

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

Union Tank Car Company,

Respondent Employer,

and

INTERNATIONAL ASSOCIATION OF,
SHEET METAL, AIR, RAIL, AND
TRANSPORTATION WORKERS (SMART)

Charging Party Union,

Case No.: 12-RC-221165

Case Nos.: 12-CA-210779
12-CA-219374
12-CA-220822
12-CA-222661

UNION TANK CAR COMPANY'S
REPLY BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46(h) of the Board’s Rules and Regulations, Counsel for Union Tank Car Company (“Company” or “UTLX”) submits this Reply Brief in Support of its Cross-Exceptions to the Decision of the Administrative Law Judge in the above-captioned case.

I. ARGUMENT

A. The ALJ Erred in Concluding that UTLX’s Use of Telephone Rule Violated Section 8(a)(1) of the Act.

UTLX is not, as General Counsel suggests, trying to contort the reading of the Use of Telephone Rule. The Use of Telephone Rule simply does not support the ALJ’s finding of a violation of Section 8(a)(1). [ALJD 7:30-35]. In full, that rule provides:

Our telephone system needs to be able to handle the heavy load of business calls. For this reason, we ask you to limit incoming and outgoing calls to those that are truly necessary. Cell phones will not be allowed in use during work hours or in work areas at any time unless approved by management.

[Id.] (emphasis added). This rule, when interpreted reasonably, is a lawful Category One rule under Boeing.

Admittedly, the rule uses “work hours,” as opposed to “work time,” but a reasonable employee would read the rule as placing a restriction on cell phone usage only when they should be working – not when they are on break. If the rule prohibited cell phone usage at any time during the day (including break time or when employees were off-duty), the underscored portion of the rule above would be unnecessary and redundant. General Counsel’s read of the rule violates the fundamental proposition that rules must be read in their entirety – and not by taking words and phrases out of context, while ignoring other words and phrases entirely. Lutheran Heritage, 343 NLRB 646 (2004) (The Board “must refrain from reading particular phrases in isolation”). The Boeing case, while expanding the number of rules that would be deemed lawful, most certainly

did not contradict this basic principal. See also, Lafayette Hotel, 326 NLRB 824, 826 (1998) (refusing to engage in a “parsing” of the rule’s language and the reading of terms in isolation).

Clearly, the rule deals with two separate concepts: (1) employees should not talk on their cell phones when they should be working; and (2) employees should not be using their cell phones in work areas, even if their break has begun. If it did not apply to two different situations, then there would be absolutely no reason for the rule to include the second phrase: “or in work areas at any time.”¹

General Counsel suggests that a reasonable employee would read the Use of Telephone Rule as prohibiting them from using their cell phones to call, text, or email each other, union organizers, and other relevant third parties, when on breaks and during mealtimes. However, the testimony from the hearing is clear that this is not actually true. (Tr. 29, 80, 219-220). None of the employees read the rule this way, nor was it ever enforced that way. Id. How a rule has or has not been enforced is significant as to how it might be “reasonably” interpreted. Compare: Hyundai America Shipping Agency, 357 NLRB 860 (2011) (rule regarding “losing interest in your work” lawful as no evidence employer ever linked rule to action protected by Section 7) with The Roomstore, 357 NLRB 1690 fn. 3 (2011) (distinguishing Hyundai, as in that case there was evidence of a linkage).

Moreover, a reasonable hypothetical employee would not read the rule as broad as the GC suggests. GC is essentially arguing that the employees at UTLX’s Valdosta facility would have read the Use of Telephone Rule as prohibiting them from calling their doctor during breaks to schedule an appointment or prohibiting them from calling their spouse over lunch to let them know they are working overtime. Such a reading of this rule is not only wrong, but completely

¹ Employees are hardly likely to come to the plant on their day off to go to a work area to use their cell phone to text or call someone.

unreasonable. A reasonable employee would not look at this rule and think that they are prohibited from using their cell phone to call their spouse during a break.

Put another way, a reasonable employee would be well aware of how other employees treated the rule. It is impossible to believe any reasonable employee would read the rule as prohibiting him/her from using their cell phone to check baseball scores or NCAA tournament scores during break times; accordingly, such employee would not hesitate to call a business agent or text another employee while on break.

Further, any limited intrusion on Section 7 rights would be slight indeed. Employees at the Company come to work at a single site, share break rooms and locker rooms and work areas. This is not a situation where employees are scattered across a wide geographic area with no way to communicate except by phone. In any event, there would be ample time for a reasonable employee to use a phone even if the rule was read as expansively as General Counsel contends. The employee could call or text other employees before work, after work, and/or on the weekends.

Further, the Company has a legitimate basis for the rule – safety – which the General Counsel puts no weight whatsoever on, contrary to Boeing. (Tr. 137-38, 146). While the employer has rescinded the rule, this does not mean its rationale should be ignored. Simply put, just as a president might issue an Executive Order but later choose a different method to achieve his goals, employers can decide on a different method to achieve a goal without conceding the initial goal or method was unlawful.

