

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**COTT BEVERAGES INC.**

**and**

**Case 16-CA-181144**

**JOSEPH KELLY, an Individual**

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

Megan E. McCormick Lemus  
Counsel for the General Counsel  
National Labor Relations Board, Region 16  
819 Taylor Street, Room 8A24  
Fort Worth, Texas 76102  
Tel: (682) 703-7233  
Fax: (817) 978-2928  
Email: [Megan.McCormick@nlrb.gov](mailto:Megan.McCormick@nlrb.gov)

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## I. PROCEDURAL BACKGROUND

This case was heard on May 24, 2017, in San Antonio, Texas before the Honorable Administrative Law Judge Paul Bogas (ALJ), based on an unfair labor practice charge filed by Joseph Kelly (Charging Party), a former employee of Cott Beverages, Inc. (Respondent). On September 12, 2017, the ALJ issued his initial decision, finding that Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by, *inter alia*, maintaining two unlawful cell phone rules or policies (JD-68-17 slip op. at 14-18).<sup>1</sup> In evaluating the lawfulness of these rules, the ALJ applied the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). On December 14, 2017, the Board issued its decision in *The Boeing Company*, 365 NLRB No. 154 (2017), overturning the first prong of *Lutheran Heritage* and establishing a new standard for employer work rules and policies aimed at balancing employees' Section 7 rights and employers' business justifications. Because the legal framework underlying both the Complaint and the ALJ's decision was changed by *Boeing*, on May 21, 2019, the Board remanded the case to the ALJ to reopen the record, if necessary, and to prepare a supplemental decision addressing the allegations impacted by *Boeing*. *See Cott Beverages, Inc.*, Case 16-CA-181144, May 21, 2019 (unpublished order). No party sought to introduce further evidence and after reviewing briefs, the ALJ issued a supplemental decision on October 7, 2019.

Based on the entire record in this matter and the arguments presented below, Counsel for the General Counsel respectfully excepts to the ALJ's findings and conclusions and urges the Board to find that Respondent's no-cell phone rules do not violate the Act.

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<sup>1</sup> The initial Judge's decision will be identified herein as JD-68-17. References to the supplemental Judge's decision will simply be JD. In JD-68-17, the Judge also found that Respondent coercively interrogated employees about their protected concerted activities. That violation of the Act is not at issue and will not be directly addressed herein.

## II. FACTS<sup>2</sup>

Respondent manufactures beverages at fifteen facilities nationwide, including in San Antonio, Texas (JD slip op. at 3, LL. 7-8). Employees at the San Antonio facility work on four different production lines that either produce beverages or containers or fill containers with beverages. (JD slip op. at 3, LL. 13-14). Production lines operate on a continuous basis during shifts, with four to six employees working on each line (JD slip op. at 3; LL. 14-16). Production line employees take unscheduled breaks during their shifts, including 30 minutes for lunch (JD slip op. at 3, LL. 17-18). Line lead employees, who oversee each line's operation, fill in for production workers while they are on break (JD slip op. at 3, LL. 18-21). The facility operates a warehouse where five employees work per shift (JD slip op. at 3, LL. 21-22). Forklifts are used in both the warehouse and production area to move products and materials (JD slip op. at 3, LL. 22-24).

The rules at issue here include a corporate policy and policy specific to Respondent's San Antonio facility. (JD slip op. at 3, LL. 37-38). Since about March 25, 2014, Respondent has maintained at its facilities nationwide a Good Manufacturing Guideline Policy (GMP) (JD slip op. at 3, LL. 37-46; 4, LL. 1-20; GC Exh. 3). Respondent's GMP provides as follows in paragraph 5 of its "Cleanliness" standard:

4. All jewelry, including earrings, body piercing such as tongue, cheek, eyebrows, and nose, necklaces etc. and other objects that might fall into the product, equipment, or containers must be removed. (Stoneless wedding bands and Medical Emergency I.D. necklaces are allowed in the processing, batching and production areas.) (Medical Alert Bracelets are not permitted.) Medical emergency I.D. needs, must be reported to HR.

