

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

**INTERSTATE MANAGEMENT COMPANY, Case 28-CA-206663
L.L.C. as agent for BRE NEWTON HOTELS
PROPERTY OWNER, LLC d/b/a RESIDENCE
INN BY MARRIOTT SANTA FE ALL-SUITES
HOTEL**

and

RESIDENCE MARRIOTT COMMITTEE

**RESPONDENT’S REPLY BRIEF IN SUPPORT OF EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE’S DECISION**

I. *Introduction*

Although the General Counsel pays lip service to the Board’s new standard in *The Boeing Company*,¹ he attempts to inappropriately narrow the test to justify his desired conclusion. Like the ALJ, the General Counsel unreasonably reads the challenged polices, disregards Respondent’s business justifications for the policies, and advocates for a “narrowly tailored” standard the Board has expressly declined to adopt. The General Counsel fails to oppose much of Respondent’s position in his Answering Brief,² effectively conceding several key points regarding Respondent’s policies:

- The precedent cited by Respondent supports a finding that the policies are lawful;

¹ *The Boeing Company*, 365 NLRB No. 154 (2017).

² References to the Administrative Law Judge’s Decision are cited herein as “ALJD” followed by the page number(s) and line number(s). References to the General Counsel’s Answering Brief are cited herein as “AB” followed by the page number(s). References to Respondent’s Brief in Support of Exceptions are cited herein as “BSE” followed by the page number(s). General Counsel exhibits are cited herein as “GX” followed by the number(s). Respondent exhibits are cited herein as “RX” followed by the number(s). The Reporter’s Transcript is cited herein as “T” followed by the page number(s).

- There is no record evidence that the policies interfered with any employee’s exercise of Section 7 rights. To be sure, Respondent’s policies did not inhibit Brandt, Orona, or Ramirez-Orozco from sharing information with Somos un Pueblo Unido, filing charges with various agencies including the Board, or participating in government investigations, including that of Region 28; and
- Respondent has legitimate business justifications for the policies, including compliance with privacy laws, preventing unfair competition, protecting the safety/security of employees and guests, and controlling the method by which it officially responds to government requests.

II. *The General Counsel Ignores Relevant Board Precedent*

A. *The General Counsel Fails to Show That the ALJ’s Interpretation of the Policies is Reasonable*

Under *Boeing*, a policy will not be found unlawful simply because it *could* be interpreted to reach Section 7 activity.³ The General Counsel’s strained interpretation of Respondent’s policies ignores the requirement of “an objective standard.”⁴ Indeed, one of the flaws of the *Lutheran Heritage* standard was that “one can ‘reasonably construe’ even the most carefully crafted rules in a manner that prohibits some hypothetical type of Section 7 activity.”⁵

³ *Boeing*, slip op. at 10 n.43; *see also* General Counsel Memorandum 18-04, at 1 (Jun. 6, 2018) (“Regions should now note that ambiguities in rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included”).

⁴ *Id.*, slip op. at 4 n.16; *see also* slip op. at 3, n.14 (Kaplan, concurring) (“a reasonable employee does not view every employer policy through the prism of the NLRA”) (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017)).

⁵ *Id.*, slip op. at 9.

The General Counsel agrees the Board should “take into consideration particular events that may shed light on the purpose or purposes served by a challenged rule or on the impact of its maintenance on protected rights.” (AB 6) “Evidence regarding a particular rule’s impact on protected rights or the work-related justifications for the rule” is a useful interpretation tool.⁶ However, the General Counsel failed to present evidence of the challenged policies’ impact on protected rights and the only evidence regarding a reasonable interpretation of the challenged policies⁷ directly contradicts the General Counsel’s conclusions.

The General Counsel continued to disregard the context⁸ of the challenged policies and instead supported the ALJ’s unsubstantiated assertions that the policies have a “severe” or “significant” impact on Section 7 Rights. (AB 11; ALJD 18:21, 21:12). To reach this erroneous conclusion, the General Counsel analyzed single words in isolation with absolute disregard to the surrounding policy language and examples provided.

B. *The General Counsel Supports the ALJ’s Improper “Narrowly Tailored” Standard*

The General Counsel failed to balance the potential adverse impact of the policies against Respondent’s legitimate business justifications as required by *Boeing* and impermissibly took Respondent’s justifications into “account for the sole purpose of determining whether they can be

⁶ *Id.*, slip op. at 15.

