Nicholson Terminal & Dock Company *and* Steve Lavender. Case 07–CA–187907

July 30, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On May 16, 2018, Administrative Law Judge Elizabeth M. Tafe issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.[1]

The National Labor Relations 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 handles maritime cargo at two facilities, one in Detroit and the other in the nearby downriver community of Ecorse, Michigan. Most of the Respondent's statutory employees are represented by International Association of Machinists Local Lodge 698. At all material times, the Respondent and the Union were parties to a collective-bargaining agreement. The Respondent also employs four unrepresented clerical employees.

Since September 1, 2016, the Respondent has maintained its Personnel Handbook, which, as relevant here, contains two provisions the complaint alleges are unlawful to maintain.[2] Personnel Handbook section II, "Guidelines for Appropriate Conduct," subsection A provides, in relevant part, as follows:

> Types of behavior and conduct that the Company considers inappropriate include, but are not limited to the following:
>
> . . .
>
> 16) Calling, participating in, or encouraging others to call or participate in an illegal slowdown, strike (including a sympathy strike), or walkout.

And Personnel Handbook section III, "General Company Policies," subsection V provides as follows:

> **Moonlighting**
>
> Employees are expected to devote their primary work efforts to the Company's business. Therefore, it is mandatory that they do not have another job that:
>
> - Could be inconsistent with the Company's interests.
> - Could have a detrimental impact on Company's image with customers or the public.
> - Could require devoting such time and effort that the employee's work would be adversely affected.
>
> Before obtaining any other employment, you must first get approval from the Company Treasurer. Any change in this additional job must also be reported to the Company Treasurer.

II. DISCUSSION

A. Legal Standard

"[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," and "[i]f it does, we will find the rule unlawful." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), overruled in part on other grounds by *The Boeing Company*, 365 NLRB No. 154 (2017); see also *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 5 fn. 10 (2019). If a challenged rule is facially neutral—if it does not explicitly restrict protected activity—the Board first determines whether the rule, reasonably interpreted, would potentially interfere with the exercise of NLRA rights. *Boeing*, 365 NLRB No. 154, slip op. at 3. If it would not, then the Board will find the rule lawful without further analysis. Id., slip op. at 3, 16; accord *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019). If, however, the rule would reasonably be read to restrict Section 7 rights, then the Board will evaluate two

[1] On March 20, 2020, the Board issued a Notice to Show Cause why the allegations that the Respondent violated Sec. 8(a)(1) of the National Labor Relations Act by maintaining Personnel Handbook Rule III.Q and the email-usage rule set forth in Attachment A to the handbook should not be severed and remanded to the administrative law judge for further proceedings consistent with the Board's decision in *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*, 368 NLRB No. 143 (2019). In response, the General Counsel moved to sever and remand those allegations to the Regional Director so that the Charging Party could withdraw them. The Charging Party and the Respondent concurred in the General Counsel's request to remand the allegations, and on May 15, 2020, the Board severed the allegations and remanded them to the Regional Director to process the withdrawal request. On May 19, the Regional Director approved the Charging Party's request and dismissed the complaint as to those allegations.

[2] In his answering brief to the Respondent's exceptions, the General Counsel changed his position. The General Counsel now argues that these two rules are lawful to maintain, and that the complaint should be dismissed in relevant part.

things: "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." *Boeing*, 365 NLRB No. 154, slip op. at 3. In conducting this evaluation, the Board will strike a proper balance between the asserted justifications and the invasion of employee rights in light of the Act and its policies, viewing the rule or policy from the employees' perspective. Id.[3]

B. The Rule Against Illegal Slowdowns, Strikes, and Walkouts

The judge found the Respondent violated Section 8(a)(1) by maintaining the rule against illegal slowdowns, strikes, and walkouts on the basis that the rule explicitly restricts protected strike activity. She explained that determining whether a particular strike is protected or unlawful entails a legally complex, fact-intensive analysis that involves multiple factors, including the strike's purpose, conditions, and context. On this basis, she deemed the word "illegal" ambiguous. She also said it was ambiguous whether the adjective "illegal" before the word "slowdown" also modifies "strike" and "walkout." For several reasons, we disagree with the judge's analysis.

To begin with, we disagree with the judge's finding that the rule explicitly restricts protected strike activity because it is ambiguous as to whether it does not do so. Her analysis fails to account for one of the principal reasons set forth in *Boeing* for overruling the "reasonably construe" prong of *Lutheran Heritage*, which is that the test was based on a false premise that "employers drafting facially neutral policies, rules and handbook provisions *can* anticipate and avoid all potential interpretations that may conflict with NLRA-protected activities." *Boeing*, 365 NLRB No. 154, slip op. at 9. As further explained in *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 1–2, numerous Board decisions applying the "reasonably construe" standard "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 [they] outlawed rules and policies based on [the Board's] 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."

In this case, the Respondent's rule explicitly prohibits illegal slowdowns. Even if the judge is correct that the rule may or may not prohibit something other than an illegal strike or walkout, it certainly does not do so explicitly. Accordingly, the rule is facially neutral, and *Boeing* applies to determine whether its maintenance is unlawful.

As stated above, the first step in the *Boeing* test requires a determination whether the rule, reasonably interpreted, would potentially interfere with the exercise of NLRA rights. *Boeing*, 365 NLRB No. 154, slip op. at 3. That determination is made from "the perspective of an objectively reasonable employee who is 'aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA.'" *LA Specialty Produce*, supra, slip op. at 2 (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017)). The General Counsel bears the burden of proof on this issue.

We find that the General Counsel has failed to prove that an objectively reasonable employee would construe the rule's prohibition of "illegal" activity as possibly extending to job actions protected by the Act. In spite of the rule's arguable ambiguity, we do not see why such employee would construe a prohibition against "illegal" activity as contrary to its plain meaning, not only restricting the application of "illegal" to job slowdowns but also inferring that the prohibition in the same sentence would apply to legal strikes and walkouts protected by the Act. In fact, the General Counsel's answering brief to the Respondent's exceptions makes clear that he no longer contends that the rule is unlawful.

Accordingly, we do not reach the balancing stage of the *Boeing* framework.[4] We find the Respondent's rule is lawful and we shall place it and similar rules in *Boeing* Category 1(a).

C. The Moonlighting Rule

The judge applied the *Boeing* balancing test to the moonlighting rule and found the rule unlawful. The judge reasoned that the rule would have a "significant potential impact" on employees' exercise of NLRA rights because

[3] As a result of this balancing, the Board places a challenged rule into one of three categories. Category 1(b) consists of rules that are lawful to maintain because, although the rule, reasonably interpreted, potentially interferes with the exercise of Sec. 7 rights, the interference is outweighed by legitimate employer interests. Category 3, in contrast, consists of rules that are unlawful to maintain because their potential to interfere with the exercise of Sec. 7 rights outweighs the legitimate interests they serve. Categories 1(a), 1(b), and 3 designate *types* of rules; once a rule is placed in one of these categories, rules of the same type are categorized accordingly without further case-by-case balancing (for Category 1(b) and 3 rules; balancing is never required for rules in Category 1(a)). Some rules, however, resist designation as either always lawful or always unlawful and instead require case-by-case analysis under *Boeing*'s balancing framework. These rules are placed in Category 2. See *Boeing*, 365 NLRB No. 154, slip op. at 3–4; *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 2–3.

