

No. 20-60472

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

LOWES HOME CENTERS, L.L.C.,
[Petitioner Cross-Respondent]

v.

NATIONAL LABOR RELATIONS BOARD,
[Respondent Cross-Petitioner]

Petition for Review of Decision and Order of the
National Labor Relations Board, Case No. 19-CA-191665

PETITIONER'S REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Lowe's Home Centers, LLC, Petitioner. Lowe's Home Centers, LLC is a manager-managed limited liability company, whose only member is Lowe's Companies, Inc. Lowe's Companies, Inc. is a publicly held corporation, and its shareholders, officers and directors have an interest in the outcome of this case. Lowe's Companies, Inc. has

no parent corporation, and no publicly held corporation owns 10% or more of its stock.

2. Peter J. Rusthoven, Peter A. Morse, Jr., David J. Pryzbylski, and Peter J. Wozniak are counsel of record in this case for Petitioner Lowe's Home Centers, LLC. All named attorneys for Petitioner are affiliated with the law firm of Barnes & Thornburg LLP.

3. As the Respondent National Labor Relations Board is a governmental entity, it is not among the parties described in the fourth sentence of Rule 28.2.1.

/s/ Peter J. Rusthoven
Peter J. Rusthoven
Counsel of Record for Petitioner
Lowe's Home Centers, LLC

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INTRODUCTION

The Board says Lowe’s “waived” its arguments, pursuant to Section 10(e) of the Act, by not moving the Board to reconsider its decision.

Not so. The crucial Section 10(e) inquiry—which the Board leaves out—asks only whether it had “adequate notice” of an issue. In this Court’s summary, no motion to reconsider is needed if “the Board already understood the issue.” *Indep. Elec. Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543, 551 (5th Cir. 2013). Here, the ALJ ruling, the Lowe’s exceptions to it, and the Board decision itself leave no doubt the Board had more than “adequate notice” of the issues on appeal.

On the merits, the Board’s Brief further illustrates that its decision disregarded *Boeing*, applying instead a “double-negative” paraphrase of the *Lutheran Heritage* “reasonably construe” test that *Boeing* overruled.

The Board also argues what no one disputes—to wit, that rules can’t bar workers from discussing their *own* wages. The Board has no persuasive response to the actual, dispositive point: Lowe’s Rule—read, as the law requires, reasonably and in context—does no such thing,

At bottom, the Board treats *any* reference to wages or salary as a *per se* violation. Full stop. That’s not the law. The Court should reverse.

ARGUMENT ON REPLY

I. Lowe's Didn't Waive The Issues It Presents.

A. Section 10(e) Requires Only that the Board Have "Adequate Notice" of an Issue Raised on Appeal.

In claiming Lowe's arguments were waived under Section 10(e), 29 U.S.C. § 160(e), the Board omits the simple, dispositive inquiry on any such claim: Did the Board have "adequate notice" of the issue?

"The crucial question in a section 160(e) analysis is whether the Board 'received adequate notice of the basis for the objection.'" *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 437 (3d Cir. 2016) (quoting *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 521 (8th Cir. 2016) (quoting in turn *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 985 (D.C. Cir. 2001))). "Section 10(e) does not ... 'deprive the court of jurisdiction if the [party] gave the Board adequate notice of the argument it seeks to advance on review.'" *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14, 24 (1st Cir. 2007) (quoting *Am. Postal Workers Union v. NLRB*, 370 F.3d 25, 28 (D.C. Cir. 2004)) (other internal quotations omitted).

The adequate notice standard comports with the statutory purpose. "This section furthers 'the salutary policy ... of affording the Board an opportunity to consider on the merits questions to be urged on review of

its order.” *Consol. Freightways v. NLRB*, 669 F.2d 790, 793 (D.C. Cir. 1981) (quoting *Marshall Fields & Co. v. NLRB*, 318 U.S. 253, 256 (1943)). Hence, “lack of a motion for reconsideration [is] not fatal [if] the Board already understood the issue.” *Indep. Elec. Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543, 551 (5th Cir. 2013) (citing *Bath Marine*).¹

A petitioner that “completely fails to raise an issue during” a Board proceeding has indeed “forfeited its right to challenge the Board’s disposition.” *Nathan Katz*, 251 F.3d at 986 (citation & internal quotation marks omitted). Likewise, “a generalized objection to ‘each and every recommendation’ of an ALJ” is insufficient. *Consolidated Freightways*, 669 F.2d at 793 (quoting *Marshall Fields*, 318 U.S. at 255) (other internal quotation marks omitted). So, too, is merely objecting that something is “unsupported by evidence and contrary to law.” *Id.* (citing *NLRB v. Seven Up Bottling Co.*, 344 U.S. 344, 350 (1953)).

