

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of :

ENTERGY NUCLEAR OPERATIONS,
INC.,

Respondent,

And

UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA,
INTERNATIONAL UNION, LOCAL 25

Charging Party.

Case: 01-CA-153956
01-CA-158947
01-CA-165432

**Respondent Entergy Nuclear Operations, Inc.'s Supplemental Brief
Addressing *The Boeing Company*, 365 NLRB No. 154 (2017)**

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Respondent Entergy Nuclear Operations, Inc. (“Entergy”) respectfully submits this supplemental brief to address the impact of the Board’s decision in *The Boeing Company* on the remaining allegations in the Complaint.

Pursuant to an Order to Show Cause issued on October 3, 2018, the Board issued an order on January 15, 2019 severing the allegations that certain work rules were unlawfully maintained, and remanding those allegations to the ALJ to issue a supplemental decision in light of *Boeing*. Following the Board’s remand order, Counsel for the General Counsel filed a Motion to Withdraw Complaint Allegations, which was granted on April 3, 2019.

Following the Board’s severance and remand order and the withdrawal of certain allegations by the General Counsel, only two types of rules remain at issue here: Entergy’s Government Investigations Policy, and certain portions of its Confidentiality rules. As discussed below, under the teachings of *Boeing*, these rules do not violate the Act.

In *The Boeing Company*, the National Labor Relations Board overruled its prior *Lutheran Heritage* “reasonably construe” standard for analyzing facially neutral employer rules. *The Boeing Company*, 365 NLRB No. 154, slip op. at 7. “The Board will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee ‘would reasonably construe’ a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future.” *Id.* Instead, “the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated

with the requirement(s).” *Id.*, slip op. at 14. Under the new standard, the Board categorizes employment policies as follows:

- *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the “harmonious interactions and relationships” rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.
- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with one another.

Here, the only issues to be addressed are (i) whether the challenged policies, when reasonably interpreted, would prohibit or interfere with Section 7 rights; and (ii) if so, whether the potential adverse impact on protected rights is outweighed by the justifications for the policies. Under *Boeing*, “this is an objective standard, and the reasonable interpretation of the rule is conducted from the perspective of a reasonable employee.” *Id.*, slip op. at 4 n. 16.

The Confidentiality rules remaining in this case are found in Sections 3.1 and 5.2 of Entergy's Protection of Information Policy. In Your Honor's May 12, 2017 Decision, you first concluded that certain sections of that same policy were lawful, pointing to the savings clause, which states:

Nothing in **this Policy** is intended to restrict an employee's rights under any federal, state or local labor or employment law, or regulation, except to the extent such rights are clearly waived by the express terms of a current collective bargaining agreement. These employee rights include, but are not limited to, the right to engage in protected concerted activity for mutual aid and protection, and the right to engage in protected concerted activity relating to wages, hours and other terms of employment, such as the right to discuss his or her wages, benefits and employment conditions with others.

GC Exh. 15(d) at Bates 000011 (emphasis added).

In finding that Sections 3.1 and 5.2 were unlawful, Your Honor pointed to the distance between the savings clause and the challenged provisions. It may be the case that, under the myopic lens of *Lutheran Heritage*, more immediate proximity between a savings clause and the remainder of the policy was required. However, under the practical test set forth in *Boeing*, the question is whether it is reasonable to conclude that Entergy's policies *would*—and not simply *could*—interfere with employees' Section 7 rights. Requiring that savings clauses appear on the same page as other policy language is inconsistent with *Boeing*, and would lead to absurd results. Take, for example, the 15-page Protection of Information Policy at issue here, which would need to have repetitive disclaimer verbiage on literally every page to pass muster. *Boeing* teaches that words are not to be read in isolation and violations found based on unrealistic hypotheticals about what an employee might perceive the meaning and intent of a policy to be. Under the new standard, the

presence of a savings clause—that plainly states that “Nothing in this Policy is intended to restrict an employee’s rights... to engage in protected concerted activity for mutual aid and protection, and the right to engage in protected concerted activity relating to wages, hours and other terms of employment”—renders the Protection of Information Policy lawful under *Boeing*.

The Decision also concluded that Section 5.13 of Entergy’s Issue Resolution Policy was unlawful. That policy provides an avenue for non-bargaining unit employees to appeal certain suspensions and terminations to an Issue Resolution Panel, comprised of five (5) non-bargaining unit employees. The policy is *only* applicable when an aggrieved individual invokes it. To protect the confidentiality of the individual who is seeking review of his/her suspension or termination, the policy provides that “Disclosure, circulation, distribution, or discussion of the information *collected by the Panel* should be limited to those individuals who have a legitimate business need to know the contents.” (emphasis added). There are no words in the policy that limit the ability *of the employee* to discuss his/her discipline and no basis to conclude that, under *Boeing*, this language restricts Section 7 rights.

Finally, the Decision found that Entergy’s Government Investigations Policy was unlawful. Under *Boeing*, a reasonable employee would understand this policy as a mechanism to protect the Company’s legal rights when faced with subpoenas, Civil Investigative Demands, or other similar investigations by state and federal regulators. In a workplace such as Pilgrim—where nearly all employees belong to a union—no reasonable employee would understand this policy as restricting access to the NLRB or its processes.

Conclusion

For all of these reasons, and on the Record as a whole, the remaining Complaint allegations should be dismissed.

Respectfully submitted,

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Certificate of Service

Pursuant to Section 102.31(b) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, the undersigned certifies that the foregoing Supplemental Brief in Support of Cross-Exceptions was served via electronic mail on this 24th day of May, 2019 upon the following:

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