

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

PAE AVIATION AND TECHNICAL SERVICES LLC

and

Cases 28-CA-170401
28-CA-175936

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LOCAL LODGE 2949, AFL-CIO

**ORDER (1) GRANTING MOTION TO WITHDRAW AND
REMAND ALLEGATIONS TO THE REGIONAL DIRECTOR AND
(2) REMANDING ALLEGATIONS TO THE REGIONAL DIRECTOR**

On October 19, 2016, Administrative Law Judge Joel P. Biblowitz issued a recommended decision and order in this case in which he found, inter alia, that Respondent PAE Aviation and Technical Services LLC (Respondent) violated Section 8(a)(1) of the Act rules by maintaining overly broad work rules requiring employees (a) to work harmoniously with others and (b) to cooperate in a company investigation. In finding these rules unlawful, Judge Biblowitz relied on the Board's then-extant standard for evaluating facially lawful work rules, set forth in *Lutheran Heritage Village-Lithonia*, 343 NLRB 646 (2004). Respondent filed exceptions to Judge Biblowitz' decision.

On December 14, 2017, the Board issued its decision in *The Boeing Company*, 365 NLRB No. 154 (2017), in which it partially overruled *Lutheran Heritage* and announced a new standard for evaluating facially neutral work rules. On May 24, 2018, the Board issued a decision in the instant proceeding, in which it severed and retained for further consideration the two above-described allegations. See *PAE Aviation and Technical Services LLC*, 366 NLRB No. 95, slip op. at 1 (2018).

On October 22, 2018, the Board issued a Notice to Show Cause as to why the two severed allegations should not be remanded for consideration in light of the new *Boeing* standard. *PAE Aviation and Technical Services LLC*, Cases 28-CA-170401, et al., Notice to Show Cause (Oct. 22, 2018). Counsel for the General Counsel and Charging Party International Association of Machinists and Aerospace Workers, Local Lodge 2949, AFL-CIO (Charging Party) each responded with a request that the allegations be remanded in accordance with the Board's order.

On December 3, 2018, the Board remanded the severed allegations to the Chief administrative Law Judge for reassignment to an Administrative Law Judge (Judge Biblowitz having had retired), for the purpose of reopening the record, if necessary, and preparing a supplemental decision addressing the complaint allegations affected by *Boeing* and setting forth

credibility resolutions, findings of fact, conclusions of law, and a recommended Order. *PAE Aviation and Technical Services LLC*, Cases 28–CA–170401, et al., Order Remanding (Dec. 3, 2018).

On January 9, 2019, I conducted a telephonic conference with the parties. Counsel for the General Counsel, as well as counsel representing Respondent and Charging Party, appeared. After confirming that each of the parties intended to offer evidence at a reopened hearing in this proceeding, I set a hearing date for February 26, 2019, at 9:00 a.m. in Tucson, Arizona. During the call, however, Counsel for the General Counsel indicated that it was possible that he would withdraw at least one of the severed and remanded allegations, pursuant to the recent *Boeing* decision. Counsel for Charging Party expressed his intention to oppose and/or appeal any such decision.

On January 24, 2019, the General Counsel filed a Motion to Withdraw Certain Allegations from Complaint and for Remand to the Regional Director (Motion to Withdraw and Remand), pursuant to Section 102.24 of the Board’s Rules and Regulations. In support of its motion, Counsel for the General Counsel cites “the Board’s new standard under *Boeing*” and further states that remand of the case to the Regional Director is appropriate in order for him to take “further action consistent with *Boeing*.” (General Counsel Motion to Remand at 3). According to Counsel for the General Counsel, Respondent does not oppose the motion.

On February 4, 2019, Charging Party filed an Opposition to Motion to Withdraw Allegations and for Remand, arguing that the allegations the General Counsel seeks to withdraw remain meritorious and that the Board’s remand order “did not contemplate or allow the withdrawal of any allegation.” (Charging Party Opposition at 1) As discussed below, I find that Charging Party lacks standing to make such arguments, that the General Counsel’s motion is appropriate and that nothing in the Board’s remand order precludes the withdrawal of the two allegations at issue here.

