

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

REGISTRY OF INTERPRETERS FOR THE
DEAF, INC.

and

Case 20-CA-164088

PACIFIC MEDIA WORKERS GUILD, LOCAL
39521

COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE TO THE
BOARD'S NOTICE TO SHOW CAUSE

In accordance with the Notice to Show Cause issued by the National Labor Relations Board ("Board") on November 2, 2018, Counsel for the General Counsel ("GC") hereby files this Response in order to show cause why this matter should not be remanded. The ALJ's findings are consistent with current law and, in light of the GC's simultaneously-filed motion to withdraw certain cross-exceptions, remand is unnecessary.

Procedural Background

This case reaches the Board on a stipulated record. By the pertinent Complaint and subsequent litigation, the GC has challenged the maintenance by Registry of Interpreters for the Deaf, Inc. ("Respondent") of an antitrust policy and a civility policy, and Respondent's application of said policies in effecting the removal of Facebook posts alleged to be protected by Section 7 of the National Labor Relations Act, as amended ("Act") See Jr. Exh. C at ¶¶5(b), 5(c) & 6.

In his Decision, ALJ Joel P. Biblowitz found that Respondent twice violated Section 8(a)(1) of the Act. First, the ALJ concluded that Respondent's antitrust policy "explicitly prohibits activities protected by Section 7 of the Act...." ALJD at 9:35-36. Specifically, the ALJ pointed to language in the policy barring "discussion" regarding, *inter alia*, "wages" and

“salaries.” *Id.* at 9:25-27; see also Jt. Exh. G. Thus, maintenance of the rule violates Section 8(a)(1) of the Act. ALJD at 11:20-22. Second, ALJ Biblowitz concluded that Respondent violated Section 8(a)(1) by removing a Section 7-protected Facebook exchange from a forum that it operates and maintains. *Id.* at 10:46-49, 11:24-26. Respondent explicitly invoked and applied the antitrust and civility policies in effecting removal of the posts. See *id.* at 8:26-45.

In making these determinations, the ALJ did not resort to determining whether employees would reasonably construe the challenged policies as prohibiting protected conduct. See, e.g., *id.* at 9:35-37 (“Because the antitrust policy explicitly prohibits activities protected by Section 7 of the Act, there is no need to determine if employees would reasonably construe it to prohibit this activity.”), citing to *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999) and *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

Rather than challenge the above-described determinations, Respondent focused its exceptions and briefing on the applicability of the Act in the somewhat peculiar circumstances the matter presents.¹ In limited cross-exceptions, the GC argued, *inter alia*, that the ALJ erred in failing to treat the civility policy separately from the antitrust policy and by failing to find the civility policy would reasonably be construed as restricting Section 7 activity and is thus

¹ To be clear, Respondent did “except[] to the ALJ’s conclusions of law as erroneous and unsupported in fact and/or law,” and to the remedy and order in their entirety. See Resp. Excs. 8 & 9. Its briefing, however, focused on the argument that, as a non-employer of the impacted members, it cannot be held liable for the Section 8(a)(1) violations. Respondent did not brief the legality of the policies themselves or of their application in the removal of Section 7-protected Facebook posts. In the absence of specified exceptions and supporting briefing, the GC views Respondent as conceding that the ALJ’s Section 8(a)(1) findings are correct if it may be held liable under the factual circumstances presented. Certainly, Respondent did not in any way except to the ALJ’s failure to apply the “reasonably construe” test to the challenged policies.

unlawful in and of itself. See GC Cr. Excs. 4 & 5. In a motion filed simultaneously with this Response, however, the GC has sought withdrawal of these exceptions.²

Remand is Unnecessary.

In *The Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495, at *15-*16 (Dec. 14, 2017), the Board overruled the *Lutheran Heritage* “reasonably construe” test applicable to facially neutral workplace rules and announced a new standard that applies retroactively to all pending cases. The Notice to Show Cause in this matter contemplates a remand to allow for an analysis of the challenged policies consistent with *Boeing*. The ALJ’s findings and conclusions, however, are consistent with *Boeing*. Absent cross-exceptions invoking the *Lutheran Heritage* “reasonably construe” test, there is no need for a remand.

As already stated, the ALJ found that the antitrust policy explicitly prohibits Section 7 activity, *to wit*, discussion of wages and salaries. This finding was not premised on the *Lutheran Heritage* “reasonably construe” test and is in fact consistent with *Boeing* itself. See *The Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495, at *16 (“*Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with one another.”).

Similarly, the ALJ’s conclusion that Respondent’s removal of Section 7-protected Facebook posts violated Section 8(a)(1) of the Act was not premised on *Lutheran Heritage* and is consistent with *Boeing*. See *id.* at *17 (“[T]he Board may find that an employer may lawfully *maintain* a particular rule, notwithstanding some possible impact on a type of protected Section 7

² The Charging Party filed a similar cross-exception. See CP Cr. Exc. 1. It is the GC’s understanding that the Charging Party will request withdrawal of its cross-exception 1 and agrees that remand is unnecessary.

activity, even though the rule cannot lawfully be *applied* against employees who engage in NLRA-protected conduct.[FN] For example, if the Board finds that an employer lawfully maintained a “courtesy and respect” rule, but the employer invokes the rule when imposing discipline on employees who engage in a work-related dispute that is protected by Section 7 of the Act, we may find that the discipline constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1).” (emphases in original).

The GC’s cross-exceptions 4 and 5 did rely on the *Lutheran Heritage* “reasonably construe” test to challenge the ALJ’s failure to find the maintenance of the civility policy to be unlawful. The GC has now moved to withdraw these cross-exceptions; in doing so, he is relinquishing any argument that Respondent’s maintenance of its civility policy, by itself, violated the Act. See, e.g., *id.* at *16 and fn.76 (“[T]o the extent the Board in past cases has held that it violates the Act to maintain rules requiring employees to foster ‘harmonious interactions and relationships’ or to maintain basic standards of civility in the workplace, those cases are hereby overruled.”). Assuming the Charging Party withdraws its cross-exception 1, application of the *Lutheran Heritage* “reasonably construe” test is no longer implicated and there is no inconsistency with *Boeing*.

Conclusion

The ALJ’s findings and conclusions are consistent with current law as articulated in *Boeing*. The GC’s withdrawal of his cross-exceptions 4 and 5 and the Charging Party’s anticipated withdrawal of its cross-exception 1 remove any need for additional fact-finding or

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analytical recalibration from *Lutheran Heritage* to *Boeing*. Therefore, remand is unnecessary.

The GC respectfully requests that the Board retain the matter and issue its decision in due course.

DATED AT San Francisco, California, this 7th day of November, 2018.

Respectfully Submitted,

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AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S MOTION TO
WITHDRAW CERTAIN CROSS-EXCEPTIONS and COUNSEL FOR THE GENERAL
COUNSEL'S RESPONSE TO THE BOARD'S NOTICE TO SHOW CAUSE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **November 7, 2018**, I served the above-entitled document(s) by **e-mail** upon the following persons, addressed to them at the following addresses:

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