G&E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank *and* Patrick Thurman. Case 28–CA–178893

July 16, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On November 19, 2018, the National Labor Relations Board issued an order remanding several facially neutral work rules maintained by the Respondent, and alleged to be unlawful, for analysis under *Boeing Co.*, 365 NLRB No. 154 (2017). On November 8, 2019, Administrative Law Judge Robert A. Ringler issued the attached decision on remand. The Respondent filed exceptions and a supporting brief. The General Counsel also filed exceptions and a supporting brief, and the Respondent filed an answering brief.[1]

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[3]

The judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining the following six policies in its employee handbook: Responsive Action, Outside Employment and Business Activities, Reference Inquiries and Requests for Employee Information, Company Property, Social Media, and Outside Speaking and Writing Activities. We find merit in the Respondent's exceptions regarding these rules and, accordingly, we reverse the judge's findings and dismiss these allegations. We also find merit in the General Counsel's exceptions based on the judge's failure to address the allegation that the Respondent violated Section 8(a)(1) by including the language "Confidential—For Internal Use Only" in the footer of every handbook page, and we herein find that violation.

I. LEGAL PRINCIPLES

In *Boeing*, above, the Board established a new standard for determining whether a facially neutral work rule, reasonably interpreted, would unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.[4] The Board overruled the "reasonably construe" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which held that a facially neutral work rule would be found unlawful if employees would reasonably construe it to prohibit Section 7 activity. Id. at 647. Instead, the Board in *Boeing* held that,

> 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.

Boeing, 365 NLRB No. 154, slip op. at 3 (emphasis in original).

In conducting this evaluation, the Board will strike the proper balance between the employer's asserted business justifications for the policy against the extent to which the policy interferes with employee rights under the Act, viewing the rule or policy from the employees' perspective. Id. Ultimately, the Board places work rules into one of three categories:

> *Category 1* will include rules that the Board designates as lawful to maintain, either because [(a)] the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or [(b)] the potential adverse impact on protected rights is outweighed by justifications associated with the rule. . . .

[1] Subsequently, the Board issued a notice to show cause why one allegation, regarding the Use of Company Information Technology Policy, should not be severed and remanded to the judge for further proceedings in light of the judge's reliance on *Purple Communications, Inc.*, 361 NLRB 1050 (2014), which was overruled by the Board in *Caesars Entertainment d/b/a Rio-All Suites Hotel & Casino*, 368 NLRB No. 143 (2019). The Respondent and the General Counsel each filed a response opposing remand to the judge. The Respondent contends the existing record sufficiently demonstrates that its policy is lawful under *Caesars Entertainment* and the complaint allegation should be dismissed. The General Counsel, similarly not seeing merit in the allegation under *Caesars Entertainment*, moves in his response to amend the complaint to withdraw the allegation. Pursuant to Sec. 102.17 of the Board's Rules and Regulations, we grant the General Counsel's unopposed motion to withdraw the allegation regarding the Use of Company Information Technology Policy, and we remand the allegation to the Regional Director for further appropriate action.

[2] No exceptions were filed to the judge's dismissal of allegations regarding the Respondent's Tape Recording Policy, Cooperation in Investigations and Litigation Policy, Personal Appearance Policy, or Standards of Conduct Policy.

[3] We shall amend the judge's conclusions of law consistent with our findings and legal conclusions herein. We shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language, as set forth in full below, and in accordance with our decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall also substitute a new notice to conform to the Order as modified.

[4] Reasonable interpretation of a rule is from "the perspective of an objectively reasonable employee who is aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA." *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019) (internal quotations omitted).

> *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Id., slip op. at 3–4 (emphasis in original).[5] These categories "represent a classification of *results* from the Board's application of the new test" and "are not part of the test itself." Id., slip op. at 4 (emphasis in original).

Under this classification scheme, if the General Counsel fails to meet his initial burden of establishing that a reasonable employee would interpret a rule as potentially interfering with the exercise of Section 7 rights, the analysis proceeds no further. *LA Specialty*, 368 NLRB No. 93, slip op. at 2. The rule at issue will be lawful and fit within *Boeing* Category 1(a). Id. If the General Counsel establishes that a reasonable employee would consider the rule to potentially interfere with Section 7 rights, the Board will then balance that potential interference against the employer's legitimate justifications for the rule. Id., slip op. at 3. When the balance favors the employer's interests, the rule at issue will be lawful and fit within *Boeing* Category 1(b). Id. When the potential interference with Section 7 rights outweighs any possible employer justifications, the rule at issue will be unlawful and fit within *Boeing* Category 3. Id. Finally, in some instances, "it will not be possible to draw any broad conclusions about the legality of a particular rule because the context of the rule and the competing rights and interests involved are specific to that rule and that employer. These rules will fit within *Boeing* Category 2." Id.

