

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHERN BAKERIES, LLC

and

Case 15-CA-174022

BAKERY, CONFECTIONARY, TOBACCO  
WORKERS, AND GRAIN MILLERS UNION

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**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENT'S CROSS-EXCEPTION TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION ON REMAND**

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Counsel for the General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, submits this Answering Brief to Respondent's Cross-Exception to the Decision on Remand of Administrative Law Judge (ALJ) Arthur J. Amchan, dated February 11, 2019.

**Issue Presented by Respondent's Cross-Exception**

Respondent filed a single cross-exception to the ALJ's Decision on Remand. By this cross-exception, Respondent challenges the ALJ's finding that Respondent violated Section 8(a)(1) by maintaining a work rule prohibiting employees from using company time or resources for personal use unrelated to employment (ALJD 3:18-31).<sup>1</sup>

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<sup>1</sup> References to "ALJD" are to the pages and lines of the decision of the Administrative Law Judge (ALJ) as follows: ALJD page(s):line(s).

**The ALJ Properly Found Respondent’s Rule Prohibiting “Using Company Time or Resources for Personal Use Unrelated to Employment with the Company without Proper Authorization” to be Unlawfully Overbroad.**

The Judge correctly determined that the rule prohibiting employees from using “company time” for “personal use unrelated to employment with the company” was unlawfully overbroad, because Respondent fails to distinguish between employee rights during working time and break time (ALJD 3:24-31). In these circumstances, this rule is correctly viewed as a Category 2 rule and was properly found to be unlawful by Judge Amchan.

The *Boeing* decision<sup>2</sup> did not alter the well-established principles recognizing that employees are free to engage in Section 7 communications and other protected activities during non-work times, e.g., break times and lunch, whether paid or unpaid. The Judge’s determination that employees would reasonably read this rule to prohibit protected activities during these periods should be sustained.<sup>3</sup> An employer that seeks to restrict employees’ protected activities during non-work periods bears the heavy burden of showing that special circumstances exist that make the restrictions necessary to maintain production or discipline.

Respondent’s contention that the rule is justified by its need to ensure that employees are present and available to work at all times during the continuous manufacturing process was properly rejected by the Judge. *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 872-873 (2011) (rule prohibiting “activities other than

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<sup>2</sup> *The Boeing Co.*, 365 NLRB No. 154 (2017).

<sup>3</sup> *Cf. Ichikoh Mfg.*, 312 NLRB 1022, 1022 (1993), *enforced*, 41 F.3d 1507 (4<sup>th</sup> Cir. 1994). *See also BJ’s Wholesale Club, Inc.*, 297 NLRB 611, 612 (1990) (“ . . . a rule prohibiting solicitation during ‘working hours’ is prima facie susceptible of the interpretation that solicitation is prohibited during all business hours and, thus, invalid . . . ).

Company work during working hours” unlawfully overbroad); *cf. Our Way, Inc.*, 268 NLRB 394, 395 (1983) (rules using “working time” are presumptively valid because the term signifies periods when employees are performing actual job duties, periods which do not include the employees’ own time such as lunch and break periods). Moreover, the rule’s requirement that “prior authorization” be obtained for employees’ activities during non-work times is also cause to find this rule facially unlawful. Rules that require prior authorization to engage in Section 7 activity have generally been found unlawful, absent disclaimer language that would clarify to employees that such authorization is not required for Section 7 communication or activities.<sup>4</sup> Under *Boeing*, given the significant chilling effect of prior authorization rules, the adverse impact on NLRA rights will generally outweigh any justifications associated with this type of rule.

For all of the foregoing reasons, the Judge’s finding that this rule constitutes an unwarranted infringement on employees’ Section 7 rights should be upheld.

### **Conclusion**

For the reasons discussed above, Counsel for the General Counsel requests that the Board deny Respondent’s cross-exception and affirm the Judge’s rulings, findings and conclusions insofar as they have been challenged by the cross-exception.

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<sup>4</sup> See, e.g., *Trump Marina Associates*, 354 NLRB 1027, 1027 n.2 (2009) (rule requiring employees to obtain prior authorization from management before releasing statements to the media found overly broad), *adopted by a three-member panel*, 355 NLRB 585 (2010), *enforced mem.*, 435 F. App’x 1 (D.C. Cir. 2011); *Fremont Mfg. Co.*, 224 NLRB 597, 603-604 (1976) (finding unlawful provision in confidentiality rule that prohibited employees from “making any statement or disclosure regarding company affairs...without proper authorization from the company”), *enfd.* 558 F.2d 889 (8<sup>th</sup> Cir. 1977); *Teletech Holdings*, 333 NLRB 402, 403 (2001) (finding no-distribution rule unlawful because, *inter alia*, it required employees to secure employer’s “proper authorization”).



**CERTIFICATE OF SERVICE**

I hereby certify that on April 29, 2019, a copy of Counsel for the General Counsel's Answering Brief to Respondent's Cross-Exception was filed via E-Filing with the NLRB Office of Executive Secretary.

I further certify that on April 29, 2019, a copy of Counsel for the General Counsel's Answering Brief to Respondent's Cross-Exception was served by e-mail on the following:

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I further certify that on April 29, 2019, a copy of Counsel for the General Counsel's Answering Brief to Respondent's Cross-Exception was served by regular mail upon the following:

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