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LA Specialty Produce Company and Teamsters Local 70, International Brotherhood of Teamsters.
Case 32–CA–207919

October 10, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN,
KAPLAN, AND EMANUEL

On June 28, 2018, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

I. BACKGROUND

The Respondent is a wholesale distributor of produce and other fine and specialty foods. Since at least 1998, the Respondent has maintained the LA & SF Specialty Employee Manual (the Manual), which contains the two rules at issue in this case, the Respondent’s Confidentiality and Non-Disclosure rule (Confidentiality rule) and the Media Contact rule. The Confidentiality rule states, in its entirety, as follows:

Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of [Respondent] including but not limited to client/vendor lists, client/vendor information, accounting records, work product, production processes, business operations, computer software, computer technology, marketing and development operations, to name a few. Confidential information will also include information provided by a third party and governed by a non-disclosure agreement between [Respondent] and the third party. Access to confidential information should be disclosed on a “need-to-know” basis and must be authorized by management. Any breach to this policy will not be tolerated and will be subject to disciplinary and legal action.

(Emphasis added.) The complaint alleges that only the language in bold violates the Act.

The Media Contact rule states: “Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our President,

Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization.” The complaint alleges that the rule in its entirety violates the Act.

II. ANALYSIS

A. Legal Standard

Section 7 of the Act provides that employees have the right to “self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]” These rights are vital to the achievement of the national labor policy that Congress has established, but they are not absolute. More than 70 years ago, the Supreme Court held that the law requires “an adjustment between the undisputed right of self-organization assured to employees . . . and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.” *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945).

Consistent with this framework, the Board recognized in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that employers have legitimate reasons for adopting workplace rules and policies and that, in determining whether a challenged rule is unlawful, the Board must give the rule a reasonable reading and refrain from reading particular phrases in isolation, “and it must not presume improper interference with employee rights.” *Id.* at 646. The Board also stressed that where, as in this case, “the rule does not refer to Section 7 activity, [the Board would] not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.” *Id.* at 647 (emphasis in original).

As thoroughly recounted in *Boeing Co.*, 365 NLRB No. 154, slip op. at 11–14 (2017), however, the Board subsequently lost its way. In case after case, it invalidated commonsense rules and requirements that most people would reasonably expect every employer to maintain. In doing so, the Board viewed challenged rules not from the standpoint of reasonable employees, but from that of traditional labor lawyers who have devoted their professional lives to interpreting and applying the NLRA. And it outlawed rules and policies based on its judgment that such rules could have been written more narrowly to eliminate potential interpretations that might conflict with the exercise of Section 7 rights—interpretations that might occur to an

experienced labor lawyer but that would not cross a reasonable employee's mind.

Boeing recommitted the Board to the balanced approach required by *Republic Aviation* in two important ways. First, *Boeing* repudiated the quest for “linguistic precision” that had prevailed under the misapplied “reasonably construe” prong of the *Lutheran Heritage* standard, under which the Board demanded a “perfection that literally [was] the enemy of the good.” 365 NLRB No. 154, slip op. at 2. Instead, *Boeing* requires the Board to determine whether a facially neutral rule, reasonably interpreted, would potentially interfere with the exercise of NLRA rights. *Id.*, slip op. at 3. Here, we agree with Member Kaplan's observation in *Boeing* that the outcome of this inquiry “should be determined by reference to 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.’” *Id.*, slip op. at 3 fn. 14 (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017)). Accordingly, 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. *Id.*, slip op. at 9.¹

Second, even if a facially neutral rule, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, *Boeing* also requires the Board to “evaluate . . . (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” *Id.*, slip op. at 3 (emphasis in original). Having performed this two-step evaluation, the Board will find that “the rule's maintenance . . . violate[s] Section 8(a)(1) if . . . the justifications are outweighed by the adverse impact on rights protected by Section 7.” *Id.*, slip op. at 16.

In order to provide the certainty and predictability that the Supreme Court in *First National Maintenance*

required, the Board will, over time, sort employer rules into three categories:

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

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

Category 3 will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Id., slip op. at 3–4 (emphasis in original). However, these categories “will represent a classification of *results* from the Board's application of the new test. The categories are not part of the test itself.” *Id.*, slip op. at 4 (emphasis in original).

As indicated, the classification of types of rules will result from application of the *Boeing* test over a period of time.² However, we provide the following points of clarification for the guidance of parties in future litigation.

First, it is the General Counsel's initial burden in all cases to prove that a facially neutral rule *would* in context be interpreted by a reasonable employee, as defined above, to potentially interfere with the exercise of Section 7 rights.³ If that burden is not met, then there is no need for the Board to take the next step in *Boeing* of addressing any general or specific legitimate interests justifying the rule. The rule is lawful and fits within *Boeing* Category 1(a). There will be no need for further case-by-case litigation of the legality of a rule so classified. As discussed below, we find the Confidentiality and Media Contact rules at issue in this case are lawful and belong in Category 1(a).

¹ As the Board in *Boeing* properly recognized, “[t]he Supreme Court has stressed the need to provide ‘certainty beforehand’” so that employers “can ‘reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice’ . . .” *Id.*, slip op. at 14 fn. 74 (quoting *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679 (1981)). And the Board in *Boeing* also recognized that its “rules” jurisprudence “is an area where the Board has a special responsibility to give parties certainty and clarity.” *Id.*, slip op. at 14.

² Going forward, we prefer to designate the two subdivisions of Category 1 as 1(a) and 1(b).

³ The word *potentially* as used in *Boeing* must not be misunderstood. It does not turn the first step of the *Boeing* analysis into an inquiry into whether the rule at issue *could* be interpreted to prohibit Sec. 7 activity.

As *Boeing* itself makes clear, a challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Sec. 7 activity. *Id.*, slip op. at 9; see also *Lutheran Heritage*, 343 NLRB at 647 (“Where . . . the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.” (emphasis in original)). Rather, the word *potentially* reflects the commonsense understanding that even when a rule would be reasonably interpreted to prohibit Sec. 7 activity, it may not actually interfere with such activity. Employees may be unaware of the rule or may choose to disregard it.

Second, if the General Counsel meets the initial burden of proving that a reasonable employee would interpret a rule to potentially interfere with the exercise of Section 7 rights, the *Boeing* analysis will require a balancing of that potential interference against the legitimate justifications associated with the rule. In many instances, we anticipate that it will be possible to strike a general balance of competing employee rights and employer interests for certain types of rules, thus eliminating the need for further case-by-case balancing. When the balance favors the general employer interests over the potential interference with the exercise of Section 7 rights, the rule at issue will be lawful and will fit within *Boeing* Category 1(b). When the potential for interference with the exercise of Section 7 rights outweighs any possible employer justification, the rule at issue will be unlawful and will fit within *Boeing* Category 3.⁴ In this respect, the practice of setting a legal standard based on the one-time application of the *Boeing* balancing test is consistent with other standards set by a similar one-time balancing of employee rights and employer interests in precedent that *Boeing* did not disturb.⁵

Third, 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 in *Boeing* Category 2.

With this clarification, we now turn to an analysis of the two rules at issue.

B. Confidentiality Rule

The Respondent's Confidentiality rule, in relevant part, requires employees to preserve the confidentiality of information "regarding matters that are confidential and proprietary of [Respondent] including but not limited to client/vendor lists." Applying *Boeing*, the judge found the maintenance of this rule unlawful. In her view, the rule interferes with the exercise of Section 7 rights, and the interference outweighs the Respondent's business justification for the rule. The Respondent's client and vendor lists contain sensitive information about pricing and discounts, and the judge acknowledged that the Respondent has a

substantial justification in preventing this information from being disclosed to its competitors. The judge found, however, that as written, the Confidentiality rule is not targeted at protecting this sensitive information, and it prohibits employees from sharing even customer and vendor names with third parties, such as a labor organization. The judge also noted that employees have a Section 7 right to appeal to an employer's customers in a labor dispute. In conclusion, she found that the Confidentiality rule infringes on the exercise of Section 7 rights to an extent that "tips the scale in favor of employee rights." For the following reasons, we reverse.⁶

Preliminarily, we agree that employees have a Section 7 right to concertedly appeal to third parties, including their employer's customers, for support in a labor dispute. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978); *Trinity Protection Services*, 357 NLRB 1382, 1383 (2011); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-1172 (1990); *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 230 (1980), *enfd. mem.* 636 F.2d 1210 (3d Cir. 1980). But the judge did not explain, and we are unable to perceive, how the language at issue would be reasonably read to interfere with that right. The Confidentiality rule requires employees to protect the confidentiality of the Respondent's client and vendor lists. It says nothing about *talking* to the Respondent's clients or vendors.

In addition, "employees may be lawfully disciplined or discharged for using for organizational purposes information improperly obtained from their employer's private or confidential records." *Macy's, Inc.*, 365 NLRB No. 116, slip op. at 4 (2017). This is so because the Act does not protect employees who divulge information that their employer lawfully may conceal. *Id.* (citing *International Business Machines Corp.*, 265 NLRB 638 (1982) (employer lawfully discharged employee who knowingly distributed salary information illicitly obtained from confidential wage table compiled by employer for its own internal use)).

We find that the Confidentiality rule, as interpreted by an objectively reasonable employee, does not prohibit or

⁴ E.g., *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019). We note that the *Boeing* opinion misleadingly stated that "[a]n example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another." 365 NLRB No. 54, slip op. at 4. On the contrary, a rule that *expressly* prohibits employees from discussing wages is not facially neutral and would be found unlawful under longstanding precedent predating *Boeing* and *Lutheran Heritage*. See, e.g., *Triana Industries, Inc.*, 245 NLRB 1258 (1979); *Coosa Valley Convalescent Center*, 224 NLRB 1288 (1976). However, a facially neutral rule that an objectively reasonable employee would interpret as prohibiting discussion of wages with co-workers would be unlawful and fit within *Boeing* Category 3 because the potential impact on the exercise of a core Sec. 7 right outweighs any possible employer

interest, whether general for all employers or specific to the employer involved, in maintaining such a rule.