II. ANALYSIS

A. Responsive Action Policy

The Respondent's policy covering consequences resulting from individual complaints of harassment, discrimination, or retaliation includes a final paragraph captioned "False Allegations":

> If, after investigating a complaint (including a complaint of harassment, discrimination or retaliation), the Company determines that the complaint is frivolous, that the person making the complaint intentionally or recklessly made false allegations or that persons involved in the investigation provided false information, the individual(s) who made the false allegations or gave the false information may be subject to appropriate discipline, up to and including termination of employment, or such other responsive action as determined by the Company.

The judge found that this policy would deter employees from protected concerted activity out of fear they could be disciplined for innocent factual errors and that the intrusion is not outweighed by the Respondent's interest in reliable investigations. We disagree that employees would reasonably interpret this policy to potentially interfere with Section 7 rights. The context of addressing "frivolous" complaints and "intentionally or recklessly . . . false allegations" makes clear that the policy is concerned with intentional or reckless falsehoods (which have no protection in the Act) and not innocent errors. We find this policy is lawful and fits within *Boeing* Category 1(a).

B. Outside Employment and Business Activities Policy

The Respondent's policy on outside employment and other business activities most pertinently states:

> In order to ensure regulatory compliance and avoid potential conflicts of interest, employees are prohibited—without prior written notice to and formal written approval from the General Counsel or Head of Compliance—from participating in outside work activities that might present a conflict of interest (including employment relationships, consulting relationships and service on boards of directors of corporations, educational institutions and charitable/not-for-profit institutions) and from making non-passive investments.

Here, and for other policies in this case, the judge erred by analyzing the policy expressly from the viewpoint of how employees "could reasonably read" the language, instead of how reasonable employees *would* interpret it. In finding that employees could interpret the policy to ban organizing activities, the judge erred in finding possible interference from an unlikely reading of the policy. See *LA Specialty*, 368 NLRB No. 93, slip op. at 2 ("[A] challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity, or because the employer failed to eliminate all ambiguities from the rule, an all-but-impossible task."). The policy self-evidently aims to prevent business conflicts of interest from outside *work activities*—including employment, consulting, or board memberships—not mere membership in outside organizations or run-of-the-mill volunteering. Accordingly, employees would not reasonably read the

[5] In *LA Specialty,* the Board redesignated the subdivisions of *Boeing* Category 1 as (a) and (b). 368 NLRB No. 93, slip op. at 2–3.

rule to extend to union organizing, which is a much different activity than those described by the policy. Moreover, although the rule could conceivably be interpreted to reach holding a leadership position with a union or working for a union for pay, we find that when reasonably interpreted, the rule has no potential to interfere with such activities. Holding such positions does not implicate the rule's stated purpose of ensuring regulatory compliance and avoiding conflicts of interest. Policies limiting outside business relationships are common and have no reasonable potential to interfere with Section 7 rights. We find this policy is lawful and fits within *Boeing* Category 1(a).

C. Reference Inquiries and Requests for Employee Information Policy

The Respondent's policy on requests for employee information provides, in most relevant part:

> All requests for information regarding a current or former Company employee must be forwarded to the Human Resources Department for a response. Should an employee (including managers and supervisors) receive a written or verbal request for a reference, the employee should direct the individual seeking information (without any on or "off the record" statement), or forward the written request, immediately to the Human Resources Department. . . .
>
> No Company employee may provide a written reference for or supply employee information regarding any current or former employee without the permission of the Human Resources Department. Under no circumstances should any Company employee release any information about any current or former employee orally.

The judge interpreted the altered quote—"No company employee may . . . supply employee information . . . without . . . permission"—out of context in finding that the policy "could reasonably be construed to bar wage or related discussions." Read in its full context, the policy clearly is addressing formal reference requests and similar inquiries about employees. Reasonable employees would not read it to be concerned with discussions about wages or other protected discussions amongst themselves or with outside union representatives. We find this policy is lawful and fits within *Boeing* Category 1(a).

D. Company Property Policy

The Respondent's property policy, in relevant part, states:

> Offices, cubicles, desks, computers, file cabinets, lockers, and vehicles are Company property and must be maintained according to Company rules and regulations. All company property must be used solely for the Company's benefit and business purposes, and not for the employees' or contractor's personal benefit (or the benefit of any other person or entity). The Company's property includes its funds, premises, equipment (such as beepers, phones, computers, Blackberries, etc.) and supplies, as well as proprietary information and intellectual property (e.g., software, business plans, non-public information, ideas for new products and services, customer, vendor and employee lists, confidential information and materials).

The judge found this policy unlawful, reasoning that it "can be reasonably construed by employees to bar all unauthorized solicitation and other protected activity during non-working hours at [the Respondent's p]remises" and to prohibit employees from using the Respondent's email systems. We disagree that employees would reasonably interpret this policy to potentially interfere with protected activity. Rather, we believe a reasonable employee would understand the policy to be what it is, a general declaration of the Respondent's property rights, and would not view it as a blanket prohibition of solicitation or other protected activity at the facilities. Employees also would not reasonably read this policy to concern the use of the Respondent's email systems because a separate policy, closely following this one in the handbook, addresses email use in detail.[6] We find this policy is lawful and fits within *Boeing* Category 1(a).