[4] We therefore express no opinion with respect to our concurring colleague's balancing of interests if the General Counsel had proved that an objectively reasonable employee would view the Respondent's rule as interfering with protected rights to strike.

organizing activities on behalf of a labor organization, including by paid salts, could be seen as "inconsistent with the [Respondent]'s interests" or as "hav[ing] a detrimental impact on [the Respondent]'s image with customers or the public." On the other side of the *Boeing* scale, the judge found that the Respondent has a legitimate interest in avoiding conflicts of interest that could arise if its employees moonlight for a competitor, but she concluded that the rule was nevertheless unlawful because that interest could be "addressed with a better tailored rule."[5] And because she found that the rule restricted Section 7—protected conduct, she found that the requirement to obtain permission before obtaining outside employment was also unlawful.

We disagree and find the moonlighting rule lawful. The rule applies only to outside "job[s]," i.e., paid employment. The preamble to the rule explains that its purpose is to ensure that employees "devote their primary work efforts to the Company's business." Consistent with this provision, the Respondent's treasurer and manager, Patrick Sutka, testified without rebuttal that the purpose of the moonlighting rule is to ensure that employees do not work for a competitor or work so many hours elsewhere that they would be too exhausted to work their regular shift at the Respondent. This purpose is also reflected in the part of the rule that requires employees to obtain approval for "outside employment." The Respondent's moonlighting rule thus imposes no restrictions on becoming a member of the Union or volunteering on its behalf. Hence, employees would not reasonably interpret the rule to prohibit them from forming, joining, or assisting a labor organization. Even assuming that the rule could have been "better tailored" as the judge suggests, the rule may not be condemned simply because it "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." *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 1–2.[6]

The only protected activity that the rule arguably reaches is paid employment by a union under circumstances protected by the Act—e.g., working as a paid union "salt." But even as to this narrow category of Section 7—protected conduct, we find that the rule, reasonably interpreted, has no potential to interfere with it. Such employment does not implicate the stated purpose of the rule: to prevent employees from taking outside employment that adversely affects their work for the Respondent. See generally *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 95–96 (1995) (recognizing that service to the union for pay does not involve abandonment of service to the employer or disloyalty). Although the rule also addresses employment that "[c]ould be inconsistent with the Company's interests," reasonable employees would construe that provision in light of the rule's overall purpose as well. As for the prohibition on outside employment that could have a "detrimental impact on [the] Company's image with customers or the public," reasonable employees would understand that as referring to disreputable work or employment by a disreputable employer. Viewing these provisions from the perspective of an employee "who is aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job," we find that reasonable employees would not interpret them to prohibit the protected activity of part-time work as a union salt that did not interfere with their ability to perform their duties for the Respondent. *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 2. Accordingly, we place rules that limit only paid, outside employment that would conflict with the employer's interests or have a detrimental impact on the employer's image with customers or the public in *Boeing* Category 1(a).[7]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 30, 2020

[5] The judge also found that the Respondent's asserted interest in avoiding employee fatigue caused by working multiple jobs was legitimate. She noted, however, that the complaint does not challenge the portion of the moonlighting rule prohibiting outside employment that "[c]ould require devoting such time and effort that the employee's work would be adversely affected." The judge further explained that the provisions of the rule that she found unlawful did not advance the Respondent's interest in avoiding fatigue.

[6] Moreover, it cannot be the case that an employer's legitimate justifications for maintaining a rule will be outweighed by the rule's potential to interfere with Sec. 7 rights whenever the employer's interests could be met with a "better tailored" rule. That reasoning cannot be squared with the *Boeing* framework. Under *Boeing*, a rule may be lawful notwithstanding that it interferes with the exercise of Sec. 7 rights. Indeed, all rules that fall within *Boeing* Category 1(b) interfere to some extent with Sec. 7 rights. In other words, a Category 1(b) rule is overbroad—and an overbroad rule always could have been drafted more narrowly or "better tailored." If finding that an overbroad rule could have been better tailored defeats the employer's justification, then the justification could never outweigh the interference with Sec. 7 rights, and *Boeing* Category 1(b) would exist only in theory. It would have no content.

[7] Cf. *G&E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank*, 369 NLRB No. 121, slip op. at 2–3 (2020) (finding lawful and placing in *Boeing* Category 1(a) an employer rule stating that "employees are prohibited—without prior written notice to and formal written approval from the [employer]—from participating in outside work activities that might present a conflict of interest (including employment relationships, consulting relationships and service on boards of directors of corporations, educational institutions and charitable/not-for-profit institutions) and from making non-passive investments").

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN RING, concurring.

I join my colleagues in dismissing the allegation that the moonlighting rule unlawfully interferes with employees' Section 7 rights. I also agree with my colleagues that the Respondent did not violate the Act by maintaining a rule that prohibits employees from "[c]alling, participating in, or encouraging others to call or participate in an illegal slowdown, strike (including a sympathy strike), or walkout." However, because this rule specifically mentions strike activity, and the right to strike is so deeply rooted in the protections of the Act, the Respondent's maintenance of this rule requires greater scrutiny. Thus, I reach the same conclusion as my colleagues, but through somewhat different reasoning.

While the National Labor Relations Act protects the right of employees to engage in strikes under many circumstances, the Act also prohibits certain types of strike activity. Section 7 of the Act does not protect employees when they engage in such prohibited strike activities.[1] Because the illegal-strike rule prohibits only "illegal" slowdowns, strikes, and walkouts, I agree with my colleagues that it does not explicitly restrict activity that the Act protects. However, I cannot agree that the illegal-strike rule has *no* potential to interfere with Section 7 rights. I would find that it has some tendency to chill protected strike activity, but that this is outweighed by significant legitimate interests served by the rule. Accordingly, I would find the rule lawful and place it within *Boeing* Category 1(b). See *Boeing Co.*, 365 NLRB No. 154 (2017).

Under *Boeing*, the Board begins by determining whether a challenged rule, when reasonably interpreted, potentially interferes with the exercise of Section 7 rights. Whether it does "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. *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019) (citing *Boeing*, 365 NLRB No. 154, slip op. at 9).

If the Board, applying the foregoing standard, finds that a challenged rule does potentially interfere with the exercise of Section 7 rights, it then assesses the extent of the potential interference and balances that against the legitimate justifications associated with the rule, i.e., the legitimate interests served by the rule. When the balance favors the employer's legitimate interests over the potential interference with the exercise of Section 7 rights, the rule is lawful and placed in *Boeing* Category 1(b). When the potential for interference with the exercise of Section 7 rights outweighs the employer's legitimate interests, the rule is unlawful and placed in *Boeing* Category 3.[2]

Contrary to my colleagues, I believe that the illegal-strike rule does potentially interfere with the exercise of Section 7 rights. To be sure, an objectively reasonable employee would understand that the Respondent's illegal-strike rule applies only to illegal strikes. Nevertheless, it is logical to expect—perhaps it even was intended—that such a prohibition tied to strike activity would cause reasonable employees at least momentarily to pause and question the legality of their actions before engaging in a legal strike. Indeed, employees reasonably wary both of violating the law and of losing their jobs might delay more than merely momentarily until they have satisfied themselves that participating in a strike is legal. After all, knowing that one may engage in legal strikes is not the same as knowing that a *particular* strike is legal and hence

[1] See, e.g., *CC 1 Limited Partnership d/b/a Coca Cola Puerto Rico Bottlers,* 368 NLRB No. 84 (2019) (finding that employees who participated in wildcat strike after union disavowed it were lawfully discharged); *Alexandria Clinic,* 339 NLRB 1262 (2003) (finding that employees were lawfully discharged for engaging in strike without satisfying the Sec. 8(g) notice requirement), rev. denied 406 F.3d 1020 (8th Cir. 2005).

