

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

**COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF
IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION ON REMAND**

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

Argument in Support of Exceptions

Respondent's handbook contains the following rule: "Bringing or allowing any non-employee inside the facility (including the break room) without prior permission from management. Unauthorized plant entry by employee." (JX 2 at 19, Rule 7).¹

General Manager Ledbetter testified that this rule is justified by Respondent's legitimate interest in maintaining control of who enters the facility in order to protect product safety and the safety of on-duty employees. However, contrary to Respondent's

¹ "GCX" and "RX" references are to the numbered exhibits of the General Counsel, or Respondent, respectively. "JX" references are to the numbered Joint Exhibits. Transcript references will be denoted by "Tr." followed by the page number(s). 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).

claim in its answering brief, Ledbetter *never testified* that off-duty employees *are never permitted* to enter the facility (Tr. 296-97, 306-08) and the ALJ did not so find (ALJD 4:31-32). Instead, Ledbetter failed to provide examples of circumstances in which off-duty employees are permitted to enter the facility and when they are not.

The *Boeing* decision did not change extant Board law which holds that off-duty employees may not be denied access to the interior of the facility to engage in protected concerted activities absent a lawful rule barring entry to those areas by off-duty employees for any purpose.² Under *Tri-County Medical Center*, such a no-access rule is lawful only if it “(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.”³ Thus, if an employer’s rule fails to satisfy each of these three conditions, the maintenance of such a rule violates Section 8(a)(1).⁴

Applying these principles here, the Judge’s reasoning and conclusion cannot be sustained. First, the Judge misread the rule when he determined that it effectively barred off-duty employee from accessing the premises “under any circumstances” when in fact the rule prohibits only “unauthorized” access by current employees. Thus, the Judge erroneously construed this rule as a blanket prohibition of off-duty employee access when it clearly is not (ALJD 4:27-32). This critical error is the basis for the Judge’s determination that Respondent’s maintenance of its no-access rule was lawful when in fact

² *The Boeing Co.*, 365 NLRB No. 154, slip op. at 9 and n.32 (2017). *Piedmont Gardens*, 360 NLRB 813, 813-14 (2014) (employer maintenance of rule restricting off-duty employees access to interior areas held facially unlawful because rule was invalid under *Tri-County* by not barring access for any purpose).

³ *Tri-County Medical Center*, 222 NLRB 1089, 1090 (1976).

⁴ *Piedmont Gardens*, 360 NLRB at 814.

the rule fails to satisfy the third element of the *Tri-County* test since there is no evidence supporting a blanket prohibition and the rule, as written, is not a blanket prohibition.⁵

Respondent presented no evidence as to the circumstances in which off-duty employees are authorized to enter the facility and when such permission is denied.⁶ As the Board stated in *Casino San Pablo*, allowing access only with management’s approval “effectively vests management with unlimited discretion to expand or deny off-duty employees’ access for any reason it chooses.” *Casino San Pablo*, 361 NLRB No. 148, slip op. at 6 (2014); *Saint John’s Health Center*, 357 NLRB at 2080-83.

In light of the foregoing, the Board should grant these exceptions and hold that Respondent’s maintenance of its no-access rule for off-duty employees violates Section 8(a)(1).

CONCLUSION

For the reasons discussed above, the General Counsel requests that the Board grant these exceptions and find that Respondent committed additional violations of Section 8(a)(1) as set forth herein.

Dated at Memphis, Tennessee, this 29th day of April, 2019.

Respectfully submitted,

/s/
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⁵ See e.g., *Sodexo America, LLC*, 358 NLRB 668, 669 (2012) (off-duty access policy “violates Section 8(a)(1) because it does not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose”), citing *Saint John’s Health Center*, 357 NLRB 2078, 2082-83 (2011). *Sodexo America* was issued by a panel that under *Noel Canning* was not properly constituted. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The Board should adopt the sound reasoning and rationale of the *Sodexo America* decision as its own.

⁶ See *Piedmont Gardens*, 360 NLRB at 814 (finding employer’s no-access rule for off-duty employees unlawful despite employer’s claim it permitted access only in three limited circumstances because evidence did not establish these were the only circumstances under which employer had granted interior access).

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2019, a copy of Counsel for the General Counsel’s Reply Brief in Support of Exceptions 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 Reply Brief in Support of Exceptions 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 Reply Brief in Support of Exceptions was served by regular mail upon the following:

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