

THE BOEING COMPANY
365 N.L.R.B. No. 154 (2017)

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE,
MCFERRAN, KAPLAN, AND EMANUEL

This case involves the legality of an employer policy, which is one of a multitude of work rules, policies and employee handbook provisions that have been reviewed by the Board using a test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In this case, the issue is whether Respondent's mere maintenance of a facially neutral rule is unlawful under the *Lutheran Heritage* "reasonably construe" standard, which is also sometimes called *Lutheran Heritage* "prong one" (because it is the first prong of a three-prong standard in *Lutheran Heritage*). Thus, in *Lutheran Heritage*, the Board stated:

[O]ur inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (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.

Most of the cases decided under *Lutheran Heritage* have involved the *Lutheran Heritage* "reasonably construe" standard, which the judge relied upon in the instant case. Specifically, the judge ruled that Respondent, The Boeing Company (Boeing), maintained a no-camera rule that constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA or Act).

Boeing designs and manufactures military and commercial aircraft at various facilities throughout the United States. The work undertaken at Boeing's facilities is highly sensitive; some of it is classified. Boeing's facilities are targets for espionage by competitors, foreign governments, and supporters of international terrorism, and Boeing faces a realistic threat of terrorist attack. Maintaining the security of its facilities and of the

information housed therein is critical not only for Boeing's success as a business-- particularly its eligibility to continue serving as a contractor to the federal government--but also for national security.

Boeing maintains a policy restricting the use of camera-enabled devices such as cell phones on its property. For convenience, we refer to this policy as the "no-camera rule." Boeing's no-camera rule does not explicitly restrict activity protected by Section 7 of the Act, it was not adopted in response to NLRA-protected activity, and it has not been applied to restrict such activity. Nevertheless, applying prong one of the test set forth in *Lutheran Heritage*, the judge found that Boeing's maintenance of this rule violated Section 8(a)(1) of the Act. Based on *Lutheran Heritage*, the judge reasoned that maintenance of Boeing's no-camera rule was unlawful because employees "would reasonably construe" the rule to prohibit Section 7 activity. In finding the no-camera rule unlawful, the judge gave no weight to Boeing's security needs for the rule.

The judge's decision in this case exposes fundamental problems with the Board's application of *Lutheran Heritage* when evaluating the maintenance of work rules, policies and employee handbook provisions. For the reasons set forth below, we have decided to overrule the *Lutheran Heritage* "reasonably construe" standard.

I. BACKGROUND

For decades, Boeing has had rules in place restricting the use of cameras to capture images or videos on Boeing property. The current version of Boeing's "camera rule" provides in relevant part as follows:

Possession of the following camera-enabled devices is permitted on all company property and locations, except as restricted by government regulation, contract requirements or by increased local security requirements.

However, use of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security.

Boeing's no-camera rule defines "business need" as "a determination made by the authorizing manager that images or video are needed for a contractual requirement, training, technical manuals, advertising, technical analysis, or other purpose that provides a positive

benefit to the company.”

Boeing Senior Security Manager James Harris testified concerning the several purposes of Boeing’s no-camera rule. His testimony, which is undisputed, establishes the following.

First, Boeing’s no-camera rule is an integral component of Boeing’s security protocols, which are necessary to maintain Boeing’s accreditation as a federal contractor to perform classified work for the United States Government.

Second, Boeing’s no-camera rule plays a key role in ensuring that Boeing complies with its federally mandated duty to prevent the disclosure of export-controlled information or the exposure of export-controlled materials to unauthorized persons.

Third, Boeing’s no-camera rule helps prevent the disclosure of Boeing’s proprietary information, which Harris defined as “any nonpublic information that has potential economic value to Boeing,” such as “manufacturing methods and processes” and “material usage.”

Fourth, Boeing’s no-camera rule limits the risk that employees’ personally identifiable information will be released. Besides the invasion of employee privacy, photographs and videos that permit Boeing employees to be identified could also compromise proprietary information. In addition, if a photograph shows an employee’s badge, that image could be used to create a counterfeit badge that an unauthorized person may use to gain entry to Boeing property.