In addition to strikes that are prohibited by law, the Act also does not protect employees if they engage in strikes in violation of a contractual no-strike provision. See *Complete Auto Transit, Inc. v. Reis,* 451 U.S. 401, 416 fn. 18 (1981) (recognizing that employers may lawfully discharge an employee who "unlawfully walks off the job" in violation of a no-strike clause). Because such strikes are unprotected, the rule does not prohibit activity the Act protects even if it also prohibits such strikes.

[2] 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. *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 3.

that one may participate in it without running afoul of the Respondent's rule.[3] For this reason, even though the rule applies only to illegal strikes, it has the potential to chill employee participation in strikes that turn out to be lawful. Hence, I would reach the next step of the *Boeing* analysis, assess the extent of the potential interference, and balance that against the Respondent's legitimate interests.

I find the rule's potential interference with the right to strike to be limited. First, the rule merely tells employees to avoid what they know they must avoid anyway: breaking the law. Moreover, employees are well aware that strikes occur and that the law generally protects, rather than prohibits, such activity. See *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 2 (stating that the Board evaluates rules from the perspective of "an objectively reasonable employee who is aware of his legal rights"). I recognize that "employees do not generally carry lawbooks to work" and cannot be expected to make lawyer-like determinations in borderline situations. *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994). But such situations are rare. In the vast majority of cases, the issue of whether a strike is illegal will not be close. For example, it would be unreasonable to conclude that the Act prohibits (and hence that the Respondent's rule bars) employees from engaging in an economic strike after expiration of a collective-bargaining agreement.

Against the comparatively slight burden the rule places on employees' Section 7 rights, the Respondent has substantial and compelling business justifications for the rule. Employers have an obvious interest in avoiding work stoppages that are prohibited by law, and a compelling interest in informing employees of the expectation that they will refrain from illegal strike activity and in alerting them to the consequences of engaging in such activity. In addition, unionized employers may negotiate for contractual provisions prohibiting strikes during the term of the agreement, as was the case here.[4] Such employers also have a legitimate interest in maintaining a work rule that mirrors the contractual prohibition and ensures that they realize the benefit of the bargain they struck.[5] Congress has determined that there is also a *public* interest in preventing illegal strikes, such as secondary strikes and strikes undertaken without the notices required by Section 8(d) or 8(g) of the Act.[6] Maintenance of the challenged rule also serves important employee interests. Employees are subject to discharge or discipline if they engage in illegal strike activity,[7] and they are well served by a rule that places them on clear notice that such prohibitions exist and thereby encourages them to ensure that they do not cross that line.

Weighing these significant interests associated with the illegal-strike rule against the rule's relatively limited potential to interfere with the right to engage in strikes that are close to the line separating protected from illegal, I would find the rule lawful and place it in *Boeing* Category 1(b).

Dated, Washington, D.C. July 30, 2020

John F. Ring, Chairman

NATIONAL LABOR RELATIONS BOARD

[3] For example, one significant limitation on strike activity is the prohibition against so-called secondary strikes in Section 8(b)(4) of the Act. Even for the most experienced labor lawyer, distinguishing protected primary strike activity from unlawful secondary strike activity can be difficult in some cases. See *Electrical Workers IUE Local 761 (General Electric) v. NLRB*, 366 U.S. 667, 674 (1961) ("However difficult the drawing of lines more nice than obvious [between primary and secondary activity], the statute compels the task.").

[4] *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956) ("*Provided the selection of the bargaining representative remains free*, such waivers [of the right to strike during the term of the agreement] contribute to the normal flow of commerce . . . .") (emphasis in original).

[5] See *Complete Auto Transit, Inc. v. Reis*, supra, 451 U.S. at 421 (Justice Powell, concurring) (explaining that employers, in practice, generally lack an effective legal remedy for strikes in breach of no strike clause).

[6] See Sec. 1 of the Act ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."); *Carpenters District Council of Kansas City (Wadsworth Building Co.)*, 81 NLRB 802, 806 (1949) (explaining that Sec. 8(b)(4) "was aimed at eliminating all secondary boycotts and their concomitant activities which Congress thought were unmitigated evils and burdensome to commerce"), enfd. 184 F.2d 60 (10th Cir. 1950), cert. denied 341 U.S. 947 (1951); Sec. 8(d)(3) of the Act (defining the duty to bargain as requiring unions to given certain notices before striking to minimize obstructions to commerce and providing that an employee who engages in a strike within those notice periods "shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title," i.e., Secs. 8, 9, and 10 of the Act); Sec 8(g) of the Act (requiring that labor organizations give health care institutions at least 10 days' advance written notice of an intent to strike).

[7] See *CC 1 Limited Partnership*, supra, 368 NLRB No. 84; *Alexandria Clinic*, supra, 339 NLRB 1262.

Renée D. McKinney, Esq., for the General Counsel.
Steven H. Schwartz, Esq. and *Chelsea Ditz, Esq. (Keller Thomas, PC),* for the Respondent.

DECISION

STATEMENT OF THE CASE

ELIZABETH M. TAFE, Administrative Law Judge. This case was tried in Detroit, Michigan, on July 27, 2017, following the issuance of the complaint by the Regional Director of Region 7 on April 13, 2017. The complaint alleged that the Respondent, Nicholas Terminal & Dock Company, violated Section 8(a)(1) of the Act by maintaining certain work rules contained in its Personnel Handbook. The Respondent timely answered the complaint, admitting maintenance of the contested rules but denying all wrongdoing.

The parties were given a full opportunity to participate in the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, and to file briefs and supplemental briefs.[1] On the entire record, including my observations of the demeanor of the witnesses, and after fully considering the briefs and supplemental briefs filed by the Respondent and the General Counsel, I make the following findings, conclusions, and recommendations.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, engages in the business of handling marine cargo at its facilities in Detroit, Michigan and Ecorse, Michigan (the Detroit and Ecorse facilities, respectively). Annually, in conducting its operations the Respondent purchased and received at its Detroit and Ecorse facilities goods valued in excess $50,000 directly from points outside of the State of Michigan. The 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.

II. ALLEGED UNFAIR LABOR PRACTICES

Factual Background

The Respondent operates a commercial dock that processes cargo, and loads, and unloads cargo to/from ships. The Respondent employs about 46 employees at its two sites, the Detroit and Ecorse facilities, which include employees who perform stevedoring, hi-lo or crane operations, and mechanical repairs[2] and who are represented by the International Association of Machinists Local Lodge 698 (IAM) (herein referred to as the material handlers/stevedores or unit employees).[3] The employer also employs four office clerical employees who are admitted to be statutory employees but who are not represented by a union (clerical or nonunit employees), and various supervisors, the treasurer, and the president. The material handlers/stevedores have been covered by successive collective-bargaining agreements (CBAs), the current agreement in effect from February 1, 2017, to January 31, 2020 (R. Exh. 1) and the most recent previous agreement in effect from February 1, 2014 to January 31, 2020 (R. Exh. 2). The IAM or the Ship Workers Union, which historically merged with the IAM, has represented the material handlers/stevedores since at least the 1970s.