¹ As in *International Electrical*, this Court commonly cites decisions in other Circuits on NLRA issues. *E.g. Hallmark Phoenix 3, L.L.C. v. NLRB*, 820 F.3d 696, 707 (5th Cir. 2016) (citing *Bath Marine* and Fourth Circuit case on “sound arguable basis” test for modifying collective bargaining agreement); *Macy’s, Inc. v. NLRB*, 844 F.3d 188, 193 & n.4 (5th Cir. 2016) (six-judge dissent from denial of rehearing *en banc*) (noting agreement of “Fifth Circuit and sister circuits” on aspect of “community of interest” test for bargaining units; citing Third and Eighth Circuit *FedEx Freight* decisions).

But “adequate notice” doesn’t mean petitioners waive anything not recited *in haec verba* to the Board. Courts reject “hyper-refinement of party obligations under § 10(e).” *HTH Corp. v. NLRB*, 823 F.3d 668, 674 (D.C. Cir. 2016). Indeed, even an objection that fails to “specify the attributes of [Board action] that called for special judicial concern”—which might otherwise be insufficient—yields no waiver “when the issues implicated by an imprecisely drafted objection are made evident by the context in which it is raised.” *Id.* at 673 (quoting *Consolidated Freightways*, 669 F.2d at 794). *See May Dep’t Stores Co. v. NLRB*, 326 U.S. 376, 386 n.5 (1945) (vague exception to paragraph including cease and desist order as “not supported or justified by the record” sufficient to preserve issue of the proper scope of that order); *NLRB v. Blake Constr. Co.*, 663 F.2d 272 (D.C. Cir. 1981) (objections regarding scope of complaint, substantiality of proof and ALJ’s conduct of proceeding adequate to preserve due process objections); *Florence Printing Co. v. NLRB*, 376 F.2d 216, 222 (4th Cir. 1967) (objection to sufficiency of proof preserved objection to placement of the burden of proof).

Consolidated Freightways, after summarizing the three cases just cited in precisely these words, reiterates the key question governing

application of Section 10(e): “In each case, the critical inquiry is whether the objections made before the Board were adequate to put the Board on notice that the issue might be pursued on appeal.” 669 F.2d at 794.

Courts sensibly apply this test. In *Bath Marine, e.g.*, the Board said Section 10(e) barred the union petitioners “from arguing that the General Counsel alleged a § 8(a)(5) unilateral change violation because the Unions did not move for reconsideration of the Board’s *sua sponte* holding.” 475 F.3d at 24. The Court disagreed. The General Counsel’s complaint “could have been clearer”; but “the Board’s own discussion below [of] arguments [that] are relevant only to § 8(a)(5) claims” showed it “had adequate notice that the General Counsel and the Unions believed that the § 8(a)(5) unilateral change issue was before the Board.” *Id.*

To repeat this Court’s summary: Section 10(e) doesn’t require moving to reconsider when “the Board already understood the issue.” *Independent Electrical*, 720 F.3d at 551 (5th Cir. 2013). Indeed, even a short, unelaborated reference may suffice; it need only give the Board adequate notice that the issue may be pursued on appeal. *E.g., FedEx Freight*, 832 F.3d at 438 (“Despite the Board’s arguments to the contrary, FedEx’s footnote in its petition for review provided sufficient notice”).

B. The Board Had More Than Adequate Notice of the Issues Lowe’s Presents in its Petition for Review.

(1) The first issue presented by Lowe’s Petition for Review—*i.e.*, whether the Board, in evaluating Lowe’s Rule, failed to follow *Boeing’s* departure from the former *Lutheran Heritage* standard—was at the heart of the agency proceedings here.