Fifth and finally, Boeing’s no-camera rule limits the risk of Boeing becoming a target of terrorist attack. Harris testified that Boeing has “documented evidence” of surveillance by potentially hostile actors “to determine vulnerabilities” on Boeing property, and “[u]ncontrolled photography” could inadvertently disclose such vulnerabilities.

Camera use has occasionally occurred in Boeing facilities in circumstances where Boeing has addressed the above concerns in various ways. For example, Boeing has conducted public or VIP tours at some facilities. Although Boeing does not search tour participants for camera-enabled devices, and tour guides do not confiscate personal camera-enabled devices from individuals who may have used them during a tour, Boeing’s 777 Director of Manufacturing and Operations Jason Clark testified that

tour participants are briefed beforehand regarding what is and is not permitted during the tour, and Boeing security personnel review tour participants' photos and video footage afterwards. Boeing also created a time-lapse video of the 777 production line for public release. However, the video was produced by Boeing itself, which permitted Boeing to ensure that the video did not reveal confidential or proprietary information and was safe to release to the public.

II. DISCUSSION

A. Lutheran Heritage Is Overruled

Under *Lutheran Heritage*, even when an employer's facially neutral employment policies, work rules and handbook provisions do not expressly restrict Section 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity, the Board will still determine that the maintenance of these requirements violates Section 8(a)(1) if employees "would reasonably construe the language to prohibit Section 7 activity." For the following reasons, we overrule the *Lutheran Heritage* "reasonably construe" standard.

First, the *Lutheran Heritage* "reasonably construe" standard is contrary to Supreme Court precedent because it does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions. These justifications are often substantial, as illustrated by the instant case. More importantly, the Supreme Court has repeatedly required the Board to take these justifications into account. A five-member Board recognized this in *Lafayette Park Hotel*, where it quoted the Supreme Court's decision in *Republic Aviation v. NLRB*, *supra*, and held:

Resolution of the issue presented by . . . contested rules of conduct involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society."

[*Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), quoting *Republic Aviation v. NLRB*, 324 U.S. 793, 797-98 (1945)].

Second, the *Lutheran Heritage* "reasonably construe" standard is

contradicted by NLRB case law. For example, the Board has recognized that it is lawful for an employer to adopt no-solicitation rules prohibiting *all* employee solicitation--including union-related solicitation--during working time, and no-distribution rules prohibiting *all* distribution of literature--including union-related literature--in work areas. Employers may also lawfully maintain a no-access rule that prohibits off-duty employees from accessing the interior of the employer's facility and outside work areas, even if they desire access to engage in protected picketing, handbilling, or solicitation. Similarly, employers may lawfully adopt "just cause" provisions and attendance requirements that subject employees to discipline or discharge for failing to come to work, even though employees have a Section 7 right to engage in protected strikes. Each of these rules fails the *Lutheran Heritage* "reasonably construe" test because each one clearly prohibits Section 7 activity. Yet each requirement has been upheld by the Board, based on a determination that legitimate employer interests and justifications outweighed any interference with Section 7 rights.

Third, in many cases involving facially neutral policies, rules and handbook provisions, the Board *has explicitly* balanced employees' Section 7 rights against legitimate employer interests rather than narrowly examining the language of a disputed rule solely for its potential to interfere with the exercise of Section 7 rights, as the *Lutheran Heritage* "reasonably construe" test requires. As noted above, in *Lafayette Park Hotel* the Board expressly acknowledged that "[r]esolution of the issue presented by . . . contested rules of conduct involves 'working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments.'"

Fourth, *Lutheran Heritage* is predicated on false premises that are inconsistent with the Act and contrary to the Board's responsibility to promote certainty, predictability and stability. Several considerations are relevant here:

- Because the Act protects so many potential concerted activities (including the right to refrain from such activities), a wide variety of facially neutral rules can be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity.
- *Lutheran Heritage* requires employers to eliminate all ambiguities from all policies, rules and handbook provisions that might conceivably touch on some type of Section 7 activity, but this

disregards the fact that generalized provisions related to employment--including those relating to discipline and discharge-- have been deemed acceptable throughout the Act's history.