⁵ E.g., *Peyton Packing Co.*, 49 NLRB 828 (1943) (no-solicitation rules), *enfd.* 142 F.2d 1009 (5th Cir. 1944), *cert. denied* 323 U.S. 730 (1944); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962) (no-distribution rules); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

⁶ On June 27, 2018, the General Counsel filed a motion to withdraw the complaint allegation that the Confidentiality rule is unlawful. The motion was filed after the parties had litigated the issue and one day before the judge issued her decision in this case. In these circumstances, we find that it would effectuate the policies of the Act to rule on this issue. Accordingly, the motion is denied.

interfere with the exercise of Section 7 rights. Contrary to the judge's finding, the rule does not prohibit employees from disclosing the names of the Respondent's customers and vendors to third parties, such as labor organizations. The disputed portion of the rule only applies to disclosure of the Respondent's "client/vendor lists." The other categories of information prohibited from disclosure—"accounting records, work product, production processes, business operations, computer software, computer technology, marketing and development operations, to name a few"—further confirm that the portion of the Confidentiality rule at issue only applies to the Respondent's own nonpublic, proprietary records.⁷

Having found that an objectively reasonable employee would not interpret the Respondent's Confidentiality rule as potentially interfering with the exercise of Section 7 rights, no consideration of the asserted business justifications offered for the rule is necessary in order to find it lawful under *Boeing*.⁸ Further, we now generally categorize rules that prohibit the disclosure of confidential and proprietary customer and vendor lists as Category 1(a) rules. Rules seeking to protect such lists target the protection of business information a company has developed over time. These rules do not target information central to the exercise of Section 7 rights, such as employee salary or wage information. Nor do they prohibit employees from appealing to customers or vendors for support in a labor dispute, or from disclosing the names and locations of customers or vendors derived from sources other than the employer's own confidential records.⁹

C. Media Contact Rule

The Media Contact rule provides that "[e]mployees approached for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization." For reasons stated

⁷ In finding the rule unlawful, the judge stated that the rule was not clear about what employees could share because "the record lacks any evidence as to whether it is well-known to employees what customer and vendor lists are as defined by Respondent" and because the Respondent's director of human resources and customer service, Wesley Wong, testified inconsistently regarding whether customer names and locations are confidential. We disagree with the judge's rationale. The issue here concerns the lawfulness of the Confidentiality rule on its face, and *Boeing* requires that the rule be *reasonably* interpreted. In other words, whether the rule potentially interferes with the exercise of Sec. 7 rights is determined under an objective standard. Evidence, or the lack of evidence, concerning how Wong or the Respondent's employees interpret the rule does not control that objective inquiry.

⁸ We do not mean to suggest that the justification asserted for a rule of this kind lacks merit. It requires no great act of imagination to picture the grave harm that disclosure of the Respondent's customer and vendor lists could inflict on its business. However, absent proof that employees

below, we reverse the judge and find that the Media Contact rule does not violate the Act.

Employees may engage in protected concerted activity "when they seek to . . . improve their lot as employees through channels outside the employee-employer relationship." *Eastex*, 437 U.S. at 565. Thus, Section 7 generally protects employees when they speak with the media about working conditions, labor disputes, or other terms and conditions of employment. See, e.g., *Valley Hospital Medical Center*, 351 NLRB 1250 (2007), *enfd. mem. sub nom. Nevada Service Employees Union, Local 1107, SEIU v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009); *Mas-Tec Advanced Technologies*, 357 NLRB 103 (2011), *enfd. sub nom. DirecTV, Inc. v. NLRB*, 837 F.3d 25 (D.C. Cir. 2016), *cert. denied* 138 S.Ct. 92 (2017); see also *Kinder-Care Learning Centers*, 299 NLRB at 1171 (finding unlawful a rule prohibiting employees from discussing terms and conditions of employment with third parties). However, the Media Contact rule at issue here is not facially unlawful unless it would reasonably be interpreted as infringing on the Section 7 right to communicate employees' personal opinions about wages, hours, or working conditions to the media. We find otherwise. When reasonably interpreted as required by *Boeing*, the Media Contact rule provides only that when employees are approached by the news media for comment, they cannot speak *on the Respondent's behalf*. Since employees have no right under the National Labor Relations Act to speak on their employer's behalf, the Media Contact rule does not potentially interfere with the exercise of NLRA rights.

The Media Contact rule speaks only to situations in which employees are *approached* by the news media, and it only prohibits employees from speaking *on the Respondent's behalf*.¹⁰ We recognize that the first sentence of the rule, standing alone, might suggest that employees may never speak to the news media—on behalf of the Respondent or themselves—when approached for comment.

would reasonably interpret the rule as potentially interfering with the exercise of any Sec. 7 right, there is no need to consider and weigh any justifications for the rule.

⁹ Union Trustee Richard Fierro testified that the Union is currently organizing the employees at the Respondent's facility, and for organizing purposes, the Union will collect the names of an employer's clients and vendors so it can make these third parties aware of the working conditions of the employer's employees. But there is no basis for finding that employees supporting the Union's campaign would reasonably believe that the Union could not obtain this information from employees without disclosure of the client and vendor lists.

¹⁰ Unsurprisingly, the Respondent's director of human resources and customer service testified that the purpose of the Media Contact rule is to authorize and designate Glick alone to speak on behalf of the Company so as to prevent "false information" from going out. We do not rely, however, on this testimony to determine how employees would reasonably interpret the rule. We rely on the language of the rule itself.

But the Board “must refrain from reading particular phrases in isolation,” *Lutheran Heritage*, 343 NLRB at 646, and, in any event, the rule in its entirety is at issue. We find, contrary to the judge, that an objectively reasonable employee would understand that the second sentence qualifies the first sentence by explaining that only Glick is authorized and designated to comment on company matters. The phrase “authorized and designated” is key. It signifies that Glick is the Respondent’s spokesperson, i.e., the only person authorized to comment about company matters *on the Respondent’s behalf*. Thus, read as a whole and from the perspective of a reasonable employee, the rule provides that because only Glick is authorized and designated to comment on company matters, employees approached for comment by the news media cannot speak on the Respondent’s behalf.

The General Counsel misreads the Media Contact rule to prohibit employees from *ever* speaking to the media, reading the first sentence to say that employees may never speak to the news media when approached for comment, and reading the second sentence to say that nobody but Glick may comment to the news media, meaning that employees may never do so. Again, however, to read the rule reasonably is to read it as a whole, and reading both sentences together, the second sentence merely explains the prohibition contained in the first sentence against speaking *when approached* for comment by the news media. The second sentence does not expand the prohibition in the first sentence from “when approached” to “at all times.” To read the second sentence of the rule that way renders the first sentence entirely superfluous. If the Respondent meant to prohibit its employees from *ever* speaking to the news media, it would not have begun by limiting employees from speaking to the news media only *when approached*.¹¹ And again, read together with the second sentence designating Glick as the only person authorized

to speak on company matters, a reasonable employee would understand that he or she is only precluded from speaking *on behalf of the Respondent* when approached for comment.

Based on the foregoing application of the *Boeing* test, we find that the Media Contact rule at issue is lawful. Further, we designate rules that prohibit employees from speaking to the media *on behalf of their employer* as *Boeing* Category 1(a) rules. Since there is no Section 7 right to speak to the media on behalf of the employer—i.e., to act as the company spokesperson—such rules, when reasonably interpreted, would not potentially interfere with the exercise of Section 7 rights.

III. RESPONSE TO DISSENT

Our dissenting colleague disagrees with our analysis for several reasons, most of which were previously articulated in her dissent in *Boeing*. She questions our allocation of the burden of proof in rules-maintenance cases, and she rejects the categorization of work rules and policies that *Boeing* adopts. The dissent then disputes our evaluation of the specific rules at issue in this case. We disagree with our colleague’s views for the reasons stated in *Boeing* and those that follow.¹²

First, there is no merit to the dissent’s criticism of our allocation of the burden of proof in cases of this type. As stated above, it is the General Counsel’s burden to prove “that a facially neutral rule *would* in context be interpreted by a reasonable employee . . . to potentially interfere with the exercise of Section 7 rights.” This follows inescapably from the undisputed principle that the General Counsel always bears the burden to prove that the Act has been violated,¹³ and from *Boeing* itself, which emphasized that, absent evidence that a disputed rule, reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, “the Board’s inquiry into maintenance of the rule

¹¹ We recognize that the rule might have been better written if the order of the two sentences were reversed, and it would be better still if the rule included a statement that employees remain free to express their personal opinions to the media as long as it is clear that they are not speaking on behalf of the company. However, as previously stated, *Boeing* properly rejected “linguistic perfection” as a standard for determining whether the language of a facially neutral employer rule or policy would be reasonably interpreted by an objective employee to interfere with Sec. 7 rights.

As with the rule requiring employees to maintain the confidentiality of client and vendor lists, we do not mean to suggest that the justifications asserted for rules that prohibit employees from speaking to the media on behalf of their employer lack merit. To the contrary, employers have a legitimate and indeed compelling interest in designating who may speak to the news media on their behalf in order to control messaging and thus mitigate risks of economic and reputational harm. However, absent proof that employees would reasonably interpret the Media Contact rule as potentially interfering with the exercise of any Sec. 7 right, there is no need to consider and weigh any justifications for the rule.