⁷ Brandt, Orona, and Ramirez-Orozco were not deterred from sharing their information with Somos un Pueblo Unido for the purpose of improving working conditions. (T 73, GX 6, p.2) Nor were they deterred from participating in Region 28’s investigation, providing affidavits, or testifying at the hearing. (T 47, 98, 129) Ramirez-Orozco also was not deterred from filing her charge and two amended charges with the Board or from filing claims with other government agencies. (GX 1(a), 1(c), 1(e); T 113-15)

⁸ General Counsel Memorandum 18-04, at 16 (“contextual factors include the placement of the rule among other rules, the kinds of examples provided, and the type and character of the workplace”).

accommodated by a more narrowly tailored rule.”⁹ The General Counsel agrees with the ALJ that “Respondent can accomplish all of its presumed justifications with a more narrowly tailored rule,” (AB 9; ALJD 21:20-23) and that “a more narrowly tailored rule would serve the same purpose.” (AB 12; ALJD 19:23-27) This blatant disregard of the Board’s express and repeated denial of a “narrowly tailored” standard¹⁰ demonstrates the General Counsel’s effort to obtain his desired result at any cost.

III. *The General Counsel Unreasonably Interpreted the Challenged Policies and Did Not Give Proper Weight to Respondent’s Legitimate Business Justifications*

A. *The General Counsel Improperly Applied Boeing to Respondent’s Information Protection Policy*

Regarding Respondent’s Information Protection policy, there are two problems with the General Counsel’s argument that “the section of the rule at issue is not limited to database information” and “there is no mention of “database(s) anywhere in the rule.” (AB 8) First, the General Counsel impermissibly isolates a “section of the rule” rather than reading the rule in context. Second, the General Counsel seems to have forgotten that synonyms exist—indeed, the word “database(s)” is not included in the Information Protection policy but the phrase “information system(s)” is referenced multiple times throughout. Splitting hairs between two synonymous terms is precisely the type of “exacting standard” the Board refuses to impose on employers.¹¹

The General Counsel falsely alleges the policy does not “explicitly limit the protected information to company non-public information contained in Respondent’s databases.” (AB 9)

⁹ *Boeing*, slip op. at 20, n.90 (the Board majority declined to adopt such an analysis, which was urged by the dissent).

¹⁰ *Id.*, slip op. at 9-10, 21, n.42-43, 90, 92 (Board repeatedly rejected a standard that would require employer policies to be “narrowly tailored”).

¹¹ *Id.*, slip op. at 21, n.90.

However, the policy’s plain language states “One of the Company’s most valuable assets is information and the *information systems* we use to process and store that data. Keeping confidential *our Company’s non-public information* is important to the success of our Company” and goes on to provide bullet point definitions and examples of confidential information. (GX 1(g), 3, p. 3) A reasonable contextual interpretation of the policy’s plain language makes it obvious that the Information Protection policy is properly limited to non-public information contained in Respondent’s databases.¹² The General Counsel does not dispute that employer policies which are limited to non-public information stored in an employer’s database are lawful.

The General Counsel also does not dispute or distinguish the case law cited by Respondent, which illustrate similar lawful confidentiality policies.¹³ The General Counsel erroneously relied

¹² The General Counsel cites *Quicken Loans*, 830 F.3d 542, 548 (D.C. Cir. 2016) to support the premise that “employees must be permitted to gather and share among themselves and with union organizers in exercising their Section 7 rights.” Respondent does not dispute this premise. The confidentiality policy in *Quicken* deemed confidential personnel information to include “all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses.” *Id.* at 546. However, context matters—the policy in *Quicken* was not limited to non-public information stored in company databases but rather applied to such information “irrespective of the medium in which it is stored.” 359 NLRB 1201, 1203 (2013). Additionally, the General Counsel’s reliance on *Quicken* is misplaced because, as the Board in *Boeing* noted, the employer’s business justifications for the policy were not considered. *See Boeing*, 365 NLRB No. 164, slip op. at 13-14, n.69.

