

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

LOWE’S HOME CENTERS, LLC	)	
	)	
Petitioner	)	
	)	
v.	)	No. 20-60472
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	

**UNOPPOSED MOTION TO LODGE EXCEPTIONS BRIEF**

The National Labor Relations Board (the Board), respectfully requests permission to lodge with the Court Lowe’s Home Centers, LLC’s brief in support of its exceptions to the administrative law judge’s decision. In support of this motion, the Board shows:

1. As discussed in the Board’s brief (pp.25-26) Section 10(e) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(e), bars this Court from considering any argument not raised to the Board.

2. The Board’s brief (pp.26, 30-31, 33) cites to Lowe’s brief in support of exceptions in order to show that Lowe’s opening brief raises arguments not brought before the Board.

3. The record in a Board case does not include briefs to the administrative law judge or briefs in support of exceptions. *See* 29 C.F.R. § 102.45(b).<sup>1</sup> In light of that fact, the Board's normal practice in cases where a party's brief may prove helpful to the Court is to recommend that the Court permit the brief to be lodged separately from the formal record.

4. Board counsel has contacted counsel for Lowe's, who indicated that Lowe's does not oppose this motion.

WHEREFORE, the Board respectfully requests that the Court grant its motion to lodge Lowe's brief in support of exceptions.

Respectfully submitted,

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
NATIONAL LABOR RELATIONS BOARD  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 14th day of December 2020

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<sup>1</sup> That section provides that the record before the Board consists of: "The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in section 102.46, shall constitute the record in the case."  
29 C.F.R. § 102.45(b).

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

LOWE’S HOME CENTERS, LLC )  
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 Petitioner )  
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 v. ) No. 20-60472  
 )  
 NATIONAL LABOR RELATIONS BOARD )  
 )  
 Respondent )

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 424 words of proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

/s/ David Habenstreit  
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Dated at Washington, D.C.  
this 14th day of December 2020

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

LOWE'S HOME CENTERS, LLC	)	
	)	No. 20-60472
Petitioner	)	
	)	Board Case No.
v.	)	19-CA-191665
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on December 14, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit  
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(202) 273-2960

Dated at Washington, DC  
this 14th day of December 2020

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

LOWE'S HOME CENTERS, LLC	)	
	)	
Respondent,	)	
	)	
and	)	Case: 19-CA-191665
	)	
AMBER FRARE,	)	
	)	
an Individual	)	
	)	

**RESPONDENT LOWE'S HOME CENTERS, LLC'S,  
BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AND RECOMMENDED  
ORDER OF THE ADMINISTRATIVE LAW JUDGE**

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The Respondent, Lowe’s Home Centers, LLC, (“Respondent” or “Lowe’s”) submits this brief in support of its exceptions to the decision and recommended order (“Decision”) of Administrative Law Judge Amita Baman Tracy (“ALJ”) issued on April 17, 2018. For the reasons set forth below, Lowe’s respectfully contends that the ALJ erred in failing to dismiss the Amended Complaint in its entirety. As such, the Board should sustain Lowe’s exceptions filed herewith.<sup>1</sup>

**I. STATEMENT OF THE CASE**<sup>2</sup>

This action stems from an underlying unfair labor practice charge filed by Amber Frare (“Charging Party”) on January 23, 2017. SF ¶ 1; Exh. A. The Charging Party amended her unfair labor practice charge on January 31, 2017 (Exh. B) and again on February 1, 2017 (Exh. C). The second amended unfair labor practice charge alleges in full: “Within the past six months [Lowe’s] maintained an unlawful policy concerning confidential information, interrogated employees concerning their protected concerted activity, prohibited employees from discussing an internal investigation and disciplined Christa Walker and discharged Amber Frare because of their protected concerted activity.” *Id.*

On April 27, 2017, the Regional Director of Region 19 issued a complaint and notice of hearing (“Complaint”). SF ¶ 4; Exh. D. On May 11, 2017, Lowe’s timely answered the Complaint denying that it had violated the National Labor Relations Act (“Act”) and asserting therein seven viable defenses. SF ¶ 5; Exh. E. On July 5, 2017, pursuant to a settlement entered into between the parties with respect to the Charging Party’s individual allegations, the Regional

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<sup>1</sup> Lowe’s hereby requests oral argument be taken in this case pursuant to section 102.46 of the Board’s Rules and Regulations.

<sup>2</sup> References to the parties’ Revised Joint Motion and Amended Stipulation of Facts (“Revised Stipulation”) dated October 27, 2017 are designated as “SF ¶ \_\_.” References to the joint exhibits filed with the original stipulation dated July 10, 2017 are lettered and references to the joint exhibits filed with the Revised Stipulation are numbered. Both are designated as “Exh. \_\_” with the appropriate letter or number.