¹² In a brief aside, our colleague presents a variation on her oft-repeated charge that we wrongfully modify the law without public participation. We again reject her argument, which is particularly inapposite since this matter was litigated after *Boeing* was decided, and we are merely clarifying that decision. Moreover, the parties and the judge applied *Boeing*, and any interested party who wished to do so could have filed a motion requesting the Board to accept its amicus brief regarding how *Boeing* should be applied to the rules at issue here. Moreover, even accepting our colleague’s skepticism that our decision represents a “clarification” of *Boeing*, nothing in the Act, the Board’s Rules, the Administrative Procedure Act, or procedural due process principles requires the Board to invite amicus briefing before reconsidering precedent.

¹³ See, e.g., *Centex Independent Electrical Contractors Assn.*, 344 NLRB 1393, 1402–1403 (2005) (“[E]very unfair labor practice hearing begins with the presumption that the respondent has obeyed the law, and the General Counsel bears the burden of proving violative conduct by a preponderance of the evidence.”).

comes to an end.”¹⁴ The dissent finds this standard “perplexing” and the meaning of *would* “elusive.” We see nothing elusive in the meaning of this word. Indeed, the Board used the same word when formulating the General Counsel’s burden of proof under the *Lutheran Heritage* approach our colleague claims to espouse.¹⁵ Nor, contrary to the dissent, is there anything unclear about who it is that performs the balancing of employer interests and employee rights that *Boeing* requires. As *Boeing* emphasized, “the Board will conduct this evaluation, consistent with [its] ‘duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,’ focusing on the perspective of employees, which is consistent with Section 8(a)(1).” 365 NLRB No. 154, slip op. at 3 (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967) (emphasis in *Boeing*)). There is nothing new about this principle, which relies on Supreme Court precedent.¹⁶

Second, there is also nothing new about categorizing workplace rules based on a one-time balancing of rights and interests. As observed in *Boeing*, the Board has previously engaged in a similar exercise with respect to rules restricting solicitation, distribution of literature, and off-duty employee access. 365 NLRB No. 154, slip op. at 8. As a result, employers and employees have clear guidance regarding their respective rights and obligations. We seek, where possible, to provide the same clear guidance for other types of rules common to many American workplaces. Our colleague prefers to examine each rule afresh to determine whether it could have been “tailored” more narrowly, an exercise in unpredictability. We believe that employees and employers deserve better—and more

importantly, so does the Supreme Court.¹⁷ We recognize, however, that some rules “warrant individualized scrutiny,” and “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.”

That said, we are puzzled by our colleague’s objection to our classification in *Boeing* Category 1(a) of “rules that prohibit the disclosure of confidential and proprietary customer and vendor lists” and “rules that prohibit employees from speaking to the media *on behalf of their employer.*” The dissent agrees that “*there is no dispute that*” an employer has the right to maintain such prohibitions (emphasis added).¹⁸ Our decision today goes no further than that. We have not given all client-and-vendor confidentiality rules or all media contact rules a categorical stamp of approval. No fair reader of our decision could come away with that mistaken impression.

Finally, the dissent contends that the specific rules at issue in this case should be found unlawful, but her analysis is flawed in several respects. Our colleague concedes that the Confidentiality Rule is lawful insofar as it relates to the Respondent’s own confidential client-and-vendor lists. But she would find it unlawful all the same on the premise that “the phrase ‘client/vendor lists’ might well include any written list, or an oral list, or even two or more names.” This reasoning contradicts both *Boeing* and *Lutheran Heritage* because it focuses on whether an employee “might well” interpret the rule to prohibit Section 7 activity, rather than whether an employee *would* reasonably interpret the rule to do so.¹⁹ Moreover, the dissent reaches this result by reading “client/vendor lists” in

¹⁴ See *Boeing*, 365 NLRB No. 154, slip op. at 16.

¹⁵ See *Lutheran Heritage*, 343 NLRB at 647 (holding that maintenance of a work rule is unlawful if, among other things, “employees *would* reasonably construe the language to prohibit Section 7 activity”) (emphasis added). But as we will show, while our colleague advocates adherence to *Lutheran Heritage*, her opinion recapitulates the erstwhile Board majority’s deviation from that standard in practice.

¹⁶ “It is the primary responsibility of the Board . . . ‘to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.’” *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. at 33–34). The Board has long applied the same principle. See *Caesar’s Palace*, 336 NLRB 271, 272 fn. 6 (2001) (“It is the responsibility of the Board to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.”).

¹⁷ See *First National Maintenance Corp. v. NLRB*, 452 U.S. at 678–679; see also fn. 1, above. Actually, our colleague’s approach produces its own kind of predictability, since the question “Can it be tailored more narrowly?” will almost always be answered “Yes.” See *Boeing*, 365 NLRB No. 154, slip op. at 9 (“[I]t is likely that one can ‘reasonably construe’ even the most carefully crafted rules in a manner that prohibits some hypothetical type of Section 7 activity.”). But this is a bad kind of

predictability, the sort that tempts employers to throw up their hands in despair. See *id.*, slip op. at 10 (“[W]hen parties are held to a standard that cannot be attained, the natural and predictable response is that they will give up trying . . .”).

¹⁸ Specifically, the dissent states that “[t]here is no dispute that the Respondent may lawfully prevent employees from speaking on its behalf without authorization – with a narrowly tailored rule” and that “[t]here is no dispute that the Respondent’s computerized and annotated lists are the Respondent’s property and are properly subject to a narrowly tailored confidentiality rule.” While the dissent insists that such rules must be “narrowly tailored” to be lawful, that position is flawed for the reasons explained in *Boeing* and herein.

¹⁹ *Boeing*, 365 NLRB No. 154, slip op. at 16; *Lutheran Heritage*, 343 NLRB at 647. Of course, to ask whether an employee “might well” interpret a rule to prohibit Sec. 7 activity is to ask whether an employee *could* interpret the rule to do so. The dissent avoids framing her analysis in these terms because this would make it too obvious that she does not, in fact, adhere to *Lutheran Heritage*, her protestations to the contrary notwithstanding. See *Lutheran Heritage*, 343 NLRB at 647 (“Where . . . the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way” (emphasis in original)).

isolation. She fails to give any weight to the context in which that term appears. As explained above, our interpretation of the disputed provision as limited to the employer's own client/vendor lists is supported by the fact that the other categories of information covered by the rule—"accounting records, work product, production processes, business operations, computer software, computer technology, marketing and development operations"—also refer to information maintained in the Respondent's own confidential and proprietary business records. Again, the dissent's failure to take this context into consideration is contrary to both *Boeing* and the *Lutheran Heritage* standard the dissent purports to apply.²⁰

Our colleague's analysis of the Media Contact rule fails as well, and for similar reasons. Once again, the dissent contradicts the principles stated in both *Boeing* and *Lutheran Heritage* by reading each sentence in isolation, disregarding the fact that the rule's second sentence—referring to the Respondent's president as "the only person authorized and designated to comment" on Company policies—illuminates the rule as a whole. Consequently, she amplifies isolated ambiguities while ignoring the overall import of the rule from the perspective of a reasonable employee. Indeed, she goes even further. The dissent ridicules our reading of the Media Contact rule as limited to situations in which employees are approached by the news media as "illogical[]" and one that "cannot be taken seriously"—*even though this is precisely what the Media Contact rule states*.²¹ Reasonable employees do not scour the employee handbook searching for ambiguities that suggest interference with their Section 7 rights, and they certainly do not ignore what a rule actually says. Our colleague also errs insofar as she bases her violation finding on her view that "[i]t would have been easy for the Respondent to draft the rule" more narrowly. Once again, both *Boeing* and *Lutheran Heritage* preclude this reasoning.²²

²⁰ *Boeing*, 365 NLRB No. 154, slip op. at 15; *Lutheran Heritage*, 343 NLRB at 646 ("In determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.")

²¹ "Employees *approached* for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization." (Emphasis added.)

²² *Boeing*, 365 NLRB No. 154, slip op. at 2 (rejecting quest for "linguistic precision" that had prevailed under the misapplied "reasonably construe" prong of the *Lutheran Heritage* standard, under which the Board demanded a "perfection that literally [was] the enemy of the good"); *Lutheran Heritage*, 343 NLRB at 647 ("Where . . . the rule does not refer to Section 7 activity, we will not conclude that a reasonable

Ultimately, our disagreement with the dissent flows from the fact that we and she hold incompatible views of what constitutes a reasonable employee. For our colleague, the reasonable employee is akin to an insecure child, "cautious," "fear[ful]," "vulnerable" and "easily chilled." To support her view, she repeatedly cites *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), but she does not give a crucially important word in the language she quotes from that decision the weight it deserves. In *Gissel*, the Supreme Court said that a proper balancing of employer and employee rights "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up *intended* implications of the latter that might be more readily dismissed by a more disinterested ear." *Id.* at 617 (emphasis added). *Intended* implications, not speculative or imagined ones. This does not mean, contrary to our dissenting colleague's misreading of our analysis, that a rule will only be found unlawful if the employer intended to chill Section 7 activity, let alone that intent is an element in Section 8(a)(1) cases. Rather, the Supreme Court's decision in *Gissel* reinforces what we have already stated: employees interpret workplace rules from a viewpoint that we and the Fifth Circuit have termed the "everydayness of their job," and from that perspective a reasonable employee does not presume a Section 7 violation lurks around every corner.²³ Moreover, in adopting this viewpoint, we break no new ground. See *Lutheran Heritage*, 343 NLRB at 646 (the Board "must not presume improper interference with employee rights"); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (rejecting interpretation that would require the Board to "attribut[e] to the [r]espondent an intent to interfere with employee rights").

