

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

COTT BEVERAGES INC.,
Respondent

- and -

JOSEPH KELLY,
an Individual,

Charging Party

Case No. 16-CA-181144

**RESPONDENT'S BRIEF IN SUPPORT OF
ITS EXCEPTIONS TO THE ALJ'S SUPPLEMENTAL DECISION**

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INTRODUCTION

In this case, the ALJ once again wrongly concluded that employees have a Section 7 right to carry their personal cellular phones into the manufacturing and warehousing space of a beverage producer during their working time. (ALJ Supplemental Decision and Errata, herein “ALJD,” at 15:8-11). Based on this conclusion, the ALJ found unlawful Refresco Beverages US Inc.’s¹ (herein, “Respondent”) corporate GMP Policy and local Good Manufacturing Practices Introduction policy which, among various other items, prohibit employees from carrying personal cellular phones into the working areas of the facility during working time. In so doing, the ALJ has once again ignored decades of established Board case law, as well as the Board’s recent decision in *Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017).

There should be no doubt that Respondent’s policies are lawful and that dismissal of these allegations is required. Counsel for the General Counsel agrees and, after the case was remanded to the ALJ, the Counsel for the General Counsel filed a motion with the ALJ asking the ALJ to remand the case to the Region because “in light of the Board’s decision in *Boeing*, the rules at issue no longer violate the Act.” (Motion for Remand, at p. 3.) The ALJ, however, refused to remand to case to the Region, noting in his Decision that he anticipated that the General Counsel would be dismissing the allegations. (ALJD 2: n.2.) Instead, the ALJ proceeded to issue an order requiring the parties to file briefs on remand. In the Counsel for the General Counsel’s brief, counsel made clear her position that dismissal was warranted: “Herein, Counsel for the General Counsel provides its position, addressing the relevant facts and discussing why, in light of the changed legal standard, the Complaint should be dismissed.” (Counsel for the General

¹ Cott Beverages Inc. was sold after this case was tried and exceptions to the ALJ’s decision (before the remand) were submitted. Refresco Beverages US Inc. is now the Respondent.

Counsel’s Brief on Remand to the Administrative Law Judge, p. 2.) Counsel for the General Counsel’s position went unnoticed, as the ALJ did not address in his Decision any of the arguments in support of dismissal addressed in the Counsel for the General Counsel’s Brief on Remand. Similarly unaddressed are most of the arguments Respondent raised in its own brief on remand to the ALJ.

Instead, what has become clear is the ALJ’s personal agenda to proceed with this case despite the fact that the General Counsel has sought dismissal of the case and that the Board’s precedent warrants dismissal. In choosing to proceed and issuing his Decision, the ALJ has sidestepped the practical realities of the workplace and the specific legitimate justifications Respondent, as a manufacturer of carbonated soft drinks, juice products and water has for maintaining these policies. As the D.C. Circuit observed in the course of reversing a Board decision that trampled on important employer interests, “Common sense sometimes matters in resolving legal disputes”— or at least it should. *See Southern New England Telephone Company v. NLRB*, 793 F.3d 93, 94 (D.C. Cir. 2015). Here, the ALJ repeatedly ignored common sense, as well as the facts and the law. The ALJ’s decision here cries out for giving serious consideration to important interests that should outweigh any imagined statutory “right” to carry a miniature computer in one’s pocket at every waking moment. His decision is unfounded and should be reversed.

STATEMENT OF THE CASE

I. Respondent’s Business

Respondent manufactures carbonated soft drinks, juice products, and water at fifteen manufacturing facilities nationwide. (ALJD 3:7-11; Tr. 28:13; Tr. 134:11-16.) All the facilities run 24-hour operations for at least part of the week. (Tr. 137:2-4.) The number of employees assigned to each manufacturing line is typically from four to five employees per line. (Tr. 139:9-

14.) The manufacturing floor at these facilities was described at the hearing, in unrebutted testimony, as follows:

It is fast-paced. It is high-speed bottling. It is loud. There is a lot of traffic. You have forklift traffic. You have pieces of equipment that are running at various speeds. I mean, it's—it is a lot of activity going on in the plant, on the plant floor.

(Tr. 138:14-18.) Despite the traffic, there are spaces on the manufacturing floor that are outside of anyone else's line of sight. (Tr. 142:9-12.) For example, operators working on the manufacturing lines are out of sight but within arm's length of heavy machinery. (Tr. 142:13-17.)

In addition to the manufacturing lines, each facility has a warehousing area used for the storage of finished goods. (Tr. 139:18-24.) In the warehouse, beverages are stacked from 20 to 26 feet high to maximize warehouse square footage. (Tr. 143:1-4.) The materials are moved from the manufacturing floor to the warehousing area with the use of forklifts. (Tr. 139:25-140:1.) These forklifts are very heavy, weighing between five and six tons. (Tr. 140:17-23.)

In each of the facilities, various cleaning chemicals are used, including multiple types of alkaline detergents, chlorine sanitizers, and floor cleansers. (Tr. 139:1-4.) These chemicals can be dangerous if they are mishandled, which is why employees must have the proper training before using them. (Tr. 139:5-8.) The dangerousness of these chemicals is also evident from the ammonia leak that took place at the San Antonio facility on May 12, 2016, which caused employees to experience coughing, trouble breathing, and burning of their eyes and noses and resulted in the evacuation and closing of the facility shut down for a number of hours. (ALJD 7:14-15.)

II. Respondent's San Antonio Facility

This case (and the ALJ's recommended order) relates to Respondent's San Antonio facility, where the manufacturing area covers more than 30,000 square feet. (Tr. 141:19-22.) At this

facility, Respondent makes carbonated soft drinks for large retailers and small distributors throughout the country. (Tr. 28:8-10.) The facility is divided into four production lines. (Tr. 60:17-61:7.) Lines 1, 3, and 4 run 24-hour operations, whereas Line 2 runs only a day shift, from 6:00 a.m. to 4:00 p.m. (Tr. 61:18-25.)

Employees working on the lines do not have scheduled lunches or breaks; they must wait to be relieved. (Tr. 62:16-18; Tr. 63:1-6.) If the employee is “physically present on the line,” it is considered working time. (Tr. 63:13-20.) Indeed, “[w]hen employees are on the manufacturing floor or in the warehousing area . . . they [are] always supposed to be working.” (Tr. 145:19-22.)

III. Respondent’s Good Manufacturing Practices Policies

A. The Corporate Policy

Respondent’s Good Manufacturing Practices (GMP) Policy applies to all 15 of its manufacturing facilities and sets forth work rules that employees must follow in the manufacturing and warehousing areas to ensure that the facilities, equipment, and processes are sanitary and safe for both employees and consumers. (GC Ex. 3; Tr. 133:24-134:6.) Among other things, the GMP Policy states as follows:

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. Cell communication devices may be maintained on the person for management and leadership roles. Radios and company provided 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.

(GC Ex. 3 at COTT 8.)