Director entered an order severing paragraphs 5 and 6 of the Complaint. SF ¶ 6; Exh. F. On July 10, 2017, the parties filed a joint motion to submit this case to the Division of Judges for a decision based on the stipulated factual record as set forth in the parties' Stipulation of Facts filed concurrently with the joint motion. SF ¶ 7. Pursuant to the ALJ's July 10, 2017 order, the joint motion was granted, the Stipulation of Facts were approved, and the parties were directed to file briefs on or before July 31, 2017. SF ¶ 8; Exh. 2.

On July 29, 2017, the ALJ issued an Order granting the General Counsel and Respondent's July 28, 2017 joint motion for an extension of time. SF ¶ 9; Exh. 3. On September 18, 2017, the parties submitted their Joint Motion to Reopen the Record. SF ¶ 11; Exh. 7. This motion was granted on September 19, 2017. SF ¶ 11; Exh. 8. On September 20, 2017, the ALJ issued an amended order reopening the record. SF ¶ 12; Exh. 9.

On September 20, 2017, the Regional Director issued the Amended Complaint in this case. SF ¶ 13; Exh. 10. Lowe's timely answered the Amended Complaint on October 4, 2017, denying that it had violated the Act. SF ¶ 14; Exh. 11. On October 27, 2017, the parties filed their Revised Joint Motion and Amended Stipulation of Facts to submit this case to the Division of Judges for a decision based on a stipulated factual record. By order dated October 27, 2017, the ALJ granted the motion, approved the Revised Stipulation, and directed the parties to file briefs on or before December 4, 2017. Thereafter, the parties timely filed their briefs.

On December 15, 2017, due to the Board's decision in *The Boeing Company*, 365 NLRB No. 154 (2017), which overruled portions of the work rule standard already briefed by the parties and set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the ALJ ordered the parties to state their positions as to whether the matter should be reopened for further evidence and/or supplemental briefing. The parties filed their responses on February 6, 2018, declining to

reopen the record and requesting to file supplemental briefs. The parties submitted their supplemental briefs on March 16, 2018.

On April 17, 2018, the ALJ issued her Decision finding Lowe's confidential information provision violated the Act as alleged. The parties thereafter participated in the Board's Alternative Dispute Resolution program but were unable to reach a mutually agreeable resolution. As such, the Office of the Executive Secretary set the deadline for the parties to file exceptions for December 3, 2018.

## II. STATEMENT OF FACTS

Lowe's is a North Carolina limited liability corporation, with offices and places of business throughout the United States, including Mill Creek, Washington. SF ¶ 15. Lowe's is engaged in the business of retail sale of home improvement goods. *Id.*

Lowe's maintained a company compliance document officially titled "Lowe's Code of Business Conduct and Ethics" (hereinafter, the "Code"). Exh. 13. The underlying Code went into effect on May 31, 2013 and was rescinded in August of 2018.<sup>3</sup> Exh. 12. The Code was an eleven-page, stand-alone document with an opening message from Lowe's CEO, a table of contents, an introduction, and fifteen distinct subparts.<sup>4</sup> The Code set forth "certain conduct

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<sup>3</sup> The underlying Code of Business Conduct and Ethics (including the confidential information provision at issue in this case) was rescinded by the Company's Board of Directors in August of 2018. Because Lowe's rescinded the underlying confidential information provision *after* the ALJ's Decision, there is no record evidence of this significant development in the parties' stipulated record. Nevertheless, this information is pertinent and should be brought to the Board's attention. Lowe's therefore submits that the record should be re-opened for the limited purpose of the parties stipulating to the fact that Lowe's rescinded the underlying confidentiality provision in August of 2018. *See* section 104.48(b)(1) of the Board's Rules and Regulations ("[T]he Board...may reopen the record and receive further evidence...").