In contrast, the dissent's analysis—like that of the former Board majority that misapplied the "would reasonably construe" prong of *Lutheran Heritage* in case after case—posits so-called reasonable employees whose

employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way" (emphasis in original).

²³ For example, a reasonable employee of the Respondent would understand that her Sec. 7 right to engage with her fellow employees to advocate for better terms and conditions of employment would encompass the right to inform third parties of current terms and conditions. Nevertheless, she would also recognize that a prohibition on the dissemination of "client/vendor lists," among numerous other confidential and proprietary business records maintained by the Respondent, is not aimed at curtailing her Sec. 7 rights but at protecting confidential business records. Accordingly, the reasonable employee would understand that she may *appeal* to third parties, including clients and vendors, but she may not *disseminate* the Respondent's client/vendor lists. This is a distinction easily understood and a prohibition that does not unduly trench on the exercise of Sec. 7 rights.

delicate sensibilities will not permit them to engage in union or other protected concerted activities unless their employers' rules cannot be read to prohibit those activities. We think that the vast majority of actual employees would reject this well-intentioned but patronizing assessment. We believe that the reasonable employee posited by the Fifth Circuit in *T-Mobile USA*, above, by Member Kaplan in *Boeing*, and by us in our decision today better corresponds to the self-reliance, common sense, and team spirit that have always characterized America's workers. In saying as much, however, we do not disregard the reality, emphasized by the Court in *Gissel* and by our colleague, that employees are economically dependent on their employer. But neither *Boeing* nor this decision gives employers free rein to maintain rules that trample on employees' rights under Section 7 of the Act. We simply conclude that the rules at issue here do not.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. October 10, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER McFERRAN, dissenting.

In *Boeing Co*, a newly-constituted Board majority purported to bring “certainty and clarity” to the law by imposing a new test for determining the legality of employer work rules.¹ The decision was a “jurisprudential jumble of factors, considerations, categories, and interpretive principles”² that served only to bring more confusion to this difficult area of Board law. Perhaps recognizing the shortcomings of the original decision, today the majority purports to clarify *Boeing* itself, on its own initiative, without first seeking public participation by inviting amicus

¹ 365 NLRB No. 154, slip op. at 14 (2017).

² *Id.*, slip op. at 37 (dissenting opinion).

³ See, e.g., *Cordia Restaurants, Inc.*, 368 NLRB No. 43 (2019); *Electrolux Home Products, Inc.*, 368 NLRB No. 34 (2019); *Walmart Stores, Inc.*, 368 NLRB No. 24 (2019); *UPMC*, 368 NLRB No. 2 (2019); *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019).

briefs or engaging in rulemaking. Unfortunately, this effort fails. The *Boeing* test remains a mess.

But, even more problematic, today's “clarification” seems to confirm what my dissent predicted was the likely outcome of *Boeing*: that entire broad subject areas of workplace regulation—whether it be the “civility” rules the majority reached out to address in *Boeing* or the confidentiality and media rules at issue at issue here—will henceforth be categorically exempt from scrutiny, regardless of how a reasonable employee would read the particular work rule in question, or what chilling effect the rule might have on workers' exercise of their Section 7 rights. It appears that, under *Boeing*, the majority can now pick a case with a type of rule, analyze that particular rule (including its context and specific wording) to determine that it could not reasonably be read to apply to Section 7 activity (thus necessitating no application of the balancing test that would allow for weighing of worker rights and employer interests), and then proceed to broadly declare that any other similar workplace rule is lawful, regardless of the language or context of that rule, how it would be read, or the likely impact on exercise of Section 7 rights. This simply cannot be correct, and entirely ignores the statutory protections it is our job to enforce. But that is exactly what happens here. The majority upholds two work rules that—as drafted and interpreted consistent with the Supreme Court's guidance—have a reasonable tendency to chill employees from exercising their Section 7 rights, and then insulates any similar rules from future review. The “clarification” in this case thus further erodes the Board's ability to protect Section 7 rights. It can be added to a long and growing list of such holdings by the majority.³

I

Before analyzing the majority's purported “clarification” of *Boeing* in more detail, I should briefly explain, again, why *Boeing* was wrongly decided.⁴

To begin, *Boeing* rejected a well-established legal test, applied for more than 13 years, which had never been rejected by a federal court of appeals—and it did so sua sponte, without notice and without inviting briefing from the public, contrary to the Board's traditional norms.⁵ Today, again dispensing with public participation, the majority treats the Board's pre-*Boeing* approach—the *Lutheran Heritage* analytical framework⁶—as irrational, but it points to no judicial support for its view. As I pointed out in dissent, the courts not only applied the *Lutheran*

⁴ As indicated, my views are explained at length in my *Boeing* dissent. 365 NLRB No. 154, slip op. at 29–44. I also endorse the dissenting view of then Member Pearce. See *id.*, slip op. at 23–29.

⁵ *Id.*, slip op. at 31–33.

⁶ *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

Heritage framework without criticism, but even struck down certain employer rules that the Board had upheld under that test.⁷

Second, *Boeing* was based on a fundamental misunderstanding of *Lutheran Heritage* and on a failure to consider the key aspect of the problem before the Board in this area of the law: “how to address the fact that some work rules maintained by employers will discourage employees subject to the rules from engaging in activity that is protected by the National Labor Relations Act.”⁸ Contrary to the *Boeing* majority, *Lutheran Heritage* did not somehow prohibit the Board from considering an employer’s legitimate business justifications for its work rules; indeed, judicial decisions applying *Lutheran Heritage* refute that claim.⁹ What *Lutheran Heritage* required—with the approval of the courts—is that employer rules that infringe on employee rights be narrowly tailored and that employers prove that their legitimate business justification for a rule outweighs the rule’s adverse effect on employees.¹⁰ The *Boeing* majority’s other criticisms of *Lutheran Heritage*—including that it somehow required employers to eliminate all ambiguities from its rules—are also easily shown to be contrived.¹¹

Third, *Boeing* wrongly broke with the key premise of *Lutheran Heritage*: “that for purposes of administering the National Labor Relations Act, an employer’s work rules should be evaluated from the perspective of the employees subject to the rules—and protected by the statute.”¹² Because employer work rules are evaluated under the standard of Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]” of the Act,¹³ the Board is required to follow the admonition of the Supreme Court that:

Any assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting. Thus, an employer’s rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in [Section] 7 and protected by [Section] 8(a)(1). . . . *And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.*

⁷ *Boeing*, supra, 365 NLRB No. 154, slip op. at 30 & fn. 6 (dissenting opinion).

⁸ Id., slip op. at 34.

⁹ Id. at 35.

¹⁰ Id., citing *Midwest Division-MMC, LLC v. NLRB*, 867 F.3d 1288, 1302 (D.C. Cir. 2017).

NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (emphasis added). *Boeing* violated this requirement.

Finally, *Boeing*’s rule-categorizing scheme—sorting rulings into three boxes: always-lawful, sometimes-lawful, and never-lawful—serves neither claimed goal of certainty or clarity, not for employers and certainly not for employees, who must decide whether their contemplated Section 7 activity could cost them their jobs.¹⁴ Moreover, as the *Boeing* Board’s blanket approval of “civility” rules illustrated, *Boeing* arbitrarily and capriciously dispensed with individualized scrutiny for work rules that fit into approved categories based on their subject matter—and regardless of their wording or whether they were narrowly tailored.¹⁵

In short, *Boeing* reflected a failure to engage in reasoned decision making.

II.

None of the fatal flaws in *Boeing* are fixed today. Instead, the majority perpetuates the problems created by that earlier decision. I address each of today’s purported clarifications of *Boeing* in turn.

A.

First, the majority holds that “it is the General Counsel’s initial burden in all cases to prove that a facially neutral rule *would* [emphasis in original] in context be interpreted by a reasonable employee . . . to potentially interfere with the exercise of Section 7 rights.” This means, says the majority, that the rule is interpreted 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.’” Thus, 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. . . .” But this description of the employee perspective is in tension with the Supreme Court’s admonition in *Gissel*.

In my *Boeing* dissent, discussing how the Board might refine the *Lutheran Heritage* framework, I suggested that:

[T]he Board might take heed of the Fifth Circuit’s recent observation that the Board has not “specifically defined” the “reasonable employees” reflected in the *Lutheran Heritage* standard. A more specific definition—*necessarily grounded in the . . . observation of the Gissel*

¹¹ Id. at 36.

¹² Id. at 38.

¹³ 29 U.S.C. §158(a)(1).

¹⁴ *Boeing*, supra, 365 NLRB No.154, slip op. at 38–39 (dissenting opinion).

¹⁵ Id. at 39–40.

Court that employees are economically dependent on their employers and thus particularly sensitive to coercive implications in employer statements—might aid the Board, the courts, and the public.

365 NLRB No. 154, slip op. at 43 (emphasis added; internal citation omitted), citing *T-Mobile USA, Inc.*, 865 F.3d 265, 271 (5th Cir. 2017).¹⁶

In today’s decision, the majority fails to heed the *Gissel* Court’s admonition that the Board “must take into account the economic dependence of the employees on their employers” and the “necessary tendency” of employees to interpret employer statements as coercive, even where a third party would not. Put another way, a reasonable employee is a vulnerable employee, easily chilled—and *that* is the perspective the Board must adopt in interpreting employer work rules. Instead, the majority refers to 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.’” What this test actually means is hopelessly unclear.¹⁷ What is clear is that it cannot be reconciled with *Gissel*.