E. Social Media Policy

The Respondent's policy on social media provides:

> The Company recognizes the importance of social media and that its professionals, practice groups, service lines and offices are interested in social media as a way to raise their visibility, communicate successes, solicit new opportunities and raise their profiles in accordance with the company's overall strategy. Employees and contractors must keep in mind; however, that, due to the nature of its business and those of its affiliates, only those types of social media that have been approved by the Company's management are permitted. As a general matter, use of social media that provides for communication that the Company cannot capture and/or monitor (e.g., Facebook, Twitter, Snapchat, Instagram and similar apps, as well as blogs and microblogs) is prohibited. If an employee or contractor is uncertain whether a social network or other communication method is approved by the Company, they should seek guidance

[6] We granted, above, the General Counsel's withdrawal of the complaint allegation about the policy on email, the Use of Company Information Technology Policy. See supra fn. **Error! Bookmark not defined.**.

from Compliance or the Company's information Technology staff.

. . . Where certain postings are permitted, the policy is intended to ensure that any social media activities affiliated with the Company and its affiliate offices are used appropriately, furnish accurate information, and are in compliance with the Company's established policy and procedures. Employees and contractors are not permitted to post in any fashion that would indicate that they represent the Company or are speaking on the Company's behalf unless permitted by the Social Media Policy or the Compliance Department.

Employees or contractors who are posting for personal reasons (for example, making comments, blog entries, posting on Twitter) should keep in mind that information posted is not necessarily private (it may be shared far beyond the group of initial circulation) and cannot be "deleted" once it has been shared. Employees should not be making personal posts on working time. Employees' and contractors' personal posts should not:

- Use the employee's Company e-mail address or contact number. If the fact that the employee works for the Company . . . appears in a post, the employee . . . must make clear that he/she is not representing the Company and that the views expressed are his or her own views and not those of the Company.
- Be false or misleading. Neither employees nor contractors should post anonymously regarding the Company or clients, or its products of services. If an employee or a contractor see information on the internet regarding the Company or its clients that he or she feels should be rebutted or supported, the employee or contractor should bring it to the attention of his/her manager or the entity's public relations staff.
- Use or disclose any Confidential Information of or regarding the Company or its clients, business partners or staff.
- Violate company policy or laws (for example, conduct that violates the Company's prohibitions against intimidation, threats of violence, discrimination, harassment or retaliation, unauthorized use of the intellectual property of others, or spamming).

The judge selectively quoted from the first two paragraphs of this policy, without the context of the final paragraphs on the personal use of social media, to find that employees "could reasonably construe" this policy to bar social media use for Section 7 activity. The judge was mistaken. The first two paragraphs, as employees would reasonably understand, regulate social media use that involves speaking on behalf of the Respondent or otherwise conducting business. The latter half of the policy, unmentioned by the judge, makes clear that personal social media use is not prohibited, and includes guidelines that would not be reasonably interpreted to prohibit Section 7 activity. We find this policy is lawful and fits within *Boeing* Category 1(a).

F. Outside Speaking and Writing Activities Policy

The Respondent's policy on outside speaking and writing states, "Prior Company approval must be obtained for participation in any outside writing/publishing activities, speaking engagements relating to the Company or any of its affiliates, any of the Company's business(es), industry or markets in which it participates, participation in industry seminars, and engaging in other similar activities." In finding this policy unlawful, the judge reasoned that it "can be reasonably construed to bar [employees] from speaking at union meetings about 'the company.'" We find, however, that employees would reasonably interpret this policy to pertain only to professional speaking or writing engagements that could be viewed by the audience as speaking on behalf of the Respondent and, therefore, would not interpret it as applying to speaking at a union meeting or other protected activity. We find this policy is lawful and fits within *Boeing* Category 1(a).

G. Confidentiality Footer

Each page of the Respondent's employee handbook includes the statement "Confidential—For Internal Use Only" in its footer. As mentioned above, the judge failed to mention or address the General Counsel's allegation that the Respondent's maintenance of this language violated Section 8(a)(1). Addressing the merits of this allegation, we find that the Respondent's inclusion of this footer was unlawful. Employees would reasonably interpret the footer to prohibit sharing the employee handbook or its terms and conditions with outside parties, such as unions. Employees had no reason to know, as the Respondent defends, that it was only a notation for administrative purposes so that the handbook would be posted on the intranet site instead of the public website. The Respondent offers no justification for this broad interference with Section 7 activity, and we cannot imagine any justification for generally designating an employee handbook confidential that would outweigh the adverse impact on NLRA rights. Accordingly, we find this footer is unlawful and fits within *Boeing* Category 3.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 2.

2. The Respondent has violated Section 8(a)(1) of the Act by maintaining a 'Confidential—For Internal Use Only' footer on each page of its employee handbook.