The Respondent maintains work rules set forth in a Personnel Handbook (Jt. Exh. 1). The most recent handbook has been in effect since September 1, 2016 and copies were distributed to all employees around that date (Jt. Exh. 1, Tr. 22).[4] The Personnel Handbook is a 21-page document that organizes rules in three general sections: I. General Provisions (2 pages), II. Guidelines for Appropriate Conduct (2 pages), and III. General Company Policies (15 pages). It also contains an introduction page, an acknowledgement page, and an Attachment A: Email and Voice Mail Employee Acknowledgment Form. The complaint alleges that certain provisions of the Guidelines for Appropriate Conduct, General Company Policies, and Attachment A contain unlawful work rules. The contested rules, which I will analyze in detail below, restrict or prohibit conduct related to: (1) strikes and work stoppages; (2) the use of computer and electronic equipment, including work email; (3) the use of personal recording equipment and cell phones at work; and (4) outside work or "moonlighting."

When the current CBA was negotiated, the parties agreed to language that refers to the Personnel Handbook issued on September 1, 2016 (R. Exh. 1, p. 1; Tr. 31–32, 62–64). The current CBA contains a grievance/arbitration provision that leads to binding arbitration and a management rights retention clause that permits discipline for cause and that permits the Respondent to "adopt, revise, and enforce working rules . . . ." (R. Exh. 1, pp. 21–22, 29–30). There does not appear to have been discussion or objection to the Personnel Handbook during contract negotiations and no grievance has been filed by the IAM regarding the handbook. (Tr. 33, 51, 63.) No employees have been disciplined pursuant to the rules in the Personnel Handbook. (Tr. 50.)

The General Counsel alleges that the contested handbook rules, maintained by the Respondent and in effect since about September 1, 2016, are "facially unlawful" because they are

[1] At the hearing, I granted the General Counsel's motion to amend the complaint to withdraw the allegation that the Respondent's Personnel Handbook Rule II.A(17) (regarding posting notices) violates the Act. I also granted the General Counsel's motion to correct and renumber original complaint pars. 6 to 8 to become corrected pars. 5 to 7, due to an apparent typographical error. On December 14, 2017, the Board issued its decision in *Boeing Co.*, 365 NLRB No. 154 (2017), which made retroactive the application of a new legal standard to pending cases alleging that facially neutral workplace rules are unlawful. The parties were granted the opportunity to identify any need to supplement the record and to file supplemental briefs. Both the Respondent and the General Counsel opined that the record was complete without reopening the record, and both filed supplemental legal briefs. The Charging Party did not file briefs. During supplemental briefing, I granted the General Counsel's unopposed motion to withdraw complaint allegations regarding the following handbook rules: (1) Rule II.A(26): Failing to maintain confidential Company or vendor information; (2) Rule III.L: Trade Secrets and Confidential Information; and (3) Rule III.N: Dress Code. The rules that remain in dispute are identified in corrected par. 5 of the complaint, and described in detail below.

[2] The job titles of employees represented by the IAM are listed in the current CBA. (R. Exh. 1, Appendix A, p. 34).

[3] The IAM is not a party to this case.

[4] A prior version of the handbook was promulgated in 2013. The General Counsel does not allege that rules in the prior handbook are unlawful.

overly broad and would reasonably tend to chill employees in the exercise of their Section 7 rights, in that the impact of the rules on NLRA rights is not outweighed by the Respondent's legitimate justifications for the rules. See *Boeing*, below. The Respondent asserts that the rules do not implicate Section 7 rights, and, to the extent they are found to do, the impact on NLRA rights is outweighed by the Respondent's legitimate justifications for the rules. Id. The Respondent also defends the rules by asserting that the Personnel Handbook was negotiated and incorporated into its CBA with IAM covering its material handlers/stevedores employees, the rules have not been applied to discipline any employees (unit or nonunit employees),[5] and neither the Union nor employees have challenged the legitimacy of the rules.

ANALYSIS

A. Legal Framework

An employer violates Section 8(a)(1) of the Act when it maintains workplace rules or policies that would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). This applies to workplace rules found in employee personnel handbooks like those contested in this case. The Board has long-held that the mere maintenance of unlawful rules may violate the Act without regard for whether the employer ever applied the rule for unlawful purposes. *Rio All-Suites Hotel & Casino*, 362 NLRB 1690, 1698 (2015), disfavored in part on other grounds, *Boeing*, below, slip op. at 19–20, fn. 89. The analytical framework for assessing whether the maintenance of workplace rules violates the Act is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), as reformed and overruled in pertinent part by the Board in *The Boeing Company*, 365 NLRB No. 154 (2017).[6] Under *Boeing*, the Board confirmed the general framework of *Lutheran Heritage* and left unchanged certain elements of the legal standards set forth, but expressly overruled the established test for determining when a work rule that does not explicitly restrict rights protected by the Act (facially neutral rule) will be found to violate Section 8(a)(1). Thus, when evaluating whether a workplace rule is unlawful, the Board's inquiry still begins by determining whether "the rule *explicitly* restricts activities protected by Section 7," in which case the Board will find the rule unlawful. *Lutheran Heritage* at 646 (emphasis in the original); see *Boeing*, slip op. at 3–4. Similarly, the Board still finds to be unlawful facially neutral rules that were "promulgated in response to union activity" or "applied to restrict the exercise of Section 7 rights" *Lutheran Heritage* at 647; *Boeing*, slip op. at 7.

In *Boeing*, the Board reevaluated its approach to determining when an employer's mere maintenance of facially neutral rules will be found to violate the Act. The Board overruled its prior application of the related holding in *Lutheran Heritage* where facially neutral rules were found unlawful when employees "would reasonably construe" the rules to interfere with, coerce or restrain them in the exercise of Section 7 rights. In its place, the Board has established a "balancing test," whereby, when evaluating the lawfulness of facially neutral workplace rules the Board will consider the employer's justification for the contested rule and weigh that justification against the potential impact of the rule, as reasonably interpreted, on employees' Section 7 rights. *Boeing,* slip op at 3, 15. Thus, when evaluating a facially neutral rule that, when reasonably interpreted, would potentially interfere with NLRA rights, the Board evaluates two things: (1) the nature and extent of the potential impact of the rule on Section 7 rights, and (2) legitimate justifications associated with the rule. Id. Focusing on a reasonable interpretation of the rule from the perspective of employees, the Board endeavors to strike the proper balance between the invasion of employee rights protected by the Act and the asserted business justifications for the rules.[7] Id., slip op. at 15.

In explaining its reasons for developing the *Boeing* balancing test for considering the lawfulness of facially neutral rules, the majority in *Boeing* expressed criticism for the Board's prior evaluation of "overly broad" and "ambiguous" rules. Id, slip op. at 2, 9–10, fn. 43, 13, fn. 68. These concepts still play a role in the analysis, however, as often rules are deemed facially neutral because their terms are either overly broad or ambiguous. Whether a workplace rule is overly broad or ambiguous may affect the analysis of both aspects of the balancing test, i.e., the evaluation of the nature and extent of the potential impact of the rule on NLRA rights and the legitimate justifications associated with the rule. Ambiguity or over-breadth of terms informs but does not determine the lawfulness of work rules. Id.