The majority insists that it does not “disregard the reality, emphasized by the Court in *Gissel* . . . that employees are economically dependent on their employer.” Yet it characterizes my view that employees must therefore be treated as vulnerable and easily chilled—for purposes of the Board’s application of Section 8(a)(1) of the Act and its interpretation of employer rules—as “well-intentioned but patronizing.” It should be clear that the majority’s quarrel is less with me than with Congress and the

¹⁶ “Such a refined definition,” I explained, “would want to take into account the level of knowledge concerning their Section 7 rights that may reasonably be attributed to employees, as well as an informed understanding of what forms of Section 7 activity are most commonly undertaken—or considered—in the typical workplace, where most workers are not represented by a union.” Id.

¹⁷ For purposes of effectively administering Sec. 8(a)(1) of the Act, the Board should assume that a reasonable employee is one who contemplates engaging in Sec. 7 activity that may be covered by a rule and who wishes to avoid subjecting herself to possible discipline or discharge for violating the rule—the lawfulness of the rule turns on whether it would “interfere with, restrain or coerce” the employee in exercising her rights under the Act. To assume otherwise—such as by focusing on the applicability of rules to the “everydayness of [the employee’s] job” that do not involve protected concerted activity—neglects the Act’s core purpose of protecting such activity. It is precisely those situations that do *not* represent the “everydayness of [the employee’s] job” that the Act is concerned about.

The majority does not explain how an employee’s “aware[ness] of his legal rights” should be taken into account in interpreting employer rules—it is unclear whether the majority is suggesting that an employee who is “aware of his legal rights” would be particularly cognizant of how rules could interfere with those rights, or, conversely, whether the suggestion is that the “aware” employee would naturally tend to interpret rules as consistent with his legal rights—if the intention is the latter, the majority offers no basis for its assumption that employees will inevitably

Supreme Court. That employers have power over their employees, and that employees require countervailing statutory protection in the workplace, are core premises of the National Labor Relations Act. These are the reasons why Section 8(a)(1) exists in the first place. Perhaps Congress was wrong to think that employees have “delicate sensibilities” (in the majority’s words) and should instead have trusted in the “self-reliance, common sense, and team spirit that have always characterized America’s workers” (again quoting the majority), but Congress made its choice in 1935 and the Board must honor it. The majority is simply mistaken, meanwhile, if it means to suggest that the *Gissel* Court was focused not on how employees will tend to interpret their employer’s statements, given their economic dependence, but rather on what the employer’s actual intent is.¹⁸ Intent is not, and has never been, a necessary element of a Section 8(a)(1) violation: an employer’s rule can be unlawfully coercive regardless of whether the employer intends to coerce employees.¹⁹

The majority’s approach is perplexing, too, in insisting that the General Counsel must prove that a work rule “*would* in context be interpreted . . . to potentially interfere with the exercise of Section 7 rights.” The emphasis on “*would*” is the majority’s, but its meaning is elusive. The majority seems to mean that the coercive interpretation of a rule must be inevitable: the *necessary* interpretation of the rule, not merely *one* reasonable interpretation of the rule or even the *most* reasonable interpretation, but the *only* reasonable interpretation. If this understanding is correct,²⁰ then the majority is imposing a test that is far too

presume their employers’ best intentions in crafting rules that subject them to possible discipline or discharge.

¹⁸ The majority asserts that I “ignore[] a crucially important word” in the *Gissel* Court’s admonition, which refers to the “*intended* implications” of an employer’s statements. 395 U.S. at 617 (emphasis added). But the majority takes the word “intended” out of context. The Court’s reference was to what employees would *perceive* as the employer’s “intended implications”—given the “labor relations setting” of the statement and their “economic dependence” on the employer (id.)—not to what the employer actually did intend. To suggest, as the majority does, that any employee interpretation not intended by the employer is “speculative” or “imagined” fundamentally misunderstands the Court’s point.

¹⁹ E.g., *Webasto Sunroofs, Inc.*, 342 NLRB 1222, 1223 (2004). See also *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 549 (D.C. Cir. 2016) (“[T]he Board’s concern about discouraging protected employee activities exists just the same ‘whether or not that is the intent of the employer.’”).

²⁰ The majority does not take up my invitation to state precisely what it means when it emphasizes the word “*would*.” Instead, the majority simply says that *Lutheran Heritage* (the precedent it rejects) also uses the word “*would*” in its standard, while suggesting that I (as a supposed “proponent of *Lutheran Heritage*”) should not be heard to complain, and citing the “erstwhile Board majority’s deviation from [the *Lutheran Heritage*] standard in practice.” The majority’s criticism does nothing to clarify the Board’s current standard. It confirms, if anything, that *Lutheran Heritage* itself was ambiguous—just like its replacement.

strict to adequately protect Section 7 rights, especially considering that this test is only the threshold for finding a violation, a prerequisite that must be satisfied even before the Board will even consider balancing employee rights and employer interests. The majority's approach is obviously contrary to the Board's longstanding approach to Section 8(a)(1) of the Act, which asks whether an employer's actions or statements have a "reasonable tendency" to (in the Act's words) "interfere with, restrain, or coerce employees"—not whether they necessarily would have that effect.²¹ The same principle applies to employer work rules.²²

B.

The majority's second purported clarification of *Boeing* addresses the balancing test to be applied if (but only if) the General Counsel carries his initial burden. As explained, the majority announces today that the Board will often be able to "strike a general balance of employees rights and employer interests," making it unnecessary to engage in a "case-by-case balancing" for "certain types of rules." The arbitrary and capricious nature of the majority's approach here should be obvious.

First, the majority fails to explain which party has the burden of proof with respect to the balancing. The Supreme Court has made clear that when employees' Section 7 rights are implicated, it is the *employer's* burden to prove that its legitimate business interests should nevertheless prevail and that no unfair labor practice should be found, despite the infringement on employee rights.²³ This principle applies when an employer's work rule is at issue, as the District of Columbia Circuit recently explained, observing that "[m]aintaining a rule reasonably likely to chill employees' Section 7 activity amounts to an unfair labor practice unless the employer 'present[s] a legitimate and

substantial business justification for the rule' that 'outweigh[s] the adverse effect on the interests of employees.'"²⁴ Today, the majority quotes language from *Boeing* that apparently would flip the established burden of proof, imposing it on the General Counsel and so finding a violation of the Act only "if the [employer's] justifications are outweighed by the adverse impact on rights protected by Section 7."²⁵ It is no answer to point out that General Counsel has the burden to prove a violation of the Act: the cases establish that he has carried that burden if he shows that Section 7 rights have been infringed and if the employer fails to prove that the infringement was justified. Nor is it sufficient to suggest that because the Board applies a balancing test, neither party has a burden of proof.

The second defect in the majority's endorsement of a "general balancing" approach is that it eliminates any consideration of the language of a particular rule and the requirement that a rule that infringes on Section 7 rights be narrowly tailored. Under the majority's approach, after the Board finds a rule of a certain type to be lawful, *every* rule of that type will be classified as lawful regardless of its wording, as long as the employer's purported "target" or "interest" is the same as the first employer's and the rule does not explicitly restrict concerted employee activity regarding terms of employment.²⁶ This categorical approach flies in the face of the long-established principle, applied by the Board and by the federal courts, that a rule restricting employees' protected concerted activity must be narrowly tailored to serve an employer's legitimate interests—and not worded more broadly than necessary to do so.²⁷ This principle is illustrated even in cases where the Board has addressed a category of rules: some rule language is permitted; some is not.²⁸

That I applied *Lutheran Heritage* as Board law when it was Board law hardly makes me a "proponent" of the decision. I did not participate in the 2004 decision, but I treated it (and its progeny) as precedent. My criticism of *Boeing* does not make me by default a "proponent" of *Lutheran Heritage*. Indeed, my *Boeing* dissent explained my views about how the Board might have revisited its approach in work rules in ways that did not result in the muddled *Boeing* test and its failed clarification today.

²¹ See *Capital Medical Center*, 364 NLRB No. 69, slip op. at 15 (2016), enfd. 909 F.3d 427 (D.C. Cir. 2018), cert. denied 139 S.Ct. 1445 (2019); *Gunderson Rail Services*, 364 NLRB No. 30, slip op. at 35 (June 23, 2016), rev. dismissed 2017 WL 6603635 (D.C. Cir. 2017); *American Freightways Co.*, 124 NLRB 146, 147 (1959).

²² See, e.g., *ITT Federal Services Corp.*, 335 NLRB 998, 1002 (2001); *Engelhard Corp.*, 342 NLRB No. 5, slip op. at 16 (2004); *Naomi Knitting Plant*, 328 NLRB 1279, 1280 (1999); *Williamhouse of California*, 317 NLRB 699, 713 (1995).

²³ See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 781–82 (1979); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 498–505 (1978); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–04 (1945).

²⁴ *Midwest Division-MMC, LLC v. NLRB*, 867 F.3d 1288, 1302 (D.C. Cir. 2017), quoting *Hyundai America Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015).

²⁵ *Boeing*, supra, 365 NLRB No. 154, slip op. at 16.

²⁶ The majority asserts that this categorical approach to finding rules lawful is "consistent with other standards set by a similar one-time balancing of employee rights and employer interests in precedent that *Boeing* did not disturb." But the cases the majority cites in support of this assertion imposed explicit restrictions (no-solicitation, no-distribution rules) that required no interpretation of their meaning. Those cases did not address rules that could be reasonably interpreted in different ways.

²⁷ See, e.g., *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 210 fn.4 (5th Cir. Cir. 2014); *NLRB v. Northeastern Land Services, Ltd.*, 645 F.3d 475, 483 (1st Cir. 2011); *Cintas Corp. v. NLRB*, 482 F.3d 463, 470 (D.C. Cir. 2007); *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 380 (D.C. Cir. 2007); *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 4 (2016).