ORDER

The National Labor Relations Board orders that the Respondent, G&E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank, Tucson, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a footer in its employee handbook indicating that the handbook is "Confidential – For Internal Use Only."

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

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

(a) Rescind the footer in its employee handbook indicating that it is "Confidential – For Internal Use Only."

(b) Furnish employees with an insert for the current employee handbook that (1) advises that the unlawful footer has been rescinded or (2) provides a lawfully worded footer on adhesive backing that will cover the unlawful provision, or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provision or (2) provide a lawfully worded provision.

(c) Post copies of the attached notice marked "Appendix"[7] at each of its facilities in the United States where its employee handbook is in effect or has been in effect at any time since December 23, 2015. Copies of the notice, on forms provided by the Regional Director for Region 28, 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 any of its facilities where the employee handbook was in effect on or after December 23, 2015, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed at those facilities at any time since December 23, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegation involving the Use of Company Information Technology Policy is remanded to the Regional Director for Region 28 for further appropriate action.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found or remanded to the Regional Director.

Dated, Washington, D.C. July 16, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) 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

[7] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

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 footer in our employee handbook indicating that it is "Confidential – For Internal Use Only."

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

WE WILL rescind the footer in our employee handbook that unlawfully indicates that it is "Confidential – For Internal Use Only."

WE WILL furnish you with an insert for the current employee handbook that (1) advises that the unlawful footer has been rescinded or (2) provides a lawfully worded footer on adhesive backing that will cover the unlawful provision, or WE WILL publish and distribute to you revised employee handbooks that (1) do not contain the unlawful provision or (2) provide a lawfully worded provision.

G&E REAL ESTATE MANAGEMENT SERVICES, INC. D/B/A NEWMARK GRUBB KNIGHT FRANK

The Board's decision can be found at http://www.nlrb.gov/case/28-CA-178893 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.

Nestor M. Zarate-Mancilla, Esq., for the General Counsel.
Derek Barella, Esq. (Winston & Strawn, LLP), for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, ADMINISTRATIVE LAW JUDGE. The Board remanded this case under *Boeing Co.*, 365 NLRB No. 154 (2017), to evaluate whether G&E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank (G&E or the Respondent) maintained unlawful Employee Handbook rules. Thereafter, the General Counsel (the GC) filed a Motion to Amend Complaint, which condensed the complaint to 11 rules allegations. As will be explained, 4 of these rules are valid, while 7 have been found to be unlawful.

FINDINGS OF FACT[1]

I. GENERAL PRINCIPLES

In *Boeing*, regarding facially neutral rules akin to those at issue herein, the Board held:

> 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 . . . . [and] . . . strike the proper balance between . . . asserted business justifications and the invasion of employee rights . . . .
>
> [T]he Board . . . [listed] three [rules] categories . . . .:
>
> **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 . . . basic standards of civility . . . .
>
> **Category 2 . . . rules** . . . warrant individualized scrutiny . . . 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.
>
> **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.

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

II. RESPONSIVE ACTION POLICY[2]

This Category 2 rule fails the *Boeing* balancing test. It states that:

> If, after investigating a complaint (including a complaint of harassment, discrimination or retaliation), the Company determines . . . that persons involved in the investigation provided false information, the individual(s) who made the false allegations or gave the false information may be subject to appropriate discipline, up to and including termination . . . .

(GC Exh. 2 at §206.)

Concerning §7 rights, this rule would reasonably deter workers from aiding investigations involving collective issues out of fear that their innocent factual errors might lead to discipline.

[1] G&E sought judicial notice of the administrative records in *BGC Partners, Inc.*, Case 28–CA–195500 and *Cantor Fitzgerald, LP*, Case 28–CA–195506 in lieu of reopening the record for additional evidence. This request was granted. The parties filed briefs on May 31, 2019.

[2] This allegation appears under ¶¶4(a)(2) and 5 of the complaint.

Employees may also refrain from concerted speech aimed at improving their workplace due to the same concerns. This rule, notably, does not distinguish between blameless, non-negligent factual errors and intentional defamation, which would strike a more reasonable balance.

Concerning G&E's interests, it holds a valid interest in reliably investigating workplace complaints. It also maintains a stake in discouraging employee dishonesty.

Boeing's balancing test tips against G&E. This rule, which covers all falsehoods (i.e., as opposed to only defamation), is a Category 2 rule that, when reasonably interpreted, bars innocent employee errors on collective matters. This is a significant infringement, which undercuts collective speech during workplace investigations. This interference is not outweighed by G&E's interests, which might still be reasonably advanced by limiting the rule's scope to defamatory speech.[3] This rule is, accordingly, invalid; simply put, it fails to strike the proper balance between §7 rights and business interests.

III. OUTSIDE EMPLOYMENT AND BUSINESS ACTIVITIES POLICY[4]

This Category 2 rule similarly fails the *Boeing* balancing test. It provides that:

> [E]mployees are prohibited–without . . . approval . . . from participating in outside work activities that might present a conflict of interest . . . .