5. Items are not to be kept in shirt pockets or in any location above the waist that would allow them to fall into the product, food contact surface, or food packaging materials. No personal cell phones are permitted on the manufacturing floor except for those which are company issued or approved. Cellular communication devices may be maintained on the person for management and leadership roles. Radios and company provided

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<sup>2</sup> The facts presented herein are those relevant to the issues remaining in this case.

communication devices are to be used as the primary form of communication in the manufacturing area. Clothing and personal belongings, such as cigarettes, purses, newspapers, magazines, medications, and personal cell phones are not to be kept at the work station. These items are to be stored in lockers or in your personal vehicle. No personal portable electronic equipment i.e. MP3 players, IPODS, pocket pagers, portable games etc. are allowed in manufacturing, processing, or warehousing areas.

(JD slip op. at 3, LL. 42-46; 4, LL. 1-20; GC Exh. 3). In addition, since about April 2015, Respondent has maintained at its San Antonio facility a Good Manufacturing Practices Introduction, which is provided to employees upon hire and provides:

**PERSONAL BELONGINGS:**

Personal items (items not directly related to production processes or job requirements) are not allowed in work areas. These include, but are not limited to: clothing, cell phones, MP3 players, gaming devices, cigarettes, purses, magazines, medications, newspapers, etc. These may be kept in an associate's locker and may be used during break periods in designated areas.

**JEWELRY:**

All jewelry, including earrings, body piercing such as tongue, cheek, eyebrows, and nose, necklaces etc. and other objects that might fall into the product, equipment or containers must be removed (plain wedding bands and Medical Emergency I.D. necklaces are allowed in the processing, batching and production areas).

\* \* \*

**NO ITEMS ABOVE THE WAIST:**

No items may be carried in shirt pockets (i.e. pens, pencil[s], combs, etc.) All loose items must be carried in pants pockets or otherwise secured below the waist; such items should be minimized. Plants providing uniforms are encouraged to purchase shirts with no pockets, to help enforce this policy.

(JD slip op. at 4, LL. 22-45; 5, 1-7; GC Exh. 4).

While serving as Respondent's corporate senior director of quality from October 2013 to May 2017, Patrick Rank was the head of a team that developed the policies referenced above (JD slip op. at 5, LL. 9-12). Rank testified that Respondent instated the prohibitions on personal cell phones and electronic devices for two main reasons. First, the policy was intended to protect

against contamination that could be caused by a cell phone or other item “above the belt” being dropped into a container used in food production (JD slip op. at 5, LL. 14-16). Respondent is subject to the U.S. Food and Drug Administration’s (FDA) Food, Drug, and Cosmetic Act (FDCA) (JD slip op. at 5, LL. 19-22). The FDA has established regulations known as the Current Good Manufacturing Practice in Manufacturing, Packaging, or Holding Human Food (GC Exh. 1(j) at 1, citing 21 C.F.R. § 110 (2016)). Those regulations require that Respondent “evaluate the hazards that could affect food manufactured, processed, packed, or held” by its facility and to “identify and implement preventive controls to significantly minimize or prevent the occurrence of such hazards.” (GC Exh. 1(j) at 7 fn. 3). Second, Rank testified that the prohibition sought to ensure employee safety by eliminating the risk of distractions, slow reactions, and injury on the job (JD slip op. at 5, LL. 24-27). Rank testified that use of cell phones in the warehouse could distract employees and cause potential forklift accidents (JD slip op. at 5, LL. 27-29). The record does not reflect any actual incidents of contamination or injury caused by cell phones or other devices (JD slip op. at 5, LL. 29-31).

Rank also testified that Respondent’s employees in leadership roles, including line leads, are permitted to carry and use cell phones on the manufacturing floor (JD slip op. at 6, LL. 13-16). According to Rank, the rationale for this exception is twofold: (1) leadership employees are an extension of management and have a responsibility and a need to communicate with the outside world and with management; and (2) leadership employees are not tied to equipment, so the potential risk of a safety or contamination issue arising is outweighed by the benefit of maintaining communication (JD slip op. at 6, LL. 16-22).