As the policy expressly states, the prohibition on carrying personal items, including cell phones, is limited to the manufacturing and warehousing spaces, not other areas of the facility such as break rooms and office space. (Tr. 63:7-12; Tr. 144:19-145:22; GC Ex. 3.)

B. The San Antonio GMP Introduction

At its San Antonio facility, local management gives its new hires a GMP Introduction based on the corporate GMP Policy. (GC Ex. 2; GC Ex. 4.) The very beginning of the San Antonio document expressly confirms that it applies only “to all production and warehouse areas,” not to other working or non-working areas. (GC Ex. 4 at COTT 1.) Among other things, the GMP Introduction states:

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.

(GC Ex. 4 at COTT 3.)

C. The Reasons for Prohibiting Personal Cell Phones (in addition to other personal items) in Manufacturing and Warehousing Areas

Respondent’s former Senior Director of Quality, Patrick Rank, was responsible for creating the GMP Policy. (ALJD 5:9-11; Tr. 144:2-5.) Rank testified that there are basically two reasons behind the prohibition on cell phones in the manufacturing and warehousing spaces: food safety and employee safety. (ALJD 5:12-15; ALJD 5:24-25; Tr. 146:15-25.) With respect to food safety, it is undisputed that Respondent’s facilities are governed by the Federal Food, Drug, and Cosmetic Act (FDCA). (ALJD 5:19-22; Tr. 137:9-11; Tr. 144:9-14; GC Ex. 3.)

Regarding food safety, Rank testified that cell phones are prohibited from the manufacturing floor, in part, because of the risk of contamination they present:

As simple as dropping a cell device into an open container, is a concern. It is a foreign material concern. You also have—if you dropped that piece of equipment,

that cell device, into a running piece of equipment, that could also cause you a food—potentially a food contamination issue with a jam or a foreign object into your packaged material, which you just do not want.

(Tr. 146:15-21; Tr. 147:25-148:6.)

Concerning employee safety, Rank testified about the risks posed by employees paying attention to personal cell phones rather than the manufacturing process:

The other piece is, you know, if you are paying attention to a cell device or something that you are reading, and you have a jam on your piece of equipment, your reaction time is slowed. The other piece is, you are going to react but you are not going to react if you're actually paying attention to what you're doing rather than looking at your cell device and trying to run a piece of equipment. It was really put in place for that associate's safety.

(Tr. 147:13-21.) Similarly, Rank explained that it is unsafe to carry personal cell phones in the warehousing area because of the forklift traffic:

If they are not paying attention to where they are driving, they could damage—damage themselves if they hit something, and then also if an individual is walking the production floor or warehousing floor with their cell device, and reading that cell device, they could walk into the path of a forklift.

(Tr. 148:10-18.)

Rank testified that cell phones are prohibited for the same reasons that some other personal items are prohibited; for example, he testified that purses are prohibited in the warehouse because “[i]t would be the same idea of a foreign material falling into an open container, either that is part of a purse, or falling out of a purse into an open container.” (Tr. 148:25-149:3.)

Likewise, Rank explained that the prohibition on newspapers being carried into the manufacturing floor also relates to food and employee safety. (Tr. 149:4-11.)

Rank further explained that a policy allowing employees to carry their personal cell phones into the manufacturing or warehousing areas, but prescribing how they could be carried or limiting their use would not be realistic: “you would then be in a position to have to manage . . .

every single minute of what an associate was doing with that particular device, so I don't think the policy in itself would be manageable." (Tr. 150:21-151:8.)

Although Respondent prohibits personal items, including cell phones, from the manufacturing and warehousing areas, its policy contains one exception: leadership is allowed to carry a cell phone. (GC Ex. 3 at COTT 8.) Rank explained the reasoning behind this narrow exception:

One, they are an extension of management, and they have a responsibility to communicate whether it's anything from a safety perspective or downtime on a piece of equipment perspective, to the outside world or to the management, and you know, we have to give them that ability to do that.

The other piece is a supervisor or lead is not tied to a piece of equipment, so they're not—the risk of them having that type of situation occur is much a lower risk. So if you look at it from a risk assessment, the benefit of having communication being able to come from the floor, from the leadership person, in our opinion, outweighs the benefit or the issue that—of the low risk of something happening.

(Tr. 149:12-150:3.)

QUESTION PRESENTED

Did the ALJ err by concluding that Respondent's prohibition on the possession of personal cell phones in manufacturing and warehousing areas violates Section 8(a)(1) of the Act? (*See* Respondent's Exceptions 1-21.)

ARGUMENT²

I. **The ALJ's Decision is Plainly Wrong Under the Board's Test Established in *Boeing* (Exceptions 1-8, 13, 15, 16-20).**

In *Boeing*, the Board held that there were "fundamental problems with the Board's application of *Lutheran Heritage* when evaluating the maintenance of work rules, policies and

² In Exception 21, Respondent excepts to the ALJ's repeated references to "similar devise[s]" or "other electronic devices" in his Decision. This is legally improper as the Counsel for the General Counsel never alleged that any aspect of Respondent's policies violated the Act aside from the specific prohibition on cell phones. (GC Ex. 1(c) ¶

employee handbook provisions,” and thus that the Board had “decided to overrule the *Lutheran Heritage* ‘reasonably construe’ standard.”³ *Boeing*, 365 NLRB No. 154, slip op. at 2 (Dec. 14, 2017). The Board adopted a new standard for evaluating facially neutral policies and rules. If the rule or policy, when reasonably interpreted, does not potentially interfere with the exercise of Section 7 rights, then the rule or policy is deemed lawful and the test ends there. *Id.*, slip op at 14. When evaluating a facially neutral policy or rule that, when reasonably interpreted, could potentially interfere with the exercise of NLRA rights:

the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justification associated with the rule.

Id., slip op. at 4 (emphasis in original). The Board noted:

[w]e emphasize that *the Board* will conduct this evaluation, consistent with the Board’s ‘duty to strike the *proper balance* between . . . assorted business justifications and the invasion of employee rights in light of the Act and its policy,’ focusing on the perspective of employees, which is consistent with Section 8(a)(1).

Id. (emphasis in original). The Board further explained that:

[a]s a result of this balancing, in this and future cases, the Board will delineate three categories of employment policies, rules and handbook provisions (hereinafter referred to as ‘rules’):

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 . . .

4.) Despite the ALJ’s reference, the ALJ’s remedy appears to be limited to cell phones, and thus, Respondent will not address this exception any further in its brief.

³ In *Lutheran Heritage*, the Board stated: “our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rules do not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Lutheran Heritage*, 343 NLRB 646, 646-647 (2004) (footnote omitted).

Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with 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 of a *Category 3* rule would be a rule that prohibits employees from discussing wages or benefits with one another.

Id. (emphasis in original). The Board noted that the “above three categories will represent a classification of *results* from the Board’s application of the new test. The categories are not part of the test itself. The board will determine, in future cases, what types of additional rules fall into which category.” *Id.*, slip op. at 5 (emphasis in original).

