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PERSPECTIVE

Obama's NLRB out of sync with precedent

By Mark Ross and Iris Kokish

Does a work rule asking employees to communicate with one another "in a manner that is conducive to effective working relationships" inhibit employee protected concerted activity under the National Labor Relations Act (NLRA)? Over the last several years, the "Obama board" — that is, the current National Labor Relations Board (NLRB) — has repeatedly found that such rules, although appearing on their face to be neutral, do actually violate those employee rights. The Obama board's position misapplies long-settled board law and does a disservice both to employees and employers.

The Obama board has issued numerous decisions invalidating workplace rules that are facially neutral with respect to union activity or protected concerted activity ("Section 7 conduct") under the NLRA. Beginning in 2011, the Obama board found that an employer's mere maintenance of an invalidated rule constituted an unfair labor practice in violation of Section 8(a)(1) of the NLRA. To quote former board Chairman William Gould, under the board's current reading of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), "virtually all work rules in today's workplace could be deemed violative of the Act." *Lafayette Park Hotel*, 326 NLRB 824, 830, (1998).

"Facially neutral work rules" are those employee handbook provisions and human resource policies used in almost every American workplace. Typically such rules do not mention unions, unionization or protected concerted activity; such rules exist to accomplish legitimate business objectives. Even so, the activist Obama board has parsed and assigned meanings to facially neutral work rules it supposes could "potentially" affect Section 7 rights. In such instances, the Obama board's speculation on the goblins employees *might* find in otherwise benign language has become the nonsensical enemy of the good. A perfect case in point is *T-Mobile USA, Inc.*, 363 NLRB 171 (2016).

Maintaining a positive work environment seems like it should be encouraged. It seems obvious that the law has "gone terribly off the rails" when an employer is found to have violated federal labor law simply by asking its workers to "maintain a positive work environment" by communicating with one another and with management "in a manner that is conducive to effective working relationships." As the prior board noted in *Lutheran Heritage*, "employees reading such rules will not construe them to prohibit conduct protected by the Act ... simply because it could be interpreted in that way." Yet that is exactly what the Obama board did in *T-Mobile*, finding fatal ambiguity in the phrase "positive work environment" and the requirement that employees communicate with one another "in a manner that is conducive to effective working relationships," concluding, *without any supporting evidence*, that "employees would reasonably construe the rule to restrict potentially controversial or contentious communications and discussions, including those protected by Section 7."

New York Times

President Barack Obama in Alington, Va., on Sunday

In rendering decisions like *T-Mobile*, the Obama board has claimed that it is simply applying standards laid down by the previous NLRB in *Lutheran Heritage* and its predecessor in *Lafayette Park Hotel*. However, a plain reading of the two earlier board decisions proves the opposite. For example, in *Lafayette Park*, the employer maintained "Standards of Conduct" that, among other things, prohibited employees from "being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the [Employer's] goals and objectives." Identical rules have not passed muster with the current board. *See, e.g., First Transit, Inc.,* 360 NLRB 72 (2004); *Lytton Rancheria of California d/b/a Casino San Pablo*, 361 NLRB 148 (2014).

But according to the *Lafayette Park* board, the rule was neutral as to Section 7 conduct and sufficiently clear to place workers on notice of what legally unprotected conduct was not permissible. Accordingly, the *Lafayette Park* board said the mere maintenance of these rules would not reasonably tend to chill employees' exercise of their Section 7 rights. Further, the majority answered dissenter claims that the rules were ambiguous with the following observation: "[A]ny arguable ambiguity arises only through parsing the language in the rule, viewing [its phrases] in isolation and attributing to the Respondent an intent to interfere with employee rights. We are unwilling to place such a strained construction on the language." Indeed, "to find the maintenance of this rule unlawful as do our dissenting colleagues, effectively precludes a common sense formulation by the [Employer] of its rule and obligates it to set forth an exhaustively comprehensive rule anticipating any and all circumstances in which the rule even theoretically could apply."

Likewise, in *Lutheran Heritage*, the board considered the facial validity of rules prohibiting employees from using "abusive and profane language" and from engaging in "harassment" and "verbal, mental and physical abuse." Again, the Obama board has been unwilling to find similar neutral policies to be facially valid. *William Beaumont Hospital*, 363 NLRB 162 (2016); *2 Sisters Food Group*, 357 NLRB 1816 (2011). But in *Lutheran Heritage*, the then board found them lawful, noting their clear intent to maintain order and avoid liability in the work-

place. In answer to the dissenters, the *Lutheran Heritage* majority observed that verbal abuse and profane language are not inherent parts of Section 7 activity and that the question of whether particular prohibited conduct was legally protected turns on the specific facts of each case. Accordingly, absent the application of the rules to a case of what might arguably be Section 7 conduct, the board would not presume the rule to be unlawful. Further, in answer to the dissenters' claim that an employer may not maintain a rule that prohibits conduct that could end up being protected by Section 7, the *Lutheran Heritage* majority observed that "[w]ork rules are necessarily general in nature and typically drafted by and for laymen, not experts in the field of labor law."