It is well established that, pursuant to Section 3(d) of the Act, the General Counsel has exclusive authority over the issuance and prosecution of unfair labor practice complaints. See *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (decision as to whether a complaint should issue or be litigated, is within the exclusive province of the General Counsel); see also *Weigand v. NLRB*, 783 F.3d 889, 895 (D.C. Cir. 2015); *Operating Engineers Local 150 v. NLRB*, 325 F.3d 818, 830 (7th Cir. 2003). It is for this reason that, at hearing, the charging party has no right to introduce evidence in support of an allegation or theory not asserted by the General Counsel and the administrative law judge may not find a violation on a theory that the General Counsel has expressly disclaimed. See *Mid-Atlantic Regional Council of Carpenters (Goodell, Devries, Leech & Dann, LLP)*, 356 NLRB 61 n. 2 (2010).

The Board has also specifically held that a violation may not be found based on an allegation or theory that has been asserted only by the charging party. See *Hobby Lobby Stores, Inc.*, 365 NLRB No. 195, slip op. at 1 n. 2 (2016) (“[i]t is well settled that a charging party cannot enlarge upon or change the General Counsel’s theory of a case”); see also *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999) (judge properly refused to consider charging party’s

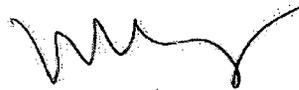
theory that respondent's hiring policy was unlawful on its face, as the General Counsel argued only that it was unlawfully applied); *Winn-Dixie Stores*, 224 NLRB 1418, 1420 (1976) (judge erred in finding that the respondent engaged in surface bargaining as claimed by the charging party, as the General Counsel had not acquiesced in expanding the complaint's 8(a)(5) allegations to include that allegation), *enfd.* in part 567 F.2d 1343 (5th Cir. 1978); *GTE Automatic Electric*, 196 NLRB 902, 903 (1972) (judge erred by granting the charging party's motion to amend the complaint to allege an 8(a)(3) discharge).

Based on the foregoing, I find that the General Counsel has the sole right to withdraw the allegations at issue. I further find that nothing in the Board's remand order purports to preclude the General Counsel from doing so. Accordingly, I find that it would effectuate the policies of the Act to grant the Counsel for the General Counsel's motion to withdraw and remand this action to the Regional Director for Region 28.

Accordingly, it is **ORDERED** that the Motion to Withdraw Certain Allegations from Complaint and for Remand to the Regional Director is **GRANTED**, and

IT IS FURTHER ORDERED that this case is **REMANDED** to the Regional Director for Region 28 for further handling consistent with this Order.

Dated: February 11, 2019, San Francisco, California.



Mara-Louise Anzalone
Administrative Law Judge

Served by email upon the following:

Chris J. Doyle, Esq.
Jeffery W. Toppel, Esq.
David A. Rosenfeld, Esq.

christopher.doyle@nlrb.gov
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From: Lee, Vanise J.
Sent: Monday, February 11, 2019 10:25 AM
To: Doyle, Christopher J. <Christopher.Doyle@nlrb.gov>; Toppel, Jeffrey W. (Phoenix) <Jeffrey.Toppel@jacksonlewis.com>; drosenfeld@unioncounsel.net
Cc: Gómez, Doreen E. <Doreen.Gomez@nlrb.gov>; Lee, Vanise J. <Vanise.Lee@nlrb.gov>; DiCrocco, Brian <Brian.DiCrocco@nlrb.gov>
Subject: PAE Aviation 28-CA-170401, Order Granting CGC Motion to Withdraw and Remand, dd., 2/11/19
Importance: High

Good day Counsel,
Please see the attached Order from Administrative Law Judge, Mara-Louise Anzalone.
Regards,
Vanise J. Lee, Legal Tech.
NLRB Division of Judges San Francisco Branch
Main – 415.356.5255

From: Microsoft Outlook
Sent: Monday, February 11, 2019 10:25 AM
To: Lee, Vanise J.
Subject: Relayed: PAE Aviation 28-CA-170401, Order Granting CGC Motion to Withdraw and Remand, dd., 2/11/19

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

Toppel, Jeffrey W. (Phoenix) (Jeffrey.Toppel@jacksonlewis.com)

Subject: PAE Aviation 28-CA-170401, Order Granting CGC Motion to Withdraw and Remand, dd., 2/11/19

From: Microsoft Outlook
Sent: Monday, February 11, 2019 10:25 AM
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To: Lee, Vanise J.

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Doyle, Christopher J. (Christopher.Doyle@nlrb.gov)

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