

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHERN BAKERIES, LLC

and

BAKERY, CONFECTIONARY, TOBACCO  
WORKERS, AND GRAIN MILLERS UNION

Case 15-CA-174022

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**RESPONDENT SOUTHERN BAKERIES LLC'S ANSWERING BRIEF TO  
COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION ON REMAND**

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Respondent Southern Bakeries, LLC ("SBC"), by counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, hereby submits its Answering Brief to the Counsel for the General Counsel's ("General Counsel") Exceptions to the Administrative Law Judge's Decision on Remand.

**I. ISSUES PRESENTED BY GENERAL COUNSEL'S EXCEPTIONS**

The General Counsel's exceptions to the decision of the Administrative Law Judge ("ALJ") present the following issues:

1. Whether the ALJ correctly found SBC's rule prohibiting unauthorized entry into the facility by employees to be lawful? (Exception 1)
2. Whether the ALJ erred in finding the SBC's rule prohibiting unauthorized plant entry by employees does not permit plant entry by employees under any circumstances? (Exception 2)

## II. BACKGROUND

### A. Facts

SBC has an Employee Handbook that is distributed to all employees which contains Facility Rules and Disciplinary Procedures. (JX 2; Tr.282:4-8.) The workplace rules, which apply to all employees (including non-bargaining unit employees), were enacted in 2005 pursuant to the management rights provision negotiated between SBC and the Union. (Tr.282:9-24, 293:13-15.) Since that time, SBC and the Union have negotiated several collective bargaining agreements; the Union never challenged any of the work rules at issue here over the course of those negotiations or through any grievances. (Tr.282:21-283:3, 297:23-298:3.) It is undisputed that the rules at issue do not explicitly restrict Section 7 activity, were not promulgated in response to union activity, and have not been used to restrict the exercise of Section 7 rights. (Tr.298:4-7.)

The following work rule under review on remand prohibits “[b]ringing or allowing any non-employee inside the facility (including the break room) without prior permission from management. Unauthorized plant entry by employees.” (Second Consolidated Complaint ¶ 7(c)).

Employees who are on duty are authorized to be at the facility and in the plant. The rule only affects unauthorized employees and is aimed at maintaining a secure facility, preventing unnecessary distractions, protecting the company’s confidential and proprietary information, and safeguarding the integrity of the production process. (Tr.296:17-297:10.) As such, the rule complies with safe food

manufacturing practices, as it allows SBC to monitor who is inside their facility and to assure compliance with its food safety protocol. (Tr.296:5-297:10.) The rule also protects the safety of the facility and employees by not permitting third parties onto the premises without authorization. (*Id.*)

## **B. Procedural History**

On May 11, 2017, the ALJ issued a decision finding, *inter alia*, that the work rule at issue was lawful. (May 11, 2017 ALJ Decision at 10-11 & n.11.) On December 7, 2018, the Board issued an order remanding this proceeding to the ALJ “for the purpose of reopening the record, if necessary, and the preparation of a supplemental decision addressing the complaint allegations affected by [*The Boeing Co.*, 365 NLRB No. 154 (2017)], and setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order.” (Dec. 7, 2018 Order Remanding.) After allowing briefing, the ALJ issued a Decision on Remand (“Remand Decision”), finding that the work rule was lawful:

[SBC’s] rule . . . does not permit plant entry by off-duty employees under any circumstances. Although, one can argue that this allows [SBC] unlimited discretion as to when to allow such access, I believe, as a policy matter, it would [be] best to address [SBC’s] rule when it is applied in a discriminatory fashion. Since the rule, as written, does not permit off-duty employees access to the inside of the facility under any circumstances, I find that it does not violate Section 8(a)(1).

(Remand Decision, at 4.)

## **III. LEGAL ARGUMENT**

The ALJ correctly determined that SBC’s rule prohibiting unauthorized entry into the facility by employees to be lawful, and both of the General Counsel’s

exceptions lack any merit. The work rule is properly upheld under *The Boeing Company* decision, because it does not prohibit or interfere with the exercise of NLRA rights, and any potential adverse impact on protected rights is outweighed by justifications associated with those rules. *See The Boeing Company*, 365 NLRB No. 154, 2017 WL 6403495, at \*4 (2017).

As expressly stated in *Boeing*, “[e]mployers may also lawfully maintain a no-access rule that prohibits off-duty employees from accessing the interior of the employer’s facility and outside work areas, even if they desire access to engage in protected picketing, handbilling, or solicitation.” 2017 WL 6403495, at \*9. The rule would not be interpreted by employees as restricting their Section 7 rights, as the rule is tailored to apply only to “unauthorized plant entry.” Under *Diamond Shamrock Co. v. NLRB*, 443 F.2d 52 (3d Cir. 1971), the Third Circuit distinguished rules that prohibit access to plant areas for solicitation by on-duty employees and off-duty employees, finding that a rule prohibiting the former from being on the premises is improper and overbroad, but a rule banning the latter may be justified as a valid business practice. *Id.* at 55-56. Here, employees who are on duty are authorized to be at the facility and in the plant. The rule only affects unauthorized employees and is aimed at maintaining a secure facility, preventing unnecessary distractions, protecting the company’s confidential and proprietary information, and safeguarding the integrity of the production process. (Tr.296:17-297:10.) Thus, this rule does not interfere with valid Section 7 organizational rights of employees who are on duty.

Furthermore, the rule against unauthorized access is supported by legitimate interests. The rule complies with safe food manufacturing practices, as it allows SBC to monitor who is inside their facility and to assure compliance with its food safety protocol. (Tr.296:5-297:10.) The rule also protects the safety of the facility and employees by not permitting third parties onto the premises without authorization. (*Id.*)

In its exceptions, the General Counsel argues that the ALJ “misread the rule when he determined that it effectively barred off-duty employees from accessing the premises ‘under any circumstances’ when in fact the rule prohibits only ‘unauthorized’ access by current employees.” (Exceptions Br. at 3.) To the General Counsel, SBC “presented no evidence as to the circumstances in which off-duty employees are authorized to enter the facility and when such permission is denied,” and therefore the rule does not amount to a “blanket prohibition of such access for off-duty employees for any purpose.” (*Id.*)

The General Counsel’s position should not be well taken. SBC has consistently maintained that only on-duty employees are authorized to be at the facility and in the plant. The General Counsel now suggests that off-duty employees may be authorized to enter the facility (but points to no evidence that they are). To the extent that the General Counsel believes that the rule is applied disparately, it had the burden to present evidence demonstrating that to be the case. Because it has failed to do so, its exceptions should be summarily denied.

#### IV. CONCLUSION

Respondent Southern Bakeries, LLC respectfully requests that the Board deny General Counsel's exceptions and affirm the ALJ's rulings, findings and conclusions on remand insofar as they have been challenged by the General Counsel's exceptions.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 15, 2019, a copy of the foregoing “Respondent Southern Bakeries LLC’s Answering Brief to the Counsel for the General Counsel’s Exceptions to the Administrative Law Judge’s Decision on Remand.” was filed electronically with the National Labor Relations Board and has been served upon the following by email:

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