union-related photography. Thus, the evidence does not demonstrate a pattern or policy of disparate enforcement.⁷ As to the Employer-issued cameras, which the Employer did prohibit, the evidence demonstrates that even where the prior permitted camera usage was not strictly for business purposes, it was generally still work-related, such as to photograph team-building and employee recognition events like retirements and baby showers. Therefore, the Employer did not discriminate against Section 7 activity in violation of Section 8(a)(1).

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by unlawfully surveilling employees and by maintaining an overbroad rule limiting photography taken by employees' personal camera-enabled devices in non-classified areas. The Region should dismiss, absent withdrawal, the remaining allegations.

/s/

B.J.K.

ADV.19-CA-090932.Response.Boeing (b) (6), (b)

⁷ It was also not unlawful for the Employer to prohibit Union representatives from using their personal camera-enabled devices, and subsequently deleting those photographs, because those representatives were non-employees.