The ALJ set this critical context at the outset of her decision, noting that she invited and received supplemental briefing precisely because *Boeing* established “a new balancing test to matters involving alleged unlawful employers’ rule,” thereby “overruling portions of the standard set forth in *Lutheran Heritage*.” [ROA.171] The Decision’s “analysis” section then discussed *Boeing* at great length, including addressing the ALJ’s views of how it differed from *Lutheran Heritage*. [ROA.172-74]

The ALJ missed a key difference by construing against Lowe’s claimed “ambiguities” in its Rule. As the Board stated, *Boeing* “clearly rejected” this. [ROA.174 n.1] But there’s no question that *Boeing* and its alteration of the *Lutheran Heritage* standard were a centerpiece of the ALJ’s reasoning and recommendation.

The same is true of Lowe’s’ Exceptions Brief to the Board on the ALJ decision. The Board lodged that Brief with the Court, saying it

showed Lowe's opening Brief here "raises arguments not brought before the Board." [Doc. 515672683 at 1] In fact, the Exceptions Brief's "Argument and Analysis" start with over four pages detailing the *Boeing* standard; how the new standard differs from *Lutheran Heritage*; and how the ALJ misapplied *Boeing* here. Exceptions Br. 6-10. The Board could have no doubt whatever that a centerpiece of Lowe's objection was that *Boeing's* departure from *Lutheran Heritage* showed that Lowe's Rule should be upheld.

And the Board had no such doubt. Its decision centered on whether Lowe's Rule was valid under *Boeing*. While noting the ALJ's mistaken use of *Lutheran Heritage's* discarded rule on construing ambiguities, the Board otherwise adopted the ALJ's views and rejected Lowe's claim that *Boeing's* departure from *Lutheran Heritage* required a different result. As in *Bath Marine*, "the Board's own discussion" shows it "had adequate notice" that this "issue was before [it]." 475 F.3d at 24. Here, it was *the* issue presented, underscored by the Board noting that one panel member "adheres to her dissent in *Boeing*" [ROA.174 n.1]). *See FedEx Freight*, 832 F.3d at 438 (one Board member's "concurrence reflects the Board's acute awareness" of the issue Board now claimed had been "waived").

In short, it's evident "the Board already understood the issue" Lowe's pursues on appeal, without needing "a motion for reconsideration" to open the Board's eyes to Lowe's contentions. *Independent Electric*, 720 F.3d at 551. Lowe's didn't waive its argument that the Board failed to follow *Boeing's* departure from *Lutheran Heritage*.

(2) Lowe's also didn't waive its argument that the Board misconstrued Lowe's Rule and failed to consider its legitimate justifications.

The ALJ and Board read the Rule as barring Lowe's employees from discussing their *own* wages with each other. The linchpin of this "construction" was viewing an employee's own wages as proprietary information Lowe's "entrusted" to the employee. As Lowe's showed in its opening Brief here (*e.g.*, Br. 21-27), this is an unnatural, unreasonable reading that disregards the Rule's actual purpose, effect and justifications.

The Board's claim that Lowe's waived this argument bears no scrutiny. The ALJ decision explicitly summarized Lowe's' contention:

[Lowe's] argues that the Confidential Information provision relates to situations in which a person *who is entrusted with non-public information* relating to [Lowe's] business shares such information; [Lowe's] argues that the Confidential Information provision *does not prohibit employees from discussing salary information with one another*.

[ROA.172 (emphasis added)]

In briefing the Board on its exceptions to the ALJ decisions, Lowe’s emphasized that the Rule’s “confidentiality provision” starts as follows: “Employees must maintain the confidentiality of information entrusted to them by Lowe’s, its suppliers, its customers, or its competitors” Exceptions Br. 4 (quoting Rule) (italics & underscoring in original). The Exceptions Brief then explicitly argued that:

- “[A]nalysis of work rules ... must ‘consider the *context* in which the rule was applied and its actual impact on employees.’”

Exceptions Br. 9 (quoting *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001)) (Brief’s emphasis).

- “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.’”

Exceptions Br. 9 (quoting *Echostar Techs., LLC*, Case 27-CA-66726, 2012 WL 4321039, at 9 (NLRB Div. of Judges (Sept. 20, 2012))).