²⁸ See, e.g., *Our Way, Inc.*, 268 NLRB 394 (1983) (examining no-solicitation and no-distribution rules and distinguishing between lawful prohibitions applying to "working time" and unlawful prohibitions applying to "working hours").

C.

The majority's third "point of clarification" acknowledges that a "general balancing" of rights and interests will not always be possible, because sometimes "the context of the rule and the competing rights and interests are specific to that rule and that employer." This assertion seems to state the exception to the majority's rule, but the majority neither gives the exception content, nor offers any illustrations. Notably, the majority never clearly acknowledges that the particular language of work rules must be a crucial consideration in *every* case. Employees consulting an employee handbook or a posted list of rules are confronted not with general categories of rules, but with specific rules that they must follow to keep their jobs.

III.

This case illustrates all of the flaws in the majority's approach, most notably the failure of the majority to engage with the actual language of particular rules and to take into account the vulnerability of employees in determining the reasonably likely effect of the rules on Section 7 activity. Here, as explained, the majority not only upholds the two rules at issue—the Media Contact Rule and the Confidentiality Rule—but holds that employers are always permitted to maintain rules of the same type. But both of the rules in question have a reasonable tendency to chill employees from engaging in protected concerted activity, and neither rule is narrowly tailored. The majority insists that it has "not given all client-and-vendor confidentiality rules or all media contact rules a categorical stamp of approval." The majority's decision, however, recites that the Board will "now generally categorize rules that prohibit the disclosure of confidential and proprietary customer and vendor lists as Category 1(a) rules," which are always lawful to maintain, and it also places "rules that prohibit employees from speaking to the media on behalf of their employer" in the same always-lawful category. Because the two rules here are, in fact, impermissibly overbroad, the majority's general categorization of such rules effectively means that all such overbroad rules will be lawful: the majority does not adopt a rule-by-rule approach.

A.

The Respondent's media-contact rule states (my emphasis): "Employees approached for interview and/or comments by the news media, cannot provide them with *any information*. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies *or any event that may affect our organization*."

In the majority's view, when "reasonably interpreted," this rule "speaks only to situations in which employees are approached by the news media, and it only prohibits employees from speaking on the Respondent's behalf." "[A]n 'objectively reasonable employee,'" the majority insists, "would understand that the second sentence qualifies the first sentence by explaining that only Glick is authorized and designated to comment on company matters." Moreover, "[i]f the Respondent meant to prohibit its employees from ever speaking to the news media, it would not have begun by limiting employees from speaking to the news media only when approached." According to the majority, the "overall import of the rule"—not its particular language—is decisive.

In other words, the rule's two blanket prohibitions on providing the media with "any information" and on commenting on "any event that may affect our organization" (separate and apart from commenting on "Company policies"), under the majority's view, cannot possibly mean what they clearly say, because employees would necessarily grasp the "overall import of the rule." This is a distortion of plain English and common sense. There is no dispute that the Respondent may lawfully prevent employees from speaking on its behalf without authorization—with a narrowly tailored rule. But a bar on "provid[ing] any information" whatsoever and on "comment[ing] on any event that may affect our organization," without further qualification (such as the language the majority inexplicably reads into the rule limiting its scope to statements officially made on behalf of the employer), would be read, on its plain language, by a reasonable employee to restrict employees from communicating about terms of employment and other protected activity. This is all the more true from the perspective of employees, "who are dependent on the employer for their livelihood [and] would reasonably take a cautious approach and refrain from engaging in Section 7 activity for fear of running afoul of a rule whose coverage is unclear."²⁹ And the majority's speculation that an employee would read the rule to suggest that their employer would prohibit them from talking to media "when approached" but would not care what they said if *not* approached cannot be taken seriously. No reasonable person, let alone a reasonable employee, would interpret the rule so illogically.

The majority also arbitrarily refuses to consider the fact that this rule was not narrowly tailored, as the Act demands to ensure that employees are not chilled from exercising their Section 7 rights. This is not a matter of employees "scour[ing] the handbook searching for

²⁹ 365 NLRB No. 154, *supra*, slip op. at 38, citing *Gissel*, *supra*, and *Whole Foods Market*, 363 NLRB No. 87, slip op. at 4 fn. 11 (2015).

ambiguities,” but of an employer’s failure to take reasonable steps to avoid infringing on statutory rights. It would have been easy for the Respondent to draft the rule in a way that complied with the Act while achieving the aim of the rule endorsed by the majority. The addition of the phrase “on the Company’s behalf”—the purported essence of the rule—to each of the rule’s two sentences, for example, would have avoided any intrusion on Section 7. But in the majority’s view, such an elementary corrective is tantamount to requiring an employer to “eliminate all ambiguities from the rule, an all-but-impossible task,” and the rule’s obvious encroachment on Section 7 activity is dismissed as “some hypothetical scenario.” This ignores reality. The Board’s obligation to provide “certainty and clarity” to employers to the extent possible does not, as the majority implies, create a license for the majority to provide such “clarity” by ignoring the requirements of the Act.³⁰

B.

The Respondent’s confidentiality rule reads as follows (with emphasis on the terms alleged to be unlawful):

Every employee is responsible for protecting any and all information that is used, acquired, or added to regarding matters that are confidential and proprietary of [Respondent] including but not limited to client/vendor lists, client/vendor information, accounting records, work product, production processes, business operations, computer software, computer technology, marketing and development operations, to name a few. Confidential information will also include information provided by a third party and governed by a non-disclosure agreement between [Respondent] and the third party. Access to confidential information should be disclosed on a “need-to-know” basis and must be authorized by management. Any breach to this policy will not be tolerated and will be subject to disciplinary and legal action.

The key phrase in this rule is “client/vendor lists,” which the judge quite properly found made the rule unlawful.³¹ It is well-established that employees have the right to disclose the names and locations of their

employer’s clients and vendors to third parties (including a union) for the purpose of asking them for support in the course of their protected concerted activities.³² The majority, however, treats as accurate the Respondent’s assertion that “client/vendor lists” must be read to refer solely to a specific set of computerized lists of clients and vendors it maintains. Since those particular lists contain sensitive information about pricing and discounts, the majority finds the rule lawful, noting that it “says nothing about talking to the Respondent’s clients or vendors” and “does not prohibit employees from disclosing the names of the Respondent’s customers and vendors to third parties.” The majority further suggests that the rule is lawful because “there is no basis for finding that employees supporting the Union’s campaign would reasonably believe that the Union could not obtain this information from employees without disclosure of the [computerized] client and vendor lists.”

There is no dispute that the Respondent’s computerized and annotated lists are the Respondent’s property and are properly subject to a narrowly tailored confidentiality rule. But as the Respondent’s rule was worded, an employee would reasonably conclude that the rule would constrain him from generating or using a list of the employer’s customers for purposes of Section 7 activity; indeed, the phrase “client/vendor lists” might well include any written list, or an oral list, or even two or more names. Again, the majority reads into the rule clarifying language that is not there. We cannot assume a reasonable employee would necessarily do the same.

IV.

Employees in the diverse workplaces covered by the National Labor Relations Act are governed by innumerable and widely varying employer work rules. Some of these rules have a reasonable tendency to chill the exercise of Section 7 rights without justification. It is the Board’s responsibility to redress such violations of the Act. Without justification, *Boeing* jettisoned the analysis the Board had carefully crafted for this purpose and replaced it with a new framework that is not merely unworkable, but impermissible.³³ My colleagues’ attempt to “clarify” *Boeing* in this case, and their refusal to find the challenged rules

³⁰ In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), cited by the majority and in *Boeing*, and in which the Supreme Court referred to an employer’s need for “some degree of certainty beforehand” in order to “reach decisions without fear of later evaluations labeling its conduct an unfair labor practice,” the Court was referring to the employer’s obligation to bargain over changes in terms of employment under Sec. 8(a)(5) of the Act, not to the wording of work rules under Sec. 8(a)(1). It is clearly easier for the Board to provide “certainty” on whether a subject is bargainable as a term of employment than to define generalized categories of lawful (or unlawful) work rules that are ambiguously worded.

³¹ The separate phrase “client/vendor information,” also appearing in the rule, was not alleged to be unlawful.

³² *Trinity Protection Services*, 357 NLRB 1382, 1383 (2011); *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990); *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 230 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980).

³³ See *Guardsmark, LLC v. N.L.R.B.*, 475 F.3d 369, 374 (D.C. Cir. 2007) (accepting the “reasonably tend to chill” standard as a permissible interpretation of Sec. 8(a)(1) with respect to work rules and making clear that the court will deny enforcement of “an unreasonable or otherwise indefensible interpretation of Section 8(a)(1)’s prohibition”)

here unlawful, have only confirmed this fact. As in *Boeing* itself, the only “clarity” provided in this case is that employer interests will routinely prevail when work rules are challenged and that many more employees will be deterred from engaging in Section 7 activity as a result. I therefore dissent.

Dated, Washington, D.C. October 10, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

Noah J. Garber, Esq., for the General Counsel.
James A. Bowles, Esq., for the Respondent.
Andrew H. Baker, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in Oakland, California, on March 26, 2018. The General Counsel alleges, in the January 31, 2018 complaint, based on an October 13, 2017 charge filed by Teamsters Local 70, International Brotherhood of Teamsters (Charging Party or Union), that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by unlawfully maintaining two rules in its employee manual: the “Confidentiality & Non-Disclosure” rule and the “Media Contact” rule.¹ Respondent filed a timely answer.

For the reasons that follow, I find that Respondent violated Section 8(a)(1) of the Act with regard to both rules.

On the entire record,² including my observation of the

¹ On March 5, 2018, the Regional Director for Region 32 of the National Labor Relations Board (Board) issued an order approving a partial withdrawal request which partially withdrew complaint allegations.

² Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations but rather on my review and consideration of the entire record for this case. In addition, the transcript in this case is generally accurate, but I make the following corrections to the record: Transcript (Tr.) 5, Line (L.) 3: “preliminary” should be “formal”; and Tr. 5, L. 7: “Baman” should be included as the middle name.

³ I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom. A credibility determination may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness’

demeanor of the witnesses,³ and after considering the briefs filed by the General Counsel, Charging Party, and Respondent,⁴ I make the following

FINDINGS OF FACT AND ANALYSIS

I. JURISDICTION

Respondent, a State of California corporation with an office and place of business in Hayward, California (facility), is engaged in the nonretail sale and distribution of produce, where it annually sold and shipped from its facility goods valued in excess of \$50,000 directly to points outside the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Based on the above, I find that these allegations affect commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. THE ALLEGED UNLAWFUL RULES

A. Respondent’s Organization and the LA & SF Specialty Employee Manual

Respondent is a wholesale distributor of produce and other fine foods and specialty foods to white tablecloth restaurants, hotels, and specialty grocers (Tr. 25). Respondent’s corporate office is in Santa Fe Springs, California, and it has facilities in Northern and Southern California including Hayward, California, as well as in Arizona and Nevada (Tr. 26). Michael Glick (Glick) is Respondent’s owner (Tr. 26).

Wesley Wong (Wong), who is Respondent’s director of human resources and customer service, testified that since at least 1998 Respondent has maintained the LA & SF Specialty Employee Manual (the Manual) which contains the two rules at issue (Tr. 25, 27). Wong admitted that he was not involved in the drafting of these rules but discussed them with Glick and other members of management (Tr. 26–27, 34).

testimony. *Daikichi Sushi*, 335 NLRB at 622. In this matter, there are no significant credibility disputes.

⁴ Other abbreviations used in this decision are as follows: “GC Exh.” for General Counsel’s exhibit; “GC Br.” for the General Counsel’s brief; “CP Br.” for the Charging Party’s brief; and “R. Br.” for Respondent’s brief. After the filing of briefs, Respondent, on June 12, 2018, filed a notice of recent supplemental authority in which Respondent cites to General Counsel memorandum 18–04, dated June 6, 2018. The Charging Party “opposes” the notice. General Counsel memorandums are simply guidance for Regional Offices, and have no binding legal precedent on administrative law judges who are bound by Board precedent that neither the Board nor the Supreme Court has reversed. See *George Joseph Orchard Siding, Inc.*, 325 NLRB 252, 255 (1998) (“the General Counsel’s memoranda, or indeed other communications or positions of the General Counsel, like the positions of the counsel for the General Counsel made at trial, are but the position of a party to the complaint litigation. As such the General Counsel’s positions-as opposed to joint General Counsel-Board determinations or provisions-are not binding on the Board or its judges and are effective only to the extent they are persuasive”); see also *Western Cab Co.*, 365 NLRB No. 78, slip op. at 1 fn. 4 (2017). In that regard, since the Board’s decision in *The Boeing Co.*, 365 NLRB No. 154 (2017), the Board had issued no further decisions in these rules-type cases.

B. “Confidentiality & Non-Disclosure” Rule

As alleged in the complaint, since at least April 13, 2017, Respondent has maintained a confidentiality and non-disclosure rule in the Manual. The “Confidentiality & Non-Disclosure” rule states, in entirety,

Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of [Respondent] including but not limited to client/vendor lists, client/vendor information, accounting records, work product, production processes, business operations, computer software, computer technology, marketing and development operation, to name a few. Confidential information will also include information provided by a third party and governed by a non-disclosure agreement between [Respondent] and the third party. Access to confidential information should be disclosed on a “need-to-know” basis and must be authorized by management. Any breach to this policy will not be tolerated and will be subject to disciplinary and legal action.

(Emphasis added) (GC Exh. 2). The complaint only alleges that the portion in bold violates the Act.⁵

Wong described that Respondent’s customer lists, on a computer system, includes addresses, contact information, ordering preferences, pricing and customer discounts (Tr. 28, 36). Wong stated also that the customer lists may be manipulated to omit any information not needed such as pricing (Tr. 36). Wong testified that Respondent seeks to keep the customer lists confidential because, “Those are our trade secrets. If those get out to our competitors, it’s an extremely competitive business. They can use that against us, especially with outbidding us with the pricing. They can lowball us. They can once they know what the customer orders, they can approach those customers and attack us, and outbid us.” (Tr. 29).⁶ The vendor list is similar to the customer list but with vendor names and similar information including pricing (Tr. 29). Again, Wong testified that Respondent seeks to keep the vendor list confidential because, “We can get outbid with pricing. They can undermine us and secure these vendors that we worked hard to establish relations through the years.” (Tr. 29).

Wong testified that Respondent considers customer names and locations to be confidential but confusingly, also stated on cross-examination that employees could share customer names with a union because “Employees have the right to say what they want [. . .] or talk to who they want” (Tr. 37, 40–41, 44–45). Moreover, when asked about the difference between customer/vendor lists and customer/vendor information, as indicated as confidential and proprietary in the rule, Wong stated, “Well, lists is what we specified before, where you go on a computer and printout a whole list. Information can be anything” including information already provided on the list (Tr. 41).

⁵ The Charging Party raises an additional argument that other portions of the Confidentiality & Non-Disclosure rule also violate the Act (Tr. 41; CP Br. at 6). However, the General Counsel has the sole authority to issue the complaint and any amendments. The General Counsel specifically limited its complaint allegation to the section bolded, and thus, this

Wong offered that if any employee is unclear about the rule, the employee may ask him to clarify (Tr. 44).

Respondent provided no evidence of economic harm aside from Wong’s conjecture (Tr. 35). Moreover, Wong testified that no employee has been disciplined for violating the “Confidentiality & Non-Disclosure” rule (Tr. 31, 34–35).

Union Trustee Richard Fierro (Fierro) testified that the Union is currently organizing the employees at Respondent’s facility (Tr. 17–18). Fierro testified that for organizing purposes the names of clients or vendors from employees to the Union is important so as to bring awareness to these third parties of the working conditions of a business’ employees (Tr. 18–19). Fierro admitted that customer identities could be obtained through employees but the employees do not know the identities of all the customers (Tr. 21–23).

C. “Media Contact” Rule

As alleged in the complaint, since at least April 13, 2017, Respondent has maintained a media contact rule in the Manual. The “Media Contact” rule states, “Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization” (GC Exh. 2).

Wong testified that Respondent’s reason for the Media Contact rule was to ensure that Glick was the only person authorized and designated to speak on behalf of Respondent as he did not want “false information” going out (Tr. 31). Wong admitted that Respondent has never suffered economic harm by an employee speaking to the media and no employee has been disciplined for violating the “Media Contact” rule (Tr. 32, 34–35). However, Wong stated that if an employee were to speak to the media on his own behalf, he would not be violating the policy as an employee has the right to speak to the media when he wants (Tr. 31–32, 45).

Fierro testified that when the Union organizes employees, it will ask employees to speak to the media to strengthen support for unionization, to discuss their working conditions, and to pressure a business to improve working conditions for employees (Tr. 18, 20). These employees speak on their own behalf, and not on behalf of a business (Tr. 21).

III. CONTENTIONS OF THE PARTIES

The General Counsel alleges that Respondent’s “Confidentiality & Non-Disclosure” rule and “Media Contact” rule in the Manual violate Section 8(a)(1) of the Act. Specifically, the General Counsel alleges that these rules are category 3 rules under the Board’s decision in *Boeing Co.*, 365 NLRB No. 154 (2017), and therefore, unlawful. Furthermore, the General Counsel argues that Respondent’s business justifications do not outweigh the adverse impact on employees’ Section 7 rights (GC Br. at 7–13). The Charging Party sets forth similar arguments as the

decision will only focus on that portion of the rule when determining whether that section of the rule is unlawful.

⁶ Wong was asked a couple of questions regarding the California Trade Secrets Act and the necessity of confidentiality policies due to trade secrets (Tr. 33–34). Wong stated in response, “I’m not clear on that, but I will say yes” (Tr. 34).

General Counsel (CP Br. at 6–8).

Respondent admits that it has maintained these two rules in the Manual since at least April 13, 2017. However, Respondent denies that these rules violate the Act as the rules were promulgated for legitimate and lawful business reasons such as to protect proprietary trade secrets which outweigh any potential impact on employees Section 7 rights (R. Br. at 8-19).

IV. ANALYSIS OF UNFAIR LABOR PRACTICE

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act].” Section 7 provides that “employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.” Specifically, Section 7 protects employees’ right to discuss, debate, and communicate with each other regarding workplace terms and conditions of employment.

Under Board law, a work rule is unlawful if “the rule *explicitly* restricts activities protected by Section 7.” *Lutheran Heritage*, supra at 646 (emphasis in original). Moreover, if a work rule does not explicitly restrict protected activities, it nonetheless may violate Section 8(a)(1) if “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” Id. at 647. However, in *Boeing Co.*, supra, the Board overruled the “reasonably construe” standard in prong 1 of *Lutheran Heritage* and replaced it with a new standard. The Board stated, “When evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” Id., slip op. at 3 (emphasis in original). The Board continued, “the Board will conduct this evaluation, consistent with the Board’s ‘duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy’, focusing on the perspective of employees, which is consistent with Section 8(a)(1).” Id. (emphasis in original, footnotes omitted).

Furthermore, the Board, as a result of this balancing, created three categories of employment policies, rules and handbook provisions:

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

Category 1 rules are the no-camera requirement in this case, the “harmonious interactions and relationships” rule that was at issue in *Williams Beaumont Hospital*, and other rules requiring employees to abide basic standards of civility.

