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

DATE: June 14, 2018

TO: Jill H. Coffman, Regional Director
Region 20

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Lyft, Inc. 512-5012-0100
Case 20-CA-171751 512-5012-0133

The Region submitted this case for advice as to whether two of the Employer's work rules violate Section 8(a)(1) of the Act because they are unlawfully overbroad: an "Intellectual Property" policy prohibiting use of its logos without express written approval, and a "Confidentiality" policy prohibiting use of proprietary and confidential information that includes "User information." We agree with the Region that both of these rules are lawful.

FACTS

Lyft, Inc. (the Employer) is headquartered in San Francisco, California, and operates a website and software application available on smartphones that matches riders seeking transportation with drivers offering transportation in their personal vehicles. The Employer's services are available in approximately 65 cities nationwide.

The instant charge was filed by Teamsters Joint Council 7, alleging that the Employer has, *inter alia*, maintained certain unlawfully overbroad work rules. In light of the Board's recent decision in *Boeing Company,*[1] the Region reviewed the Employer's rules that it had previously concluded were unlawfully overbroad to determine their legality under the new *Boeing* standard.

The Region submitted to the Division of Advice the following two rules contained in the Employer's "Terms of Service" agreement:

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[1] 365 NLRB No. 154, slip op. at 2–3 (Dec. 14, 2017) (expressly overruling the "reasonably construe" standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004)).

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Intellectual Property (Section 11). You agree that you will not:

Create any materials that incorporate the Lyft Marks or any derivatives of the Lyft Marks other than as expressly approved by Lyft in writing.

Confidentiality (Section 18):

You agree not to use any technical, financial, strategic and other proprietary and confidential information relating to Lyft's business, operations and properties, including User information ("Confidential Information") disclosed to you by Lyft for your own use or for any purpose other than as contemplated herein. You shall not disclose or permit disclosure of any Confidential Information to third parties.

ACTION

We conclude that these two policies are lawful.

In cases where a facially neutral employer work rule, if reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on Section 7 rights, and (ii) legitimate business justifications associated with the requirement(s).[2] The Board will conduct this evaluation "consistent with the Board's 'duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,' focusing on the perspective of employees."[3] In so doing, "the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral)," and make "reasonable distinctions between or among different industries and work settings."[4] The Board will also account for particular events that might shed light on the purpose served by the rule or the impact of its maintenance on Section 7 rights.[5]

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[2] *Boeing Co.*, 365 NLRB No. 154, slip op. at 2–3.

[3] *Id.*, slip op. at 3, *quoting NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967).

[4] *Boeing Co.*, 365 NLRB No. 154, slip op. at 15.

[5] *Id.,* slip op. at 16.

The Board also indicated that its balancing test will ultimately result in its ability to classify the various types of employer rules into three categories, thereby eliminating the need to conduct case-specific balancing as to certain types of rules so as to provide employers, employees, and unions with greater certainty in the future. The Board described the following categories:

> • *Category 1* will include rules that the Board designates as *lawful* to maintain, either because: (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of Section 7 rights and thus no balancing of rights and justifications is required; or (ii) even though the rule has a reasonable tendency to interfere with Section 7 rights, the potential adverse impact on those protected rights is outweighed by employer justifications associated with the rule. The Board included in this category rules requiring "harmonious relationships" in the workplace, rules requiring employees to uphold basic standards of "civility," and rules prohibiting cameras in the workplace.
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> • *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of Section 7 rights, and if so, whether any adverse impact on protected conduct is outweighed by legitimate business justifications.
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> • *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit Section 7 conduct, and the adverse impact on Section 7 rights is not outweighed by justifications associated with the rule. The Board included as an example of a Category 3 rule one that prohibits employees from discussing wages and benefits with each other.[6]

1. Intellectual Property Policy (Section 11)

Applying the Board's new test here, we conclude that the Intellectual Property policy is a traditional prohibition on employee use of employer trademarks/logos that belongs in Category 1.[7]

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[6] *Id.,* slip op. at 3–4, 15.

[7] *See* Guidance on Handbook Rules Post-*Boeing,* Memorandum GC 18-04 at 13-14 (June 6, 2018).

