Shamrock Foods Company *and* Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL–CIO–CLC. Case 28–CA–150157

July 29, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On January 9, 2019, the National Labor Relations Board remanded allegations concerning facially neutral work rules maintained by the Respondent for analysis under *Boeing Co.*, 365 NLRB No. 154 (2017), which issued while this case was pending.[1] On October 7, 2019, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision on remand. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the Respondent filed reply briefs. In addition, the Charging Party filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Supplemental Decision and Order.[4]

There are three rules at issue: (1) "Protecting the Company's Confidential Information," (2) "Requests by Regulatory Authorities," and (3) "Blogging" (specifically, paras. 2 and 10 of the "Blogging" rule).[5] The judge found that the first two rules and paragraph 2 of the "Blogging" rule were lawful. In addition, the judge found that paragraph 10 of the "Blogging" rule was unlawful. We agree with the judge, for the reasons set forth in his decision, with regard to the rules found lawful. For the reasons discussed below, however, we disagree with the judge's finding that paragraph 10 of the "Blogging" rule was unlawful.

Analysis

The Respondent's "Blogging" policy states in pertinent part:

> Shamrock recognizes that blogs, other types of self-published online journals, and collaborative Web-based discussion forums can be effective tools for sharing ideas and exchanging information of all kinds.
>
> Shamrock is concerned with ensuring that use of such communications serves Shamrock's need to maintain brand identity, integrity, and reputation while minimizing actual or potential legal risks.
>
> The following rules and guidelines apply to blogging, whether blogging is done for Shamrock on company time, on a personal Web site during non-work time, or outside the workplace. The rules and guidelines apply to all associates.
>
> . . . .
>
> **[¶10] Shamrock discourages associates from linking to Shamrock's external or internal Web site from personal blogs**.

(Emphasis added.)

[1] The Board had previously severed these allegations in a Decision and Order reported at 366 NLRB No. 117 (2018).

[2] We find no merit in the Charging Party's exceptions that raise arguments outside the scope of the General Counsel's complaint. It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case. See *Hobby Lobby Stores, Inc*., 367 NLRB No. 78, slip op. at 1 fn. 3 (2019).

[3] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We find no merit in the Respondent's contention that the judge erred in recommending that the notice to employees be posted at all of its locations. During the remand proceedings, the Respondent's former senior vice president of human resources, Robert Beake, testified that its Associate Handbook was applicable at all of its facilities. Accordingly, a nationwide notice posting is appropriate. *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

We shall amend the judge's conclusions of law and modify the judge's recommended Order to conform to our findings and our standard remedial language for the violations found, and in accordance with our recent decision in *Danbury Ambulance Service, Inc*., 369 NLRB No. 68 (2020). We shall also substitute a new notice to conform to the Order as modified. We reject the Charging Party's request that we impose additional remedies on the Respondent. The Charging Party has not shown that the remedies recommended by the judge are insufficient to remedy the Respondent's violations in this case.

In its brief, the Respondent indicates that it issued an updated 2017 Handbook that rescinded and superseded the 2014 Handbook. "The legal effect of any efforts by the Respondent to remedy the violations found by the judge may be addressed in compliance." *Postal Workers Local 735 (Postal Service)*, 342 NLRB 545, 545 fn. 5 (2004).

[5] For ease of reference, we will use the paragraph numbering employed by the judge.

In its prior decision, the Board remanded 14 rules for further consideration in light of *Boeing*. Following the Board's remand, the General Counsel filed a motion to amend the complaint and to withdraw the allegations with respect to 10 of these rules. Absent opposition, the judge granted the motion on July 8, 2019.

Additionally, at the hearing on remand, the Respondent admitted that the "No Solicitation, No Distribution" rule and para. 1 of the "Blogging" rule were unlawful. As a result, the judge summarily found that these rules violated Sec. 8(a)(1). In the absence of exceptions, we adopt the judge's findings that these rules were unlawful.

The "Blogging" policy also contains the following savings clause:

> [¶11] Shamrock will not construe this policy nor apply it in a manner that interferes with associates' rights under Section 7 of the NLRA.

Additionally, at the end of the associate handbook, there is a one-page notice drafted by the United States Department of Labor that advises employees of their workplace statutory rights, including their rights under the Act to discuss their "terms and conditions of employment or union organizing with [their] coworkers or a union" and to "rais[e] work-related issues . . . with a government agency."

In *Boeing*, the Board held that "when evaluating a facially neutral policy, rule, or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." *Boeing*, above, slip op. at 3 (emphasis omitted). In conducting this evaluation, the Board balances the employer's business justifications against the extent to which the rule or policy, viewed from the perspective of reasonable employees, interferes with employee rights under the Act. Id. Ultimately, the Board places challenged rules into one of three categories:[6]

- *Category 1* will include rules that the Board designates as lawful to maintain, either because (a) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (b) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. . . .
- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Id., slip. op. at 3–4 (emphasis in original); *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2–3 (2019). Except for rules designated Category 1(a), as to which no balancing is required, the categories represent the results of the Board's balancing of employee rights and employer interests and are intended to "provide . . . greater clarity and certainty to employees, employers and unions." *Boeing*, above, slip op. at 4.

