

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 28, 2013

TO: Ronald Hooks, Regional Director
Region 19

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The Boeing Company
Case 19-CA-088157

512-5012-0125-0000

512-5012-0133-0000

512-5012-2200-0000

The Region submitted this case for advice regarding whether a “Code of Conduct” maintained as part of the Employer’s business ethics policy unlawfully interferes with employees’ Section 7 rights. We agree with the Region that the Code of Conduct does not violate Section 8(a)(1) because employees would not reasonably construe its potentially overbroad language to restrict protected concerted activities, in the context of the almost forty pages of explanations and examples immediately following the Code.

FACTS

The Boeing Company (“Employer”) manufactures commercial and military aircraft throughout the world. The Society of Professional Engineering Employees in Aerospace, Local 2001 (“SPEEA” or “Union”) represents roughly 14,000 employees at the Employer’s facilities in Washington and California. In 2004, the Employer drafted and implemented its “Ethical Business Conduct Guidelines” (“Ethical Guidelines”) in response to what the Employer felt was a high profile procurement scandal by former employees that threatened its standing as a contractor with the United States government. The Ethical Guidelines is a forty-three page manual that contains a one-page preamble—the “Code of Conduct”—followed by a table of contents and almost forty pages explaining the Employer’s business ethics policies and additional business compliance issues, with examples.

The “Code of Conduct” provides:

The [Employer] Code of Conduct outlines expected behaviors for all [] employees. [The Employer] will conduct its business fairly, impartially, in an ethical and proper manner, in full compliance with all applicable laws and regulations, and consistent with the [Employer’s] values. In conducting its business, integrity must

underlie all company relationships, including those with customers, suppliers, and communities and among employees. The highest standards of ethical business conduct are required of [the Employer's] employees in the performance of their company responsibilities. *Employees will not engage in conduct or activity that may raise questions as to the company's honesty, impartiality, reputation or otherwise cause embarrassment to the company.*

As an employee of the [Employer], I will ensure that:

- *I will not engage in any activity that might create a conflict of interest for me or the company.*
- I will not take advantage of my [company] position to seek personal gain through the inappropriate use of [Employer] or non-public information or abuse my position. This includes not engaging in insider trading.
- *I will follow all restrictions on use and disclosure of information. This includes following all requirements for protecting [Employer] information and ensuring that non-Boeing proprietary information is used and disclosed only as authorized by the owner of the information or as otherwise permitted by law.*
- I will observe fair dealing in all of my transactions and interactions.
- *I will protect all company, customer and supplier assets and use them only for appropriate company-approved activities.*
- Without exception, I will comply with all applicable laws, rules and regulations.
- *I will promptly report any illegal or unethical conduct to management or other appropriate authorities (i.e., Ethics, Law, Security, EEO).*

Every employee has the responsibility to ask questions, seek guidance, and report suspected violations of this Code of Conduct.

*Retaliation against employees who come forward to raise genuine concerns will not be tolerated.*¹

The Code of Conduct is followed by about twenty pages explaining the Employer's eleven business ethics policies, with examples. Those business ethics policies include, inter alia, "Proper Marketing Practices"; "Offering of Business Courtesies"; "Acceptance of Business Courtesies"; "Conflict of Interest"; "Recruiting and Hiring Current and Former Government Employees"; "Proper Use of Company, Customer, and Supplier Resources"; and "Buying and Selling Securities—Insider Trading."² The final fifteen pages of the Ethical Guidelines address additional business compliance issues, such as "Procurement integrity," "Export and Import compliance," "Antitrust compliance," and "Anti-Bribery—Foreign Corrupt Practices Act."

The Employer presents, distributes, and discusses its Ethics Guidelines at a mandatory day-long training and orientation program for new employees. During the program, both Employer and Union representatives are present and available to employees. Employees are also expected to reaffirm their adherence to the Code of Conduct on a yearly basis as a condition of employment.

Employees are directed by both the Ethical Guidelines and the Employer to refer to online resources for clarification on any Employer policy. One of the online "Frequently Asked Questions" on the Ethical Guidelines website states:

[The Employer] expects employees/non-employees to follow the Code of Conduct while at work, on company business, on company premises and while representing [the Employer]. This includes company travel and temporary assignments outside an employee/non-employee's home location. The Code of Conduct does not affect an individual's ability to exercise his/her constitutional, statutory or other protected rights.

ACTION

We conclude that the Employer's Code of Conduct does not violate Section 8(a)(1) because employees would not reasonably construe the Code of Conduct to restrict their Section 7 rights, given the context of the policy within the Employer's detailed

¹ Emphasis added.