More recently, the Board clarified the test and expanded on the categories. *See LA Specialty Produce Co.*, 368 NLRB No. 93 (Oct. 10, 2019). In *La Specialty Produce Co.*, the Board explained that the first step of the test is to determine “whether a facially neutral rule, reasonably interpreted, would *potentially* interfere with the exercise of NLRA rights.” *Id.*, slip op. at 2 (emphasis provided). This determination must be made “by reference to the perspective of an objectively reasonable employee who is aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA.” *Id.* (internal quotation marks and citation omitted). “Accordingly, a challenged rule may not be found unlawful merely because it *could* be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity, or because the employer failed to eliminate all ambiguities from the rule, an all-but-impossible task.” *Id.* (emphasis in original). The Board went on to say that “[t]he word *potentially* as used in *Boeing* must not be misunderstood. It does not turn the first step of the

Boeing analysis into an inquiry into whether the rule at issue could be interpreted to prohibit Sec. 7 activity.” *Id.*, slip op. at 2, n. 3.

A. The Respondent’s Policies Fall Under Category 1 and Based on *Boeing* Warrant Dismissal of the Allegations (Exceptions 1-5, 13, 15).

In *Boeing*, the Board concluded that no-camera policies fall under Category 1 and, therefore, are lawful without any need for further inquiry. 365 NLRB No. 154, slip op. at 18.

Respondent’s policies here fall under Category 1 for the very same reasons set forth in *Boeing*.

For purposes of engaging in protected concerted activity, a cell phone is generally limited in use to the very same conduct which is impermissible under *Boeing*’s no-camera policy—that is, recording or photographing. If a cell phone was allowed to be carried and used on working time and in working areas, the majority, if not all of its use would not be for protected concerted activities, but for playing games, checking and commenting on Facebook statuses, checking Snapchat posts or posting on Snapchat, texting family and friends, reading the news or other online sources, watching live sports games or movies, and engaging in any other distracting conduct that cell phones are now capable of being used for—all for entertainment purposes. Cell phones these days are mini-computers that give employees many ways to be distracted. These distracting activities do not implicate Section 7 rights. The Board noted this in *Boeing* as it relates to the no-camera restrictions and found that the restrictions “in some circumstances may potentially affect the exercise of Section 7 rights, but this adverse impact is comparatively slight.” *Id.* slip op. at 18. Given the “comparatively slight” impact, however, the Board labeled no-camera rules as Category 1 rules, which are lawful.

Based the Board’s analysis in *Boeing*, the fact that Respondent prohibits the carrying of cell phones and not just certain activities is of no significance. The issue to be determined is the impact, if any, of the restriction itself on Section 7 activity. As explained, there is very little

distinction between a no recording/no camera restriction and a no-possession of cell phone policy (which the Respondent's are not). For purposes of Section 7 activity, cell phone use would generally be limited to recording or taking photographs -- the same activity prohibited under *Boeing*. So, whether the ban is against recording/taking pictures or carrying cell phones, the result with respect to the limitation on Section 7 activity effectively is the same.

Certainly, it is conceivable that an employee could call someone and that the call could constitute Section 7 activity, but, as the Board in *Boeing* noted, the vast majority of employees would use photography/recording devices for activity that does not implicate Section 7 activity. 365 NLRB No. 154, slip op. at 21. This is the same case with respect to cell phones. Accordingly, the same finding as that in *Boeing* is warranted here.

The ALJ, however, contends that Respondent's policies are more "draconian" than the policy at issue in *Boeing* in that the Respondent's rules prohibit the carrying of cell phones and thus preclude "employees from making audio recordings or phone calls as part of NLRA-protected activities." (ALJD 8:1-5.) The ALJ goes on to argue that the prohibition also creates "asymmetrical evidentiary circumstances," because management, unlike the employees, are able to carry and use their cell phones to record evidence for use in unfair labor practice cases. (ALJD 8:23-28.) The fundamental flaw in the ALJ's position, however, is that the carrying of cell phones is not a Section 7 right. Indeed, there is no case making the carrying of a cell phone a Section 7 right and the General Counsel in its Brief on Remand notes as such. (pp. 8-9.)

In *Nicholson Terminal & Dock Co.*, Case No. 07-CA-187907, 2018 WL 2263546 (ALJ Elizabeth Tafe, May 16, 2018), the ALJ found lawful a policy that prohibited cameras, video recorders, or other recording equipment at all times, and while it allowed the carrying of cell phones with cameras, the cameras or recorders could not be used on Company premises and the

cell phones themselves could only be used during nonworking time. The policy at issue noted that “**If any such devices are found in use in the working areas of the facility they may be confiscated.**” *Id.* at *4-7 (bold in original). The ALJ explained:

Here, the record does not establish that the nature or extent of the potential impact of the rule on Section 7 rights would be distinct from that in *Boeing*, and therefore, considered with the Board’s findings in *Boeing*, I conclude that the nature and extent of the rule’s impact on Section 7 rights is slight.

Id. at * 7. Although the employees could carry their cellular phones, like here, the employees could not use their cellular phones during working time and in working areas; thus, the same Section 7 restrictions existed there as do here with respect to cell phones. Notably, the ALJ found the policy lawful despite the fact the respondent had provided very little justification for its rule and the justifications were distinct from those in *Boeing*. *Id.* Although this case is still pending with exceptions being filed and the General Counsel being opposed to certain of the ALJ’s rulings, the General Counsel’s Answering Brief in Response to the Respondent’s Exceptions to the Decision of the Administrative Law Judge notes: “The current General Counsel agrees with the Judge that Respondent’s rule against recording devices is a lawful Category 1 rule,” which is the only reference to this portion of the ALJ’s decision. (p. 2.)

B. Applying the Test in *Boeing* to the Instant Facts, Dismissal of the Allegations is Warranted (Exceptions 1-8, 16).

Even assuming that the decision in *Boeing* did not conclusively determine that policies such as Respondent’s policies are permissible Category 1 policies, applying the test in *Boeing* to the instant facts confirms that these policies are lawful, should be Category 1 policies, and the ALJ’s decision should be overturned.

1. Employees Would Not Reasonably Interpret Respondent's Policies as Interfering with the Exercise of their NLRA rights (Exceptions 1-6).

To begin, it is Respondent's position that Respondent's policies are lawful under the first part of the Board's test--when reasonably interpreted, if the rule would not potentially interfere with the exercise of Section 7 rights, then the rule is lawful and the test ends there. *Id.*, slip op at 14. Here, unlike in *Boeing*, the policies at issue are not no-cell phone policies. Rather, the policies are "Good Manufacturing Practices" policies, titled as such, and address things like proper attire, personal hygiene, and chemical handling and use; all which must be followed due to Respondent's beverage manufacturing business. (GC Ex. 3; GC Ex. 4; ALJD 3:39-5:7; Tr. 28:13; Tr. 134:11-16.) Further, the reasoning for the policies, if not clear to a reasonable employee when reading the title of them, is made clear through an explanation:

[T]hese guidelines are derived from the Code of Federal Regulations as it relates to manufacturing in food plants. All persons involved in the manufacture of food products shall understand and practice Good Manufacturing Practices . . .