On May 12, 2016, there was an ammonia leak at Respondent’s San Antonio facility (JD slip op. at 7, LL. 14-15). Charging Party Joseph Kelly, then a production line employee and

member of the facility's safety committee, smelled the ammonia and responded by alerting the 911 system to alert public safety officials about the emergency (JD slip op. at 7, LL. 13-17). Employees were later evacuated, and the facility was shut down for some hours (JD slip op. at 7, LL. 17-18). Events surrounding the leak led to employees taking certain collective action (JD-68-17 at 3, LL. 9-52; 4, LL. 1-10). The ALJ found that Manager Brian Vanley unlawfully interrogated the Charging Party about his participation in the collective action (JD-68-17 at 13, LL. 6-50). Respondent did not except to this finding. The interrogation by Vanley occurred during an interview held in his office. The Charging Party had been suspended from work at the time the interview was convened, and he came to the plant specifically for the purpose of meeting with Manager Vanley (JD-68-17 at 5, LL. 32-35; 6, LL. 1-52; 7, LL. 1-33). The Charging Party secretly recorded this conversation with his personal iPad, which was hidden in his bag (GC Exh. 16; GC Exh. 17; Tr. 88-90).

### **III. ANALYSIS**

#### **A. The ALJ Erred by Concluding that Employees would Reasonably Interpret the No Cell Phone Rules to Interfere with the Exercise of Section 7 Rights [Exception 1]**

##### **1. Board Law**

On December 14, 2017, the Board issued its decision in *Boeing*, overturning the first prong of *Lutheran Heritage Village-Livonia* and establishing a new standard aimed at balancing employees' Section 7 rights and employers' business justifications for maintaining a policy or rule. 365 NLRB No. 154 (2017). Under this standard, when evaluating a facially neutral policy that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will balance the interests involved. *See id.*, slip op. at 15. This balancing test involves an evaluation of: (1) the nature and extent of the rule's potential impact on NLRA rights, and (2)

legitimate justifications associated with the rule. *See id.* The Board also indicated that its balancing test will ultimately result in its ability to classify the various types of employer rules into three categories, thereby eliminating the need to conduct case-specific balancing as to certain types of rules to provide employers, employees, and unions with greater certainty in the future. *See id.*, slip op. at 15-16. Specifying that these categories represent the results of the new balancing test, but are not part of the test itself, the Board noted:

- *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 Section 7 rights and thus no balancing of rights and justifications is required; or (ii) even though the rule has a reasonable tendency to interfere with Section 7 rights, the potential adverse impact on those protected rights is outweighed by employer justifications associated with the rule. The Board included in this category rules requiring “harmonious relationships” in the workplace, rules requiring employees to uphold basic standards of “civility,” and rules prohibiting cameras in the workplace.
- *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 Section 7 rights, and if so, whether any adverse impact on protected conduct is outweighed by legitimate business justifications.
- *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit Section 7 conduct, and the adverse impact on Section 7 rights is not outweighed by justifications associated with the rule. The Board included as an example of a Category 3 rule one that prohibits employees from discussing wages and benefits with each other.

*Boeing*, 365 NLRB slip op. at 15-16. In *LA Specialty Produce Co.*, the Board clarified that it is the General Counsel’s initial burden:

to prove that a facially neutral rule *would* in context be interpreted by a reasonable employee...to potentially interfere with the exercise of Section 7 rights. If that burden is not met, then there is no need for the Board to take the next step in *Boeing* of addressing any general or specific legitimate interests justifying the rule. The rule is lawful and fits within *Boeing* Category 1(a). There will be no need for further case-by-case litigation of the legality of a rule so classified.

368 NLRB No. 93, slip op. at 3 (Oct. 10, 2019) (emphasis in original). Thus, not every case will involve a balancing test.

In *Boeing*, the Board specifically addressed the category of rules that restrict employees' use of camera-enabled devices, such as cell phones, on an employer's property. The Board's decision centered on Boeing's no-camera rule, which prohibited the use of camera-enabled devices, including cell phones, for the purpose of capturing images or videos on all company property and locations, without a valid business need. *Boeing*, 365 NLRB slip op. at 18-19. With Boeing's rule as its focus, the Board concluded that no-camera rules, in general, are Category 1 rules, given that they may potentially affect employees' exercise of Section 7 rights, but that "this adverse impact is comparatively slight." *Id.* slip op. at 18-20, fn. 89.