(GC Exh. 2 at §303) (emphasis added).

Concerning §7 rights, this rule could reasonably be construed by employees to ban organizing G&E's workers, making connected home visits to such coworkers, or acting as a union salt without approval. Its impact on core §7 activities is, thus, substantial.

Regarding G&E, it has a valid interest in avoiding conflicts and promoting loyalty. Such breaches may offend a client, harm a business relationship, or undercut workplace harmony.

The *Boeing* balancing test tips against G&E. Employees can reasonably construe this rule as a complete ban against organizing coworkers and engaging in other §7 activities without approval. G&E can address this infringement, while simultaneously safeguarding its valid interest in avoiding conflicts, by, for example, excluding union and other N.L.R.A. activities from the rule's scope.[5] I find, as a result, that the §7 interests at stake outweigh G&E's legitimate business interests, and the rule is unlawful.

IV. REFERENCE INQUIRIES AND REQUESTS FOR EMPLOYEE INFORMATION POLICY[6]

This policy is an invalid *Boeing* Category 3 rule. It states as follows:

> All requests for information regarding a[n] . . . employee must be forwarded to the Human Resources Department for response. Should an employee . . . receive a . . . request for a reference, the employee should direct the individual seeking information . . . to the Human Resources Department . . . .
>
> **No Company employee may . . . supply employee information . . . without . . . permission . . . .**

(GC Exh. 2 at §403) (emphasis added).

Concerning §7 rights, this rule could reasonably be construed to bar wage or related discussions. This is a great intrusion on the right to share such data for collective purposes.

Regarding G&E, it has a valid stake in handling reference requests consistently. It also has an interest in sharing employment data in a centralized manner.

This policy is an invalid *Boeing* Category 3 rule. It deeply impacts §7 activities and can be reasonably construed to bar wage and related discussions without consent. G&E can address its valid concerns regarding references and employee data releases by simply deleting the rule's second paragraph (i.e., "No Company employee may . . . supply employee information . . . without . . . permission."). It has offered no explanation for this omission, which would present a reasonable balancing of collective and business interests. In sum, this rule limits protected conduct and the adverse impact on such rights is not outweighed by G&E's justifications. *Boeing*, supra ("rule[s] that prohibit . . . employees from discussing wages or benefits with one another" are invalid under Category 3.).

V. COMPANY PROPERTY POLICY[7]

This rule is not covered by *Boeing*. It is unlawful under extant Board law. It states:

> Offices, cubicles, desks, computers, file cabinets, lockers, and vehicles are Company property and must be maintained according to Company rules and regulations. All Company property must be used solely for the Company's benefit and business purposes, and not for the employee's . . . personal benefit (or the benefit of any other person or entity). The Company's property includes its . . . premises, equipment . . . and supplies, as well as proprietary information and intellectual property (e.g., . . . non-public information, . . . customer, vendor and employee lists, confidential information and materials) . . . .

(GC Exh. 2 at §703.)

This policy, which bans non-business usage of G&E's facilities and equipment, is unlawful. It can be reasonably construed by employees to bar all unauthorized solicitation and other protected activity during non-working hours at G&E's facility remises, as well as prohibit employees from using G&E's email systems during their non-working time for §7 activities. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Purple Communications*, 361 NLRB 1050, 1066 (2014) ("right of employees to use their employers' email systems for protected communications on nonworking time"); *Stoddard-Quirk*, 138 NLRB 615 (1962) (prohibition on unauthorized distribution of

[3] G&E has neither explained why it did not limit the rule in this way nor has it clarified why disciplining employees, who make innocent factual errors during workplace investigations, advances its valid business interests.

[4] This allegation appears under ¶¶4(a)(4) and 5 of the complaint.

[5] G&E has neither explained why it did not limit the rule in this way nor has it clarified why disciplining employees, who engage in outside union activities without approval, advances its valid business interests.

[6] This allegation appears under ¶¶4(a)(5) and 5 of the complaint.

[7] This allegation appears under ¶¶4(a)(7) and 5 of the complaint.

literature on company premises is unlawful).[8]

VI. USE OF COMPANY INFORMATION TECHNOLOGY POLICY[9]

This rule is not covered by *Boeing*. It is also unlawful under extant Board law. It states:

> Computers, electronic communication, electronic information and other technology . . . support the Company's business. The Company provides many of its employees with access to telecommunication and electronic communication means and computer systems owned or operated by the Company . . . .
>
> It is the responsibility of each employee . . . to ensure that this technology and all Information Systems are used for proper business purposes . . . .
>
> Users should not use or access Company Information Systems in any manner that is unlawful, inappropriate, or contrary to the Company's best interests . . . . Users may only use Company Information Systems in a manner that is consistent with the Company's policies and procedures . . . .
>
> [V]oice mail and . . . e-mail . . . are to be used for business purposes only.