B. The ALJ Erred in Concluding that Graham Bridges Told Ridge Wallace that His Suspension Was Due to The Union.

Significantly, the ALJ did not discredit Wallace based upon demeanor. Thus, the traditional rationale for bowing to the ALJ's credibility determinations – that they observed the witness – is not present. The ALJ puts significant weight on the fact that Wallace had left the

employer and so had no reason to lie. He ignored that Wallace had filed an NLRB charge. (Tr. 107). Obviously, having given one or more affidavits under oath to the Region, he could hardly contradict his testimony at hearing.

Moreover, the ALJ also neglected to consider another possibility – that Wallace simply did not correctly hear what Bridges said. It is absurd to think that a penalty for violating a “hot work” permit requirement would be a “written warning” – where the policy specifically called for a 30-day suspension. (Tr. 158-59). If a supervisor wanted to send a threatening message to an employee about the consequences of unionization, it would be unreasonable for the employer to threaten a lesser penalty than what the written policy actually provides; it simply makes no sense. Likewise, the ALJ ignored that Bridge’s version of events was supported by a neutral witness, Weeks. Torbitt & Castleman, Inc., 320 NLRB 907, 910 fn. 6 (1996). There was no evidence that Weeks had any motivation to lie.

C. The ALJ Erred in Concluding that Jody James’ Removal of Union Literature Was a Violation of Section 8(a)(1) of the Act. (Exceptions 4 Through 6).

Jody James’ act of removing the flyers, like all Section 8(a)(1) violations, must be viewed in light of all of the surrounding circumstances. The Roomstore, 357 NLRB at fn. 3. James did not, as alleged in the Third Consolidated Complaint, confiscate the flyers from UTLX employees. Indeed, ALJ Amchan did not find that James confiscated a single flyer from any employee who was reading or otherwise possessing one. James simply picked up some flyers off the breakroom tables right before work time because the safety meeting was starting, and because he did not believe there could be any campaigning by anyone at the polling location within 24 hours of the election. There was no anti-union animus – he did not remove the literature because it was union material. He removed the flyers because they were election materials. James applied this rule

with equal vigor to pro-Company materials at the same time. (Tr. 186-87). There is no dispute that he removed the pro-Company materials, the same as he removed pro-Union materials. (Id.)

Thus, there was no evidence presented at the hearing that James gave preferential treatment to anti-union literature or any other literature in the break room at all. Moreover, the application of this rule did not interfere with the employees' Section 7 right to be informed of the Union's organizing campaign. ALJ Amchan did not find that any employees in the break room were denied access to these union flyers or did not get the opportunity to review the information. In fact, the record evidence is the opposite. (Tr. 199, 218-19). As ALJ Amchan noted, there were Union materials available throughout the facility in other locations that were wholly undisturbed by management. (ALJD 5:1-5). Every employee that was asked at the hearing admitted that he knew the flyers were also in the locker room and had access to that information. (Tr. 188, 212, 219, 226-27, 232, 238). Thus, considering all the surrounding circumstances, James' act of removing the flyers from the break room cannot constitute a violation of Section 8(a)(1).

The circumstances in the present case are distinguishable from those cases cited by ALJ Amchan. For instance, in Brooklyn Hospital, 302 NLRB 785 n.3 (1991), the Board agreed with the ALJ's determination that the employer had violated Section 8(a)(1) when one of its supervisors threw away union cards that an employee had left in his work area. Id. at 788. The ALJ in that case reached that conclusion because he found that the supervisor was not seeking to clean up the work area – he found that the supervisor threw away the literature “because it concerned union matters.” Id. The Board found that the supervisor acted in a disparate (i.e., discriminatory manner). 302 NLRB 785 at fn. 3. Here, in contrast, James was attempting to clean up the polling area by removing any and all documentation concerning the election. He removed the pro-Company documentation in the same way as pro-Union material. He did not simply remove the SMART

flyers because they were pro-union. There were numerous flyers around the facility that he and all the employees knew about that he and other managers left untouched. Nor was there any other interference with any other campaigning such as wearing of union t-shirts. (Tr. 31-32, 201, 212, 217).

In Dillingham Marine and Manufacturing Co., 239 NLRB No. 104 (1978), the Board found that an employer violated Section 8(a)(1) when a plant manager warned employees to keep authorization cards and union materials out of the work area and toolboxes located there. The basis of the Board's decision in that case was that "there [was] no evidence that [employer] restricted the employees' possession of any other personal items in the work area[.]" In other words, the employer was discriminating. In contrast, James was applying his prohibition against election materials in the break room to Union and non-Union materials alike. There was no preference given to any of the Company's documents (i.e., no discrimination in favor of anti-union materials). This case should be decided on its facts: (a) this was an isolated incident; (b) there was no discrimination; (c) no flyer was removed until all who wanted to read it had done so, and (d) materials were available elsewhere. This allegation should be dismissed.

II. CONCLUSION

For the foregoing reasons, UTLX respectfully urges the Board to grant all of UTLX's Cross-Exceptions to ALJ Amchan's Decision dated January 11, 2019.

Dated: March 29, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2019, the foregoing Union Tank Car Company's Brief In Support of its Cross-Exceptions to the Decision of the Administrative Law Judge was served as follows:

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