¹³ *See e.g., Macy’s, Inc.*, 365 NLRB No. 116, slip op. at 4 (the Act “does not protect employees who divulge information that their employer lawfully may conceal”) (citing *International Business Machines Corp.*, 265 NLRB 638 (1982)); *Minteq Int’l, Inc.*, 364 NLRB No. 63, slip op. at 6 (2016) (confidentiality policy that encompassed “any other information which is identified as confidential” was lawful because surrounding context provided examples and limited the policy’s scope); *Copper River of Boiling Springs, LLC*, 360 NLRB 459, 469 (2014) (Board upheld a confidentiality policy that encompassed “policies, procedures financial information, manuals, or any other information contained in Company records”); *Mediaone of Greater Florida*, 340 NLRB 277, 278 (2003) (Board upheld a confidentiality rule that prohibited disclosure of, among other things, “customer and employee information, including organizational charts and databases”); *Safeway, Inc.*, 338 NLRB 525, 527 (2002) (confidentiality policy that encompassed “personnel and medical records, and payroll data” was lawful because a contrary finding would depend “on a

on *Ridgley Manufacturing*¹⁴ and *Gray Flooring*,¹⁵ both of which were distinguished in Respondent’s Brief in Support of Exceptions because neither apply to employer work rules nor confidential company information stored in an employer’s database. (BSE 14-15)

The General Counsel also applied the *Boeing* standard without considering and balancing Respondent’s justifications for maintaining the Information Protection policy against any potential adverse impact on employees’ Section 7 rights.¹⁶ Rather than explain *why* Respondent’s justifications are outweighed by an adverse impact, the General Counsel instead blatantly disregarded the justifications. (AB 9) The General Counsel ignored Respondent’s responsibility to protect the personally identifiable information (“PII”) of its employees, as required by law, because the Information Protection policy “does not use the term PII.” (AB 9) Similarly, the General Counsel disregarded Respondent’s justification of protecting employee safety because “there is no

chain of inferences upon inferences”); *Community Hosp. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003), *denying enf.* in relevant part to *University Medical Center*, 335 NLRB 1318 (2001) (the court upheld an employer rule that prohibited the “release or disclosure of confidential information concerning patients or employees”); *Legacy Charter*, 28-CA-201248, 2018 NLRB LEXIS 338 *50 (NLRB Div. of Judges, Aug. 16, 2018) (the administrative law judge, applying *Boeing*, concluded an employer rule which deemed “personnel information” confidential did not violate the Act when read in context with the surrounding prohibition against disclosing non-public information about the employer).

¹⁴ 207 NLRB 193 (1973) (employer violated Section 8(a)(3) by terminating an employee for memorizing fellow employees’ names from timecards located near the employee timeclock).

¹⁵ 212 NLRB 668 (1974) (employer violated Section 8(a)(3) by terminating an employee for copying coworker names and phone numbers from cards left out in the open on supervisor’s desk).

¹⁶ Indeed, the only evidence introduced at the hearing indicates that employees are not deterred from sharing their personal information or that of other employees with third parties, such as Somos un Pueblo Unido. (T 73, GX 6, p.2)

explanation in the rule saying that confidential information does not prohibit employee Section 7 activity,¹⁷ but is instead meant for the protection of employee safety.” (AB 9)

However, there is no support in *Boeing* nor is there precedent cited by the General Counsel that would require an employer’s business justifications to be provided in the text of the policy. In fact, the legitimate business justifications for the no-camera rule at issue in *Boeing* were not included in the text of the policy but were instead furnished through “undisputed testimony” by Boeing’s senior security manager.¹⁸ In the same manner, Respondent’s vice president of compliance, Joy Johnson, provided undisputed testimony about the many legitimate business justifications for the Information Protection policy. (T 164, 167, 170-71)

The General Counsel’s complete disregard for the *Boeing* balancing test is made obvious by its assertion that “Respondent can accomplish all of its presumed justifications with a more narrowly tailored rule.” (AB 9) Such a requirement was repeatedly rejected by the Board.¹⁹

B. *The General Counsel Improperly Applied Boeing to Respondent’s Government Investigations Policy*

The General Counsel focuses his unreasonable interpretation of the Government Investigations policy on the singular phrase “regulatory authorities” and disregards the policy’s plain language and context. (AB 10) In doing so, he erroneously concluded Respondent’s Government Investigations policy prohibits employees from providing evidence to the Board or other administrative agencies without first obtaining permission from Respondent. (AB 10-11) This conclusion is particularly unreasonable considering every time employees clock in, they are

¹⁷ See *Boeing*, slip op. at 22, n.104 (Board rejected standard which required employers to include a “standard disclaimer” in their policies).