In *Purple Communications*, *Inc*., 361 NLRB 1050, 1063 (2014), the Board established a test to address the particularized circumstance of restrictions imposed on the use of employers' email systems for employee-to-employee communications. Under the test, the Board presumes that employees who have the rightful access to their employer's email systems in the course of their work have a right to use the email system for statutorily protected communications during nonworking time. An

[5] The complaint only alleges that the rules have been unlawfully maintained; there is no allegation that the rules have been unlawfully applied.

[6] In *Boeing*, the Board's analysis regularly refers to having overruled *Lutheran Heritage*; however, at fn. 4, the Board defines "Lutheran Heritage" to mean prong 1 of the *Lutheran Heritage* test, i.e., the "reasonably construe" standard applied to facially neutral rules. Moreover, the reasoning and substantive discussion in the decision reveals that the rest of the *Lutheran Heritage* framework remains intact.

[7] The Board also described that, as a result of applying this analysis, the Board would "delineate" three categories of workplace rules through the adjudicative process. Category 1 will include rules designated as lawful to maintain either because (i) when reasonably interpreted, the rule does not prohibit or interfere with 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 regarding whether the rule interferes with NLRA rights and if so, whether the justifications offered outweigh the rule's impact on protected conduct. Category 3 will include rules that the Board designates as unlawful because they would prohibit or limit protected conduct and the adverse impact on protected rights is not outweighed by justifications for the rule. *Boeing*, above, slip op. at 3–4, 15. This categorization system is meant to project clarity in rulings and predictable results, while still considering real-world complexities and recognizing unique characteristics of different work settings and industries. Id, slip op. at 10–11, 15–16.

employer may rebut the presumption by showing that special circumstances necessary to maintain production and discipline justify the restrictions on employees' rights. Because limitations should be no more restrictive than is necessary to protect employer's interests, the Board emphasized in *Purple Communications* that it anticipated that special circumstances will rarely justify a total ban on all nonwork email use by employees. Id. The Board's reasoning in *Purple Communications* was based on a consideration of Board and Supreme Court precedents addressing the accommodation of employer property interests and employees' Section 7 rights, and in particular, *Republic Aviation*, 324 U.S. 793 (1945). The Board did not rely on the *Lutheran Heritage* "reasonably construe" standard in *Purple Communications*, and, therefore, the Board's determination that the balancing of the important interests raised by the limitation of employees' use of employer's email systems for employee-to-employee communication should be resolved with the legal presumption established in *Purple Communications* is not directly affected by its establishment of the *Boeing* balancing test in considering the lawfulness of facially neutral rules.

B. Do the Contested Rules Violate Section 8(a)(1)?

For the reasons discussed below, I find that the Respondent's maintenance of the contested workplace rules found in the Respondent's Personnel Handbook concerning strikes and work stoppages, the use of computers and electronic equipment for work email, and outside work or "moonlighting" violate Section 8(a)(1).[8] I further find that the Respondent's maintenance of work rules prohibiting the use of cameras and recording equipment does not violate Section 8(a)(1) based on the standards and findings in *Boeing*, and that allegation will be dismissed.

1. Alleged unlawful limitations on employees' right to strike (Rule II.A.16)

In the Personnel Handbook section entitled, "II. Guidelines for Appropriate Conduct," subsection A states the following:

> As an integral member of the Company's team, you are expected to accept certain responsibilities, adhere to acceptable business principles in matters of personal conduct, and exhibit a high degree of personal integrity at all times.
>
> Whether you are on duty or off, your conduct reflects on the Company. You are, consequently, encouraged to observe the highest standards of professionalism at all times.
>
> **Types of behavior and conduct that the Company considers inappropriate include,**[9] but are not limited to the following:
> (Jt. Exh. 1 at 3)

Subsection A then lists and describes 27 instances of proscribed conduct, including, at number 16:

> **Calling, participating in, or encouraging others to call or participate in an illegal slowdown, strike (including a sympathy strike), or walkout.**
> (Jt. Exh. 1 at 4.)

I find that this "no-striking" rule is unlawful on its face, because it explicitly restricts activity protected by the Act, and would, therefore, reasonably tend to chill the exercise of Section 7 rights. *Lafayette Park Hotel*, above at 825; *Lutheran Heritage*, above at 646. The *Boeing* balancing test, which is applied to facially neutral rules, is not implicated by this no-striking rule that explicitly restricts protected activity. See *Boeing*, above, slip op. at 7. Employees' right to strike is a fundamental right protected by the Act; whether participation in a strike will be protected by the Act based on its purpose, the conditions or context, notice requirements, contractual limitations, or other issues, and whether the call of a strike can be found to be unlawful are legally complex, fact-specific issues not made clear to employees in this rule. Although the rule is overly broad in that it restricts some activity for which the Respondent would be entitled to discipline employees under certain factual circumstances, it also implicates strikes, protests, or work stoppages that would be lawful and protected under the Act. The placement of the qualifier "illegal" before "slowdown" does not save the rule, because it remains ambiguous how that qualifier is meant to affect the terms "strike" and "walkout" as written, and, as discussed above, the term "illegal" itself is ambiguous in the context of describing a job action.

The Respondent's argument that the rule merely restates a no-strike provision of the collective-bargaining agreement, which covers the material handlers/stevedores unit, fails for at least three reasons: (1) the rule covers nonunit statutory employees as well as unit employees and the CBA does not, so any contractual waivers that may be found in the CBA cannot eliminate the unlawful effect of the rule; (2) there is no indication and no reason to presume that the rule would become defunct upon expiration of the CBA, and so it extends to unit employees even under the Respondent's theory; and (3) the right of employees to engage in protests, including strikes, when confronted by unfair labor practices is not waived by a contractual, no-strike clause. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 284 (1956).

Therefore, I find that the Respondent has been violating Section 8(a)(1) by maintaining the limitations on the right to strike in its no-striking rule, as described in Personnel Handbook Rule II.A.16.

2. Alleged unlawful restrictions on use of electronic equipment and recording devices (Rules III.Q, III.X.1, and rules in Attachment A)

Subsection Q, of the Personnel Handbook section entitled, "III. General Company Policies" states, inter alia, the following:

> **Computer Software Communications**
> **All computers and software are owned or licensed by the Company. Therefore, access to them is restricted to employees of the Company. Any data created or transmitted via the Company's computers or through the use of the company's software is the property of the Company.**

[8] Par. 5 (formerly par. 6) of the complaint lists the handbook provisions alleged to be unlawful. Although the complaint quotes the rules, it does not number them. I have organized them by issue below and will refer to them by their section/subsection numbers as set forth Jt. Exh. 1.

[9] In these quoted sections of the employer's Personnel Handbook, the language alleged to be unlawful in the complaint is in bold, except where noted that bolding is in the original. Additional handbook language is provided for relevant context.

Communications are expected to be professional and for business purposes only, and messages can and will be monitored periodically. Thus, employees may not expect their communications are private. (Jt. Exh. 1 at 10)

Subsection X, of the Personnel Handbook section entitled, "III. General Company Policies" states, inter alia, the following:

Electronic Equipment Use
The Company has a strict policy relating to the use of electronic equipment on Company property. Please take note of the rules as it relates to specific electronic equipment listed below:

1) Cameras, video recorders or any audio or visual recording equipment is strictly forbidden at all times, without prior permission from Company management. Cell phones with cameras as standard equipment are allowed but may not be used as a camera or recorder while on duty or on Company premises.