(GC Exh. 2 at §707.) This policy, which bans the non-business usage of information technology (IT) equipment, is overbroad and unlawful, inasmuch as it bans employees from using email and IT systems during non-working time for §7 activities. *Purple Communications*, supra.

VII. TAPE RECORDING POLICY[10]

This policy is a valid *Boeing* Category 1 rule. It states that:

> [I]t is a violation of Company policy for an employee . . . to record conversations at or related to their work or services at the Company with a tape recorder, mobile device or any other recording device or to make a video recording in a work-related setting unless (1) prior approval has been granted by the Company. . ., or (2) use of the device has been otherwise properly authorized in connection with the employee's . . . performance of his . . . assigned duties . . . .
>
> Violation of this policy will result in . . . disciplinary action, up to and including immediate termination of employment . . . .

(GC Exh. 2 at §708.)

This facially neutral policy requires a balancing test, which tips in favor of G&E. On the one hand, this rule overbroadly encompasses recordings made for one's mutual aid and protection. G&E, however, has a keen interest in the maintenance of this rule, which controls unauthorized recordings of its business operations. This rule is analogous to the *Boeing* no-camera rule, which was classified as a valid Category 1 policy. *Boeing*, supra.

VIII. SOCIAL MEDIA POLICY[11]

This policy is an unlawful *Boeing* Category 2 rule. It states as follows:

> The Company recognizes the importance of social media . . . . [O]nly those types of social media that have been approved by the Company. . . are permitted. As a general matter, use of social media that provides for communication that the, Company cannot capture and/or monitor (e.g., Facebook, Twitter, Snapchat, Instagram and similar apps . . .) is prohibited. . . .
>
> Where certain postings are permitted, the policy is intended to ensure that any social media activities affiliated with the Company and its affiliate offices are used appropriately, furnish accurate information, and are in compliance with the Company's established policies and procedures . . . .

(GC Exh. 2 at §802.)

Concerning §7 rights, employees could reasonably construe this rule to bar social media usage that G&E cannot monitor as well as online commentary that is not pre-approved. This effectively bars workers discussing their wages and collective concerns on social media, which is a substantial §7 infringement. Regarding G&E, it has a valid interest in maintaining a positive online presence and controlling online commentary made by its agents.

The *Boeing* balancing test tips against G&E. Employees can reasonably construe this rule as a blanket prohibition against engaging in unapproved §7 activities on social media. G&E can adeptly address this substantial infringement, while simultaneously safeguarding its valid interests in maintaining a positive online image, by limiting the rule to state, inter alia, that, "employees cannot act as a spokesperson for G&E on social media without authorization." This narrowing would create a fairer balance and produce a valid Category 1 rule, which allows for social media discussions of workplace issues by non-spokespersons, while protecting G&E's online image. G&E offered no explanation for this omission. This rule is, accordingly, invalid.

IX. OUTSIDE SPEAKING AND WRITING ACTIVITIES POLICY[12]

This policy is an unlawful *Boeing* Category 2 rule. It states that:

> Prior Company approval must be obtained for participation in any outside writing/publishing activities, speaking engagements relating to the Company . . . and engaging in other similar activities. . . .

(GC Exh. 2 at §803.)

The *Boeing* balancing test tips against G&E. The impact on §7 rights is substantial. The rule is not limited to controlling those employees who take an unauthorized public stance on behalf of G&E. Moreover, it overbroadly requires all employees to obtain approval for any discourse "relating to the company," which can be reasonably construed to bar them from speaking at union meetings about "the company." G&E could validly narrow the rule to state, inter alia, that, "employees cannot serve as a spokesperson for the company without authorization." This narrowing would fairly advance its interests, create a valid Category 1 rule, and no longer leave workers unable to discuss their workplace as nonspokespersons without approval. G&E has, again, offered no explanation for this omission. This rule is,

[8] *Boeing* did not overrule *Purple Communications*.

[9] This allegation appears under ¶¶4(a)(9) and 5 of the complaint.

[10] This allegation appears under ¶¶4(a)(10) and 5 of the complaint.

[11] This allegation appears under ¶¶4(a)(12) and 5 of the complaint.

[12] This allegation appears under ¶¶4(a)(13) and 5 of the complaint.

thus, invalid.

X. COOPERATION IN INVESTIGATIONS AND LITIGATION POLICY[13]

This policy is a valid *Boeing* Category 1 rule. It provides that:

> Employees . . . are required to cooperate with . . . internal investigations and the defense or prosecution of claims . . . . by providing truthful information or testimony in interviews, meetings or proceedings . . . . In the event the investigation or claim involves allegations made by the employee . . . against the Company, the employee . . . will be required to provide information that the Company views as necessary to its internal investigation . . . but will not be required to provide assistance to . . . its defense or prosecution of the claim.

(GC Exh. 2 at §804.)