(GC Ex. 3 at COTT 5.) Moreover, the sections addressing cell phone use are also not stand-alone sections. The San Antonio GMP Guideline includes the prohibition on the carrying of cell phones in a section that bans all personal items:

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.

(GC Ex. 4 at COTT 3.) The GMP Policy similarly notes:

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. Cell communication devices may be maintained on the person for management and leadership roles. . . 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.

(GC Ex. 3 at COTT 8.) Thus, taken as a whole, no employee would read these policies, which do not concern Section 7 activities, but instead on their face deal with good manufacturing practices, to potentially interfere with their Section 7 rights.

The ALJ, while opposing this position, does not provide any analysis with respect to this issue other than to circularly conclude as follows: “Not only would a reasonable employee interpret the Respondent’s challenged rules to interfere with employees’ cell phone-enabled NLRA activities, but those rules cannot reasonably be interpreted as not interfering with such activities.” (ALJD at 9:32-38.) As the Board noted in *LA Specialty Produce Company*, the determination must be based from the “perspective of an objectively reasonable employee who is ‘aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA.” 368 NLRB No. 93, *slip op.* at 2. Here, a reading of a policy concerning good manufacturing practices and which prohibits a number of various things, including the carrying of various objects, would not prompt a reasonable employee to conclude that the policy interferes with his Section 7 rights.

2. The Impact on Section 7 Activity is Slight (Exceptions 1-5).

Assuming *arguendo*, however, that analyzing these policies under the two-part test is necessary, Respondent’s policies under this test are lawful. Here, the nature and extent of the potential impact on NLRA rights is indisputably slight. Respondent’s policy prohibits the possession of one particular kind of especially distracting device in one particular especially dangerous working area and only affects employees during working time. During employees’

non-working time, employees may carry and use their cell phones in any form or way they like outside of the warehouse and manufacturing areas.

As in *Boeing*, while the rule “in some circumstances may potentially affect the exercise of Section 7 rights, . . . this adverse impact is comparatively slight.” *Boeing*, 365 NLB No. 154, slip op. 21 (2017). The Board analyzed this “slight” impact in *Boeing* as follows:

The vast majority of images or videos blocked by the policy do not implicate any NLRA rights. Moreover, the Act only protects concerted activities that two or more employees engage in for the purpose of mutual aid or protection. Taking photographs to post on social media for the purpose of entertaining or impressing others, for example, certainly falls outside of the Act’s protection. It is possible, of course, that two or more Boeing employees might, in the future, engage in protected concerted activity - - for example, by conducting a group protest based on an employment-related dispute - - and Boeing’s no-camera rule might prevent the employees from taking photographs of their activity. However, 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.

Id., slip op. at 21.

As addressed above, for purposes of engaging in protected concerted activity, a cell phone is generally limited in use to the very same conduct which is prohibited by *Boeing’s* no-camera policy -- recording or photographing. Moreover, the Board concluded in *Boeing* that photography is not central to protected concerted activity. *Id.*, slip op. at 17-19. Such is also the case with respect to the carrying of cellular phones. Accordingly, the same analysis applies here and warrants finding that the potential impact on NLRA rights is slight.

Moreover, Respondent’s policies are no different than other policies placing restrictions on Section 7 activity, which the Board has historically found to be lawful. This is noted by the General Counsel in her Brief on Remand: “At its core, Section 7 was intended to protect the associational rights of employees, but associational rights of employees have been balanced with

other rights of the employer and limited at times.” (Brief at p. 7.) This is also recognized by the Board in *Boeing*:

[T]he Board has recognized that it is lawful for an employer to adopt no-solicitation rules prohibiting *all* employee solicitation--including union-related solicitation -- during working time, and no-distribution rules prohibiting *all* distribution of literature--including union-related literature--in work areas. Employers may also lawfully maintain a no-access rule that prohibits off-duty employees from accessing the interior of the employer’s facility and outside work areas, even if they desire access to engage in protected picketing, handbilling, or solicitation. Similarly, employers may lawfully adopt “just cause” provisions and attendance requirements that subject employees to discipline or discharge for failing to come to work, even though employees have a Section 7 right to engage in protected strikes. Each of these rules . . . clearly prohibits Section 7 activity. Yet each requirement has been upheld by the Board, based on a determination that legitimate employer interests and justifications outweighed any interference with Section 7 rights.

365 NLRB No. 154, slip op. at 9 (emphasis provided in original).⁴ Given this historical Board background, the slight effect on Section 7 rights, and the analysis provided by the Board in *Boeing*, this part of the test conclusively demonstrating that Respondent’s policies are lawful.

⁴ See also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (“Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee.”); *NLRB v. Baptist Hospital*, 442 U.S. 773, 782-784 (1979) (hospital may ban solicitation in corridors and sitting rooms on patient floors); *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982) (“Various special considerations which may justify prohibiting employee display of union insignia include situations where employees’ safety, the employer’s products, or equipment might be threatened, or where harmonious inter-employee relations might be jeopardized by wearing the particular button.”); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 619, 621 (1962) (“[B]ecause distribution of literature is a different technique and poses different problems both from the point of view of the employees and from the point of view of management, we believe organizational rights in that regard require only that employees have access to nonworking areas of the plant premises.”); *Sacred Heart Med. Ctr.*, 347 NLRB 531, 531-32 (2006) (no right to wear “Safe Staffing” button because message would inherently disturb patients); *Peyton Packing Corp.*, 49 NLRB 828, 843 (1943) (“Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours.”); *St. John’s Hosp. & Sch. of Nursing, Inc.*, 222 NLRB 1150, 1150 (1976) (hospitals may ban solicitation and distribution activities even during non-working time in “patient care areas, such as the patients’ rooms, operating rooms, and places where patients receive treatment”); *Bankers Club, Inc.*, 218 NLRB 22, 27 (1975) (“The Board has long approved employer rules prohibiting all solicitation, even during employees’ nonworking time, in the selling areas of stores and other establishments, such as restaurants, on the theory that such activity might tend to drive away customers.”); *Marshall Field & Co.*, 98 NLRB 88, 90 (1952) (prohibiting solicitation in the selling areas of a department store), *enf’d*, 200 F.2d 375 (7th Cir. 1953); *Andrews Wire Corp.*, 189 NLRB 108, 109 (1971) (banning union insignia on employees’ hard hats was lawful because the insignia could impair the hats’ visibility and endanger employees); *Standard Oil Co. of Ca.*, 168 NLRB 153, 153 n.1 (1967) (employer did not violate the Act by disciplining employee who refused to remove union insignia from safety hat: “The respondent established that it had a legitimate, longstanding, and not unwarranted concern about the threat to

3. Respondent Has Legitimate Justifications for its Policies (Exception 1-8, 16-20).

To allow the carrying of cell phones on working time and in working areas, only to leave open the possibility that someday an employee might use it for protected, concerted activity, would unnecessarily risk the contamination of the Respondent's food products and would risk the safety of all of its employees. These food contamination and safety concerns are legitimate reasons for Respondent's policy and are obvious from the policies themselves. Here, unlike in *Boeing*, the policies themselves explain the justification for them. Here, the policies are not stand-alone policies focused on cellular phone use. Rather, the policies are titled "Good Manufacturing Practices" and address proper attire, personal hygiene, and chemical handling and use that must be followed based on Respondent's manufacturing business. (GC Ex. 3; GC Ex. 4; ALJD 3:39-5:7; Tr. 28:13; Tr. 134:11-16.) Moreover, the policies explicitly state that they are implemented to assure Respondent's compliance with federal law. (GC Ex. 3 at COTT 5.) Additionally, the policies do not just limit the carrying and using of cell phones in working areas and working time, but prohibit all personal belongings, jewelry and food. (GC Ex. 3; GC Ex. 4.) Thus, from the face of the policies, it is clear that sanitary and safety concerns are behind the restrictions on carrying personal items including cell phones.

a. Respondent Has Legitimate Food Contamination-Related Reasons for its Policies.