The broader premise of *Lutheran Heritage*, which is even more seriously flawed, is the notion that employees are better served by *not* having employment policies, rules and handbooks. After all, when parties are held to a standard that cannot be attained, the natural and predictable response is that they will give up trying to create written rules, policies and employee handbooks. Nothing in the NLRA *requires* employers to adopt policies, rules and handbook provisions. Employees in the United States remain generally subject to the doctrine of employment at will, which means employees can be discharged for any reason or no reason at any time. Therefore, it would be lawful for employers to make all decisions regarding the potential discipline or discharge of employees on a case-by-case basis, with no expectations or requirements communicated in advance. This would impose substantial hardship on employers that strive for consistency and fairness when making such decisions, and employees would not know what standards of conduct they must satisfy to keep their jobs.

Fifth, the *Lutheran Heritage* "reasonably construe" test imposes too many restrictions on the Board itself. By making the legality of a rule turn on whether employees would "reasonably construe" its language to prohibit *any* type of Section 7 activity, *Lutheran Heritage* requires a "one-size-fits-all" analysis that gives equal weight to every potential intrusion on Section 7 rights, however slight it might be and however remote the possibility that employees would actually engage in that type of protected activity. The "reasonably construe" test also permits no consideration of the justifications for a particular rule, which in turn prevents the Board from treating some justifications as warranting greater weight than others.

Sixth, when applying the *Lutheran Heritage* "reasonably construe" standard, the Board has not given sufficient consideration to unique characteristics of particular work settings and different industries. The "reasonably construe" standard also prevents the Board from taking into consideration specific events that reveal the importance of a particular policy, rule, or handbook provision.

Finally, *Lutheran Heritage* has caused extensive confusion and litigation for employers, unions, employees and the Board itself. The "reasonably construe" standard has defied all reasonable efforts to apply and explain it. Indeed, even with the benefit of hindsight, it is still difficult to understand Board rulings that uphold some facially neutral rules while

invalidating others.

B. The New Standard Governing Maintenance of Facially Neutral Rules, Employment Policies, and Employee Handbook Provisions

In cases in which one or more facially neutral policies, rules, or handbook provisions are at issue that, when reasonably interpreted, would potentially interfere with Section 7 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 requirement(s). Again, we emphasize that *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."

When engaging in the above analysis, the Board will place particular emphasis on the following considerations.

First, this is an area where the Board has a special responsibility to give parties certainty and clarity. Most work rules, employment policies, and employee handbook provisions exist for the purpose of permitting employees to understand what their employer expects and requires. Therefore, the chaos that has reigned in this area has been visited most heavily on employees themselves. In the best case, under *Lutheran Heritage* nobody (not even Board members themselves) can reliably predict what rules are permissible and what rules are unlawful under the NLRA. In the worst case, employees may be subjected to intimidation, profanity, harassment, or even workplace violence because their employers rightfully believe the NLRB is likely to overturn reasonable standards regarding respect and civility in the workplace, or such standards will be upheld only after many years of NLRB litigation. Henceforth, consistent with the Board's responsibility to interpret the Act, we will engage in the above analysis and we will delineate 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.
- *Category 2* will include rules that warrant individualized scrutiny

in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

- *Category 3* 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 would be a rule that prohibits employees from discussing wages or benefits with one another.

The above three 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. The Board will determine, in future cases, what types of additional rules fall into which category. Although the legality of some rules will turn on the particular facts in a given case, we believe adherence to the analysis we announce here will ultimately provide far greater clarity and certainty to employees, employers and unions regarding whether and to what extent different types of rules may lawfully be maintained. Although the Board's cumulative experience with certain types of rules may prompt the Board to re-designate particular types of rules from one category to another, one can expect such circumstances to be relatively rare.