<sup>4</sup> The Code consisted of the following fifteen subparts: (1) Compliance with Laws, Regulations, and Internal Policies and Procedures; (2) Conflicts of Interest; (3) Fair Dealing and Fair Competition; (4) Corporate Opportunities and Loyalty; (5) Confidential Information; (6) Social Media Policy; (7) Bribery and Corruption; (8) Importance of Accurate Books and Records and Adequate Internal Control Structure and Procedures for Financial Reporting; (9) Protection and Proper Use of Company Assets; (10) Public Company Reporting; (11) Insider Trading; (12) Intellectual Property; (13) Employee Relations; (14) Compliance with this Code; and (15) Amendment, Modification and Waiver.

requirements for Lowe's employees and business partners who make decisions on Lowe's behalf" and "basic policies and procedures for topic areas of key legal and ethical importance." Exh. 13 at p. 2, 4 (emphasis added). It "applie[d] to all Lowe's employees" and "third party business partners that act on Lowe's behalf." Exh. 13 at p. 4 (emphasis added). The Code also applied to "non-executive members of its Board of Directors...when acting as members of Lowe's Board of Directors or on other matters related to Lowe's." *Id.*

Section E of the Code was titled "Confidential Information" (hereinafter, "confidentiality provision") and was the only work rule evaluated by the ALJ in this matter.<sup>5</sup> The confidentiality provision provided in full:

Employees must maintain the confidentiality of information entrusted to them by Lowe's, its suppliers, its customers, or its competitors, except when disclosure is authorized by the Chief Compliance Officer or required by law. Employees must consult with the Chief Compliance Officer before disclosing any information that could be considered confidential.

Confidential information includes, but is not limited to: material non-public information; and proprietary information related to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records or salary information, and future plans and strategy.

*Id.* at p. 7 (emphasis added). The Code further sets forth two "Q &As" as follows:

Q: A friend of mine is a vendor in the home improvement industry. He asked me for pricing information related to a Lowe's vendor, which is one of his key competitors. He explained that the information would give him a competitive edge in competing for business with the Lowe's vendor but promised that the information would have no direct impact on Lowe's business. How should I reply to him?

A: You must decline his request. A vendor's pricing information is confidential to Lowe's and must not be disclosed. The disclosure of this information could harm our vendor and damage Lowe's reputation.

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<sup>5</sup> A previous version of Lowe's Code of Business Conduct and Ethics was in effect prior to May 31, 2013. However, this previous iteration was updated and is no longer in use. *See* Exh 12 ("On May 31, 2013, Lowe's Board of Directors approved certain amendments to Lowe's Code of Business Conduct and Ethics...").

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Q: My sister-in-law knows a lot about the confidential promotion strategy of one of our key competitors. I'm very curious – may I ask her?

A: No. The information is a trade secret of our competitor. Employees must respect the trade secrets of our competitors as well.

*Id.*

### **III. ALJ'S DECISION**

By order dated April 17, 2018, the ALJ issued her Decision finding Lowe's confidentiality provision violated the Act as alleged. In the remedy and recommended order section, the ALJ recommended that Lowe's cease and desist from maintaining the underlying confidentiality provision. (Decision 9:38-10:32). Additionally, the ALJ recommended that Lowe's take the following "affirmative action" necessary to effectuate the policies of the Act: (a) rescind the underlying confidentiality provision; (b) furnish employees with inserts for the rule that either advise that the unlawful rule has been rescinded *or* provide a lawfully worded rule; (c) within 14 days after service by Region 19, post at its facilities nationwide the notice marked "Appendix" for a period of 60 consecutive days;<sup>6</sup> and (d) within 21 days after service by Region 19, file with the Regional Director a sworn certification attesting to the steps Lowe's has taken to comply. (Decision 10:37-11:19).

### **IV. QUESTIONS PRESENTED**

1. Whether the ALJ erred in finding the underlying confidentiality provision violated Section 8(a)(1) of the Act.

2. Whether the ALJ erred in ordering a remedy that is overly broad and unnecessary.

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<sup>6</sup> The recommended order also directs Lowe's to distribute the notice 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.*" (emphasis supplied) (Decision 11:7-9). Without taking any position on this portion of the ALJ's recommended order at this time, Lowe's notes that there is no record evidence as to how Lowe's "customarily" communicates with its employees.

V. ARGUMENT AND ANALYSIS

A. The ALJ Erred by Finding That Lowe’s Confidentiality Provision Violates Section 8(A)(1) of the Act.

The ALJ overstepped her bounds. She misapplied the legal standard for evaluating Lowe’s confidentiality provision and impermissibly discounted Lowe’s argument in finding that the provision violates Section 8(a)(1) of the Act.

1. Applicable Legal Standard

The Board has long held that a work rule that does not expressly restrict Section 7 conduct can violate Section 8(a)(1) if the rule is applied to restrict protected conduct, was promulgated in response to protected conduct, or if employees would “reasonably construe the [rule’s] language to prohibit Section 7 activity.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004). Recently, however, the Board observed that “[o]ver the past decade and one-half, the Board has invalidated a large number of common-sense rules and requirements that most people would reasonably expect every employer to maintain.” *The Boeing Company*, 365 NLRB No. 154, at 3 (Dec. 14, 2017). In so doing, the Board determined it had applied the *Lutheran Heritage* “reasonably construe” standard in a manner that conflicts with Supreme Court and Board precedent inasmuch as it “entails a single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions.” *Id.*, at 2.