- Indeed, Board precedent showed that a “reasonable employee would interpret text based on surrounding text.” Exceptions Br. 9 (citing *Tradesmen Int’l*, 338 NLRB 460, 461 (2002)).

- Likewise, caselaw showed the NLRB must examine the “context of [a] rule and its location in the manual,” which can refute a Board decision that a rule is “unlawful on its face.” Exceptions Br. 9 (citing *Aroostook Cty. Reg’l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 212-13 (D.C. Cir. 1996) (reversing Board)).
- “[T]he confidentiality provision does not prohibit employees from exercising their Section 7 rights.” Exceptions Br. 11.
- “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.” Exceptions Br. 11.

The Board decision itself recognized Lowe’s was arguing that an employee’s own salary wasn’t confidential information “entrusted” to the employee—meaning the Rule didn’t prevent employees discussing their own wages with each other—but that the Board *rejected* that argument:

[Lowe’s] limitation of covered proprietary information to information “entrusted” to employees was insufficient to convey to a reasonable employee that the policy’s restriction on disclosure of salary information did not interfere with employees’ exercise of their core Sec. 7 right to engage in protected discussion or disclosure of their own salaries Indeed, for most employees without special access to confidential records, the only salary information they could

reasonably view as “entrusted” to them under this policy is their own salary information.

[ROA.174 n.1]

Again, the ALJ decision and Exceptions Brief show that the issue supposedly waived—to wit, “What is confidential data ‘entrusted’ to an employee, under a reasonable reading of Lowe’s Rule?”—was presented below. Again, “the Board’s own discussion” shows it “had adequate notice” that this “issue was before the Board.” *Bath Marine*, 475 F.3d at 24. Again, “the Board already understood the issue,” with no need for “a motion for reconsideration” to inform the Board that Lowe’s disagreed with its reading of “entrusted.” *Independent Electrical*, 720 F.3d at 551.

Nor does Section 10(e) bar the Court from looking at dictionaries or other potentially helpful materials (*e.g.*, how documents are construed in other contexts) unless the identical materials were cited to the agency. To reiterate the dispositive inquiry: “The crucial question” is whether the Board had “adequate notice of the basis for the objection” (*FedEx Freight*, 832 F.3d at 437), not whether every case, dictionary, or treatise cited to this Court was cited below. The Board had ample notice here.

(3) Finally, the Board’s saying that Lowe’s “waived” arguments about “judicial notice” and similar authority (Board Br. 33) is simply

misplaced. Lowe’s hasn’t argued that the Court should or may take “judicial notice” of some fact the Board disregarded below.

To the contrary: Lowe’s cited judicial notice cases (and other cases, as in antitrust contexts, where courts recognize simple economic reality) to underscore *that the Board was correct* to recognize as self-evident what the ALJ ignored: “[E]mployers have a legitimate interest in restricting employees’ unauthorized access to, and dissemination of, information stored in their employer’s confidential records, *including salary information contained in such records*” [ROA.174 n.1 (emphasis added)].

As Lowe’s made clear (*see* Br. 18-21), the Board’s mistake lay not in recognizing these legitimate, self-evident interests, but in saying such interests “were not present in this case” [ROA.174 n.1]. Such interests *are* present as to employees who were in fact “entrusted” with Lowe’s confidential information—in the Board’s words, “given access to [Lowe]’s confidential records” [ROA.174 n.1]. Again, these are the very employees to whom Lowe’s Rule was directed and applied. *Contra* the Board and ALJ, the Rule did not prohibit Lowe’s employees from discussing their *own* wages with other employees. *See also* Part III, *infra*.

II. The Board’s Brief Illustrates That Its Decision Applied The *Lutheran Heritage* Standard That *Boeing* Overruled.

The Board’s merits arguments on Lowe’s first issue—*i.e.*, that the Board failed to follow its *Boeing* standard, and instead applied its former *Lutheran Heritage* standard—are no better than its waiver contentions. Indeed, the Board’s arguments further illustrate that its decision here erroneously applied the *Lutheran Heritage* test that *Boeing* overruled.