2) Employees working on the terminal property may have Mobile (cell) phones in operation while on the job, unless a safety risk is created thereby. Employees may use Mobile (cell) phones during lunch periods and break times, when they have removed themselves from the working areas of the facility, such as the locker room.

3) Personal audio devices, such as iPods, MP3 players, and portable radios are prohibited. Employees working on the terminal property cannot have these devices in operation while on the job. Employees may use these devices during lunch periods and break times, only if they have removed themselves from the working areas of the facility, such as the locker room.

If any such devises are found in use in the working areas of the facility they may be confiscated. (bold in original)(Jt. Exh. 1 at 18)

Attachment A to the Personnel Handbook, entitled, *E-Mail and Voice Mail Employee Acknowledgement Form*, states, inter alia, the following:

I understand that all electronic communications systems provided for . . . by the Company . . . are to be used solely for job-related purposes and not for personal purposes. . . .I further agree not to use the camera feature of a cell phone while on Company premises.
(Jt. Exh. 1 at 21)

The Respondent's handbook rules restricting the use of employer supplied email and the use of electronic recording equipment, including cellphones, overlap somewhat in how they are presented in the Personnel Handbook, including that they both appear in the Appendix A, which is formulated as an employee acknowledgement form. The Board has analyzed the lawfulness of both types of rules but has established distinct approaches to each type in *Purple Communications*, above, and *Boeing*, above. Therefore, I analyze the Respondent's "no nonwork use of email" and "no-camera/no- recording" rules separately.

(a) "No nonwork use of email" rule

Regarding the Respondent's restrictions on the use of email as outlined in Rule III.Q and Appendix A, I find that the rule is unlawful. Under the Board's precedent in *Purple Communications*, the Respondent may not completely restrict the use of its email system for statutory communication by employees who have been granted access to the email system for work purposes absent a showing of special circumstances that justify such a bar. Here, the Respondent has provided no evidence or argument of special circumstances, other than its property interest in the email system and its generalized need for productivity and discipline. However, the Board's reasoning in *Purple Communications* already takes into consideration an employer's general property interest in its email system and need for productivity and discipline, and here, the Respondent has not established that these interests constitute a special circumstance. The Respondent's argument that it is entitled to restrict the use of email because the material handlers/stevedores unit employees are not granted access to email as part of their work does not account for the fact that nonunit statutory employees *are* granted access to the Respondent's email system. Therefore, the rule is unlawful because it applies to the nonunit statutory employees. Thus, although pursuant to *Purple Communications*, the Board does not require the Respondent to permit the use of email to those employees not granted access to its email system for work purposes, this handbook rule is unlawfully overbroad in that it also limits the use of email for protected communications among employees who have been granted use of the email system for use in the course of their work.

I find that the Respondent has been violating Section 8(a)(1) by maintaining its prohibition of nonwork use of its email system as described in its Personnel Handbook at Rule III.Q and Appendix A.

(b) "No-camera/no-recording" rule

Regarding the Respondent's no-camera/no-recording rule, the Board's legal standards in *Boeing* apply. In addition to the balancing test established in Boeing to determine the lawfulness of employer rules, policies, and handbook provisions, the Board explained that, after applying the balancing test in each case, it would delineate categories of rules by assigning its findings to one of three categories. The Board explained that it expected by assigning rules to these categories, it would provide certainty and clarity. Id., slip op. at 10–11, 14–15. In setting up this classification scheme, however, the Board did not define the categories as creating "per se" determinations, legal presumptions (rebuttable or otherwise), or evidentiary burden shifting, which, of course, the Board could have explicitly done. Therefore, I read the Board's categorization of the outcomes of its rulings related to work rules established in *Boeing* and subsequent cases to develop guidance in future cases, i.e., an indication of how the Board will expect to address a rule or type of rule, absent a considerably distinct factual context, rather than per se determinations or legal presumptions. I read Boeing to instruct that, if the Board has determined that a type of rule falls into either Category 1 (lawful) or Category 3 (unlawful), rules of that type will likely be found lawful or unlawful, respectively, in future cases. I read *Boeing* to instruct that, if the Board determines that a type of rule falls into Category 2, it expects to highly scrutinize the rule, and anticipates that specific circumstances will likely affect the

outcome of its application of the *Boeing* balancing test to similar rules or rules of that type falling into that category. In any case, I read *Boeing* to require me to apply the balancing test in every case, even if the Board has already addressed a similar rule or similar type of rule and has assigned the similar rule to either Category 1 or 3, with the above guidance in mind.

In *Boeing*, the Board determined that Boeing's no-camera rule was lawful, because Boeing's justifications for its restrictions on the use of camera-related devices on its property outweighed the rule's more limited adverse effect on the exercise of Section 7 rights. *Boeing*, above, slip op. at 5. The Board balanced its finding that the potential adverse impact on employees Section 7 rights was comparatively slight, against Boeing's multiple justifications for the rule. Boeing justified its no-camera rule based on the rule's roles of: (a) being an integral part of the Boeing's security protocol, (b) in ensuring compliance with government confidentiality requirements, (c) in the protection of Boeing's proprietary information, (d) in the protection of employees' personally identifiable information, and (e) in limiting the risk of Boeing being a terrorist target. Id., slip op. at 19–20. The Board further determined that "[a]lthough the justifications associated with Boeing's no-camera rule were compelling, [the Board believed] that no-camera rules, in general, fall into Category 1, types of rules that the Board will find lawful . . . ." Id., slip op. at 17. Therefore, the Board has provided the guidance that, in general, it expects to find no-camera rules lawful.

As discussed below, after applying the *Boeing* test, and considering the Board's expressed guidance regarding no-camera rules, I find that the Respondent's no-camera/no-recording rule in this case is lawful, and I recommend the related complaint allegation be dismissed.

Respondent's Handbook Rule III.X.1 states, in relevant part, "Cameras, video recorders or any audio or visual recording equipment is strictly forbidden at all times, without prior permission from Company management. Cell phones with cameras as standard equipment are allowed but may not be used as a camera or recorder while on duty or on Company premises." Appendix A states, in relevant part, "I further agree not to use the camera feature of a cell phone while on Company premises." These are facially neutral rule provisions, in that they do not explicitly implicate Section 7 rights, but when reasonably read from an employee's perspective, would potentially interfere with the Section 7 rights to record and/or publish recordings of Section 7 activities, such as certain group protests, evidence of safety violations, or organizing activity, without the Respondent's prior permission. The rule is vague and overbroad in that it does not distinguish between activities on nonwork time, or nonwork areas of the Respondent's premises. The rule also may have some impact on employees' lawful collection of information about the identities of coworkers or customers, or the lawful collection of information about safety violations or CBA violations. When evaluating a facially neutral rule that, when reasonably interpreted, would potentially interfere with NLRA rights, the Board evaluates two things: (1) the nature and extent of the potential impact of the rule on Section 7 rights, and (2) legitimate justifications associated with the rule. *Boeing*, above, slip op. at 3, 14. In balancing these interests, the Board focuses on a reasonable interpretation of the rule from the perspective of employees. Id. Here, the record does not establish that the nature or extent of the potential impact of the rule on Section 7 rights would be distinct from that in *Boeing*, and therefore, considered with the Board's finding in *Boeing*, I conclude that the nature and extent of the rule's impact on Section 7 rights is slight.

