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**Southern Bakeries, LLC and Bakery, Confectionary,
Tobacco Workers, and Grain Millers Union.**
Case 15–CA–174022

August 28, 2019

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On December 7, 2018, the National Labor Relations Board issued an Order Remanding, in light of the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017). The Board remanded allegations concerning seven facially neutral work rules,¹ maintained by the Respondent, for analysis under *Boeing*. On February 11, 2019, Administrative Law Judge Arthur J. Amchan issued his decision on remand. The General Counsel filed exceptions with supporting argument, the Respondent filed an answering brief, and the General Counsel filed a reply brief. In addition, the Respondent filed a cross-exception with supporting argument, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exception, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.²

Of the seven work rules remanded to the judge, only two rules are at issue here: the rule prohibiting "[u]sing Company time or resources for personal use unrelated to employment" and the rule prohibiting "[u]nauthorized plant entry by employee."³ The judge found that the maintenance of the former rule was unlawful and that the maintenance of the latter rule was lawful. We find the opposite to be true and reverse both of the judge's conclusions.

¹ The Board severed these allegations in a Decision and Order reported at 366 NLRB No. 78 (2018).

² We shall amend the judge's conclusions of law consistent with our findings and legal conclusions herein. We shall modify the judge's recommended Order to conform to our findings, the Board's decision in *Excel Container, Inc.*, 325 NLRB 17 (1997), and the Board's standard remedial language, as set forth in full below. We shall also substitute a new notice to conform to the Order as modified.

³ As for the other five rules, the parties stipulated to the legality of four of them, and no exceptions were filed to the judge's finding that the "off-duty conduct" rule was lawful.

I. RULE PROHIBITING PERSONAL USE UNRELATED TO
EMPLOYMENT

Under *Boeing*, the Board first analyzes whether "a facially neutral policy, rule or handbook provision . . . when reasonably interpreted, would potentially interfere with the exercise of NLRA rights." 365 NLRB No. 154, slip op. at 3–4. If a rule would not be so read, the Board's inquiry ends. *Id.* However, if a rule potentially interferes with employees' rights under the Act, then the Board will weigh any adverse impact on NLRA-protected conduct against the respondent's legitimate justifications for maintaining the rule. *Id.*⁴ Here, we find that the rule prohibiting "[u]sing Company time or resources for personal use *unrelated to employment*" has no potential to interfere with the exercise of NLRA rights. (Emphasis added.) Put simply, because the Act does not contain any protections that are not related to employment, this rule cannot reasonably be interpreted to interfere with protected rights. As a result, we find that this rule falls within Category 1(a) under *Boeing*, a rule that is lawful to maintain because "the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights." *Id.*

II. RULE PROHIBITING UNAUTHORIZED ENTRY BY
EMPLOYEES

The Respondent's rule prohibiting "[u]nauthorized plant entry by employee" concerns off-duty employee access. Because Board law on off-duty employee access rules has evolved separately from the "reasonably construe" standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and replaced in *Boeing*, we analyze this rule according to the principles set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976), and its progeny. Accord *Boeing*, *supra*, slip op. at 8 & fn. 32.

Under *Tri-County*, such an access rule is valid 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." 222 NLRB at 1089. The Board applied these factors in *Piedmont Gardens*, 360 NLRB 813 (2014), and found that an off-duty access rule that prohibited access "unless previously authorized by" their supervisor failed the third prong of *Tri-County*. The Board found that the rule failed this prong because it gave the employer unlimited

⁴ Member McFerran acknowledges that *Boeing Co.*, 365 NLRB No. 154 (2017), is currently governing law, and she applies that decision here for institutional reasons, while adhering to her dissenting view in the case.

discretion to determine when employees may access the facility. *Id.* at 813–814. We find the Board’s holding in *Piedmont Gardens* governs this case, because the rule here against *unauthorized* access is effectively the same as the rule found unlawful in *Piedmont Gardens*. Accordingly, we find that the Respondent’s maintenance of this rule violated Section 8(a)(1).⁵

AMENDED CONCLUSION OF LAW

1. Substitute the following as the Conclusion of Law.

“The Respondent has violated Section 8(a)(1) of the Act by maintaining a rule that prohibits ‘[u]nauthorized plant entry by employee.’”