(1) As Lowe’s pointed out (Br. 13-16), the Board’s core rationale for putting Lowe’s Rule in *Boeing* Category 3 “unlawful” slot was the “reasonably construe” test that *Boeing* expressly overruled. To repeat: There’s no practical difference between saying (a) “employees would reasonably construe [a rule’s] language to prohibit Section 7 activity” (*Lutheran Heritage*, 343 NLRB at 647), and (b) the rule’s language “was insufficient to convey to a reasonable employee” that it “did not interfere with employees’ exercise of their core Sec. 7 right” (the rationale below). Under either formulation, a workplace rule is invalidated based on how it supposedly might “reasonably” be read by a “reasonable” employee.

The Board’s response (Br. 27) is an *ipse dixit*: “Simply because the Board used language that is similar to *Lutheran Heritage* does not mean that the Board applied the overruled ‘reasonably construe’ prong.” But

the Board never identifies any actual, meaningful difference between the *Lutheran Heritage* standard (“reasonable employee would construe rule” to prohibit Section 7 activity) and its “double-negative” reformulation below (“insufficient to convey to a reasonable employee that it would not” prohibit Section 7 activity). Nor does the Board identify any workplace rule that would be (a) invalid under *Lutheran Heritage*, but (b) permissible under its double-negative paraphrase of *Boeing*.

The short answer remains the correct one: There is no difference. Certainly, there is no practical difference that could inform and guide the conduct of employees, unions, or employers in complying with the Act.

(2) The Board makes a three-page argument (Br. 18-21) for the proposition on which its case depends—to wit, “The Board reasonably read [Lowe’s Rule] to prohibit employee from discussing their salaries.” This argument cites a single case to support that proposition: *Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205 (5th Cir. 2014).

Here is how the Board cites that case (Br. 20): “*Flex Frac*, 746 F.3d at 207 (applying *Lutheran Heritage* ‘reasonably construe’ test).”

Lowe’s respectfully submits that this highlights that the Board made and now defends its decision using the very test *Boeing* overruled.

(3) As below, the Board agrees *Boeing* rejected the *Lutheran Heritage* view that workplace rule ambiguities are construed against employers. But the Board now says (Br. 28) that ‘Lowe’s misrepresents the [ALJ]’s decision as relying solely on ambiguities to find its confidentiality rules unlawful.’”

Well. Here’s what the ALJ said in rejecting Lowe’s’ view that reasonable reading of “entrusted” refuted the notion that employees are somehow “entrusted” with—and thus somehow barred from discussing—supposedly “confidential information” on their *own* salaries:

Respondent argues that the term “entrusted” indicates that the information covered by the rule would not cover wages, and that the focus of the Confidential Information rules are to avoid unfair competition and sharing of proprietary information. However, the Confidential Information rule in the Original Code is not limited to only sharing information with competitors, but includes overbroad, ambiguous language of sharing confidential information “harmful to Lowe’s.” *Any ambiguities in a rule are construed against the drafter*, and here, “focusing on the perspective of employees,” *the Confidential Information rule could not be read as Respondent offers*.

[ROA.173] (citing *Boeing* [!]) (emphasis added)]

While rejecting the ALJ’s dispositive use of this discarded *Lutheran Heritage* principle, the Board itself then failed to read Lowe’s Rule in its textual, factual context, as required by the NLRB and caselaw authority

cited in Lowe's Exceptions Brief (*see supra* at 9-10). The Board never even addressed that authority. As shown, it instead replaced the ALJ's mistaken use of *Lutheran Heritage* with the Board's own, equally mistaken "double-negative" paraphrase of the *Lutheran Heritage* "reasonably construe" test that *Boeing* overruled.

The Board's quibbling here can't obscure that the ALJ plainly did reach her mistaken reading of Lowe's Rule by construing supposed "ambiguities" against Lowe's, and that the Board itself then substituted its own mistaken reliance on discarded *Lutheran Heritage* reasoning.

(4) The Board actually disputes that application of the *Boeing* standard *could* require a different outcome on a workplace rule's validity from application of its discarded *Lutheran Heritage* test.