The Board further explained that the *Lutheran Heritage* standard, especially as applied in recent years, “reflects several false premises that are contrary to our statute, the most important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies.” *Id.* This flawed assumption actually “disadvantage[s]” employees, the Board

explained, “when they are denied general guidance regarding what standards of conduct are required and what type of treatment they can reasonably expect from coworkers.” *Id.*

On account of these and other defects, the Board overruled *Lutheran Heritage* and established in *Boeing* a new test of general application for evaluating the legality of facially-neutral work rules, employment policies, and employee handbook provisions. The Board held:

[we] will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee “would reasonably construe” a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future.

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Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would 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 justifications associated with the rule.

*Id.*, at 3 (emphasis in original).

*Boeing*’s change to the governing standard for evaluating work rules is meaningful. As the General Counsel has since explained, “not only did the Board in *Boeing* add a balancing test, but it also significantly altered its jurisprudence on the reasonable interpretation of handbook rules.” General Counsel Memorandum 18-04, *Guidance on Handbook Rules Post-Boeing*, at 1 (June 6, 2018). In application, the Board explained that its new test will separate work rules into three categories:

- *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.
- *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.

*Boeing*, at 3-4.

Further, the Board emphasized that its balancing of interests must be qualitative in nature:

[W]hen deciding cases in this area, the Board may differentiate among different types of NLRA protected activities (some of which might be deemed central to the Act and others more peripheral), and the Board must recognize those instances where the risk of intruding on NLRA rights is “comparatively slight.” Similarly, the Board may distinguish between substantial justifications—those that have direct, immediate relevance to employees or the business—and others that might be regarded as having more peripheral importance.

*Id.*, at 15.

Finally, in articulating its reasons for overruling *Lutheran Heritage*, the *Boeing* Board emphasized a number of key interpretative maxims to be utilized in weighing a work rule’s alleged Section 7 impact against its underlying business justifications. Specifically, work rules need not (indeed, cannot) be drafted with absolute perfection. Rather, one “false premise of *Lutheran Heritage*,” the Board explained, “is the notion that employers drafting facially neutral policies, rules and handbook provisions can anticipate and avoid all potential interpretations that may conflict with NLRA-protected activities.” *Id.*, at 9.

Relatedly, 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.” *Id.* In that regard, the Board rejected the “consistently misapplied [] evidentiary principle that ambiguity in general work rule language must be construed against the drafter.”

*Id.*, at 10, fn. 43.

Finally, even under the Board's pre-*Boeing* jurisprudence, in construing a challenged work rule, the rule must be given "a reasonable reading" that "refrain[s] from reading particular phrases in isolation, and [...] must not presume improper interference with employee rights." *Lutheran Heritage*, 343 NLRB at 646. Moreover, the analysis of work rules must be based on more than "fanciful speculation," but instead must "consider the *context* in which the rule was applied and its actual impact on employees." *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001) (emphasis added). This includes textual as well as factual context: "one may not select portions or fragments of text on which to base a decision about the effect on an employee when it is reasonable that an employee considering the text at issue would inevitably read more." *Echostar Techs., LLC*, Case 27-CA-66726, JD(SF)-44-12, at 13 (Sept. 20, 2012); *Aroostook Cty. Regional 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); *In re Tradesmen Intern'l*, 338 NLRB 460, 461 (Oct. 31, 2002) (finding that reasonable employee would interpret text based on surrounding text).

Despite the foregoing, the ALJ misapplied the standard in finding that Lowe's confidentiality provision violated the Act. Rather, under *Boeing*, Lowe's confidentiality provision is lawful. It is facially neutral and, when read in its entirety and in proper context, it cannot reasonably be construed to impose *any* limitation on Section 7 activity; or, alternatively, any arguable limitation on NLRA rights is exceedingly slight. Additionally, the ALJ impermissibly interpreted the confidentiality rule "against the drafter" (Decision 7:10) despite Board precedent holding the opposite. Finally, the rule serves important business justifications and interests that substantially outweigh any alleged potential impact on protected rights.

Lowe's confidentiality provision should be deemed a Category 1 rule, and the Amended Complaint should be in its dismissed in its entirety.

