

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

COTT BEVERAGES INC.,

and

JOSEPH KELLY, an Individual

Case No. 16-CA-181144

RESPONDENT'S EXCEPTIONS TO THE ALJ'S SUPPLEMENTAL DECISION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Respondent Cott Beverages Inc., respectfully submits the following exceptions to the Administrative Law Judge's Supplemental Decision ("Decision"):

1. Respondent excepts to the ALJ's erroneous conclusion that "Respondent has unlawfully interfered with employees' exercise of their NLRA rights in violation of Section 8(a)(1) by maintaining rules prohibiting employees from possessing personal cell phones on the manufacturing floor and/or at their work stations," (ALJD 15:8-11).
2. Respondent excepts to the ALJ's portion of the ALJ's recommended order requiring Respondent to [r]escind its policies prohibiting employees at its San Antonio, Texas, facility from possessing personal cell phones on the manufacturing floor and/or at their work stations." (ALJD 16:19-21).
3. Respondent excepts to the ALJ's portion of the ALJ's recommended order requiring the posting of a Notice to Employees relating to these issues and the electronic distribution "if Respondent customarily communicates with its employees by such means," (ALJD 16:30-37 and Recommended Notice Appendix).

4. Respondent excepts to the extent the ALJ found that Respondent's prohibition on personal cell phones applies anywhere other than the manufacturing floor (and their work stations), including the warehousing area, it is contrary to the undisputed evidence, (Tr. 144:19-145:22), and the ALJ's legal conclusion and recommended order are contrary to law.

5. Respondent excepts to the ALJ's interpretation and analysis of the Board's precedent in *The Boeing, Co.*, 365 NLB No. 154 (2017), including the ALJ's position that the facts in *Boeing* are distinguishable to the instant case because the employer in *Boeing* and the concerns the employer had in *Boeing* are different from those in the instant case. (ALJD 7:31-8:6; 14:22-15:2; 15:8-11).

6. Respondent excepts to the ALJ's finding that employees would reasonably interpret Respondent's written policies implementing its prohibition on the possession of cell phones in manufacturing and warehousing areas as interfering with the exercise of their NLRA rights. (ALJD 9:17-19.) Nothing in the policies refers to Section 7 activity in any manner whatsoever. (GC Ex. 3; GC Ex. 4.)

7. Respondent excepts to the ALJ's conclusion that the requirements of the Food and Drug Administration and the statute and regulations it enforces do not outweigh the alleged restrictions on Section 7 activity caused by Respondent's policy because the FDA does not specifically mention banning of cell phones from production or warehouse areas. (ALJD 12:12-13:7.) This conclusion is contrary to law, and Respondent furthermore urges the reversal of any Board precedent that may be interpreted to support the ALJ's conclusion on this issue.

8. Respondent excepts to the ALJ's conclusion that Respondent's prohibition on cell phones in manufacturing and warehousing areas is not narrowly tailored to address the important objectives of preventing contamination and maintaining safety. (ALJD 13:1-2; 14:42-15:2; 15:16-18.) This conclusion is contrary to extant Board law, Respondent furthermore urges the reversal of any Board precedent that may be interpreted to support this conclusion, and the conclusion also improperly rests on erroneous factual findings that are contrary to the record evidence and plain common sense. (GC Ex. 2; GC Ex. 3; GC Ex. 4; Tr. 137:9-11; Tr. 144:9-14; Tr. 146:15-25; Tr. 147:13-149:11; Tr. 150:21-8.)

9. Respondent excepts to the ALJ's conclusion that Respondent could sufficiently satisfy its important objectives of protecting against contamination and maintaining safety by allowing employees to carry personal cell phones "in pants pockets or otherwise secured below the belt," or by requiring them not to be used while operating equipment. (ALJD 5:18-25; 11:15-124.) This conclusion is contrary to extant Board law, and the conclusion is supported by only one factual finding, which itself is contradicted by the record evidence, (*see* Exception No. 7, *infra*). (GC Ex. 3; GC Ex. 4; Tr. 147:1-148:21; Tr. 150:21-Tr. 151:8; Tr. 151:9-18.) Respondent furthermore urges the reversal of any Board precedent that may be interpreted to support this conclusion.

10. Respondent excepts to the ALJ's factual finding that it permits employees to carry pens, pencils, and combs onto the manufacturing floor. (ALJD 11:17-24; 14:35-40.) There is no record evidence to support this finding; it is based entirely on the ALJ's

factually unsupported interpretation of Respondent's written policies. (GC Ex. 3; GC Ex. 4; *see generally* Hearing Transcript.)

11. Respondent excepts to the ALJ's conclusion that its policy is not narrowly tailored to its important objectives of preventing contamination and maintaining safety because Respondent permits leads, supervisors, and management to carry cell phones on the manufacturing floor. (ALJD at 6:13-30; 11:29-37; 14:35-40.) These conclusions are contrary to extant Board law, and Respondent furthermore urges the reversal of any Board precedent that may be interpreted to support these conclusions.

12. Respondent excepts to the ALJ's conclusion that its policy is not narrowly tailored to its important objectives of preventing contamination and maintaining safety because Respondent purportedly "relaxes the prohibition" by allowing employees to carry "company issued or approved" cell phones on the manufacturing floor. (ALJD 6:32-7:3; 11:40-12:5.) This conclusion is contrary to extant Board law, Respondent furthermore urges the reversal of any Board precedent that may be interpreted to support this conclusion, and, in any event, the ALJ's factual finding that rank-and-file employees are permitted to carry cell phones in the manufacturing or warehousing area is without any evidentiary support in the record. (GC Ex. 3; GC Ex. 4; *see generally* Hearing Transcript.)

