

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DENTON COUNTY ELECTRIC COOPERATIVE, INC.
D/B/A COSERV ELECTRIC

and

Case 16-CA-149330

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 220,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS

David Foley and Phillip Melton, Esqs., for the General Counsel.
Carrie B. Hoffman and Brooke Bahlinger, Esqs.
(*Foley & Gardere, LLP*), for the Respondent.
Michael A. Murphy, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. In *Boeing Co.*, 365 NLRB No. 154 (2017), the National Labor Relations Board (the Board) revised its framework for analyzing whether workplace rules are unlawful. The Board, thereafter, remanded this pre-*Boeing* case to the undersigned to gauge whether Denton County Electric Cooperative, Inc. d/b/a CoServ Electric (CoServ or the Respondent) maintained invalid rules under the *Boeing* standard. Thereafter, the General Counsel (the GC) filed a Motion to Amend Complaint (the 1st Motion), which withdrew several allegations that were validated by *Boeing*. This 1st Motion, which was granted, reduced the complaint to five rules. A supplemental hearing was then held on December 16, 2019.

Following the hearing, on January 30, 2020, the GC filed another Motion to Amend Complaint (the 2nd Motion), which withdrew the complaint par. 5 (i.e., averring that the “Protecting CoServ Assets” policy’s limitation on employee emails usage was unlawful). The 2nd Motion was prompted by the Board’s decision in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019), which newly held that facially neutral email

restrictions are now generally lawful¹ The 2nd Motion, which was also granted, streamlined the complaint to just four rules. After carefully considering the entire record, I find that three rules are lawful, and one rule (i.e., Rule 6) is not.

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FINDINGS OF FACT

I. GENERAL PRINCIPLES

In *Boeing*, the Board held as follows:

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In cases [where] ... facially neutral ... rules ..., when reasonably interpreted, would potentially interfere with §7 rights, the Board will evaluate ...: (i) the ... extent of the potential impact on NLRA rights, and (ii) legitimate justifications [T]he Board will ... “strike the proper balance between ... asserted business justifications and the invasion of employee rights”

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.... [T]he Board ... will ... delineate three categories of ... rules ... :

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- **Category 1 ... rules** [are] lawful to maintain, either because (i) the rule, when reasonably interpreted, does not ... interfere with the exercise of NLRA rights; or (ii) the potential adverse impact ... is outweighed by justifications ... [for] the rule. Examples ... are the no-camera requirement in this case, the “harmonious interactions and relationships” rule ... at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility

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- **Category 2 ... rules** ... warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

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- **Category 3 ... rules** ... [are] 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 would be a rule that prohibits employees from discussing wages or benefits with one another.

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Id. at 15–16 (footnotes omitted and emphasis added).

¹ *Caesars*, like *Boeing*, represented a significant reversal of extant law. Moreover, *Caesars* expressly overruled earlier Board precedent on workplace emails, which protected the “right of employees to use their employers' email systems for protected communications on nonworking time.” See *Purple Communications*, 361 NLRB 1050 (2014).

II. ANALYSIS

1. Rule 6

5 Rule 6 is an unlawful Category 3 rule. Before April 2016, Rule 6 prohibited, “[u]nauthorized or improper use or disclosure of CoServ’s trade secrets, confidential information, or other data (e.g., financial data, employee data, member/customer data, etc.)” (ALJ Exh. 2).² Concerning interference with §7 rights, Rule 6 could reasonably be construed to bar employees from discussing wages, workplace issues or other “employee data” amongst themselves or union representatives without permission. Regarding CoServ, although it admittedly has a valid stake in maintaining workplace confidentiality, which includes regulating reference inquiries and the dissemination of “employee data,” it fails the *Boeing* balancing test.

15 Rule 6 fits under Category 3. Moreover, it substantially impacts core §7 activities and can reasonably be construed to bar wage and other workplace discussions occurring without consent. The adverse impact on NLRA rights is not outweighed by CoServ’s generalized confidentiality justifications. Rule 6 is, thus, invalid. *Boeing*, supra (“rule[s] that prohibit ... employees from discussing wages or benefits with one another” fit under Category 3.); *Lowes Home Centers, LLC*, 368 NLRB No. 133, slip op. at 5-6 (2019).

2. Rule 20

25 Rule 20 is valid. Before April 2016, Rule 20 prohibited, “[c]ommitting a crime, whether a felony or misdemeanor, or engaging in other conduct, which would damage the image or reputation of CoServ.”³ (R. Exh. 2).

30 Rule 20 is a hybrid rule that can be halved into two Category 1 and 2 rules under *Boeing*. The first half of Rule 20 is a Category 1, on-duty conduct policy, which bars “[c]ommitting a crime, whether a felony or misdemeanor, or engaging in other conduct which would damage the image or reputation of CoServ” *during working hours*. The second part of Rule 20 is a Category 2, off-duty/off-premises conduct policy, which bars “[c]ommitting a crime, whether a felony or misdemeanor, or engaging in other conduct which would damage the image or reputation of CoServ” *during non-working hours* away from the workplace.