2. The Confidential Information Provision is Lawful

The underlying confidentiality provision does not violate the Act. As discussed *supra*, when evaluating a facially neutral work rule,<sup>7</sup> the Board first determines whether, when reasonably interpreted, the rule would have a tendency to interfere with Section 7 rights. In making such a determination, “[a]mbiguities in rules are no longer interpreted against the drafter”,<sup>8</sup> “generalized provisions should not be interpreted as banning all activity that could conceivably be included”<sup>9</sup> and the analysis must be viewed from any objectively reasonable employee who is “aware of his legal rights.”<sup>10</sup> “[W]hen a facially neutral rule, reasonably interpreted, would *not* prohibit or interfere with the exercise of NLRA rights, maintenance of the rule is lawful without the need to evaluate or balance business justifications, and the Board’s inquiry into maintenance of the rule comes to an end.” *Boeing*, 365 NLRB No. 154 at p. 16 (emphasis in original).

That is the case here. The sole basis of the General Counsel’s Amended Complaint is contained in paragraphs 5 and 6. In these paragraphs, the General Counsel alleges the confidentiality provision “has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.” However,

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<sup>7</sup> The term “facially neutral” describes rules that do not expressly restrict Section 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity. *See Boeing*, 365 NLRB No. 154 at p.1 fn. 4.

<sup>8</sup> General Counsel Memorandum 18-04, *Guidance on Handbook Rules Post-Boeing* (June 6, 2018).

<sup>9</sup> *Id.*; *see also Boeing Co.*, 365 NLRB No. 154, at 10 fn. 43 (“[T]he Board has consistently misapplied an evidentiary principle that ambiguity in general work language must be construed against the drafter.”); *Lafayette Park Hotel*, 326 NLRB 824, 829-30 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999), *overruled on other grounds sub nom. Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017).

<sup>10</sup> *Boeing Co.*, 365 NLRB No. 154, at p. 4 fn.14, p. 17 fn. 80.

the General Counsel has not proffered and cannot proffer any evidence regarding actual impact of the confidentiality provision on NLRA rights. *Id.*, at 14. Indeed, the events giving rise to this litigation confirm the same – the Charging Party was not disciplined for her violation of any provision in the Code. Exh. E, ¶ 4. Rather, the Charging Party was terminated for her unproductive and unprofessional workplace behavior after she accessed her supervisor’s password-protected personal employee account without her supervisor’s knowledge or consent. The decision-makers at Store No. 1573 in Mill Creek, Washington did not rely on, or even consider, any provision in the Code in making their disciplinary decision. *Id.* The events related to the Charging Party are not unique. In fact, Lowe’s is not aware of any employee being subject to discipline for discussing salary information in the workplace or for violating the confidential information provision in any version of its Code. Here, like *Boeing*, there is no allegation that the confidential information provision actually interfered with any type of Section 7 activity, nor is there any evidence that the provision prevented employees from engaging in protected activity.

Moreover, the confidentiality provision does not prohibit employees from exercising their Section 7 rights. Even if it is assumed the underlying rule has any impact on Section 7 rights (which it does not), the impact of the rule would be relatively slight when compared to Lowe’s interest in preventing disclosure of proprietary and confidential information. A reasonable reading of the entire provision, which is required by Board precedent, evidences an effort by Lowe’s to maintain the privacy of its confidential and proprietary information and not an effort to infringe on Section 7 rights. Nevertheless and despite this obligation, it is clear the ALJ did not reasonably read the rule as she was required.<sup>11</sup>

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<sup>11</sup> Indeed, “[a]mbiguities in rules are no longer interpreted against the drafter”, “generalized provisions should not be interpreted as banning all activity that could conceivably be included” and the analysis must be viewed from any objectively reasonable employee who is “aware of his legal rights.” General Counsel

The Board has consistently upheld an employer's efforts to protect their confidential and proprietary information through confidentiality agreements and policies so long as they are tailored to protect the interests of the employer and would not be broadly construed to prohibit employees from engaging in protected activity. *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998) ("Clearly, businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information.") An employee who discloses information an employer is privileged to protect for reasons of confidentiality is not engaged in protected activity, and therefore, a rule regulating or preventing such disclosure does not run afoul of the NLRA. *See Macy's, Inc.*, 365 NLRB No. 116, at p. 4 (2017) ("the Board has repeatedly held that employees may be lawfully disciplined or discharged for using for organizational purposes information improperly obtained from their employer's private or confidential records."); *Asheville School, Inc.*, 347 NLRB 877, 881 (2006) (employee's disclosure of wage information of other employees not protected since the employer "considered the...information to be confidential"); *Int'l Business Machines Corp.*, 265 NLRB 638 (1982) (employer's confidentiality policy preventing the disclosure or distribution of wage data lawful because the employer had "established substantial and legitimate business justifications for its policy.")