The Respondent's legitimate justifications for the no-camera/no-recording rule provisions in this case, however, are distinct from those offered in *Boeing*. In this case, the Respondent provided very little substantive justification for its no-camera/no-recording rule. On the stand, the Respondent's treasurer and manager, Patrick Sutka, testified that the reason for the rule was "for safety purposes" and explained that the Respondent did not want their employees in the field distracted while at work. (Tr. 48.) This reasoning does not adequately explain the no-camera/no-recording rule, however, as the cell-phone use and Ipod/MP3 player use limitations (rules III.X.2 and III.X.3) are less strict, more tailored, and implicate similar potential safety issues due to distraction. The rule also applies equally to employees when they do not work in the field. Moreover, the Respondent concedes in its briefs that employees may take handwritten notes about safety or work-related issues, which I find counter-intuitive, as there is no reason to believe that taking handwritten notes would be less distracting than taking pictures or making recordings.

In its briefs, the Respondent further asserts that security concerns related to its OSHA and Homeland Security obligations are also reasons justifying the no-camera/no-recording rule and offered that the no-camera/no-recording rule addressed Respondent's concerns regarding disclosure of confidential and proprietary business and customer information. Although no witness or documentary evidence established an assertion that security or confidentiality concerns were reasons for maintaining these rule provisions, Sutka testified that the Respondent was concerned about confidentiality and proprietary protection, as well as security issues related to the Respondent's function as a port. Based on the above, I find that the Respondent has asserted some legitimate reasons for the no-camera/no-recording rule provisions, although, the record does not fully establish that those reasons were the actual reasons for maintaining the rule.

The General Counsel argues that I should not consider justifications for rules not offered by the Respondent on the record, particularly considering that the Respondent was provided and declined an opportunity to supplement the record following the issuance of the *Boeing* decision. In *Boeing*, the Board explained that sometimes the Board would consider that a work rule's impact on Section 7 rights and/or its justification is self-evident. I rely on the Respondent's legal reasoning on brief to infer from the record that security concerns related to Respondent's port operation and protection of confidential and proprietary customer and business information are legitimate justifications for the rule, because they are plausible based on the record and considering the nature of the business and similar justifications were found legitimate by the Board in *Boeing*. Based on the above, and considering the Board's guidance in *Boeing* that no-camera rules, in general, will likely be found lawful, I find that the Respondent's no-camera/no-recording rule, like the rule in *Boeing*, has a comparatively slight impact on Section 7 rights, and that the slight

impact on Section 7 rights is outweighed by the Respondent's asserted justification for the rule provisions.[10]

The General Counsel also argues that the Respondent's reasons for the rules should be disregarded to the extent they were not explained to employees. In *Boeing*, the Board did not address whether the reasons for the rules must be explained to employees or what effect not explaining the reasons would have on the *Boeing* balancing test. In certain circumstances, explaining the reasons for a rule might diminish its coercive effect, and therefore, whether employees had notice of the reasons for the rules would be a relevant consideration. Here, however, where I have relied on the Board's ruling in *Boeing* to determine that the no-camera/no-recording rule provisions have only a slight impact on Section 7 rights, the lack of notice to employees of the reasons for the rule provisions does not affect the outcome of the application of the *Boeing* balancing test.

3. Alleged unlawful limitations on outside work

Subsection V, of the Personnel Handbook section entitled, "III. General Company Policies" states, inter alia, the following:

> **Moonlighting**
>
> **Employees are expected to devote their primary work efforts to the Company's business. Therefore, it is mandatory that they do not have another job that:**
>
> - **Could be inconsistent with the Company's interests.**
> - **Could have a detrimental impact on Company's image with customers or the public.**
> - Could require devoting such time and effort that the employee's work would be adversely affected.
>
> **Before obtaining any other employment, you must first get approval from the Company Treasurer. Any change in this additional job must also be reported to the Company Treasurer.** (Jt. Exh. 1 at 17)

The Respondent's "no moonlighting without permission" rule is a facially neutral rule, in that it does not explicitly implicate Section 7 rights, but, when reasonably read from the perspective of employees, it would have some potential impact on employees' Section 7 rights to organize, to associate with other employees, and to affiliate with and work for unions, without their employer's knowledge or interference.[11] Therefore, the *Boeing* balancing test applies, and the question presented is whether the potential impact on NLRA rights is outweighed by the employer's legitimate justifications for the rule.[12] As discussed below, I find that the Respondent's justifications for this rule do not outweigh the potential impact on Section 7 rights, and therefore, the rule is unlawful.

The rights of employees to engage in organizing activities, to associate with other employees for mutual aid or protection, and to affiliate with and/or work for any union are core rights under Section 7 of the Act. Although an employer can expect employees to devote their working time to the employer's business, this rule's restrictions on moonlighting by definition affects and interferes with nonwork time. When engaging in organizing efforts, including salting or dissenting union efforts as well as efforts supporting a recognized union in a labor dispute, employees may participate in efforts that "could be inconsistent with the [employer's] interests" or that "could have a detrimental impact" on the employer's image with customers or the public. Moreover, requiring employees to get management's preapproval before engaging in Section 7 activities is particularly coercive and would tend to chill that activity. See, e.g., *Lily Transportation Corp.*, 364 NLRB No. 54, slip op. at 1, 6 (Board affirms administrative law judge's reasoning without discussion, including that the mere fact that employees must seek permission to engage in protected conduct would have a chilling effect on Sec. 7 rights). I find that the Respondent's "no moonlighting without permission" rule has a significant potential impact on substantial, core Section 7 activities.

The Respondent justifies this rule by stating that (1) the Respondent requires employees to be alert and attentive at work as their work can be dangerous, suggesting that moonlighting will increase risk for fatigue; and (2) the Respondent does not want

[10] The Board's categorization of this type of rule as "Category 1," a rule that it would likely find lawful, tipped the scales in my reasoning when applying the *Boeing* balancing test to this work rule. In the absence of the Board's guidance in *Boeing* that, in general, it expects to find no-camera rules lawful, my conclusion would have been different. Here, the Respondent's proffered reasons are based on weak evidence and asserted posthoc reasoning from which I have inferred some legitimate justifications for the rule. These justifications are somewhat similar in type to those established in *Boeing* but not substantiated in the record to a comparable extent. Even considering that the Board determined in *Boeing* that the potential impact on Sec. 7 rights of a no-camera rule is slight, presented with only weak evidence of legitimate justifications for the rule in this case, I would have found that the Respondent's proffered justifications do not outweigh the potential impact on Sec. 7 rights in this case, had the Board not instructed that no-camera rules, in general, would be found lawful.

[11] On brief, the General Counsel urges me to rely on several cases decided by the Board pursuant to the *Lutheran Heritage* "reasonably construe" standard, because, he argues, the Board stated in *Boeing* that it was not passing on the legality of past decisions not referenced in *Boeing*, but would leave to future cases the legality of such rules pursuant to the principles stated in *Boeing*. GC Br. at 3, fn. 2; *Boeing*, above, slip op. at 12, fn. 51. I disagree with the General Counsel to the extent he suggests that these cases remain reliable precedent regarding the ultimate question of lawfulness of the rules after *Boeing*. However, these cases continue to support the narrower question in the *Boeing* balancing test regarding whether the contested rules have been shown to have a potential impact on Section 7 rights and continue to lend insight regarding the nature and extent of that impact. See, e.g., *Schwan Homes Services, Inc.*, 364 NLRB No. 20, slip op. at 5 (2016) (restrictions on "conduct detrimental to the best interests of the company or its employees," found unlawful); *First Transit, Inc.*, 360 NLRB 619, 619–620 fn. 5 (2014) (rule that includes restrictions on "activities that are detrimental to the company's image or reputation, or where a conflict of interest exists" and conduct during nonworking hours that "would be detrimental to the interest or reputation" of the employer found unlawful); and *Sheraton Anchorage*, 362 NLRB 1038, 1038–1039 fn. 4 (2015) (rules prohibiting "conflict of interest with the hotel or company" or behavior that, inter alia, "publicly embarrasses the hotel" found unlawful). These cases support my determination that the "no moonlighting" rule in this case, when reasonably interpreted, potentially impacts Section 7 rights.