The *Boeing* balancing test tips in favor of G&E. Employees would not reasonably read this rule to require participation in a ULP investigation, which infringes upon their §7 right to refuse to cooperate in a ULP investigation. This rule is silent on ULP investigations and, absent some context referencing such investigations, employees would reasonably interpret this rule to only apply to general investigations of workplace misconduct. Thus, given G&E's keen interest in fairly investigating workplace misconduct and the rule's silence on ULPs, the potential adverse impact on protected rights is outweighed by G&E's interests.

XI. PERSONAL APPEARANCE POLICY[14]

This policy, which bans, "clothing with printed slogans/promotions," is a valid *Boeing* Category 1 rule. (GC Exh. 2 at §811.) It is improbable that employees would reasonably understand this rule, when viewed in its entirety, to bar union insignia. The portion of the rule at issue is a single bullet-point contained in a lengthy dress code rule. Given that the §7 impact is minor, and G&E has a valid interest in a dress code, this rule survives the *Boeing* balancing text.

XII. STANDARDS OF CONDUCT POLICY[15]

This policy is a valid *Boeing* Category 1 rule. It provides that:

> We require and expect our employees and contractors [. . .] to exhibit and act with common courtesy, decency, dignity and respect, and to exercise sound business judgment. This not only involves sincere respect for the rights and feelings of others but also demands that employees and contractors refrain from any behavior that might be harmful to themselves, their coworkers and colleagues, and/or the Company or that might be viewed unfavorably by current or potential customers, the industry or the public at large . . . .
>
> Listed below are some examples of conduct that is unacceptable. Some of these examples are relevant to both employees and contractors; others (primarily those related to hours and location of work, time records, and work supervision) are not applicable to contractors.
>
> This list should not be viewed as being all-inclusive, as it is not possible to list all forms of behavior that are considered unacceptable. Unacceptable conduct may result in immediate disciplinary action, including warnings, suspensions or termination of employment, or corrective action, including notice of violation, termination of employment or suspension of services. [. . .]
>
> Examples of conduct likely to lead to disciplinary or corrective action include:
>
> - Any conduct that could be construed as harming the operations or reputation of the Company . . . .

(GC Exh. 2 at §813) (emphasis added).

The *Boeing* balancing test tips in favor of G&E. This rule is essentially a civility rule, which was found valid in *Boeing*. Id. (finding that employers may maintain rules requiring "harmonious relationships" in the workplace and can require basic standards of "civility."). G&E has a strong stake in workplace civility, which deters unlawful harassment, prevents violence, limits conflict, and promotes productivity. Such interests outweigh the somewhat light impact on §7 rights. This rule is, therefore, a lawful Category 1 rule.[16]

CONCLUSIONS OF LAW

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

2. G&E violated §8(a)(1) by maintaining these Employee Handbook policies:

(a) "Responsive Action" policy, which subjects workers who non-maliciously provide false information during investigations to potential discipline and discharge.

(b) "Outside Employment and Business Activities" policy, which bans employees "from participating in outside work activities that might present a conflict of interest."

(c) "Reference Inquiries and Requests for Employee Information" policy, which bans workers from supplying employee information to outside entities without authorization.

(d) "Company Property" policy, which bars all unauthorized solicitation and other protected activity from G&E's facilities, and bans using email during non-working time for non-business purposes.

(e) "Use of Company Information Technology" policy, which bans employees from using email and other information technology systems during non-working time for non-business purposes.

(f) "Social Media" policy, which requires employees to obtain consent prior to posting anything concerning the company on social media, and employer monitoring.

(g) "Outside Speaking and Writing Activities" policy, which requires pre-approval before employees' write or speak publicly about their workplace.

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

[13] This allegation appears under ¶¶4(a)(15) and 5 of the complaint.
[14] This allegation appears under ¶¶4(a)(17) and 5 of the complaint.
[15] This allegation appears under ¶¶4(a)(18) and 5 of the complaint.

[16] The *Boeing* Board noted that any adverse effect on §7 rights was comparatively slight since a broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility. *Boeing*, supra.

REMEDY

Having found that G&E committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the Act. Given that its policies are maintained on a companywide basis, it shall be ordered to post a notice at all of its facilities where the unlawful policies have been, or are, in effect. See *Longs Drug Stores California*, 347 NLRB 500, 501 (2006); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005). Its duty to rescind or modify the unlawful policies is governed by *Guardsmark LLC*, supra.[17] It shall nationally 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).[18]

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[19]

ORDER

G&E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a "Responsive Action" policy in its Employee Handbook, which subjects workers who non-maliciously provide false information during workplace investigations to discipline and discharge.

(b) Maintaining an "Outside Employment and Business Activities" policy in its Employee Handbook, which bans employees "from participating in outside work activities that might present a conflict of interest."

(c) Maintaining a "Reference Inquiries and Requests for Employee Information" policy in its Employee Handbook, which bans workers from supplying employee information to outside entities without authorization.

(d) Maintaining a "Company Property" policy in its Employee Handbook, which bars all unauthorized solicitation and other protected activity from its facilities, and bans using email during non-working time for non-business purposes.