Applying the first prong of the Board's balancing test in *Boeing*, the confidential information provision contained in the Code is narrowly tailored to protect Lowe's confidential and proprietary information and therefore would have no impact on Section 7 rights for Lowe's employees, as it does not directly or indirectly prohibit employees from discussing wages, hours,

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Memorandum 18-04, *Guidance on Handbook Rules Post-Boeing* (June 6, 2018); *see also Boeing Co.*, 365 NLRB No. 154, at fn. 14, 43, 80.

or terms and conditions of employment. There is no evidence regarding the impact the confidentiality provision would have on Section 7 rights. Even if there was, a plain reading of the provision demonstrates that impact on Section 7 rights, if any, is slight. For example, the confidential information provision only concerns information *entrusted* to Lowe's employees, third party business partners, or non-executive members of its Board of Directors by Lowe's, its suppliers, customers, or competitors. It does not include all information related to wages, hours, or terms and conditions of employment and, therefore, would not reasonably restrict an employee's ability to communicate about the same.

Furthermore, the confidential information provision is lawful because Lowe's legitimate justifications associated with the rule are outweighed by any impact on Section 7 rights. "An employer may implement and maintain a rule restricting protected activity, so long as there is an overriding interest in doing so." *Heartland Coca-Cola Bottling Co., LLC*, 2017 WL 4803581, at \*2 (Oct. 23, 2017) (citing *Flagstaff Med. Ctr., Inc.*, 357 NLRB 659, 662-663 (2011)). Even before the Board's holding in *Boeing* in which business justifications are required to be considered in determining the validity of a work rule, the Board found that an employer's work rules and policies do not infringe on Section 7 rights in violation of the NLRA when the rule or policy is supported by an important business justification. *See, e.g., Flagstaff*, 357 NLRB 659, 663 (2011).

Indeed, the Board has held that employers do not violate the NLRA by promulgating a rule when the employer has a business justification for its implementation.<sup>12</sup> *See, e.g., Charles*

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<sup>12</sup> The General Counsel, too, gives weight to legitimate business justifications:

Employers have an obvious need to protect confidential and proprietary information, as well as customer information. Customer information may include records of past purchases, which may affect an employer's decisions concerning inventory and marketing, among other things. Customers also routinely provide businesses with their personal information, such as credit card numbers, with the reasonable expectation that the business will protect that information.

*Schwab & Co., Inc.*, 2017 WL 2773896 (June 26, 2017) (“Given the strong interest in maintaining public confidence in the securities and banking industries, and the clearly stated and well-known obligation under federal and industry regulations not to engage in acts of misrepresentation and other misleading conduct that would undermine that interest, Schwab’s employees would not reasonably interpret the subject rule as a prohibition on protected concerted activity.”); *S. Bakeries, LLC*, 2017 WL 2000718 (May 11, 2017) (“Respondent has established a pervasive and compelling interest in its proprietary information. In particular, Respondent has established a compelling interest in not allowing photographs that might reveal its production of baked goods pursuant to co-manufacturing agreements with other companies.”).

Lowe’s has an overriding interest to protect proprietary information that gives it a competitive advantage in the marketplace. In *Boeing*, the Board found that “[i]n some instances, ...the justifications associated with particular rules may be self-evident, or the justifications associated with particular rules may be apparent from the rule itself of the Board’s experience with particular types of workplace issues.” *Id.* at p. 16. In this case, the confidential information provision is self-evident and is justified to avoid unethical business conduct and unfair competition by members of the Lowe’s community who have been entrusted with competitively sensitive information, including wage data.<sup>13</sup>

Like the permissible no-camera rule in *Boeing*, which played a “key role in ensuring that Boeing complies with its federally mandated duty to prevent the disclosure of export-controlled

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Employers have a compelling interest in prohibiting the disclosure of such information to protect their business reputation and avoid significant legal liability.

General Counsel Memorandum 18-04, at 11 (June 6, 2018).

<sup>13</sup> The ALJ further erred by inferring that an employer’s business justification must be supported by “witness testimony and documentary evidence...to support [the] claimed business justification...” (Decision 8:4-5). However, *Boeing* expressly rejects this notion. There, the Board recognized that the “justifications associated with particular rules may be apparent from the rule itself or the Board’s experience with particular types of workplace issues.” *Id.* at 15. As such, the Board confirmed that evidence or testimony is not required for the Board to recognize the justifications associated with a particular work rule. *See id.*

information,” the confidential information provision in the Code was promulgated to ensure Lowe’s compliance with antitrust laws. *See Boeing*, 365 NLRB No. 154 at p. 18. Additionally, just as the no-camera rule in *Boeing* “helps prevent the disclosure of [its] proprietary information” (which was defined as “any nonpublic information that has potential economic value to Boeing”), the confidential information provision in the Code is designed to prevent the disclosure of Lowe’s confidential information which has been entrusted to members of the Lowe’s community. In fact, measures such as the confidential information provision in the Code “are critically important” and justified. *Id.* at p. 18.