During the hearing and in its post-hearing briefs, Respondent explained that the manufacturing of beverages in Respondent's facilities is extensively regulated under the Federal

safety posed by the use of authorized decorations on work hats."); *Tri-County Med. Ctr.*, 222 NLRB 1089, 1089 (1976) (finding lawful a no-access policy for off duty employees that limited access to the interior of the facility and applied to all off-duty employees seeking access for any reason); *Flagstaff Med. Ctr.*, 357 NLRB 659, 663 (2011) (lawful to ban recording at any time and in all locations of the hospital).

Food, Drug, and Cosmetic Act (FDCA) as administrated by the U.S. Food and Drug Administration (FDA). *See generally*, 21 U.S.C. § 301, *et seq.*; 21 C.F.R. § 110.5, *et seq.* The most relevant federal regulations in this regard provide:

[M]anagement shall take all reasonable measures and precautions to ensure the following:

(4) *Removing all unsecured jewelry and other objects* that might fall into food, equipment, or containers, and removing hand jewelry that cannot be adequately sanitized during periods in which food is manipulated by hand. If such hand jewelry cannot be removed, it may be covered by material which can be maintained in an intact, clean, and sanitary condition and which effectively protects against the contamination by these objects of the food, food-contact surfaces, or food-packaging materials.

(7) *Storing clothing or other personal belongings in areas other than where food is exposed or where equipment or utensils are washed.*

(9) *Taking any other necessary precautions* to protect against contamination of food, food-contact surfaces, or food-packaging materials with microorganisms or foreign substances including, but not limited to, perspiration, hair, cosmetics, tobacco, chemicals, and medicines applied to the skin.

21 C.F.R. § 110 (emphasis provided).

The FDA criminally prosecutes entities for failing to meet the sanitary requirements set forth in the FDCA and its regulations. *See* 21 U.S.C. § 301; 21 U.S.C. § 333 (setting forth the minimum infraction is imprisonment for not more than one year, a fine of not more than \$1,000, or both); *see also, e.g., U.S. v. Scotty's Inc.*, Case No. 2:14-cv-14450, 2015 WL 7733175, *10 (E.D. Mich. Apr. 30, 2015); *U.S. v. Ocean Fresh Crab Co.*, Case No. 4:04-cv-145, 2004 WL 3663461 (N.D. Fla. May 3, 2004). In *Scotty's*, the defendant was prosecuted for, among other things, failing to “ensure that plant personnel removed jewelry before cleaning and sanitizing

their hands and before processing food.” 2015 WL 7733175 at *10. In *Ocean Fresh*, the defendant was prosecuted because it failed to “store clothing or other [employees’] personal belongings in areas other than where food is exposed, as required by 21 C.F.R. § 110(b)(7).” *See id.* at *4. The Respondent must comply with the FDCA and its regulations or risk being prosecuted, in addition to preventing contamination which may result from cell phone use in the working areas of the facility.

Despite these regulations, the ALJ engaged in a technical ivory tower reading of the regulations to discredit this legitimate justification, noting: “[t]he regulations identified by the Respondent, while requiring regulated entities to implement controls to protect food safety, make no mention of cell phones or electronic devices and do not state that those items are to be banned from either production or warehouse areas.” (ALJD 12:17-20.) Respondent has never taken the position that the regulations specifically require the banning of cell phones. However as the ALJ noted, the regulations require Respondent to implement “controls” to protect food safety and Respondent’s policies set forth how it determined best to comply with these requirements, which includes but it is not limited to, the banning of personal items from the working areas of the facility. And it cannot be denied that personal items includes the employees’ cell phones.

Since the 1960’s, the Board has recognized these sanitation and food product safety concerns as special circumstances justifying restrictions on Section 7 activities in the working areas of a facility. *See Campbell Soup Co.*, 159 NLRB 74 (1966). In fact, *Campbell Soup*, is very similar to the case at hand. In *Campbell Soup*, the Board, affirming the ALJ’s findings, held that a prohibition on the carrying of a pro-union hat and button, which could affect or contaminate the product, was lawful due to the nature of the business—a manufacturer of packaged and canned food items. *Id.* at 76. As in *Campbell Soup*, the restrictions here also are related to items that

employees cannot carry with them owing to sanitary and safety considerations. Accordingly, well-established Board law, in addition to the very recent *Boeing* case, support dismissal of the allegations.

The ALJ, however, takes issue with *Campbell Soup*, not because of its analysis but because the case is old, noting that he has “some doubts about the precedential value of the results of the case given that it was decided 50 years before the Board adopted the *Boeing* balancing test.” (ALJD 12:n.10.) Many NLRB cases and NLRA principles are old and yet they are still good law. *See, e.g., NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969) (50 year-old case establishing that *Gissel* orders or bargain orders are an appropriate remedy where an employer commits unfair labor practices that make a fair election an impossibility); *NLRB v. J. Weingarten*, 420 U.S. 251 (1975) (44 year-old case establishing employees’ right to union representation during investigatory interviews); *Johnnie’s Poultry Co.*, 146 NLRB 770 (1964) (55 year-old case establishing the *Johnnie’s Poultry* statement to use prior to questioning employees). Age alone, therefore, is hardly a basis for ignoring *Campbell Soup*.

The ALJ also wrongly noted that the case is distinguishable because the employer “did not prohibit [the employee] from entering the facility while wearing those items [the hat and button],” thus, allowing the employee to convey a union message to co-workers at the facility-- even if only at the entrance. (*Id.*) This is not a distinction. Respondent does not prevent employees from walking into the facility with a cell phone. There is no record evidence to support the ALJ’s erroneous and baseless conclusion, it is contradicted by the policies themselves, and it is even contradicted by the ALJ’s own findings where the ALJ notes that employees are allowed to carry their cell phones and place them in their lockers, which are

unquestionably located inside the Company's facility. (*Id.*) There is simply no basis for ignoring this precedent.

b. Respondent Has Legitimate Employee Safety-Related Reasons for its Policies.