Lowe's, after pointing out that "*Boeing* is governing law," added the following, equally unexceptionable point: "As this Court and others recognize, *Boeing* can require upholding work rules that may arguably have been invalid under now-discarded *Lutheran Heritage* standards." Lowe's Br. 11-12 (citing cases from this and other Circuits, remanding a total of 10 Board decisions made under the *Lutheran Heritage* test for reconsideration under the *Boeing* standard).

But the Board now tells the Court this is wrong:

Whether *Boeing* can “require” finding work rules lawful that would have been deemed invalid under *Lutheran Heritage* is *not*, as Lowe’s contends, a principle that the Board or the courts have recognized. The precedent that Lowe’s relies on simply reflects the Board’s routine and uncontroversial request to remand Board decisions that applied *Lutheran Heritage* back to the Board for it to reconsider a work rule under the *Boeing* standard.

Board Br. 29 n.5 (emphasis added) (citations to Lowe’s Brief omitted).

In all candor, this makes no sense. There’s no reason to make *any* remand request, even a “routine and uncontroversial” one, unless the new test to be applied on remand may indeed “require” a different result from applying the former test that has since been overruled. The cases weren’t remanded so the Board could issue the identical decision, but simply substitute “*Boeing*” for every cite to “*Lutheran Heritage*.”

This, too, illustrates the Board’s failure to recognize that *Boeing* requires more than mere paraphrase of its *Lutheran Heritage* test.

III. The Board’s Brief Continues To Misconstrue Lowe’s Rule, And To Disregard Its Actual, Legitimate Justifications.

Another theme of the Board’s Brief, on which it spills considerable ink, is that Lowe’s had no justification for prohibiting employees from discussing their own salaries with each other. For example:

- The “Issue Presented” is whether the Board’s finding that Lowe’s violated the Act, because its Rule “restrict[s] employees from discussing salary information with each other,” should be affirmed. Board Br. 2.
- The Board’s holding that *Boeing* “foreclosed any business justification comports with longstanding Board and circuit law invalidating confidentiality rules that prevent employees from discussing their wages and finding that no legitimate purpose could warrant such a restriction.” Board Br. 10.
- “[E]ven if *Boeing* allowed consideration of Lowe’s business justifications, the Board properly found that Lowe’s had not presented any evidence that its confidentiality concerns warranted such a broad restriction on employees’ Section 7 rights” (*i.e.*, prohibiting discussion of their own wages with each other). Board Br. 11.
- Lowe’s “misreads *Boeing*, which “already balanced employees’ Section 7 right to discuss their wages against any possible employer justification for infringing on that right, and found that the Section 7 rights prevailed.” Board Br. 32.

- “Even considering Lowe’s justifications for its rule ([Lowe’s] Br. 19-27), none of them warrants infringing on employees’ right to communicate about their salaries with each other.” Board Br. 32.

All these arguments entirely miss the point. Lowe’s *did not and does not* contend it has legitimate justification to prohibit employees from discussing their *own* salaries (or engaging in any other protected Section 7 activity). It contends here, as it has *passim*, that its Rule *didn’t do this*.

Again, this is what Lowe’s’ Exceptions Brief said: “[T]he confidentiality provision does not prohibit employees from exercising their Section 7 rights.” Exceptions Br. 11. “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.” *Id.*

To use the Board’s own description of legitimate employer interests, the Rule simply prevented employees with *access* to “information stored in [Lowe’s] confidential records, including salary information contained in such records” [ROA.174 n.1], from disclosing such proprietary information. This, as the Board correctly recognized, is precisely what employers *do* “have a legitimate interest in protecting.” [ROA.174 n.1]

Lowe’s Rule did no more than protect that concededly legitimate interest. It didn’t purport to bar employees from discussing or sharing every piece of information they learn or receive. It simply said employees must maintain the confidentiality of proprietary information *entrusted* to them by Lowe’s.

Affirming the decision below requires the Court to sand-down the Rule’s specific, deliberately-used word—“entrust”—and replace it with a broader, all-inclusive term like “provide.” But “entrust” has a targeted, distinctly different meaning. Parents don’t *entrust* their children with Christmas gifts, or *entrust* the neighborhood kids with Halloween candy. Law firms don’t *entrust* first-year associates with legal pads on their first day. And when a manager tells an employee where the restrooms are, or how to exit the building during a fire—or what his or her job title or hourly wage will be—the manager’s not *entrusting* the employee with any of that information.