Second, when deciding cases in this area, the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral), and the Board must recognize those instances where the risk of intruding on NLRA rights is "comparatively slight." Similarly, the Board may distinguish between substantial justifications--those that have direct, immediate relevance to employees or the business--and others that might be regarded as having more peripheral importance. In some instances, the impact of a particular rule on NLRA rights may be self-evident, or the justifications associated with particular rules may be apparent from the rule itself or the Board's experience with particular types of workplace issues. Parties may also introduce evidence regarding a particular rule's impact on protected rights or the work-related justifications for the rule. The Board may also draw reasonable distinctions between or among different industries and work settings. We may also take into consideration particular events that may shed light on the purpose or purposes served by a challenged rule or on the impact of its maintenance on protected rights.

Third, when a facially neutral rule, reasonably interpreted, would

not prohibit or interfere with the exercise of NLRA rights, maintenance of the rule is lawful without any need to evaluate or balance business justifications, and the Board's inquiry into maintenance of the rule comes to an end. Conversely, when a rule, reasonably interpreted, *would* prohibit or interfere with the exercise of NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful. Again, the Board must carefully evaluate the nature and extent of a rule's adverse impact on NLRA rights, in addition to potential justifications, and the rule's maintenance will violate Section 8(a)(1) if the Board determines that the justifications are outweighed by the adverse impact on rights protected by Section 7.

Fourth, when the Board interprets any rule's impact on employees, the focus should rightfully be on the employees' perspective. This is consistent with established Board and court case law, and it is especially important when evaluating questions regarding alleged interference with protected rights in violation of Section 8(a)(1). Section 8(a)(1) legality turns on "whether the employer engaged in conduct, which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."

Fifth, the Board may find that an employer may lawfully *maintain* a particular rule, notwithstanding some possible impact on a type of protected Section 7 activity, even though the rule cannot lawfully be *applied* against employees who engage in NLRA-protected conduct. For example, if the Board finds that an employer lawfully maintained a "courtesy and respect" rule, but the employer invokes the rule when imposing discipline on employees who engage in a work-related dispute that is protected by Section 7 of the Act, we may find that the discipline constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1).

C. Retroactive Application of the New Standard

When the Board announces a new standard, a threshold question is whether the new standard may appropriately be applied retroactively, or whether it should only be applied in future cases. In this regard, "[t]he Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'"

Based on the above standards, we find that it is appropriate to apply the standard we announce today retroactively to the instant case and to all

other pending cases. We do not believe retroactivity will produce any “ill effects.” To the contrary, we believe all parties will benefit from Board decisions that take into account not only whether a work rule, when reasonably interpreted, would prohibit or interfere with the exercise of Section 7 rights, but also any justifications associated with the rule and whether or not such justifications are outweighed by the rule’s adverse impact on protected rights.

D. Application of the New Standard to Boeing’s No-Camera Rule

To determine the lawfulness of Boeing’s no-camera rule under the standard we adopt today, the Board must determine whether the no-camera rule, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, and if so, the Board must evaluate two things: (i) the nature and extent of the no-camera rule’s adverse impact on Section 7 rights, *and* (ii) the legitimate business justifications associated with the no-camera rule. Based on our review of the record and our evaluation of the considerations described above, we find that the no-camera rule in some circumstances may potentially affect the exercise of Section 7 rights, but this adverse impact is comparatively slight. We also find that the adverse impact is outweighed by substantial and important justifications associated with Boeing’s maintenance of the no-camera rule. Accordingly, we find that Boeing’s maintenance of its no-camera rule does not constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the Act. Although the justifications associated with Boeing’s no-camera rule are especially compelling, we believe that no-camera rules, in general, fall into Category 1, types of rules that the Board will find lawful based on the considerations described above.

We find that any adverse impact of Boeing’s no-camera rule on the exercise of Section 7 rights is comparatively slight and is outweighed by substantial and important justifications associated with the no-camera rule’s maintenance. Accordingly, we find that Boeing’s maintenance of the no-camera rule did not constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the Act.

[Members Pearce and McFerran dissented]