- *Category 2* will include rules that warrant individual 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. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

Id., slip op. at 3–4, 15 (citing *Williams Beaumont Hospital*, 363 NLRB No. 162 (2016)). These categories are not part of the balancing test but rather categorical assignment of a rule by the Board after the decision is made.⁷ Id.

A. “Confidentiality & Non-Disclosure” Rule

To recap, Respondent’s “Confidentiality & Non-Disclosure” rule, since at least April 13, 2017, states:

Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of [Respondent] including but not limited to client/vendor lists, client/vendor information, accounting records, work product, production processes, business operations, computer software, computer technology, marketing and development operation, to name a few. Confidential information will also include information provided by a third party and governed by a non-disclosure agreement between [Respondent] and the third party. Access to confidential information should be disclosed on a “need-to-know” basis and must be authorized by management. Any breach to this policy will not be tolerated and will be subject to disciplinary and legal action.

The complaint only alleged the language in bold as a violation of the Act but to ensure completeness, a reading of the entire rule is appropriate. As the “Confidentiality & Non-Disclosure” rule does not explicitly restrict Section 7 activity, and there is no allegation that this rule was promulgated in response to union activity or been applied to restrict Section 7 activity, prong 1 of *Lutheran Heritage* is implicated. As explained above, the “reasonably construed” standard in *Lutheran Heritage* has been replaced with the *Boeing* balancing test (balancing the legitimate interests served by a facially neutral rule with

⁷ In this decision, I will not classify these rules per the categories set forth in *Boeing*. The Board stated, “The Board will determine, in future cases, what types of additional rules fall into which category.” *Boeing*, supra at slip op. at 4. Thus, until the Board makes specific

determinations on which categories the “Confidentiality & Non-Disclosure” and “Media Contact” rules belong, it is not within my purview to assign as such.

the potential chilling effect of the rule on the exercise of Sec. 7 rights). Both the General Counsel and Respondent presented witnesses who testified uncontradicted about the impact of the rule on the employees and employer.

Turning to the balancing test, Respondent's asserted legitimate business justification, as explained by Wong, is that due to the nature of Respondent's competitive business, Respondent needs to keep its proprietary information of pricing and discounts offered to customers and vendors confidential. Respondent certainly has a substantial justification in protecting its pricing and discounts from competitors. However, the rule as stated does not purport to protect Respondent's proprietary information of pricing and discounts. To be clear, the General Counsel only alleged a very narrow portion of this rule to be unlawful. The rule states, in part, that employees must not divulge customer and vendor lists. Unfortunately, the record lacks any evidence as to whether it is well-known to employees what customer and vendor lists are as defined by Respondent. Customer and vendor lists as read in the rule may be read to be simply a list of customers and vendors, and not as described by Wong. To add to this confusion, Wong testified that while customer names and locations are confidential, employees may share this information with a union. But, the rule also states that customer information is confidential and proprietary. The lack of clarity as to what is permitted to be shared by employees is clear when examining the plain language of the rule and the testimony of Wong. Finally, Respondent claims that the California Uniform Trade Secrets Act "requires" this rule (R. Br. at 7, 11–16). I cannot accept this business justification claim as Wong clearly did not know whether Respondent was required to maintain such a rule (see Tr. 33–34). Even assuming that Respondent's arguments are valid, the confusion in what employees may not share regarding customers and vendors undermines Respondent's asserted legitimate business justification.

On the other hand, the potential impact on employees' Section 7 rights tips the scale in favor of employee rights. Respondent's "Confidentiality & Non-Disclosure" rule prohibits employees from sharing customer and vendor names with third parties such as a labor organization. Also generally, employees have a Section 7 right to appeal to an employer's customers and vendors for support in a labor dispute and do not constitute "a disparagement or vilification of the employer's product or reputation." *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990) (*Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 230 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980)). Again, Respondent's "Confidentiality & Non-Disclosure" rule fails to elucidate for employees what may be shared with third parties. Cf. *Macy's, Inc.*, 365 NLRB No. 116 (2017) (rule lawful which prohibited use of customer information, defining customer information and prohibiting use or disclosure of customers' social security numbers and credit card numbers). Thus, Respondent's "Confidentiality & Non-Disclosure" rule business justification does not outweigh the employees' Section 7 rights.

Respondent argues that no evidence was presented to demonstrate that the rule "actually interfered" with employees' Section 7 rights which essentially demonstrates that employees

understand Respondent's intention for the rule (R. Br. at 10). However, this argument is unavailing. Inasmuch there is no evidence regarding interference of Section 7 rights, Respondent also provided no evidence that it suffered from any economic harm as a result of employees' violating the rule; in fact, according to Wong, employees could divulge lists of customers to third parties when conducting Section 7 activity and employees would not be violating the rule. However, as read, said employee conduct would be violating the rule. Therein lies the problem with the rule. The rule, as written, with specific reference to "customer/vendor lists" is vague and ambiguous, and the *Boeing* balancing test tips in favor of employees' Section 7 rights. Accordingly, the rule violates Section 8(a)(1) of the Act.

B. "Media Contact" Rule

Respondent's Media Contact rule, since at least April 13, 2017, states, "Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our president, Michael Glick, is the only person authorized and designated to comment on company policies or any event that may affect our organization." Again, the General Counsel has not alleged that Respondent's Media Contact rule does not explicitly restrict Section 7 activity, and there is no allegation that this rule was promulgated in response to union activity or been applied to restrict Section 7 activity, prong 1 of *Lutheran Heritage*, and the *Boeing* balancing test are implicated.

Respondent argues that it has a legitimate business interest to permit only its president to speak on its behalf. Respondent argues that the phrase "on its behalf" should make clear to any employee that while they may speak to the media on any subject, they may not on its behalf (R. Br. at 16). Again, while that argument may be true, the rule as read precludes employees from speaking to the media on any subjects regarding Respondent. While it is certainly a legitimate business reason for Respondent to designate whom it wants to speak on its behalf, employees' Section 7 rights certainly tip the scales in their favor. For example, Section 7 of the Act permits employees to speak to the public including the media regarding labor disputes. See *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252 (2007), enfd. sub nom. *Nevada Service Employees Local 1107 v. NLRB*, 358 Fed.Appx. 783 (9th Cir. 2009).

Respondent concedes that Section 7 rights include employees' right to speak with the media about working conditions and other terms and conditions of employment (R. Br. at 16, 18). See *Trump Marina Casino Resort*, 355 NLRB 585 (2010) (rule allowing only company executives to speak with the media was overbroad and without legitimate business justification thereby violating Sec. 8(a)(1) of the Act); *Crown Plaza Hotel*, 352 NLRB 382, 385–386 (2008). The Media Contact rule as written does not clarify that employees may speak to the media on their own behalf but clearly states that employees may not speak to the media about Respondent when approached. The second sentence of the Media Contact rule does not make clear to employees that they can speak to the media on their own behalf. Instead, the second sentence indicates to employees that they may not speak to the media about Respondent's policies which could also concern working conditions and other terms and conditions of employment which impacts their Section 7 rights. The Media

Contact rule as written creates a chilling effect on employees when exercising Section 7 rights. Moreover, the Board in *Boeing* noted that the Board will balance an employer's legitimate interests served by a facially neutral policy with the *potential* chilling effect of the rule on the exercise of Section 7 rights. *Boeing*, supra at slip op. 10 fn. 47. Thus, the General Counsel need not prove actual harm to employees as argued by Respondent (R. Br. at 17).

In sum, Respondent's "Media Contact" rule is unlawful, and violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

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

2. Respondent maintained the following rules in its LA & SF Specialty Employee Manual since at least April 13, 2017, that are facially unlawful, which could be understood to prohibit employees from engaging in activities protected under Section 7 of the Act, and therefore, violate Section 8(a)(1).

i. In the Confidentiality & Non-Disclosure rule:

Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of [Respondent] including but not limited to client/vendor lists,

ii. In the Media Contact rule:

Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization.

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

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. To remedy Respondent's violations of Section 8(a)(1) of the Act, I shall recommend that Respondent post and abide by the attached notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

Respondent, LA Specialty Produce Company, Hayward, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the following unlawful rules in its LA & SF

⁸ 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.

Specialty Employee Manual:

i. In the Confidentiality & Non-Disclosure rule:

Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of [Respondent] including but not limited to client/vendor lists,

ii. In the Media Contact rule:

Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization.

(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 unlawful rules as set forth above.

(b) Furnish employees with inserts to its LA & SF Specialty Employee Manual regarding Confidentiality & Non-Disclosure and Media Contact rules that (1) advise that the unlawful rules have been rescinded, or (2) provide lawfully worded rules.

(c) Within 14 days after service by the Region, post at its Hayward, California facility, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 32, 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, the 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 13, 2017.

(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 the Respondent has taken to comply.

Dated, Washington, D.C. June 28, 2018

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT maintain the following rules in its LA & SF Specialty Employee Manual, dated since at least April 13, 2017:

In the Confidentiality & Non-Disclosure rule:

Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of [Respondent] including but not limited to client/vendor lists,

In the Media Contact rule:

Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind/revise the unlawful rules listed above.

WE WILL furnish you with inserts for the LA & SF Specialty Employee Manual regarding the “Confidentiality & Non-Disclosure” and “Media Contact” rules, dated since at least April 13, 2017, that (1) advise that the unlawful rules have been rescinded, or (2) provide lawfully worded rules.

LA SPECIALTY PRODUCE COMPANY

The Administrative Law Judge’s decision can be found at [www.nlr.gov/case/ 32-CA-207919](http://www.nlr.gov/case/32-CA-207919) 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.