[12] The Board has not yet ruled on into which category "no moonlighting without permission" rule will belong, and the categorization system of the *Boeing* decision does not impact my analysis of this rule.

employees working for its competitors. Although these reasons are legitimate justifications on their face, I find that they are not sufficiently addressed by the rule alleged to be unlawful in this case to outweigh the substantial impact the rule has on Section 7 rights. Significantly, the provision that makes it "mandatory that employees do not have another job" that "[C]ould require devoting such time and effort that the employee's work would be adversely affected" is not alleged to be unlawful. This provision addresses the Respondent's asserted concern about potential lack of attention or fatigue caused by moonlighting. The contested provisions regarding an employee engaging in outside work that potentially conflicts with the Respondent's interests or that might negatively affect the Respondent's image are simply not addressed by the justification that employees must be alert and not fatigued at work. The Respondent's assertion that its interest in preventing employees from working for its competitors is not fully explained, but presumably this would be related to an interest in keeping proprietary information from competitors. This is a legitimate interest, but one that could be addressed with a better tailored rule, and one that does not outweigh the employees' substantial, core NLRA rights to organize, associate, and affiliate with other employees and participate in union activity on nonwork time without their employer's interference.

The Respondent argues that the rule should be found lawful because the CBA recognizes that employees are permitted to work for the IAM and grants leave to do so under certain circumstances, arguing that employees would not reasonably read the moonlighting restrictions to affect their Section 7 rights. This argument fails because, as I discussed above, there are statutory employees at both the Detroit and Ecorse facilities who are not represented by IAM and there is no reason to assume that the handbook rules do not apply to unit employees upon the expiration of the CBA. The Respondent's argument that the rule does not significantly affect Section 7 rights because the employees are already organized by IAM fails for similar reasons. Moreover, the Respondent's argument that it would not apply the rule to disapprove an employee's request to work for IAM in his/her nonwork time is immaterial; the need to request authorization is coercive itself.

Based on the above, I find that the Respondent's prohibitions and restrictions on moonlighting are unlawful, because the proffered justifications for the work rule do not outweigh the significant potential impact of the rule on substantial, core Section 7 rights. The Respondent has been violating Section 8(a)(1) by maintaining limitations on employees' rights to organize, associate with other employees, and affiliate with unions on nonwork time in the Respondent's restrictions on employees' ability to work for other employers, as described in Personnel Handbook Rule III.V. This type of rule should be found to be a Category 3 rule, in that the rule significantly impacts substantial, core Section 7 rights, and this significant impact will not generally be outweighed by justifications associated with the rule.

CONCLUSIONS OF LAW

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

2. The Respondent has violated Section 8(a)(1) of the Act by maintaining work rules that would reasonably tend to chill employees in the exercise of their Section 7 rights either by expressly prohibiting or restraining the exercise of NLRA rights, or by potentially impacting the exercise of those rights and the justifications for the work rules do not outweigh the potential impact on Section 7 rights; specifically, the Respondent has been violating the Act by maintaining the following rule provisions in its Personnel Handbook:

(a) restrictions on employees' right to strike, as described in the Personnel Handbook at Rule II.A.16;

(b) restrictions on employees' right to use the Respondent's email system, as described in the Personnel Handbook at Rule III.Q and Appendix A;

(c) restrictions on employees' ability to engage in outside work activities, as described in the Personnel Handbook at Rule III.V.

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

4. The Respondent did not violate the Act in any other manner alleged in the complaint.

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. Having found that the Respondent maintains unlawful rules in its Personnel Handbook, the Respondent is required to revise or rescind the unlawful rules in all forms. This is the standard remedy to assure that employees may engage in protected activity without fear of being subjected to an unlawful rule. See *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). As stated there, the Respondent may comply with the order of rescission by reprinting the Personnel Handbook and its Appendix without the unlawful language or, in order to save the expense of reprinting the documents, it may supply its employees inserts stating that the unlawful rules have been rescinded or with lawfully worded rules on adhesive backing that will correct or cover the unlawfully broad rules, until it republishes documents without the unlawful provisions. Any copies that include the unlawful rules must include the inserts before being distributed to employees. Id. at 812 fn. 8. See also *Hills & Dales General Hospital*, 360 NLRB 611, 613 (2014), and *Rio All-Suites Hotel*, 362 NLRB 1690, 1695 (2015).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Nicholson Terminal & Dock Company, Detroit, Michigan and Ecorse, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining rules, policies, or handbook provisions that either expressly prohibit and restrain employees in the exercise

[13] 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.

of Section 7 rights, or that potentially impact Section 7 rights and about which the rule's legitimate justifications do not outweigh the impact on the exercise of Section 7 rights; specifically, maintaining the following work rules:

(i) restrictions on employees' right to strike, as described in the Personnel Handbook at Rule II.A.16;

(ii) restrictions on employees' right to use the Respondent's email system, as described in the Personnel Handbook at Rule III.Q and Appendix A;

(iii) restrictions on employees' ability to engage in outside work activities, as described in the Personnel Handbook at Rule III.V.

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

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

(a) Rescind the work rule provisions set forth in paragraph 1(a), above, or revise them to remove any language that prohibits or restrains the exercise of Section 7 rights, or that potentially impacts Section 7 rights and about which the rule's justifications do not outweigh the rule's impact on Section 7 rights.

(b) Notify all employees that the above rules have been rescinded or, if they have been revised, provide them a copy of the revised rules.

(c) Within 14 days after service by the Region, post at all of its facilities in Detroit, Michigan and Ecorse, Michigan, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 7 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 September 1, 2016.

(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 at Washington, D.C., May 16, 2018

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 work rules, policies, or handbook provisions that either expressly prohibit or restrain you in the exercise of these rights, or that potentially impact these rights and about which legitimate justifications do not outweigh the impact on these rights; more specifically.

WE WILL NOT maintain a work rule that expressly limits your right to strike.

WE WILL NOT maintain a work rule that prohibits your right to use our email system to communicate with each other about wage, hours, working conditions, and other protected, concerted communications.

WE WILL NOT maintain a work rule that prohibits you from working for other employers during nonwork time without our permission.

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

WE WILL rescind the provision in our Personnel Handbook at Rule II.A.16 that expressly limits your right to strike.

WE WILL rescind the provision in our Personnel Handbook at Rule III.Q and Appendix A that limits your right to use our email system to communicate with each other about wages, hours, working conditions, and other protected concerted communications.

WE WILL rescind the provision in our Personnel Handbook at Rule III.V that prohibits your ability to work for another employer without our permission.

WE WILL notify all employees that the above rules have been rescinded or, if they have been revised, provide you a copy of the revised rules.

NICHOLSON TERMINAL & DOCK COMPANY

[14] 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."

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-187907 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.