While an employee's use of the recording or camera feature of his cell phone, under certain circumstances, may be protected concerted activity, such protected concerted recording activity is on the periphery of rights protected by Section 7. As former-Member Johnson explained in his dissenting opinion in *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*, 362 NLRB 1690, 1694 fn.12 (2015), "there is no Sec. 7 right to *possession* of a camera or other recording device by employees on an employer's property, nor is there an inherent right to use a camera or other recording device in the course of Sec. 7 activity" (emphasis in original). The *Boeing* Board expressed approval of portions of Member Johnson's dissent in *Caesars Entertainment*, but did not address that portion of his dissent which discussed the absence of a right to possess a recording-capable device while in the workplace.

In the few Board cases addressing whether cell phone policies restrict Section 7 rights, the Board's focus has been on the restriction of use, rather the restriction of possession. Besides

Member Johnson's dissent in *Caesars*, the Board has not directly addressed the legality of rules limiting employees' *possession* of cell phones at the workplace.

In general, outside the context of labor and employment law, property owners have the right to restrict visitors from possessing or using cell phones or other electronic equipment on their properties. Although most properties are open to electronics, visitors are lawfully prohibited from possession or use at various venues, including certain theaters, gyms, restaurants, museums, golf courses, churches, schools, and courtrooms.<sup>3</sup> These restrictions constitute an inconvenience for visitors and slow their ability to exercise various rights, but the restrictions nonetheless generally survive legal challenges.

The right to possess any object on an employer's property has rarely been found in Board precedent. At its core, Section 7 was intended to protect the associational rights of employees. *See Summers, The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 697 (stating that '[n]ational labor policy, as articulated by Congress, was rooted in the first amendment right of freedom of association; Congress acted to protect that right because the courts had failed to do so'). Section 7 also protects actions taken by individual employees in furtherance of their common interests. The Board has long balanced the associational rights of employees against the property and other rights of employers. *See LeTourneau Co. of Georgia*, 54 NLRB 1253, 1260 (1944), *affd. sub nom. Republic Aviation v. NLRB*, 324 U.S. 793 (1945) and progeny. Typically, property owners may control who and what is allowed on their premises as well as what visitors may do while there. These interests are balanced against the Section 7 rights of employees.

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<sup>3</sup> *See e.g.* Ralph D. Mawdsley, J.D., Ph.D., Legal Issues Regarding Student Cell Phones in Schools, 301 Ed. Law Rep. 1, 2 (2014), Sharon Nelson, John Simek, Jason Foltin, The Legal Implications of Social Networking, 22 Regent U. L. Rev. 1 (2010), Rebecca Porter, Texts and "Tweets" by Jurors, Lawyers Pose Courtroom Conundrums, Trial, August 2009, at 12; Do You Sleep with Your Blackberry?, GPSolo, June 2006, at 42, 45.

Most exceptions to an employer’s right to control its property involve actions employees may take while on premises. For instance, the right of employees to engage in protected solicitation in nonwork areas on nonwork time was solidified in *Republic Aviation*. Other activities, such as sit-ins, may be against the interests of property owners, but must be nonetheless tolerated. See *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005). The Board has found the activity of recording to be lawful in certain circumstances. See *Whole Foods Market, Inc.* 363 NLRB No. 87 (2015), slip op. 3 at fn. 8, enfd. 691 Fed. Appx. (2d Cir. 2017).

In rarer cases, the Board has found that Section 7 rights require employers to admit persons or objects onto their properties. See *In-N-Out Burger, Inc.*, 365 NLRB No. 39 (2017), enfd. 894 F.3d 707 (5th Cir. 2018). With respect to the admittance of objects, exceptions have typically been limited to message-bearing objects, such as buttons and pamphlets.