Not only does the Respondent have food safety justifications for its policies, but it also has employee safety concerns. With respect to safety concerns, the Respondent provided ample evidence regarding the employees' work environment, work duties, use of chemicals and heavy equipment, and the Company's inherently dangerous processes. (Tr. 138:14-139:8.) To summarize, the work on the Respondent's manufacturing floor is production and assembly work, with heavy machinery operating 24 hours a day. The work is fast-paced, loud, and with lots of traffic, including forklift traffic. (Tr. 138:14-18.) Additionally, the Respondent uses various cleaning chemicals, which are dangerous if mishandled. (Tr. 139:5-8). Given the dangerousness of these chemicals, employees must be properly trained before using them. (Tr. 139:5-8).

Due to the dangerousness of the Respondent's facility and the nature of the employees' work, employees' complete attention to their work is crucial. The distraction that responding to a text, posting on Facebook, or using a cell phone in other ways causes could result in severe consequences for that employee and others. Rank testified about the risks posed by paying attention to personal cell phones rather than the manufacturing process:

The other piece is, you know, if you are paying attention to a cell device or something that you are reading, and you have a jam on your piece of equipment, your reaction time is slowed. The other piece is, you are going to react but you are not going to react if you're actually paying attention to what you're doing rather than looking at your cell device and trying to run a piece of equipment. It was really put in place for that associate's safety.

(Tr. 147:13-21.) Similarly, Rank explained that it is unsafe to carry personal cell phones in the warehousing area because of the forklift traffic:

If they are not paying attention to where they are driving, they could damage— damage themselves if they hit something, and then also if an individual is walking the production floor or warehousing floor with their cell device, and reading that cell device, they could walk into the path of a forklift.

(Tr. 148:10-18.) These risks are real and substantial with life or death consequences, and the Respondent should not need to have an accident that injures or kills an employee to justify its policy. Prevention of such incidents via these policies is Respondent's goal. The ALJ, however, contends that Respondent did not present any evidence of any accidents, any contamination, any uniqueness in the Respondent's facility due to forklift use, and did not specifically claim that the "presence of cell phones increases the risks that cleaning chemicals would be used improperly or that the risk involving cleaning chemicals had anything to do with the prohibitions at issue here." (ALJD 5:n.3.)

It takes nothing more than a common awareness of today's world to understand the potential for danger associated with having a cell phone while working with heavy equipment and dangerous chemicals. As Rank testified:

Q. Do you have a smartphone yourself?

A. I do.

Q. Do most of the people you interact with on a daily basis inside and outside of work have a smartphone?

A. They do, yes, sir.

Q. In your experience, would you say that you and most other people you interact with sometimes succumb to the temptation to look at a smartphone when they really shouldn't be?

A. Yes.

(Tr. 151:9-18.) Rank testified about the risks posed by paying attention to personal cell phones rather than the manufacturing process:

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(Tr. 148:10-18.)

Rank's testimony is not surprising -- it is common knowledge and common sense. One can hardly commute to work on a given day without witnessing people reading from a cell phone while driving. Billboards adorn interstates in every major city in America pleading with people not to text and drive. All this, even though everyone *knows* it is dangerous. Time and time again we hear and read stories of individuals being seriously injured or dying as a result of being distracted by their cell phones. *See, e.g.,* Listverse, *10 Horrific Deaths Caused by Cell Phones*, <https://listverse.com/2016/03/25/10-horrific-deaths-caused-by-smartphones> (Elliot Rosenhaus, March 25, 2016) (man falls of cliff trying to snap a photo; man killed after using phone's tracking feature; man causes car pileup due to texting and driving; women killed while looking down on her phone and crossing the street, etc.). In a recent article, the author documented that 1 in every 4 car accidents is caused by texting and driving. Thrive Global, *Phone Death Nation: Will Cell Phone Deaths Become the Number 1 Killer in America*, <https://thriveglobal.com/stories/phone-death-nation/> (Sa El, April 17, 2019). This same article noted that, while 90% of Americans think there should be laws that ban distracted driving, about

90% of Americans also drive distracted due to cell phone use. (*Id.*) This confirms that, while people understand the dangerousness of being distracted by cell phones, most people engage in this distracting conduct anyway.

The Respondent has a duty to keep employees safe and its manufacturing process sanitary; given that it cannot rely on its employees to use good judgment and avoid the distractions that having a cell phone brings, preventing possession of cell phones in working areas during working time is more than a legitimate justification for the ban.

Finally, with respect to the ALJ's position that Respondent presented no evidence of any accidents due to cell phone use, it would be difficult if not impossible to prove that such an accident has occurred when cell phones are banned in the first place. This case involves a question of whether the ban is lawful, after all. There is also no requirement in Board law that a prohibition is acceptable only after the employer waits to see what would happen without such a prohibition. This is evidenced in *Flagstaff Med. Ctr.*, 357 NLRB 659 (2011), where the Board did not require the hospital to show the consequences of an actual impermissible disclosure or recurrent set of disclosures of patients' confidential health information before upholding the employer's ban on recording and photography, or the case in *Boeing*, where the Board did not require evidence of espionage or terrorism to allow Boeing to maintain its no-recording policy. The ALJ's standard here is untenable and should be rejected.

C. The ALJ's Criticism of Respondent's Policy Is Without Merit (Exceptions 4, 5, 9-12, 14, 19).

The ALJ found that Respondent's policies were insufficiently narrowly tailored based on a series of faulty conclusions and flawed arguments. He noted that leads and other management personnel are able to use cell phones and claimed that this undermines Respondent's position. He found that Respondent's restrictions on the possession of cell phones were broader than the

evidence shows (erroneously claiming that it extends into areas other than the manufacturing and warehousing areas and into non-working time). He determined that a policy requiring the securing of cell phones below the waist and a rule barring their use would serve Respondent's objectives equally as well as its current policy, thereby usurping the role of management while ignoring or unfairly rejecting important un rebutted evidence and disregarding the obvious realities of human behavior. The ALJ also found that the Respondent's reasoning for its policies are "less weighty" than those in *Boeing* and thus, dismissed Respondent's justifications for the policies. The ALJ was wrong on all counts.

1. Allowing Leads, Supervisors, and Management Personnel to Use Cell Phones Does Not Undermine the Lawfulness of Respondent's Policy (Exceptions 11, 12).

The ALJ erroneously found Respondent's cell phone restriction to be unlawful in part because Respondent's policy allows leads and management personnel to carry cell phones onto the manufacturing floor.⁵ (ALJD 6:13-30; 11:29-37; 14:35-40.) The reasons for this exception are straightforward, rational, and do nothing to undermine the lawfulness of the policy.