Significantly, the definition of confidential information does not implicate any Section 7 activity. There is no question that the Act only protects concerted activities by two or more employees for the purpose of mutual aid or protection. *Boeing*, 365 NLRB No. 154 at p. 19. Using customer or supplier information for personal gain “certainly falls outside the Act’s protection.” *Id.* at p. 19. *See also International Business Machines Corp.*, 265 NLRB 638 (1982) (employee was lawfully discharged for disclosing wage data employer had compiled and classified as confidential). The Board has repeatedly held that employees may be lawfully disciplined or discharged for using information improperly obtained from their employer’s private or confidential records for organizational purposes. *See Ridgeley Mfg. Co.*, 207 NLRB 193, 196-197 (1973), *enfd.* 510 F. 2d 185 (D.C. Cir. 1975); *Flex Frac Logistics, LLC*, 360 NLRB 1004, 1005 (2014) (employee lawfully discharged for reviewing confidential information contained in employer’s files despite the fact that the information “arguably implicated concerns underlying the Section 7 rights of others”); *International Business Machines Corp.*, (employee had Section 7 right to discuss wages in an attempt to learn what others were paid, but not to disseminate employer’s own confidential compilation of wage data); *Roadway Express*, 271

NLRB 1238, 1239-1240 (1984) (employee lawfully discharged for taking bills of lading from employer's files, copying them, and providing copies to the union); *Bullock's*, 251 NLRB 425, 426 (1980) (employee lawfully discharged for wrongfully obtaining and copying confidential performance reviews in connection with challenge to employer's evaluation policy). These cases support Lowe's strong interest in maintaining the confidentiality of its confidential information. Here, that interest outweighs any minimal impact the confidentiality requirement might have on Section 7 rights.

The underlying confidentiality provision falls squarely within what the Board has described as "Category 1" rules which do not violate the Act. Because any minimal adverse impact on NLRA rights is outweighed by substantial and important justifications associated with the former confidentiality rule, Lowe's former maintenance of the confidentiality rule does not unlawfully interfere with protected rights in violation of the Act.

**B. The ALJ's Remedy is Overly Broad and Unnecessary**

Because the underlying confidentiality provision does not violate the Act, the exceptions should all be sustained and the Amended Complaint should be dismissed. Indeed, there is no need to remedy a rule that is lawful.

Nevertheless, assuming *arguendo* the Board does not find the underlying confidentiality rule lawful, the ALJ's remedy is unnecessary and overly broad. The ALJ has ordered that Lowe's former confidentiality provision be rescinded *or* revised. (Decision 10:41-43). Yet, Lowe's has already rescinded the confidentiality provision. The confidentiality provision at issue in this matter was rescinded, in its entirety, in August of 2018, as part of a routine process of revising policies from time to time. As such, the remedy to rescind *or* revise the underlying rule is unnecessary. *See UPS Supply Chain Solutions, Inc.*, 364 NLRB No. 8 (2016) (noting the Board's remedial authority is "strictly limited to measures that are remedial, not punitive.").

Furthermore, the reprinting and notice requirements of the remedy and order would cause undue confusion for employees. The requirements to notify employees and post notice regarding changes to the rules are illogical because the proposed notice (the “Appendix” to the Decision) pertains to a rule which has already been rescinded. The ALJ’s order to “furnish employees with inserts for the Code of Business Conduct and Ethics ...that advise that the unlawful rules have been rescinded” is particularly unreasonable because it would require re-printing a document that is no longer in use. (Decision 10:37-43). Doing so would only serve to confuse employees and would run the substantial risk of chilling Section 7 activity.

Indeed, the remedy and order are contrary to the purpose of the Act. Lowe’s has already rescinded the underlying confidentiality provision without an order from the Board. If the Board were to implement the remedy and order after Lowe’s has made proactive changes, this would only serve to dis-incentivize employers from proactively changing rules without Board involvement. Employers have little incentive to make prompt changes to work rules if they know they will later be forced to reprint rules and provide notice to employees about rules that were changed years prior.