² A list of those eleven policies, with brief one-line explanations, is also included in the table of contents.

Ethical Guidelines.³ Accordingly, the Region should dismiss the charge, absent withdrawal.

An employer violates Section 8(a)(1) of the Act through the maintenance of a workrule or policy if the rule would “reasonably tend to chill employees in the exercise of their Section 7 rights.”⁴ The Board has developed a two-step inquiry to determine if a workrule would have such an effect.⁵ First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restrict protected activities, it will nonetheless be found to violate the Act upon a showing that: (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.⁶

The Board has cautioned against “reading particular phrases in isolation,”⁷ and will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity.⁸ Instead, the potentially violative phrases must be considered in the proper context.⁹ Rules that are ambiguous as to their application to Section 7

³ It is clear that the Code of Conduct does not explicitly restrict Section 7 activity, and there is no evidence that it was promulgated in retaliation for Section 7 activity or applied to suppress Section 7 activity.

⁴ *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd mem.*, 203 F.3d 52 (D.C. Cir. 1999).

⁵ *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–47 (2004).

⁶ *Id.* at 647.

⁷ *Id.* at 646.

⁸ *Id.* at 647 (“[W]e will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.”). *See also Palms Hotel and Casino*, 344 NLRB 1363, 1368 (2005) (“We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it.”).

⁹ *Compare Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 3 (Sept. 11, 2012) (finding context of confidentiality rule did not remove employees’ reasonable impression that they would face termination if they discussed their wages with anyone outside the company), *and The Roomstore*, 357 NLRB No. 143, slip op. at 1 n.3, 16–17 (Dec. 20, 2011) (finding employees would reasonably interpret the

activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.¹⁰ In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.¹¹

The Code of Conduct’s restriction on “conduct or activity that may raise questions as to the [Employer’s] honesty, impartiality, reputation or otherwise cause embarrassment” to the Employer is not facially unlawful. Furthermore, employees would not reasonably construe that language as restricting Section 7 activity when viewed within the broader framework of the Ethical Guidelines. The Ethical Guidelines describes numerous activities that could undermine the Employer’s “honesty, impartiality, reputation,” or otherwise “cause embarrassment,” including bribery, antitrust violations, insider trading, and offering and accepting certain “business courtesies” regarding commercial customers and government employees—activities which clearly do not implicate activities protected by Section 7.¹²

employer’s “negativity” rule as applying to Section 7 activity in context of prior employer warnings linking “negativity” to the employees’ protected discussions concerning terms and conditions of employment), *with Wilshire at Lakewood*, 343 NLRB 141, 144 (2004) (finding lawful handbook provisions prohibiting employees from “abandoning [their] job by walking off the shift without permission of [their] supervisor or administrator,” because employees would necessarily read the rule as intended to “ensure that nursing home patients are not left without adequate care during an ordinary workday”), *vacated in part on other grounds*, 345 NLRB 1050 (2005), *rev’d on other grounds sub nom. Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007).

¹⁰ *See, e.g., Claremont Resort and Spa*, 344 NLRB 832, 836 (2005) (rule proscribing “negative conversations” about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity).

¹¹ *See, e.g., Tradesmen International*, 338 NLRB 460, 462 (2002) (employees would not reasonably read prohibition against “statements which are slanderous or detrimental to the company or any of the company’s employees” as applying to protected activity where rule was found in a list of egregious activities such as sabotage and racial or sexual harassment and where employer had not led employees to believe it applied to Section 7 activity).

¹² *See id.* at 460–61 (finding that employees would recognize that rule prohibiting “any conduct which is disloyal, disruptive, competitive or damaging to the company,” such as “illegal acts in restraint of trade” and employment with another employer

Accordingly, a reasonable employee would understand that the above Code of Conduct language references legitimate business concerns regarding potential ethical lapses rather than Section 7 activity.¹³

Similarly, the Code of Conduct's prohibition on "activit[ies] that might create a conflict of interest" between employees and the Employer also would not reasonably be interpreted to restrict Section 7 activity. The Ethical Guidelines devotes two pages to the types of conflicts of interest the Employer requires employees to avoid—such as "outside employment with a[n Employer] customer, supplier, or competitor, or having a significant financial interest with one of these entities." Thus, when viewed in the context of the Ethical Guidelines, the Code's prohibition on conflicts of interest is neither overbroad nor ambiguous.¹⁴

Moreover, the Code of Conduct's requirements that employees "protect all company, customer and supplier assets and use them only for appropriate company-approved activities" and comply with "all restrictions on use and disclosure of information . . . includ[ing] . . . all requirements for protecting [Employer]

while employed by the employer, was intended to reach conduct similar to those examples rather than Section 7 activity).

