

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

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G&E REAL ESTATE MANAGEMENT SERVICES,  
INC. d/b/a NEWMARK GRUBB KNIGHT FRANK,

Case 28-CA-178893

and

PATRICK S. THURMAN, an individual.

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**RESPONDENT’S ANSWERING BRIEF TO THE GENERAL COUNSEL’S LIMITED  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION ON REMAND**

**INTRODUCTION**

The General Counsel takes “limited exception” to the Administrative Law Judge’s (“ALJ”) November 8, 2019 supplemental recommended decision and order, challenging only the ALJ’s failure to find that the footer in Respondent’s Handbook violates the Act. The footer in question states the Handbook’s effective date and marks it as “Confidential—For Internal Use Only.” The General Counsel theorizes this notation may inhibit employees from sharing the Handbook with union officials, the Board, or other government agencies. But this is speculation, as the General Counsel presented no evidence that any employee read the footer in that way or otherwise believed she was restricted from sharing the Handbook with others.

In fact, the General Counsel’s theory of violation is definitively *disproved* by the record evidence, which is not in dispute, and which establishes that the exact opposite fact is true. The evidence shows that Respondent G&E Real Estate Management Services, Inc. (“G&E” or “the Company”) puts no limitations at all on its employees’ use or dissemination of the Handbook, within or outside the organization. Indeed, G&E gives employees and job applicants individual copies of the Handbook and encourages them to review and access it freely. The footer is simply an administrative notation for human resources staff, identifying the document’s effective date and

designating it for posting on the employee intranet, as opposed to the Company's public website. Because the General Counsel failed to prove his claim, the ALJ did not err in declining to recommend a finding G&E violated the Act by maintaining the footer in its Handbook.

## **ARGUMENT**

### **I. THE CHALLENGED FOOTER IS LAWFUL UNDER *BOEING***

In a case alleging a violation of Section 8(a)(1) of the Act, the General Counsel bears the burden of proving an unfair labor practice by a preponderance of the evidence. *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). Where the alleged violation is centered on the maintenance of a facially neutral handbook provision, the General Counsel's burden is defined by the *Boeing* standard. *The Boeing Company*, 365 NLRB No. 154. Under *Boeing*, the General Counsel is obliged to establish that a facially neutral provision had actual impact on employee's Section 7 rights outweighing any legitimate business justifications for the provision. *Id.*

In evaluating whether the General Counsel has met this burden, the Board recognizes that the Act does not require employers to "eliminate all ambiguities from all policies, rules and handbook provisions that might conceivably touch on some type of Section 7 activity." *Boeing*, 365 NLRB No. 154, slip p. at 3. Further, a challenged work rule cannot be read in isolation from the context that informs its interpretation. *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983); *Shamrock Foods Co. & Bakery*, No. 28-CA-150157, 2019 WL 4942479 (Oct. 7, 2019) (finding Respondent's confidentiality provision lawful due to testimony from Respondent that the company did not consider the Associate Handbook or its contents to be confidential). This includes textual as well as factual context. *Tradesmen Int'l*, 338 NLRB 460, 461 (2002) (finding that reasonable employee would interpret text based on surrounding text); *Aroostook Cty. Reg'l Ophthalmology Ctr.*, 81 F.3d 209, 212-13 (D.C. Cir. 1996) (relying on context of rule and its

location in the manual to conclude rule was not unlawful on its face). Likewise, a showing of actual discernible impact on employee's Section 7 rights cannot be based on "fanciful speculation," but rather must "consider the context in which the rule was applied and its actual impact on employees." *Adtranz ABB Daimler-Benz Transp., NA., Inc. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001).

Here, the factual context surrounding the challenged rule renders the General Counsel's claim untenable. At the hearing, G&E introduced uncontroverted testimony from its Director of Human Resources (who was involved in drafting the Handbook) that the footer is *not*, in fact, a work rule or policy. Rather, it is an administrative notation for personnel in the human resources and legal departments that the Handbook is to be posted on the Company's intranet, as opposed to the company's public internet site. (Tr. 50.)

Notwithstanding this ministerial notation, G&E's employees are not limited in their use or dissemination of the Handbook. Just the opposite. The Handbook is freely accessible on the Company intranet, and the Company provides hard copies of the Handbook to all employees, and even to job applicants. (Tr. 51.) Further, employees and applicants are allowed to leave G&E's premises with their copies of the Handbook. Indeed, they are encouraged to take the Handbook home, read it, and ask questions about its contents. *Id.*

In contrast, the record further establishes that when G&E *does*, on occasion, give certain of its employees access to actual Company confidential information in the course of their job duties, the Company is explicit in directing employees concerning restrictions for using or disclosing such information. *Id.* No such measures are taken with respect to the Handbook. *Id.*

The General Counsel argues that G&E "fully acknowledges that the purpose behind marking a *document* confidential . . . is to prevent the disclosure of said document." GC Brief re

Limited Exceptions at 5 (emphasis added). However, the General Counsel’s reference to an unspecified, hypothetical document is a red herring where here, the record contains unrebutted testimony concerning the particular confidentiality notation at issue. With regard to the Handbook, specifically, the record establishes that G&E’s employees and applicants are *not* instructed that the document is confidential. *Id.* Nor are they prohibited from sharing it with others, including others outside the Company. To the contrary, G&E gives all employees and applicants their own individual copies of the Handbook and encourages them to take it home and read it. As G&E’s Director of Human Resources testified— succinctly and without rebuttal— “[I]t’s not confidential. We provide [the Handbook] out there whenever asked for it.” (Tr. 51.)

For these reasons, the Board should deny the General Counsel’s limited exception. Interpreted in its proper context, the Handbook footer imposes no limitation on employees’ Section 7 activity. Alternatively, any arguable limitation, viewed in context, is comparatively slight and outweighed by the business justification for the rule (i.e., ensuring the document is maintained and posted appropriately from an administrative standpoint).

### **CONCLUSION**

For the foregoing reasons, the General Counsel’s limited exception to the ALJ’s November 8, 2019 supplemental recommended decision and order should be denied.

Dated: December 20, 2019

Respectfully submitted,

G&E REAL ESTATE MANAGEMENT SERVICES, INC.

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**CERTIFICATE OF SERVICE**

The undersigned, one of the attorneys for Respondent, hereby certifies that he has caused a true and correct copy of the foregoing to be served upon:

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via the Board's electronic filing system and electronic mail, this 20th day of December, 2019.

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