Cell phones can be used as tools of protected conduct. Employees might for instance, speak with or text one another in furtherance of their common interests. They might also use the cell phone as a recording device to document workplace hazards or capture coercive conduct. *Whole Foods*, 363 NLRB slip op. 3,fn. 8 (“our case law is replete with examples where photography or recording, often covert, was an essential element in vindicating the underlying Section 7 right”). However, the right to cell phone *possession* is not a clear one. The Board has only addressed employer restrictions on the possession of cell phones in the context of bargaining obligation through the litigation of Section 8(a)(5) allegations.<sup>4</sup> The Board has addressed restrictions on the *use* of cell phones, but it has not addressed restrictions as to the *possession* of them.<sup>5</sup>

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<sup>4</sup> See, e.g., *Warren Unilube*, 358 NLRB 816 (2012) (“even if old CR policy purported to limit cell phone use to breaktimes, the credited testimony establishes that the Respondent’s new CR policy constituted an effort to more strictly enforce that limitation, further supporting the judge’s finding”).

<sup>5</sup> Cases pertaining to cell phones and recording devices have involved rules which restricted the use of the device rather than the device’s possession. See, e.g., *Whole Foods Market, Inc.* 363 NLRB slip op. at 1 (“[i]t is a violation [] to record conversations with a tape recorder or other recording device”); *Boeing*, 365 NLRB slip op. at 7 (although the Board referred to the rule in *Boeing* as a “no-camera rule,” the rule was actually about the use rather than the

The fact that employees require access to a certain object in order to engage in certain protected conduct does not necessarily render unlawful employer rules that prohibit the possession of the necessary object. Many objects may be used in the course of protected activity. Writing implements may be used to write powerful messages and to draw unifying emblems. Objects such as calculators may be used in furtherance of union and other protected activities. *See Electromation, Inc.* 309 NLRB 990, 998 fn. 31 (1992). The same could be said of bullhorns, drums, tablets, or laptop computers. However, one cannot necessarily append to the potentially protected use of these objects an employee’s right to bring the objects onto an employer’s property.

The basic holding from *Republic Aviation* and its progeny is that employers must provide employees with “adequate avenues of communication” to “effectively” communicate about protected concerted activity. Specifically, the Board in the underlying case *LeTourneau Co. of Georgia*, 54 NLRB 1253, 1260 (1944), *affd.* sub nom. *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), laid down the general rule that “employees cannot realize the benefits of the right to self-organization guaranteed them by the Act, unless there are *adequate avenues of communication* open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization.” (emphasis added). And, the Supreme Court, applying *Republic Aviation*, stated in *Beth Israel Hospital v. NLRB*, that the right of employees to engage in Section 7 activities “necessarily encompasses the right *effectively to communicate* with one another regarding self-organization at the jobsite.” 437 U.S. 483, 491 (1978) (emphasis added). As the Supreme Court held in *NLRB v. United*

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possession of a camera: “Possession of the following camera-enabled devices is permitted on all company property and locations, except as restricted by government regulation, contract requirements or by increased local security requirements”). *See also Flagstaff Medical Center*, 357 NLRB 659 (2011).

*Steelworkers of America (NuTone, Inc.)*, even if an employer’s rule “ha[s] the effect of closing off one channel of communication,” the Act “does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers.” 357 U.S. 357, 363-364 (1958). *See also Purple Communications, Inc.*, 361 NLRB 1050, 1067 (2014) (Miscimarra, P., dissenting), overruled by *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (Dec. 17, 2019).

Thus, the issue is whether employees working under Respondent’s rule have adequate avenues of communication. There are no circumstances particular to Respondent’s operations which render the normal avenues of communication ineffective. *Cf. Argos Ready Mix*, Cases 12-CA-196002, JD-43-19, (May 14, 2019) (truck drivers’ ability to communicate impaired). As such, employees have no strong interest in possessing cell phones while on Respondent’s premises.

## **2. Application of Board Law to the Case at Hand**

When analyzed against this legal backdrop, no employee would reasonably interpret Respondent’s rules prohibiting personal cell phones in work areas to mean they could not engage in the Section 7 activities the ALJ listed, including documenting unfair labor practices or unsafe working conditions. (JD slip op. at 9, LL. 17-25.) At most, employees would reasonably interpret the rules as prohibiting them from using cell phones for such documentation. But the ALJ erred by finding that a reasonable interpretation of the rules to prohibit one manner of supporting a Section 7 right meant employees would reasonably interpret the rules to prohibit exercising the underlying right. The Board made clear in *Boeing* that a work rule is not overbroad simply because it may be read to prohibit employees from engaging in activities in furtherance of a Section 7 right when they remain free to engage in the underlying protected concerted activity. *See Boeing Co.*, 365 NLRB No. 154, slip op. at 21 (“the no-camera rule would not prevent employees from

engaging in the group protest, thereby exercising their Section 7 right to do so, notwithstanding their inability to photograph the event”). Indeed, the ALJ engaged in the precise analytical error that the Board explained in *LA Specialty Produce* is to be avoided. Specifically, the ALJ improperly found the challenged rules unlawful “merely because [they] could be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity.” 368 NLRB slip op. at 2. **[Exception 3]**