(e) Maintaining a "Use of Company Information Technology" policy in its Employee Handbook, which bans employees from using email and other information technology systems during non-working time for non-business purposes.

(f) Maintaining a "Social Media" policy in its Employee Handbook, which requires employees to obtain consent prior to posting anything concerning the company on social media and requires employer monitoring.

(g) Maintaining an "Outside Speaking and Writing Activities" policy in its Employee Handbook, which requires pre-approval before employees' write or speak publicly.

(h) 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 Act.

(a) Rescind or modify the language in the following provisions of its Employee Handbook

(i) The "Responsive Action" policy to the extent that it subjects workers who non-maliciously provide false information during workplace investigations to discipline and discharge.

(ii) The "Outside Employment and Business Activities" policy to the extent that it bans employees "from participating in outside work activities that might present a conflict of interest."

(iii) The "Reference Inquiries and Requests for Employee Information" to the extent that it bans workers from supplying employee information to outside entities without authorization.

(iv) The "Company Property" policy to the extent that it bars all unauthorized solicitation and other protected activity from its facilities, and bans using email during non-working time for non-business purposes.

(v) The "Use of Company Information Technology" policy to the extent that it bans employees from using email and other information technology systems during non-working time for non-business purposes.

(vi) The "Social Media" policy to the extent that it requires employees to obtain consent prior to posting anything concerning the company on social media.

(vii) The "Outside Speaking and Writing Activities" policy to the extent that it requires pre-approval before employees' write or speak publicly about their workplace.

(b) Furnish all current employees with inserts for the Employee Handbook that

(i) Advise that the unlawful rules have been rescinded, or

(ii) Provide the language of lawful rules or publish and distribute a revised Employee Handbook that

(1) Does not contain the unlawful rules, or

(2) Provides the language of lawful rules.

(c) Within 14 days after service by the Region, post at each of its facilities in the United States, where its Employee Handbook is in effect, copies of the attached notice, marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's

[17] "The Respondent may comply with our Order by rescinding the unlawful provisions and republishing its employee handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Thereafter, any copies of the handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees." *Guardsmark,* supra at 812 fn. 8.

[18] Although counsel for the Acting General Counsel has requested a notice reading remedy, such relief is unwarranted. Standard remedial relief will adequately remedy the unfair labor practices at issue herein.

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

[20] 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."

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 December 23, 2015.

(d) 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. November 8, 2019

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 provisions in our Employee Handbook, which subject workers who non-maliciously provide false information during workplace investigations to potential discipline and discharge.

WE WILL NOT maintain provisions in our Employee Handbook, which ban you "from participating in outside work activities that might present a conflict of interest."

WE WILL NOT maintain provisions in our Employee Handbook, which ban you from giving employee and workplace information to outside entities without authorization.

WE WILL NOT maintain provisions in our Employee Handbook, which bar all unauthorized solicitation and other protected activity from our facilities, and ban using email and other information technology during non-working time for non-business purposes.

WE WILL NOT maintain provisions in our Employee Handbook, which ban you from using telephones and other communication systems during non-working time for non-business purposes.

WE WILL NOT maintain provisions in our Employee Handbook, which require you to obtain our consent before posting anything about us on social media or require you to permit us to monitor your social media accounts.

WE WILL NOT maintain provisions in our Employee Handbook, which require our pre-approval before you can write or speak publicly about your workplace.

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 WILL rescind or modify the language in the following provisions of our Employee Handbook:

1. The "Responsive Action" policy to the extent that it subjects workers who non-maliciously provide false information during workplace investigations to potential discipline and discharge.

2. The "Outside Employment and Business Activities" policy to the extent that it bans you "from participating in outside work activities that might present a conflict of interest."

3. The "Reference Inquiries and Requests for Employee Information" to the extent that it bans you from supplying employee information to outside entities without authorization.

4. The "Company Property" to the extent that it bars all unauthorized solicitation and other protected activity from our facilities, and bans using email during non-working time for non-business purposes.

5. The "Use of Company Information Technology" policy to the extent that it bans employees from using email and other information technology systems during non-working time for non-business purposes.

6. The "Social Media" policy to the extent that it requires employees to obtain consent prior to posting anything concerning us on social media and requires employees to permit monitoring of their social media accounts.

7. The "Outside Speaking and Writing Activities" policy to the extent that it requires pre-approval before employees write or speak publicly about their workplace.

WE WILL furnish all of you with inserts for the current Employee Handbook that:

1. Advise that the unlawful provisions, above have been rescinded, or

2. Provide the language of lawful provisions, or publish and distribute revised Employee Handbooks that:

   a. Do not contain the unlawful provisions, or
   b. Provide the language of lawful provisions.

G&E REAL ESTATE MANAGEMENT SERVICES, INC. D/B/A
NEWMARK GRUBB KNIGHT FRANK

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-178893 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.