13. Respondent excepts to the ALJ's finding that "audio recording activities" and "phone calls" are activities that employees are entitled and expected to have at their disposal at all times. (ALJD at 8:4-14; 8:30-9:7; 9:32-10:6).

14. Respondent excepts to the ALJ's finding that Respondent's prohibition on the possession of cellular phones is not limited to working time or to the manufacturing and warehousing areas and require permission from management. (ALJD 10:16-38.) This is a legally impermissible conclusion because the General Counsel never made such allegations. (GC Ex. 1(c.); *see also* GC Post-Hearing Brief at 2, 5-6, 18.) This finding is also contrary to the record evidence because it disregards undisputed testimony that the prohibition on cell phones applies *only* to manufacturing and warehousing areas and undisputed testimony that "[w]hen employees are on the manufacturing floor or in the warehousing area," they are "always supposed to be working." (Tr. 144:19-146:14; *see also* GC Ex. 3; GC. Ex. 4.)

15. Respondent excerpts to the ALJ's finding that Respondent's prohibition on the possession of cellular phones "creates an asymmetrical evidentiary circumstance where only one side-the employer and its supervisor/managerial personnel-has the ability to create, and retain (or destroy), audio evidence of an alleged unfair labor practice" (ALD at 8:23-28; 12:1-4). This is a factually impermissible conclusion as no facts exist in the record concerning this unsupported alleged finding. This finding also has no bearing on the lawfulness of Respondent's policies.

16. Respondent excepts to the ALJ's conclusion that the alleged "interference" on protected Section 7 activity is not outweighed by any legitimate justifications for the "interference." (ALJD at 11:3-8; 13:1-7).

17. Respondent excepts to the ALJ's conclusion that its policy is not narrowly tailored to its important objectives of preventing contamination and maintaining safety

because Respondent did not identify an actual accident at its San Antonio facility caused by possession of a cell phone or contamination at any of its 15 production facilities or because no evidence was presented “showing that such contamination, even if it ever were to occur, could go undetected or would be difficult to remedy.” (ALJD 5:29-31; 12:6-10; 13:18-23.) This conclusion is contrary to extant Board law, and Respondent furthermore urges the reversal of any Board precedent that may be interpreted to support this conclusion.

18. Respondent excepts to the ALJ’s conclusion that its policy is not narrowly tailored to its important objectives of preventing contamination and maintaining safety because Respondent failed to “provide a basis for believing that the use of this standard piece of equipment [forklift] represents special risk at its facility,” and because Respondent “did not provide credible evidence that any such concerns could not be addressed with a narrower restriction - for example, a prohibition on the use of cell phones while driving a forklift or operating equipment - that would not trammel employees’ rights under the Act to make phone calls or recordings for their mutual aid and protection.” (ALJD 17:28-18:9, emphasis in ALJ Decision; *see also* Tr. 138:24-139:4; Tr. 140:17-25; Tr. 141:8-143:18; Tr. 147:1-21; Tr. 150:21-151:18.) This conclusion is contrary to extant Board law, Respondent furthermore urges the reversal of any Board precedent that may be interpreted to support this conclusion, and this conclusion is also supported by erroneous factual findings, (*see* Exception Nos. 13 and 14, *infra*).

19. Respondent excepts to the ALJ’s finding that the undisputed testimony quoted at Page 6, Lines 1-8, of his Decision is not credible and entitled to no weight, as

well as to the ALJ's failure to find that today's cell phones carry an inherent potential for distraction and his failure to find that the overall circumstances at Respondent's San Antonio facility do not lend themselves to the constant supervision of employees for purposes of enforcing a rule against the *use* of cell phones. (ALJD 5:31-6:11.) These findings (and failures) are contrary to the record testimony as a whole, as well as simple common sense, and rest solely on the ALJ's preconceived notions. (Tr. 60:17-61:7; Tr. 137:2-4; Tr. 138:14-18; Tr. 139:9-140:1; Tr. 140:17-23; Tr. 141:19-22; Tr. 142:9-17; Tr. 143:1-4; Tr. 150:21-151:18.)

20. Respondent excepts to the ALJ's failure to find that Respondent has an overriding interest in ensuring that its employees are attentive to their work with dangerous chemicals and not potentially distracted from such work by personal cellular phones. (ALJD 5:n.3) This failure to so find is contrary to the record evidence as a whole and contrary to common sense. (Tr. 34:14-17; Tr. 80:10-15; Tr. 81:3-7; Tr. 139:1-8; Tr. 150:21-151:18.)

21. Respondent excepts to the ALJ's repeated references to "similar devise[s]" or "other electronic devices." (ALJD 5:29-31; .) This is legally improper, as the General Counsel never alleged that any aspect of Respondent's policies violated the Act aside from its specific prohibition on cell phones. (GC Ex. 1(c) ¶ 4; GC Post-Hearing Brief at 2, 14.) Nor do the ALJ's conclusions of law or recommended order address other electronic devices in any way. (ALJD 19:15-38; 20:1-14; Recommended Notice to Employees.)

RESPECTFULLY SUBMITTED,
REFRESCO BEVERAGES US INC.

By: Karla E. Sanchez

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she caused a true and correct copy of Respondent's Exceptions to the ALJ's Supplemental Decision to be served on the following parties via e-mail and to be filed with the Board via the NLRB's electronic filing system:

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