¹³ See *id.* Cf. *Costco Wholesale Corp.*, 358 NLRB No. 106, slip op. at 1–2 (Sept. 7, 2012) (finding employer's policy prohibiting employees from making statements "that damage the Company, defame any individual or damage a person's reputation" to be unlawful because the rule had no "accompanying language that would tend to restrict its application" to legitimate business concerns); *Knauz BMW*, 358 NLRB No. 164, slip op. at 1 (Sept. 28, 2012) (finding employer's "courtesy rule," which prohibited "disrespectful" conduct and "language which injures the image or reputation" of the employer, to be unlawful, because nothing in the rule or elsewhere in the employee handbook "would reasonably suggest . . . that employee communications protected by Section 7. . . are excluded from the rule's broad reach").

¹⁴ Compare *Tradesmen International*, 338 NLRB at 461–62 ("Employees would not reasonably believe that an expectation that they represent the Employer in a 'positive and ethical manner,' in the context of a prohibition on conflicts of interest, would prohibit Section 7 activity."), with *HTH Corp.*, 356 NLRB No. 182, slip op. at 1, 25 (June 14, 2011) (affirming ALJ finding that an employer's conflict of interest policy which prohibited employees from giving advice either "solicited or unsolicited, for the intended purpose of discouraging any potential or actual customer from utilizing services of [the employer] to aid another organization," violated Section 8(a)(1) because "[i]nformation sharing such as this is specifically protected by Section 7 of the Act."), *enfd on other grounds*, 693 F.3d 1051 (9th Cir. 2012).

information” are lawful restrictions on employees’ use of certain proprietary information. Employees would not reasonably construe this language, in context, as restricting Section 7 activity such as discussing wages and other terms of employment with other employees or union representatives. Thus, the confidentiality language does not specifically reference and restrict information concerning employees and their jobs.¹⁵ Therefore, when read in context with the policy concerning “Proper Use of Company, Customer, and Supplier Resources” in the Ethical Guidelines, employees reasonably would understand that the Code of Conduct reflects the Employer’s legitimate concerns over employees using Employer property for impermissible business or political objects while on working time, rather than for Section 7 communications.¹⁶ Additionally, the fact that the Union is present at new employee orientations where the policy is presented would also lead employees to believe that restrictions on use of Employer assets and information would *not* extend to employee communications with their Union representatives.¹⁷

¹⁵ *Compare Super K-Mart*, 330 NLRB 263, 263–64 (1999) (prohibition against disclosing “company business and documents” found lawful, as it did not by its terms include employee wages or working conditions and made no reference to employee information) *with Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 1–2 (Sept. 11, 2012) (finding that employees would reasonably construe prohibition on disclosing “personnel information and documents” as prohibiting Section 7 communications, even though provision also listed “computer and software systems and process” and other examples of confidential information that the employer could legitimately restrict from disclosure, because the context failed to adequately limit the provision’s “unlawfully broad sweep”) *and DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54, slip op. at 3 (Jan. 25, 2013) (confidentiality provision prohibiting employees from disclosing employee records or other information about their coworkers’ jobs would reasonably be construed as restricting Section 7 communications, even though the provision also covered “information about customers,” “company business,” and other listed items).

¹⁶ *Cf. Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 277–78, n.4 (2003) (finding overbroad and ambiguous summary of the employer’s no-solicitation policy contained in front of an employee handbook to be lawful in light of the full, facially lawful solicitation provision contained later in the same handbook, as employees would reasonably disregard the shorter summary provision in favor of the longer and more detailed description of the policy).

¹⁷ We note that the Union’s presence, on its own, would not necessarily save an overbroad or ambiguous policy from being found unlawful as Section 7 also protects employee conduct that is at odds with a particular union’s interests.

Finally, although the Employer has not explicitly informed employees that their Section 7 activities are not covered by its Code of Conduct, the Employer has provided guidance as to the Code of Conduct's targeted scope. Thus, the statement in the Ethical Guidelines website's "Frequently Asked Questions" section indicating that the Code of Conduct does not apply to employees' "constitutional, statutory, or other protected rights," further supports finding that employees would not reasonably believe that the Code of Conduct restricts their Section 7 or union activities.

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.