This is shown by dictionary definitions (Lowe’s Br. 22), which the Board tells the Court it must ignore (evidently believing the Board can’t be faulted for ignoring ordinary meanings of ordinary words if petitioners don’t cite dictionaries in agency proceedings). It’s also shown by “entrust”

synonyms, on which authorities new and old list terms like “confide,” “trust,” and “commit,” not the amorphous term “provide.”²

Adhering to the plain, ordinary meaning of “entrust” is reinforced by the Rule’s detailed explication of the “confidential information” to which it applied. The Rule didn’t reference “salary information” in a vacuum. It covered “*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.” [ROA.174 (emphasis added)] It utterly ignores context, and defies common sense, to conclude from this that a cashier in one of Lowe’s nearly 2,000 stores has been “entrusted” with “proprietary information related to Lowe’s business” on learning that he or she will make \$13.00 an hour, or may later earn a 10% raise.

In reaching and defending that untenable conclusion, the Board ignored its precedent, requiring a rule’s words to be read “in context” that “would clarify to a reasonable employee that Section 7 activity is not the type of conduct proscribed by the rule.” *Tradesman International*, 338

² *E.g.*, *Entrust*, THESAURUS.COM, <https://www.thesaurus.com/browse/entrust>; *Entrust*, SYNONYMS.COM, <https://www.synonyms.com/synonym/entrust> (same); ROGET’S INT’L THESAURUS § 816.16 (3d ed. 1962) (same).

NLRB at 461 (given surrounding context, rule’s “prohibition on ‘disloyal, disruptive, competitive, or damaging’ conduct [can’t] reasonably be read as encompassing Section 7 activity”). Lowe’s cited this case to the Board. Exceptions Br. 9. The Board was silent.

The Board also ignored pertinent caselaw. *Aroostook*, e.g., rejected the Board view that a “rule prohibiting employees from discussing ‘office business’ with ‘spouses, families or friends’ was a *prima facie* violation” of the Act. 81 F.3d at 212. When “read in context,” the rule didn’t bar employees from discussing with “family and friends” matters “pertaining to the employees’ terms and conditions of employment.” *Id.* at 212-13. It merely barred “employees from discussing *patient medical information* with persons outside of the office.” *Id.* at 213. This was shown by the rule’s placement “as the last sentence of a long discussion regarding patient confidentiality in which the term ‘office business’ is used to refer to confidential patient medical information.” *Id.*

Lowe’s cited *Aroostook* in pointing out to the Board that the context here refuted the notion that the Rule barred Lowe’s employees from discussing their *own* salaries. Exceptions Br. 9. The Board again was silent. Nor did it cite any case involving workplace rules using a term

like “entrust,” or listing “salary information” as the penultimate item on a lengthy delineation of financial and other confidential data explicitly described as “proprietary information related to the employer’s business.”

No. The Board simply lifted “salary information” from its context, and declared the Rule therefore fell “within the scope of *Boeing* Category 3.” [ROA.174 n.1] As bottom, this boils down to treating *any* reference to wages or salary—regardless of context, or an ordinary reader’s understanding of the language—as a kind of *Boeing* Category 3 “third rail.”

That’s not the law. Nor should it be.

CONCLUSION

The Court should grant Lowe’s petition, vacate the Decision, and hold that Lowe’s Rule did not improperly restrict Section 7 rights.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Reply Brief complies with the word limit of FED. R. APP. P. 32(a)(7)(B)(ii) because, excluding the parts of the Brief exempted by FED. R. APP. P. 32(f), this Brief contains 4,599 words.

2. This Reply Brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this Brief has been prepared in proportionally spaced typeface using Microsoft Word (2016) in 14-point Century Schoolcraft font (except for footnotes, which are in 12-point size of the same font, as permitted by Circuit Rule 32.1).

January 11, 2021

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CERTIFICATE OF SERVICE

This is to certify that on January 11, 2021 the foregoing Petitioner's Reply Brief has been served *via* the Court's ECF filing system, in compliance with FED. R. APP. P. 25(b) & (c) and Circuit Rule 25, on all registered counsel of record unless otherwise noted as follows:

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