ORDER

The National Labor Relations Board orders that the Respondent, Southern Bakeries, LLC, Hope, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule prohibiting unauthorized plant entry by employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule in its employee handbook that prohibits unauthorized plant entry by employees.

(b) Furnish employees with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

(c) Within 14 days after service by the Region, post at its Hope, Arkansas facility, copies of the attached notice marked “Appendix.”⁶ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices,

⁵ Members Kaplan and Emanuel apply extant precedent here, but they would be willing to reconsider the third prong of *Tri-County* in a future appropriate case.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 14, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 28, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule prohibiting your unauthorized plant entry.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the rule in our employee handbook that unlawfully prohibits your unauthorized plant entry.

WE WILL furnish you with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

SOUTHERN BAKERIES, LLC

The Board's decision can be found at <http://www.nlr.gov/case/15-CA-174022> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Linda M. Mohms and Erin E. West, Esqs., for the General Counsel.

David L. Swider and Phillip R. Zimmerly, Esqs. (Bose, McKinney & Evans, LLP), of Indianapolis, Indiana, for the Respondent.

DECISION ON REMAND

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. I issued a decision in this matter on May 11, 2017. On May 1, 2018, the Board rendered its decision on many aspects of the case but severed the allegations pertaining to Respondent's work-rules, 366 NLRB No. 78. On December 7, 2018, the Board remanded the work-rule allegations to me for further consideration under its decision in *Boeing Co.*, 365 NLRB No. 154 (2017). The parties have declined to have the record reopened. They have stipulated to the legality of several rules alleged to be violative in the complaint. I accept the stipulation and hereby

dismiss those complaint allegations.

With respect to the remaining rules they have filed briefs.

I dismiss the complaint allegations with regard to these rules:

Maintenance of allegedly violative rules (complaint paragraph 7)

The General Counsel alleged that Respondent is violating Section 8(a)(1) of the Act by maintaining the following rules in its employee handbook (Jt. Exh. 2). However, the parties have stipulated to the legality of the following three rules:

Employees, contractors, and visitors may not carry cameras or imaging devices into any Southern facilities.

This includes:

1. Conventional film, still cameras
2. Digital still cameras
3. Video cameras
4. PDA cameras
5. Cell phone cameras

An employee with authorization to take pictures in the facility must sign in at the front reception desk and be give a Photographer's Pass. This pass must be worn at all times while shooting pictures. A Southern management employee must accompany the employee.

(Jt. Exh. 2, p. 13.)

FACILITY RULES AND DISCIPLINARY PROCEDURES GROUP A

These infractions are serious matters that often result in termination. These listed infractions are not all-inclusive. Any conduct, which could interfere with or damage the business or reputation of the Company or otherwise violate accepted standards of behavior, will result in appropriate discipline up to and including immediate discharge.¹

12. Unauthorized use of still or video cameras, tape recorders, or any other audio or voice recording devices on Company premises, in a Company supplied vehicle, or off-Company premises involving any current or former Company employees, without such person's expressed permission while on Company business.

Relevant Case Law Regarding Respondent's Rules

The legality of the contested rules in this case is governed by the Board's recent decision in *The Boeing Company*, 365 NLRB No. 154 (2017). In *Boeing*, the Board delineated 3 categories of "rules." Category 1 rules are those which are lawful because they either (1) do not prohibit or interfere with employee Section 7 rights when reasonably interpreted, or (2) the

¹ The parties stipulated that this rule was legal, but also addressed this rule in their briefs on remand. Assuming that the legality of this rule is dispute, I find that it does not violate Sec. 8(a)(1) for the same reasons I find Respondent's rule # 9 legal. Respondent's rule is materially indistinguishable from that found legal in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).

employer's justification for the rule outweighs the potential adverse impact on protected rights. Category 2 rules are those which warrant individualized scrutiny as to whether they prohibit or interfere with Section 7 rights and whether legitimate justifications outweigh any adverse impact on these employee rights. Category 3 rules are those which are unlawful because the justification for their maintenance does not outweigh their adverse impact on employee Section 7 rights. A rule which is not unlawful to maintain, may be unlawful as applied. However, application of Respondent's rules is generally not an issue in this case.