Respondent's minimal exception to the general ban on the carrying of cell phones on the manufacturing floor is narrowly tailored to meet the needs of the business while minimizing safety risks. Management must be able to communicate while on the manufacturing floor for safety and operational reasons. (Tr.149:12-150:4.) Allowing a small number of leaders who primarily do not work on the forklifts or manufacturing lines to have a cell phone, in an effort to balance competing safety concerns (as well as other operational concerns), is not the same as

⁵In his decision, the ALJ erroneously contends that hourly employees are also allowed to carry Company issued or approved cell phones. (ALJD 6:32-34.) This is an incorrect reading of the GMP Policy which states that only "company issued or approved" cell phones are permitted on the manufacturing floor but further explains that "[c]ell communications devices may be maintained on the person for management and leadership roles." (GC Ex. 3 at 4.)

allowing *everyone* to carry one at all times while operating heavy machinery, often outside management's oversight. A small exception to Respondent's general rule under these circumstances does not allow every employee to carry a cell phone onto the manufacturing floor when there is no business reason for it. *Cf. Hammary Mfg. Corp.*, 265 NLRB 57 n.4 (1982) (no-solicitation policy lawful despite exception for United Way's annual campaign on the company's premises).⁶

2. Respondent's Restrictions on Cell Phones Is Limited to Working Time and (Certain) Working Areas (Exceptions 4, 14).

The ALJ held that Respondent's policy is overbroad because Respondent allegedly bans the use of cell phones not only during working time on the manufacturing and warehouse floor, but also during non-working time and in other areas of the facility. (ALJD 10:16-38.) There is no basis for these findings, and the parties did not even litigate this issue. Indeed, the Complaint merely alleges that "Respondent has maintained overly-broad rules in its 'Good Manufacturing Guideline Policy' that prohibit employees from having personal cell phones on the manufacturing floor or at employees' work stations." (GC Ex. 1(c) ¶4.)

The challenged aspect of the GMP Policy clearly states that "[n]o personal cell phones are permitted on the manufacturing floor"; the ban does not apply elsewhere. (GC Ex. 3 at COTT 8.) Similarly, the San Antonio GMP Introduction (which merely aims to summarize and highlight the important parts of the corporate policy for new hires) begins by stating that "[t]he practices that follow apply to all "production and warehouse areas." (GC Ex. 4 at COTT 1.) The document continues to articulate a ban on cell phone "in work areas." (*Id.* at COTT 3.) In addition, Rank testified without contradiction that the prohibition on cell phones applies only on the

⁶ There is no record evidence that anyone other than management and leadership employees are issued Company cell phones or approved to carry personal ones on the manufacturing floor.

manufacturing and warehouse floors, not in the office space of the facility or anywhere else. (Tr. 144:19-145:16.) As a result, there is no basis for the ALJ's conclusion that the policy somehow prohibits employees from carrying cell phones anywhere other than the manufacturing and warehouse floors, and it would violate due process for him to so find in any event. *See, e.g., Bonadonna Shoprite, LLC*, 356 NLRB 857, 857 (2011) ("Although a judge may in appropriate circumstances find a violation not alleged in a complaint, the judge should not decide an issue that the judge 'alone has injected into the hearing, especially where as here, the parties were never advised to litigate the issue.'"); *United Mine Workers of America*, 338 NLRB 406, 406 (2002) ("to decide the case on a theory neither raised nor litigated would deny the parties due process of law").

At the same time, the testimony in the case shows that when employees are on the floor they are on working time. (Tr. 63:18-19; Tr.146:19-22.) Although the ALJ decided that this is not really true because employees are relieved from actively working on a manufacturing line while still in the manufacturing area (ALJD 10:34-38), there is no evidence in the record suggesting that employees are completely duty free at that time. Indeed, even Charging Party Joseph Kelly testified that breaks and lunches were taken at a facility break room and not on the warehouse or the manufacturing floor. (Tr. 63:7-12.) Once again, the ALJ made an improper finding based on his own unsupported presumptions. At any rate, even if the ALJ's finding were factually accurate, there is no way to permit employees to carry cell phones during the brief walk to and from the break areas unless they are allowed to carry the cell phones throughout their working time in the manufacturing and warehousing areas. Working time is for work, and the ALJ's decision seeks to override that cardinal rule of the workplace.

Regardless, the safety concerns underlying the ban on cell phones do not disappear during the short walk from a high-speed canning machine to the exit from the manufacturing floor. If anything, they are heightened; the last thing Respondent (or any employer) wants is employees relieved from the actual manufacturing line burying their heads in Twitter/Facebook/texts/etc. while ambling straight into a forklift.

3. The ALJ Wrongly Criticizes Respondent for Not Implementing Different Restrictions on Cell Phones (Exceptions 9, 10, 19).

The ALJ incorrectly concluded that Respondent's cell phone restrictions are not narrowly tailored because different, less restrictive rules supposedly would satisfy, *in the ALJ's judgment*, Respondent's concerns for food and worker safety. Specifically, the ALJ concluded that Respondent could merely require employees to secure their cell phones below the belt and not use them in dangerous circumstances (*e.g.*, while driving a forklift). (ALJD 11:14-17; 14:11-16.) It is not the ALJ's role to develop safety rules for a beverage manufacturing plant, and his proposed restrictions ignore the realities of Respondent's workplace and human nature.

It is undisputed that Respondent's employees are often out of the line of sight. As a result, a mere "do not use" rule when it comes to cell phones requires complete trust that employees will not succumb to temptation every time a call, text, Tweet, or new Facebook post comes in. Respondent should not be forced to rely on trust alone, as it will do Respondent no good if a distracted employee is seriously injured or an employee lets his iPhone slip into the manufacturing line. Rank explained this at the hearing, noting that "you would then be in a position to have to manage . . . every single minute of what an associate was doing with that particular device, so I don't think the policy in itself would be manageable." (Tr. 150:21-151:8.) The ALJ rejected this testimony as not credible, (ALJD 6:9-11), but the testimony was not contradicted by any evidence and is based on simple common sense.

The ALJ also pointed out Respondent's ban on the carrying of "loose items" above the waist and presumed that this meant a cell phone could safely be carried below the waist. (ALJD 11:17-20.) To begin with, the ALJ wrongly assumes that the ban on carrying loose items above the waist necessarily means that all such items may be carried into the manufacturing space below the waist. For example, Respondent warns employees not to carry pens, pencils or combs in their shirt pockets, but this does not mean all those items may be carried below the waist. In fact, the San Antonio GMP Introduction plainly bans *all* personal items ("items not directly related to production processes or job requirements"), which certainly would apply to combs. (GC Ex. 4 at COTT 3, "Personal Belongings.") The document also provides that loose items related to the production process "must be carried in pants pockets or otherwise secured below the waist" and "should be minimized." (GC Ex. 4 at COTT 3, "No Items Above the Waist.") There is no record evidence listing exactly which kinds of loose items may be carried below the waist for business purposes, but it is clear that there is no business purpose for a cell phone among rank-and-file employees.

Moreover, the "loose items" cited by the ALJ are markedly different from a cell phone in another important respect. No one is going to be distracted by a pen or pull a pencil out for any reason other than a business use. Cell phones, on the other hand, have games, access to the internet, access to text messages, and so on. This is why people often are injured owing to cell phone distractions.

In short, the ALJ's proposed restrictions are unworkable and insufficient to ensure employee and consumer safety. By contrast, Respondent's restrictions are reasonably tailored to meet its specific concerns while allowing employees to use their cell phones as they please in non-

working areas and during non-working time. Accordingly, Respondent's policies should be left undisturbed by the Board.