¹⁸ See *id.*, slip op. at 17-18.

¹⁹ See *id.*, slip op. at 9-10, 21, n.42-43, 90, 92.

advised by the EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT notice and all legally required government postings that they have protected rights and are also provided contact information for various government agencies. (RX 2-3)

The General Counsel relies on *Laidlaw Transit, Inc.*²⁰ and *Passavant Memorial Area Hospital*²¹ to argue that the postings near the timeclock are insufficient to cure an overly broad policy. (AB 10-11) However, both *Laidlaw* and *Passavant* applied to facially illegal policies, not to a facially neutral policy such as Respondent's Government Investigations policy.²² An objective reasonable interpretation of the policy, which is distributed to employees on the single occasion upon hire, would not interfere with protected rights given that employees are notified every day of their rights by the timeclock postings.

The plain language of the policy also makes obvious that the policy applies to Respondent's communication with government agencies, not employees' communication. The policy begins with “[w]e promote cooperation with law enforcement and government agencies,” and goes on to explain that “*the Company* requires an official written request or a subpoena” prior to the Respondent providing any information. (GX 3, p. 6) Furthermore, there is no evidence that any employee would interpret the policy to prevent him/her from filing a claim, participating in a government investigation, or otherwise deter him/her from exercising Section 7 rights as the General Counsel alleges. (AB 11) Indeed, the evidence provided by Respondent, which the Board

²⁰ 315 NLRB 79 (1994).

²¹ 237 NLRB 138 (1978).

²² See *Laidlaw*, 315 NLRB at 83 (employer promulgated a facially illegal no-solicitation/no-distribution policy); *Passavant*, 237 NLRB at 138 (employer told employees they would be fired for participating in an economic strike).

finds useful,²³ shows the exact opposite.²⁴ Thus, the plain language and evidence illustrate that an objective reasonable interpretation of the Government Investigations policy would not result in an employee believing he/she was required to obtain pre-clearance prior to providing information to a government agency, such as the Board.

The General Counsel's complete disregard for the *Boeing* standard is demonstrated by his brief, two-sentence conclusory attempt at balancing Respondent's legitimate business justifications²⁵ against the alleged potential impact on Section 7 rights and improperly insisting that a more "narrowly tailored" policy would serve the same purpose. (AB 12) The "narrowly tailored" standard relied upon by the General Counsel has repeatedly been rejected by the Board.²⁶

Importantly, the General Counsel does not dispute that employer policies may lawfully control the procedure and manner by which official information is provided to law enforcement and government agencies. Additionally, based on the General Counsel's (i) failure to dispute or distinguish the Respondent's justifications or the case law Respondent cited,²⁷ and (ii) failure to cite caselaw supporting his position, it can only be inferred that the General Counsel concedes the legitimacy of the justifications and the Respondent's appropriate application of Board precedent.

²³ See *Boeing*, slip op. at 15 ("parties may also introduce evidence regarding a particular rule's impact on protected rights").

²⁴ See *supra* at n.7.

²⁵ Respondent's justifications for the policy include providing guidance to employees about Respondent's cooperation with government investigations, ensuring Respondent provides an appropriate response to requests from law enforcement and government agencies, and controlling the procedure and manner by which official information is provided to law enforcement and government agencies. (T 173-76)

²⁶ See *Boeing*, slip op. at 9-10, 21, n.42-43, 90, 92.

²⁷ See e.g., *Blue Man Las Vegas LLC*, Case 28-CA-21126, 2008 NLRB Lexis 225, *60 (NLRB Div. of Judges, July 18, 2008) (the "critical inquiry into employer rules" of this nature is "whether the rule prohibits employees from communicating" about protected matters or "merely states that employees cannot speak on behalf of the [Employer]" concerning such matters).

Thus, the Government Investigations policy is lawful because Respondent's legitimate business justifications for the policy outweigh any potential adverse impact it may have on employees' protected rights.

IV. Conclusion

For all the reasons set forth above, Respondent respectfully requests that the ALJ's decision be reversed in part, and the complaint dismissed.

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Respectfully submitted,

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