Moreover, the flaw in the ALJ’s interpretation of the rules is revealed in part by the case he cites for the principle that employees engage in Section 7 activity when they document an employer’s unfair labor practices. In *Bon Harbor Nursing & Rehabilitation Center*, a discriminatee said she would write down in a union-provided notebook that a manager had discriminatorily removed pro-union literature from a bulletin board. 348 NLRB 1062, 1062 fn.4, 1079 (2006). The no-cell phone rules here would not interfere with employees’ Section 7 right to document unfair labor practices as occurred in *Bon Harbor*. Respondent’s rules can only be interpreted to prevent the use of cell phones in furtherance of that activity, and that does not interfere with the underlying Section 7 right. As noted above, there is no Section 7 right to possess an implement that has the capacity to aid employees engaging in protected activity.

In discussing the importance of cell phones for Section 7 activity, the ALJ noted that a secret audio recording by the Charging Party assisted him in finding that the interview with Manager Vanley constituted an unlawful interrogation (JD slip op. at 8-9; *see also Cott Beverages*, 367 NLRB No. 97, slip op. at 3, fn. 4 & 5 (Feb. 27, 2019)). However, it is worthy of note that the recording Charging Party made was not made with a phone, in a production area, or in the normal course of employment. Rather, the recording was made with an iPad, in an office, and in the context of a meeting where the Charging Party had been called in to the office after having been

suspended. It is not the case that the normal prohibition on cell phones in the production area and warehouse would have interfered with a reasonable employee's decision to record a conversation in such a situation. Moreover, the ALJ ignores that Respondent's rules would not be interpreted as prohibiting the Charging Party or any other employee from otherwise documenting similar meetings. **[Exception 4]**

In sum, because employees would not reasonably interpret Respondent's no-cell phone rules to potentially interfere with Section 7 rights, the rules are lawful under Category 1(a) of *Boeing*, as clarified in *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 2 & fn.2. As a result, there is no need to consider Respondent's business justifications in applying the *Boeing* balancing test here.

**B. Even Assuming Employees would Reasonably Interpret Respondent's Rules to Prohibit Section 7 Activity, the ALJ Erred by Concluding that their Potential Interference with Employees' Exercise of Section 7 Rights Outweighs Respondent's Business Justification [Exception 2]**

The ALJ initially erred by concluding that Respondent's no-cell phone rules placed a "particularly weighty burden" on employees' exercise of Section 7 rights (JD slip op. at 9, LL. 40-41). *Boeing* establishes that the Board does not consider employee use of cell phone cameras or recorders at work to be a significant part of any Section 7 activity in which they may engage. Indeed, referring to the no-camera rule in that case (which prohibited only the use of camera-enabled devices on the employer's property, not their possession), the Board stated that the "vast majority of images or videos blocked by the policy do not implicate NLRA rights." *Boeing*, 365 NLRB No. 154, slip op. at 21. The Board then explained that the inability to photograph Section 7 activity that employees undertake to better their working conditions does not prevent them from engaging in the actual Section 7 activity. *Id.* That same scenario is equally true in the current case. Moreover, the no-cell phone rules here do not prevent employees from using their cell phones at

work to communicate for Section 7-related purposes. Employees are permitted to keep their personal cell phones in their work lockers and to use them during break periods in designated areas. Although the ALJ correctly points out that Respondent has not yet designated areas at the San Antonio plant where employees may use their cell phones (JD slip op. at 10, LL. 22-25), employees would reasonably interpret the rules to permit personal cell phone use in break areas, such as the cafeteria. There is no evidence that Respondent has prohibited employees from using their personal cell phones in break areas. **[Exception 5]**