Most activity covered by this type of rule is unprotected, including use of employer intellectual property for unprotected personal gain or using it to give the impression one's activities are condoned by the employer. Although some protected concerted activity might fall under such a rule, including fair use of an employer's intellectual property on picket signs and leaflets, usually employees will understand this type of rule as protecting the employer's intellectual property from commercial and other non-Section 7 related uses. Furthermore, even where employees would reasonably interpret such a rule to apply to fair use of an employer's trademarks/logos as part of protected concerted activity, it is unlikely that the rule would actually cause them to refrain from so using them. The types of protected concerted activity implicated by these rules are usually fairly advanced in terms of employee organization, and employees are unlikely to be deterred from fair use of a logo on a picket sign by a rule in an employee manual. Finally, even in the event employees did refrain from such fair use, that would have only a peripheral effect on Section 7 rights. While employees might refrain from using the logo as part of their protected concerted activity, it would not stop the protected concerted activity itself.[8]

Employers have a significant interest in protecting their intellectual property, including logos, trademarks, and service marks. Such property can be worth millions of dollars and be central to a company's business model. Failure to police the use of such property can result in its loss, which can be a crippling blow to a company. Employers also have an interest in ensuring that employee social media posts and other publications do not appear to be official via the presence of the employer's logo.

Because rules prohibiting the use of an employer's intellectual property generally will not cause employees to refrain from NLRA-protected activity, and even if they did the employer's legitimate interests would outweigh the peripheral Section 7 rights at issue, this type of rule is a lawful Category 1 rule.

2. Confidentiality Policy (Section 18)

We conclude that the prohibition on using any proprietary and confidential information relating to Lyft's business, operations, and properties, "including *User Information*" (emphasis added) is facially lawful under *Boeing* because the employees would not reasonably interpret it to cover Section 7 activity.

[8] *Cf. Boeing Co.*, 365 NLRB No. 154, slip op. at 19 (noting that camera rule would not prevent employees from exercising their Section 7 right to engage in group protest notwithstanding their inability to photograph the event).

Rules prohibiting disclosure of customer information and trade or business secrets should be considered Category 1 rules.[9] But general prohibitions on posting confidential information should be considered Category 2 rules where they would reasonably be read to include information about terms and conditions of employment,[10] and such rules should be found unlawfully overbroad where the impact on Section 7 rights outweighs the employer's legitimate business justification for the rule.

With regard to the impact of such rules on Section 7 rights, a central aspect of protected concerted activity under the NLRA involves discussions and coordination among employees, and with unions and others, regarding wages and working conditions. This includes disclosing the names and contact information of other employees to coworkers or union representatives. Confidentiality rules that ban discussion of broad, undefined "employee information" or "employer business information," or that prevent employees from using freely available contact information to communicate with one another, will adversely affect core NLRA rights, and that impact often will not be outweighed by any significant employer interest that can't be accommodated by a more narrowly tailored rule.[11]

In this case, however, we conclude that employees would not reasonably interpret the rule to prohibit the sharing of information about working conditions or of employee names and contact information. The rule is primarily directed at prohibiting the disclosure of "technical, financial, strategic, and other proprietary" information. And, it does not specifically reference "employee information," but rather covers "User" information," which term refers collectively to both "riders" and "drivers" who

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[9] *See* Guideline Memorandum GC 18-04 at 13.

[10] *See id.* at 17.

[11] *See Victory Casino Cruises II*, 363 NLRB No. 167, slip op. at 8 (Member Miscimarra, concurring) (finding unlawful rule classifying "all information about present or past employees to be confidential" as the blanket prohibition would encompass protected concerted activity); *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 1 n.1 (Member Miscimarra, concurring) (unlawful rule listing information about employees as confidential); *Long Island Association for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 1 n.5 (June 14, 2016) (Member Miscimarra, concurring) (rule that prohibited employees from disclosing "salaries, contents of employment contracts, [and] . . . staff addresses and phone numbers" and from engaging in the "personal use of such information," and that also prohibited employees from disclosing to "any media source" information "regarding [employees'] employment at [the employer], the workings and conditions of [the employer], or any . . . staff member," was unlawful under Member Miscimarra's *William Beaumont Hospital* test).

are "users" of the Lyft platform. Moreover, the drivers regularly use Employer-created on-line forums to discuss their wages and other working conditions, which suggests that the parties clearly have not interpreted this rule as prohibiting those types of discussions. In these circumstances, we conclude that the rule is unlikely to interfere with rights guaranteed by the NLRA, and therefore that the rule is lawful without the need for any balancing of Section 7 rights and Employer business interests.

Accordingly, the Region should dismiss these allegations, absent withdrawal.

/s/
J.L.S.

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