In addition to being out of sync with established board precedent, the Obama board's spate of facial invalidity cases may also contravene the plain wording of the NLRA. To properly frame and answer the issue of a neutral rule's facial validity, one must look to and consider the entire statute instead of myopically focusing on only provisions that may weigh in favor of an invalidity finding. The Obama board has never conducted such a holistic analysis; for example, its facial invalidity cases have never factored the effect of Section 8(c). Commonly referred to as the free speech proviso, Section 8(c) states in part that "[t]he expressing of any view, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form shall not constitute or be evidence of an unfair labor practice ... if such expression contains no threat of reprisal or force or promise of a benefit."

In 1945, the Supreme Court observed that nothing in the NLRA "prevents an employer from making reasonable rules covering the conduct of employees on company time." *Republic Aviation Corp. v. NLRB*, 325 U.S. 894, n.10 (1945). Then, in the 1947 Taft-Hartley amendments to the act, an employer's right to make workplace pronouncements and to promulgate work regulations without governmental censorship gained explicit statutory protection in the form of the new Section 8(c). This new provision was intended to give effect to an employer's constitutionally protected free speech right to communicate with its workers. Thus, Section 8(c) creates a communication privilege that cannot be infringed upon by the NLRB unless the communication at issue actually "contains a threat of reprisal or force or promise of a benefit." 29 U.S.C. Section 158(c). *See also NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 616 (1969).

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By definition, a neutral work rule contains no threat of reprisal or force with respect to Section 7 conduct. Under Section 8(c), the issuance and maintenance of such rules constitutes speech protected by the First Amendment and expressly authorized by Section 8(c). Accordingly, contrary to recent cases like *T-Mobile*, the board may not invalidate neutral work rules unless there is evidence the rules contain a threat of reprisal or force or a promise of a benefit. That *some* employees *might* view such a neutral rule as a threat in a *theoretical* situation that *might* involve Section 7 activity should not be enough to invalidate the rule.

The board's current decisions create an impossible standard. They also present serious concerns of government censorship. The board should rethink its approach. One option would be to return to the analysis used in *Lutheran Heritage*. In the alternative, the board might employ rules of construction it has already used to determine the facial validity of other seemingly neutral clauses. For example, in *Road Sprinkler Fitters, Local* 669, 357 NLRB 2140 (2011), the Obama board was called upon to determine whether a dispute resolution clause in a master construction contract violated the "hot cargo" prohibitions of Section 8(e). The Obama board said that "where [a] clause is not clearly unlawful on its face, then the Board will interpret it to require no more than what is allowed by law." In other words, the current board refused to presume the invalidity of a provision merely because it was ambiguous and *might* be illegally applied. However, the board's facial validity analysis did not end there. Instead, the board also considered extrinsic evidence to determine whether the ambiguous clause was intended to be administered in a lawful or unlawful manner. If such extrinsic evidence showed an unlawful purpose, then the presumption of validity would be rebutted and the ambiguous provision could and would be declared unlawful on its face.

A similar methodology might be employed by the Obama board in cases testing the facial validity of work rules. If an ambiguous work rule is truly neutral on its face, the board would interpret the rule as requiring no more than that which is permissible under the law and refuse to presume its invalidity. At the same time, however, the board would leave the door open for extrinsic evidence showing any or all of the following to rebut the presumption of the rule's lawfulness: (1) the rule was intended to reach protected conduct; (2) the rule was presented and explained to the employees in such a way as to lead them to believe that it was directed at Section 7 conduct; or (3) the employees covered by the rule reasonably believed that the rule was directed at or applicable to their protected union or concerted activities.

The benefits offered by this approach are many. It would create a workable, real-world standard for employers to follow in drafting and presenting work rules, while at the same time preserving and giving full force and effect to employees' Section 7 rights. Further, because a decision invalidating a neutral work rule would not depend on bare language of the rule but on *actual* proof of the employer's threatening intent or of the making of an actual threat to Section 7 rights, the board would be less likely to be in the position of a workplace censor, saying what an employer can and cannot say to employees in violation of the First Amendment or rendering a decision in violation of Section 8(c).

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