The ALJ also erred by essentially dismissing Respondent's business justifications for the rules – to prevent product contamination from cell phones falling into beverage containers and to promote employee safety. The ALJ minimizes Respondent's position that the rules prevent product contamination by finding that a more limited restriction on cell phone use, such as by requiring employees to secure their cell phones in work areas below the waist or by prohibiting their use only when operating equipment, could serve that purpose. (JD slip op. at 11, LL. 20-24). The ALJ applies the same reasoning to Respondent's safety justification, finding that purpose can be served with a narrower rule prohibiting cell phone use only when operating production equipment or a forklift (JD slip op. at 14, LL.11-16). But the Board disfavors consideration of whether a challenged rule could be more narrowly tailored because such speculation does not further the practical aim of the *Boeing* analysis. See *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 6 & fn. 17 (noting that “the question ‘Can it be tailored more narrowly?’ will almost always be answered ‘Yes’” and prevents the Board from providing clear guidance on work rules). **[Exception 6]** More importantly, that the rules may be more narrowly tailored does not undercut Respondent's legitimate desire to avoid product contamination and workplace accidents. Even though, as the ALJ notes, Respondent did not identify an incident when a cell phone caused product

contamination or a workplace accident (JD slip op. at 5, L. 29-31; 12, LL. 6-8; 13, LL. 19-22), Respondent should not be required to wait until a production loss or employee injury occurs to establish the bona fides of its asserted justification to prevent them from happening in the first place. Indeed, in *Boeing* there was no history of employees using cell phones or other devices to photograph and disclose images of classified or proprietary workplace information, but that did not undercut the legitimate justifications for the no-camera rule in that case. See 365 NLRB No. 154, slip op. at 18-19. And while the ALJ questioned the need for the rules because they permitted cell phones in work areas if carried by supervisors, line leads, or when provided to an employee by Respondent (JD slip op. at 11, LL. 29-44), this merely implies that Respondent is willing to permit persons who need cell phones for their work to have them in work areas. That does not detract from the need to limit the number of cell phones in work areas especially when, as the ALJ previously found, the “noise level on the production floor is generally quite high” and “[m]uch of the work is fast-paced.” *Cott Beverages*, 367 NLRB No. 97, slip op. at 3.

As the foregoing explains, in balancing the relevant considerations under *Boeing*, the ALJ improperly overvalued the adverse impact of the rules on the potential exercise of Section 7 rights while he improperly undervalued Respondent’s business justifications for the rules. Rather than having a “particularly weighty burden” on the exercise of Section 7 rights, the rules here have little, if any, adverse impact on such activity. Thus, to the extent that *Boeing*’s balancing test may be applicable to this case, Respondent’s significant business justifications easily outweigh the potential adverse impact on the exercise of Section 7 rights, and the rules here are lawful.

#### IV. CONCLUSION

For the reasons advanced above, the General Counsel respectfully requests a finding that, pursuant to *Boeing*, Respondent's cell phone policies do not violate the Act. The General Counsel therefore requests that the remainder of the Complaint be dismissed.

**DATED** at Fort Worth, Texas this 19th day of December, 2019.

/s/ Megan E. McCormick Lemus  
Megan E. McCormick Lemus  
Counsel for the General Counsel  
National Labor Relations Board  
Region 16  
819 Taylor Street, Room 8A24  
Fort Worth, Texas 76102

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the above and foregoing General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Supplemental Decision has been served this 19th day of December, 2019, via electronic mail upon each of the following:

*Counsel for Respondent:*

JOHN J. TONER, ESQ.  
SEYFARTH SHAW, LLP  
975 F. ST. N.W.  
WASHINGTON, DC 20004  
[jtoner@seyfarth.com](mailto:jtoner@seyfarth.com)

*The Charging Party:*

JOSEPH KELLY,  
335 NATALEN AVE  
SAN ANTONIO, TX 78209-6812  
[nounnoun@gmail.com](mailto:nounnoun@gmail.com)

/s/Megan E. McCormick Lemus  
Megan E. McCormick Lemus  
Counsel for the General Counsel  
National Labor Relations Board  
Region 16  
819 Taylor Street, RM 8A24  
Fort Worth, Texas 76102