The parties disagree as to the legality of the following rules:

3. Using Company time or resources for personal use unrelated to employment with the Company without proper authorization. This includes leaving Company property during paid breaks or leaving your assigned job or work area without permission.

I find nothing illegal in the requirement that employees are required to stay on company property during paid breaks. They apparently are subject to being called upon during these breaks to fill-in for other employees (Tr. 290). However, I find this rule is likely to be interpreted as restricting Section 7 rights given Respondent's failure to distinguish between employee rights during working time and break time, *Hyundai American Shipping Agency, Inc.*, 357 NLRB 860, 872-873 (2011), enf. 805 F.3d 309 (D.C. Cir. 2015). A reasonable person would likely read the rule as prohibiting, for example, solicitation on behalf of a union during a paid breaktime in a break room. Per *Boeing*, I find that Respondent has not shown that it has a sufficient justification to prohibit protected activity during non-working time, even if that time is paid time. Thus, I conclude that the rule as written violates Section 8(a)(1).

9. Any off-duty conduct, which could impact, or call into question the employee's ability to perform his/her job.

The Board has not been entirely consistent with regard to this type of rule over the years. However, Respondent's rule does not appear to me to be materially different than one found legal in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). That rule read as follows:

Unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community

The Board's decision makes it clear that the *Lafayette Park Hotel* rule would be a category 1 rule under *Boeing*. I find that Respondent's rule on off-duty conduct is also a category 1 rule and not illegal.

GROUP B

7. Bringing or allowing any non-employee inside the facility (including the break room) without prior permission from management. Unauthorized plant entry by employees

(Jt. Exh. 2 pp. 17-19.)

The General Counsel contends the last sentence of the rule

violates Section 8(a)(1) because it does not prohibit plant entry (assumedly by off-duty employees) for any purpose. In this respect, the General Counsel relies on *Lytton Rancheria of California (d/b/a Casino San Pablo)*, 361 NLRB 1350 (2014); *St. John's Health Center*, 357 NLRB 2078, 2080-2083 (2011). Respondent's the rule does not indicate when plant entry will be authorized (although one can assume that one instance would be when an employee is scheduled to work). The rule in *St. John's Health Center* made an exception for employer-sponsored events, such as baby showers and retirement parties.

The rule in *Lytton Rancheria* permitted off-duty access for business with the human resources department and orientation sessions. Pursuant to these decisions the General Counsel submits that under long-standing Board precedent in *Tri-County Medical Center*, 222 NLRB 1089 (1976), a valid rule must bar access to off-duty employees for all purposes and must not leave an employer with unbridled discretion as to when to allow off-duty employees into the plant and not to do so. I would distinguish Respondent's rule by the fact that it does not permit plant entry by off-duty employees under any circumstances. Although, one can argue that this allows Respondent unlimited discretion as to when to allow such access, I believe, as a policy matter, it would best to address Respondent'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).

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) of the Act by:

Maintaining a rule that prohibits employees from using company time or resources for personal use unrelated to employment at any time, including nonwork time.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Southern Bakeries, Hope, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining rules that prohibit employees from using company time or resources for personal use unrelated to employment at any time, including nonwork time.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its rules that prohibit employees from using company time or resources for personal use unrelated to employment at any time, including nonwork time.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days after service by the Region, post at its Hope, Arkansas facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 16, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 11, 2019

APPENDIX
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An Agency of the United States Government

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule that prohibits employees from using company time or resources for personal use unrelated to employment at any time, including nonwork time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SOUTHERN BAKERIES, LLC

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