As explained by Member Johnson in his dissent in *Boch Honda*, the Board should not discourage employers from proactively taking actions to remedy alleged unfair labor practices:

[W]here there has been no overt interference with Section 7 activity and an employer has taken pains to fully comply with the Act through a line-by-line revision of its handbook in cooperation with the Region and with its approval, Passavant need not be applied with hyper-technical precision. [Internal citations omitted.] Doing so discourages respondents from taking such actions to remedy alleged unfair labor practices far more promptly than after sometimes lengthy and expensive litigation.

*Boch Honda*, 362 NLRB No. 83 (2015) (Member Johnson, dissenting) (citing *River’s Bend Health & Rehabilitation Service*, 350 NLRB 184 , 193 (2007) (finding repudiation adequate

despite that it “does not completely accord with the *Passavant* criteria with regard to timeliness and lack of ambiguity”); *Broyhill Co.*, 260 NLRB 1366 (1982) (rejecting dissenters’ application of *Passavant* criteria “in a highly technical and mechanical manner”).

Lowe’s voluntary act of rescinding the underlying confidentiality provision served the purpose of the Act; although Lowe’s believes the underlying rule was permissible, it rescinded the entire rule, including the language found by the General Counsel to be objectionable. Implementing the ALJ’s remedy and recommended order at this juncture would be punitive rather than remedial and would only serve to dis-incentivize such proactive changes by employers, which is contrary to the purpose of the Act. *See Landry’s, Inc. and its Wholly Owned Subsidiary Bubba Gump Shrimp Co. Restaurants, Inc.*, 362 NLRB No. 69 (2015) (in a case involving an allegedly unlawful work rule that the employer had already revised, the Board found that “it would not effectuate the purpose of the Act to find a violation” because the rule had already been revised and to impose a remedy “could be characterized as punitive rather than remedial”).<sup>14</sup>

Moreover, the order is vague and confusing as it gives Lowe’s the option of “provid[ing] lawfully worded rules” but provides no guidance to this effect. Indeed, by virtue of giving Lowe’s the option to rescind *or* revise its confidentiality provision (Decision 10:41-43), it follows that a significant portion of the confidentiality provision is lawful; but the ALJ does not expand on her rationale. The ALJ does not delineate which words or phrases contained in the confidentiality provision violate the Act. Because the ALJ offers no clarity on this substantial point, if Lowe’s were to revise its confidentiality provision, Lowe’s would need to speculate as

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<sup>14</sup> Given Lowe’s voluntary act of rescinding the underlying confidentiality provision, the *Landry’s* decision supports the well-reasoned conclusion that there can be no violation of the Act. As such, at the very least, the Board should find the remedies imposed by the ALJ are unnecessary and violate the remedial purposes of the Act.

to whether its revision would pass muster. As such, this portion of the ALJ's Decision is unfair to Lowe's and should be stricken from the recommended order.

Finally, the ALJ's recommended order that Lowe's post the "Appendix" on a nationwide basis is overbroad. Customarily, the Board confines the notice-posting requirements of its orders "to the facilities at which the violations were committed." *Consolidated Edison Co. of New York*, 323 NLRB 910, 911-912 (1997). Thus, if a nationwide employer commits an unfair labor practice at five of its one hundred facilities, the remedy should include a notice posting at only those five facilities. Nevertheless and despite this precedent, the ALJ impermissibly issued her recommended order that Lowe's post "at its facilities nationwide, copies of the [] notice..." (Decision 11:1-2). The ALJ issued this recommended order without allegation or evidence that any Lowe's employee had been disciplined for violating the underlying confidentiality rule. Indeed, even the Charging Party was not disciplined for violating the underlying confidentiality provision. Exh. E, ¶ 4. As such, the recommended order requiring Lowe's to post notice on a nationwide basis must be removed from the remedy. *See Albertson's, Inc.*, 351 NLRB 254, 384-385 (2007) (requiring a notice posting for facilities in the respondent's Rocky Mountain division, and not for facilities in a larger geographic region, because the bulk of the unfair labor practices occurred in the Rocky Mountain division); *see also Laborers Local 158 (Contractors of Pennsylvania)*, 280 NLRB 1100 (1986) (deleting overbroad remedy).

## VI. CONCLUSION

Based on the foregoing, the Board should sustain Lowe's Exceptions to the Administrative Law Judge's Remedy and Order and dismiss the Amended Complaint in its entirety.

Respectfully submitted this 3rd day of December, 2018.

**LOWE'S HOME CENTERS, LLC**

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**CERTIFICATE OF SERVICE**

I certify that on this 3rd day of December, 2018, I caused a true and accurate copy of the foregoing to be electronically filed with the National Labor Relations Board at <http://nlrb.gov> and a copy of same to be served via email on the following parties of record:

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