

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

WYNN LAS VEGAS, LLC

and

Case 28-CA-155984

KELI P. MAY, an individual

and

Case 28-CA-157203

KANIE KASTROLL, an individual

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

In response to the Notice to Show Cause issued by the National Labor Relations Board (Board) in the above-captioned cases on November 6, 2018, Counsel for the General Counsel (General Counsel) requests that all of the complaint allegations involving the maintenance of allegedly unlawful work rules or policies be severed and remanded to the Administrative Law Judge (Judge) for further proceedings in light of the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017). The General Counsel submits that the remaining allegations in the above-captioned cases should either be severed and remanded to the Judge, or severed and retained by the Board, pursuant to the considerations described below.

I. Additional Allegation to Sever and Remand to the Judge

The General Counsel respectfully requests that the Board sever and remand to the Judge the complaint allegation that, on about June 26, 2015, Respondent issued Charging Party Keli P. May (Charging Party May) a second written warning pursuant to an unlawfully overbroad work rule, in violation of Section 8(a)(1) of the Act.

On September 26, 2016, Administrative Law Judge Gerald M. Etchingham (Judge Etchingham) issued his decision in the above-captioned cases in JD(SF)-39-16 (ALJD). Judge Etchingham determined that Respondent issued Charging Party May a second written warning in violation of Section 8(a)(1) of the Act. Judge Etchingham applied the Board's analytical framework in *The Continental Group, Inc.*, 357 NLRB 409 (2011). In *Continental Group*, the Board held that "discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act." 357 NLRB at 412.

Charging Party May was disciplined pursuant to Respondent's Inappropriate Conduct rule. Judge Etchingham determined that Respondent's maintenance of this rule violates Section 8(a)(1) of the Act, because employees would reasonably construe the rule to prohibit Section 7 activity. (ALJD 36:20-40, 37:1-29). Judge Etchingham further determined that the conduct for which Charging Party May was issued the second written warning pursuant to the Inappropriate Conduct rule, i.e., discussing wages with a coworker, was protected concerted activity. Thus, Judge Etchingham concluded that under the standard set forth in *Continental Group*, Respondent violated Section 8(a)(1) of the Act by issuing the second written warning to Charging Party May pursuant to its Inappropriate Conduct rule. (ALJD 35:1-30).

Respondent filed exceptions to these determinations, asserting that the Judge incorrectly determined that its Inappropriate Conduct rule was unlawfully overbroad in violation of Section 8(a)(1), and, therefore, the second written warning issued to Charging Party May pursuant to the rule is not unlawful under the *Continental Group* analysis.

As stated above, the General Counsel requests that the Board remand all of the allegations involving the maintenance of allegedly unlawful work rules, which includes the allegation that Respondent maintained the Inappropriate Conduct rule in violation of Section 8(a)(1). If, on remand, the Judge's application of the Board's standards set forth in *Boeing* to Respondent's Inappropriate Conduct rule results in a determination that the rule is lawful, this determination would undermine the Judge's original analysis of Charging Party May's second written warning under the *Continental Group* framework. For this reason, the General Counsel respectfully requests that the Board sever and remand the allegation regarding Charging Party May's second written warning to the Judge, so that it may be re-examined, if necessary, in conjunction with any new determinations regarding the underlying Inappropriate Conduct rule.

II. Allegations to Sever and Retain with the Board

The General Counsel respectfully requests that the Board sever and retain all of the remaining allegations in the above-captioned cases presently before the Board on exceptions. The remaining allegations before the Board do not involve or rely on, either directly or indirectly, any of the Judge's analysis and conclusions regarding Respondent's maintenance of allegedly unlawful work rules. Thus, the remaining allegations before the Board are unaffected by the Board's precedent in *Boeing*, and any future application of that precedent to the allegedly unlawful work rules in this matter. For this reason, the General Counsel requests that the Board sever and retain these allegations for a decision on the pending exceptions.

III. Conclusion

The General Counsel respectfully requests that the Board sever and remand to the Judge, for further proceedings in light of *Boeing*, all of the allegations involving the maintenance of allegedly unlawful work rules or policies, along with the allegation that Respondent issued

Charging Party May a second written warning in violation of Section 8(a)(1) of the Act. The General Counsel requests that the remaining allegations in the above-captioned cases be severed and retained by the Board for a decision on the pending exceptions.

Dated at Denver, Colorado this 16th day of November, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Julia M. Durkin". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

Julia M. Durkin
Counsel for the General Counsel
National Labor Relations Board, Region 27
1961 Stout Street, Suite 13-103
Denver, CO 80294
(720) 598-7403

CORRECTED CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Counsel for the General Counsel's Response to the Board's Notice to Show Cause**, together with this Certificate of Service, was E-File or E-mailed, or sent by Overnight UPS Service, as indicated below, to the following parties on **November 16, 2018**.

ROXANNE ROTHSCHILD
EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF ST. SE
WASHINGTON, DC 20003
E-FILED: www.nlrb.gov

CYNTHIA FALLS, PRESIDENT
TRANSPORT WORKERS UNION OF
AMERICA, LOCAL 721
2770 S MARYLAND PARKWAY STE 313
LAS VEGAS, NV 89109-1566
E-MAIL: cynthiafalls@gmail.com

GREGORY J. KAMER, ESQ.
KAMER ZUCKER ABBOTT
3000 WEST CHARLESTON BOULEVARD,
SUITE 3
LAS VEGAS, NV 89102
E-MAIL: gkamer@kzalaw.com

NICOLE A. YOUNG, ESQ.
KAMER, ZUCKER & ABBOTT
3000 WEST CHARLESTON
BOULEVARD, SUITE 3
LAS VEGAS, NV 89102-1990
E-MAIL: nyoung@kzalaw.com

R. TODD CREER, ESQ.
KAMER ZUCKER ABBOTT
3000 WEST CHARLESTON BOULEVARD,
SUITE 3
LAS VEGAS, NV 89102-1990
E-MAIL: tcreer@kzalaw.com

KANIE KASTROLL
8593 PEACEFUL DREAMS STREET
LAS VEGAS, NV 89139-7051
E-MAIL: kanie@cox.net

KELI P. MAY
10213 QUAIN TREET STREET
LAS VEGAS, NV 89183-4252
E-MAIL: kaimanalasvegas@yahoo.com

CARRIE MESSINA
BRYAN J. COHEN, ESQ.
WYNN LAS VEGAS, LLC
3131 LAS VEGAS BLVD SOUTH
LAS VEGAS, NV 89115
OVERNIGHT UPS SERVICE

Julia M. Durkin
Counsel for the General Counsel
National Labor Relations Board, Region 27
1961 Stout Street, Suite 13-103
Denver, CO 80294
(720) 598-7403