² In April 2016, Rule 6 was modified. (Tr. 744, 748, 756–57). The amendment deleted the ban on sharing “employee data.” It now only bars, “[u]nauthorized ... disclosure of ... trade secrets, confidential information, or other data (e.g., financial data, ... member/customer data, marketing processes, plans and ideas, current and future business plans, computer and software systems and processes, etc.). (R. Exh. 12). A Handbook containing an amended Rule 6 was disseminated to employees and is continuously available on CoServ’s intranet site. (Tr. 758–60).

³ In April 2016, Rule 20 was narrowed to only bar “[c]ommitting a crime, whether a felony or misdemeanor, which affects the employee’s ability to perform his or her position,” and eliminated any connected reference to damaging the “image or reputation of CoServ.” (R. Exh. 12). An Employee Handbook containing the amended Rule 20 was disseminated to employees and is continuously available on CoServ’s intranet site. (Tr. 758–60).

The on-duty portion of Rule 20 is a lawful, Category 1 regulation, which satisfies *Boeing*'s balancing test. The vast majority of activities covered by Rule 20 (e.g., workplace felonies and misdemeanors) are unprotected, and employees would not reasonably interpret this component of the rule to regulate protected concerted action. The on-duty portion would, therefore, have little, if any, impact on §7 rights. Moreover, even assuming that there is some limited interference with §7 rights, CoServ's interest in barring workplace crimes outweighs this limited interference. Hence, the on-duty component of Rule 20 is a valid workplace regulation.

The off-duty/off-premises portion of Rule 20 is a lawful, Category 2 regulation. Concerning interference with §7 rights, although employees may arguably interpret Rule 20 to bar strikes or protests against CoServ that damage its image, this construction is remote and potential interference is light. Regarding CoServ's interests, it has a genuine interest in ensuring that off-duty employee conduct neither harms its community reputation nor generates related problems if a potential felon returns to the workplace. In gauging these competing interests, it appears that the *Boeing* balancing test tips in favor of CoServ and legitimizes this rule.

3. Rules 22 and 24

Rules 22 and 24 are valid Category 1 rules. Rule 22 barred the “[f]ailure to enhance the public image of CoServ while participating in non-work activities, while off-duty or while wearing CoServ logo apparel.”⁴ Rule 24 banned “[u]sing the CoServ name or its related trademarks and/or logos, in association with any personal advertisement, online profile, or personal use, without written permission ...”⁵

The *Boeing* balancing test tips in favor of CoServ for both rules. Although a few employees might construe these rules to ban using CoServ's image on picket signs, leaflets or apparel while engaging in protected activity, most workers would understand this rule to only ban using CoServ's intellectual property for commercial and other non-§7 uses. Moreover, even if a few workers interpreted these rules to apply to protected activities, it is unlikely that this construction would actually cause them to refrain from such activities. I find, as a result, that the resulting impact on §7 rights is relatively minor. CoServ, on the other hand, has a substantial and undisputed interest in protecting its intellectual property. The failure to police intellectual property abuses could result in the diminution of its brand, reputation and other valid interests. Such interests outweigh the limited interference with §7 rights, if any; these rules are, thus, valid Category 1 rules.

⁴ In April 2016, this rule was rescinded and employees were duly notified. (R. Exh. 12; tr. 758-60).

⁵ In April 2016, this rule was modified. It now requires workers to, “[r]espect all ... intellectual property laws [and] respect ... CoServ's ... brand (R. Exh. 12). Employees were advised of this change. (Tr. 758-60).

CONCLUSIONS OF LAW

1. CoServ is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.

2. Before April 2016, CoServ violated §8(a)(1) by maintaining Rule 6, which banned workers from sharing “employee data” without authorization.

3. The unfair labor practice set forth above affects commerce within the meaning of § 2(6) and (7) of the Act.

REMEDY

Having found that CoServ committed an unfair labor practice, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the Act. It shall distribute remedial notices via email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. See *J Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁶

ORDER

Denton County Electric Cooperative d/b/a CoServ Electric, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Maintaining workplace rules, which ban workers from sharing “employee data” without authorization.

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

2. Take the following affirmative action necessary to effectuate the policies of the Act⁷

a. Within 14 days after service by the Region, post at each of its facilities

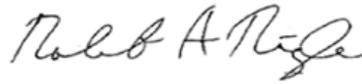
⁶ If no exceptions are filed as provided by §102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷ A rescission remedy is unwarranted herein, given that CoServ deleted the unlawful, “employee data,” portion of Rule 6 in April 2016, and validly notified employees at that time. *Lily Transportation Corp.*, 362 NLRB 406 (2015).

in the United States, where its Employee Handbook is in effect, copies of the attached notice, marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed it at any time since November 26, 2014.

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

Dated Washington, D.C. February 4, 2020



Robert A. Ringler
Administrative Law Judge

⁸ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT maintain a Rule 6 in our Employee Handbook, which bans workers from sharing “employee data” without authorization.

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

WE HAVE rescinded the invalid portion of Rule 6 and revised our Employee Handbook on this basis in April 2016.

**DENTON COUNTY ELECTRIC
COOPERATIVE, INC. D/B/A COSERV
ELECTRIC**

(Employer)

Dated _____ By _____

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: www.nlr.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/16-CA-149330 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (682) 703-7489.