4. The ALJ's Distinctions between the Respondent in *Boeing* and the Respondent Here Do Not Warrant a Different Result Here (Exception 5).

Finally, the ALJ notes that Respondent "is a very different type of employer than the employer in *Boeing*," in that Boeing is "one of the country's most prominent defense contractors" and the Board noted that "the American people have a substantial interest in permitting [t] to prohibit the use of cameras in facilities where work is performed that directly affects national security." (ALJD 14:22-27.) The ALJ concludes that Respondent's justifications are "less weighty." (ALJD 14:21.) Respondent disagrees. Ensuring that the water, juices, and soft drinks that Americans drink on a daily basis are free of contamination is a pressing issue, which is why it is heavily regulated by the federal government. And, any failure by the Respondent to ensure this could subject it to prosecution by the FDA. (ALJD 14:29-31.)

Equally pressing is keeping employees safe. Respondent's underlying justifications for these policies are the employees' and general public's safety -- the same considerations underlying Boeing's no-camera policy. While the ALJ attempts to minimize Respondent's important justifications for the policies by comparing them to the issues in *Boeing*, the Board anticipated that fact-finders would compare the espionage and terrorism justifications in *Boeing* to the justifications of other respondents, and find that most respondents' justifications paled in comparison to Boeing's justifications. Accordingly, the Board noted, "[a]lthough the justifications associated with Boeing's no-camera rule are especially compelling, we believe that no-camera rules, in general, fall into Category 1, that the Board will find lawful based on the considerations described above." *The Boeing, Co.*, 365 NLB No. 154, slip op. at 18 (2017).

Thus, a respondent does not need to show that its justifications concern preventing terrorist attacks or the like; other legitimate justifications are sufficient. Here, employee safety and the general public's safety are legitimate justifications warranting the Respondent's restriction on cellular phones.

II. Adopting the ALJ's Decision Would Improperly Intrude Upon the Regulation of Food Safety by the FDA (Exception 7).

The rules deemed unlawful by the ALJ are designed to comply with federal food safety laws. The ALJ misinterpreted the relevant regulations in that regard, but he (and the Board) has no place interpreting those regulations in the first instance. At the very least, Respondent's prohibition on cell phones is an eminently reasonable attempt to comply with FDA regulations. As such, the rule should be left undisturbed by the Board, lest Respondent and other food and beverage manufacturers be faced with a choice between stricter compliance with food safety regulations (and increased protection of the consuming public) on one hand and more laxity in those areas on the other, in the interest of satisfying at the very best extremely attenuated protected concerted activity as determined by a labor relations agency with no expertise in food safety regulation.

As set forth above, the manufacturing of beverages in Respondent's facilities is extensively regulated under the Federal Food, Drug, and Cosmetic Act (FDCA) by the U.S. Food and Drug Administration (FDA). *See generally*, 21 U.S.C. § 301, *et seq.*; 21 C.F.R. § 110.5, *et seq.* Respondent's prohibition on personal items in the manufacturing and warehousing areas (which are adjoined in San Antonio, (Tr. 31:3-18)) is designed to comply with Respondent's obligations under 21 C.F.R. § 110. Nevertheless, the ALJ brushed this issue aside in one perfunctory paragraph:

I considered the Respondent's argument that its facilities are subject to regulatory requirements imposed by the FDA. See 21 CFR Section 110 (2016). This

argument would be more persuasive if the Respondent had shown that the prohibition on cell phones was mentioned by, or necessary to comply with, requirements imposed by the FDA. However, the regulations identified by the Respondent, while requiring regulated entities to implement controls to protect food safety, make no mention of cell phones or electronic devices and do not state that those items are to be banned from either production or warehouse areas.

(ALJD 12:13-20.)

The FDA's regulations may not identify cell phones specifically by name, but they do explicitly state that "personal belongings" and "other objects" are prohibited. 21 C.F.R. § 110. Indeed, the regulations state that "personal belongings" must be stored in "areas other than where food is exposed or where equipment or utensils are washed." (*Id.*) A personal cell phone is clearly a "personal belonging," yet the ALJ contends that every employee has a right under federal labor relations law to store such an item in his or her pants pocket while working with exposed food products. This is wrong. The FDA regulations do not require a complete and total ban on cell phones and other personal items; they require only that manufacturers take "all reasonable measures" to store them elsewhere. Respondent concluded that it would not be "reasonable" to ban cell phones from leadership in the plant for the perfectly sensible reasons offered by Rank in his testimony, but this does not (contrary to the ALJ's "logic") mean the FDA would smile upon *everyone* in the plant carrying a personal cell phone while making beverages for the public.

Affirming the ALJ's position on this issue would run afoul of Supreme Court authority concerning the effectuation of federal statutes when two such statutes arguably conflict. In fact, the Supreme Court has admonished the Board for blindly applying the Act without regard to other federal statutes:

[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional

purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task. We have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.

Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942) (setting aside the Board's decision involving a striking ship's crew because the strike constituted mutiny in violation of federal law); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44 (2002) (noting that the Supreme Court has "precluded the Board from enforcing orders found in conflict with the Bankruptcy Code . . . rejected claims that federal antitrust policy should defer to the NLRA . . . and precluded the Board from selecting remedies pursuant to its own interpretation of the Interstate Commerce").

When facing a possible conflict between two federal statutes, the Supreme Court has noted that the specificity of the statutes matters "if the two Acts cannot be implemented in full at the same time." *See POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2231 (2014). Given that the ALJ's interpretation of Section 7 is, at best, a tenuous stretch of Section 7's very general language, that interpretation cannot be permitted to override the more specific requirements of food safety regulations. Further, when there is an "irreconcilable conflict between the two federal statutes at issue," implied repeal is normally found in the later of the two statutes. *See Matasushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996) (quoting *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 468 (1982)). Section 7 was enacted on July 5, 1935, 29 U.S.C. § 157, whereas the FDCA was enacted on June 25, 1938, 21 U.S.C. § 301.

Given that the ALJ's interpretation of Section 7 is (at best) a tenuous stretch of Section 7's very general language, and given that the FDCA was enacted after Section 7, the food safety laws should be given priority over Section 7 in this instance. Adopting the ALJ's conclusion

instead would impermissibly “trench” on the FDA’s jurisdiction by interpreting the Act to outlaw reasonable efforts to comply with federal food safety laws. The ALJ’s position should be rejected.

CONCLUSION

Respondent has not infringed upon employees’ rights under Section 7 of the Act by banning cell phones from its manufacturing and warehousing spaces. Its overriding interest in maintaining a safe work environment, ensuring consumer safety, and complying with federal food safety regulations is vital to its business and to the welfare of its workforce and the consuming public. For the foregoing reasons, the Board should find merit to Respondent’s exceptions and dismiss the allegations in the Complaint.

RESPECTFULLY SUBMITTED,

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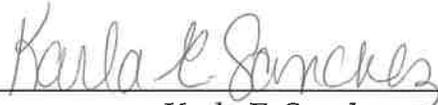
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she caused a true and correct copy of this brief 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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