Applying *Boeing*, the judge found that paragraph 10 of the "Blogging" policy potentially interfered with the right of employees to use social media by effectively discouraging them from using the common and most efficient method of identifying and directing coworkers and others to the Respondent's website to obtain further information and communicate directly with the Respondent in support of employees' work-related concerns or disputes. The judge also found that the savings clause and Department of Labor notice were insufficient because they did not state whether including a link to the Company website on a blog is a right protected by the NLRA. The judge further found that the Respondent's justification for this policy—protecting its brand from being associated with racist or other offensive blogs—did not outweigh its infringement of Section 7 rights. Accordingly, he concluded that maintenance of the policy violated Section 8(a)(1).

We disagree. The introductory language of the "Blogging" policy recognizes the importance of such forms of communication as an effective means of sharing and exchanging information and states that the purpose of the policy is to "ensu[re] that use of such communications serves Shamrock's need to maintain brand identity, integrity, and reputation while minimizing actual or potential legal risks." Linking a blog to the Respondent's website could create the impression that Shamrock is associated with the blog in some way, possibly that it endorses or at least does not dispute the contents of the blog. Therefore, reading the "Blogging" policy as a whole, a reasonable employee would not view paragraph 10 as an infringement on Section 7 rights. Rather, he or she would understand it as simply discouraging employees from giving the impression that the employee was speaking on behalf of the Respondent or making statements that might be interpreted as coming from or endorsed by the Respondent. Accordingly, we reverse the judge and find the above policy lawful.[7]

[6] These categories are not part of the *Boeing* standard. *Boeing*, above, slip op. at 4.

[7] Moreover, the savings clause in the policy further signals to employees that this policy does not pertain to their protected activity. See *Maine Coast Regional Health Facilities, d/b/a Maine Coast Memorial Hospital*, 369 NLRB No. 51, slip op. at 2–3 (2020) (finding employer's amendment of media contact rule to include a savings clause clarifying that the rule "does not apply to communications by employees, not made on behalf of [the employer], concerning a labor dispute or other concerted communications for the purpose of mutual aid or protection protected by the [NLRA]" rendered it a lawful Category 1(a) rule because no objectively reasonable employee could interpret the amended rule to interfere with Sec. 7 rights given its clear disclaimer). In addition to specifically covering Sec. 7 rights in the "Blogging" policy itself, the savings clause also effectively incorporates the language in the full-page notice of employee rights under the Act contained at the end of the

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 1(a):

> (a) a paragraph in a blogging rule that broadly discourages employees from publicly discussing on the internet 'any work-related matters, whether confidential or not, outside company-authorized communications.'

ORDER

The National Labor Relations Board orders that the Respondent, Shamrock Foods Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining "Blogging" and "No Solicitation, No Distribution" rules that unlawfully interfere with the exercise of employee rights under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) To the extent it has not already done so, rescind the unlawful paragraph in the "Blogging" rule and the overbroad "No Solicitation, No Distribution" rule in its 2014 Associate Handbook or revise them to remove any language that prohibits or reasonably may be read to prohibit conduct protected by Section 7 of the Act.

(b) Furnish employees with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

(c) Post at its Phoenix, Arizona warehouse, and all other facilities where the unlawful rules are or have been maintained in effect, copies of the attached notice marked "Appendix" in both English and Spanish.[8] Copies of the notices, on forms provided by the Regional Director for Region 28, 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. If the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notices to all current employees and former employees employed by the Respondent at any time since October 15, 2014.

(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.

IT IS FURTHER ORDERED that the amended complaint is dismissed to the extent it alleges that rule provisions other than those specifically found unlawful also violated the Act.

Dated, Washington, D.C. July 29, 2020

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John F. Ring, Chairman

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

employee handbook. Although not specifically addressing social media, the savings clause and the notice language are broad enough to cover all forms of communication. Even without these provisions, however, a reasonably objective employee would understand from the context of the policy that it does not restrict their protected and union activities.

We categorize para. 10 of the "Blogging" policy as a 1(a) rule under *Boeing*. See, e.g., *LA Specialty Produce*, above, slip op. at 2.

[8] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

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 a rule that discourages you from publicly discussing on the internet any work-related matters, whether confidential or not, outside company-authorized communications.

WE WILL NOT maintain an unlawful and overbroad no solicitation/no distribution policy that restricts you from exercising the rights set forth above.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL, to the extent we have not already done so, rescind or revise the work rules described above.

WE WILL furnish you with inserts for the Associate Handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or WE WILL publish and distribute revised employment handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

SHAMROCK FOODS COMPANY

The Board's decision can be found at www.nlrb.gov/case/28-CA-150157 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.

Néstor M. Zárate Mancilla, Esq., for the General Counsel.
Todd A. Dawson and *Nancy Inesta, Esqs. (Baker & Hostetler, LLP),* for the Respondent Company.
David A. Rosenfeld, Esq. (Weinberg, Roger & Rosenfeld), for the Charging Party Union.

SUPPLEMENTAL DECISION

JEFFREY D. WEDEKIND, ADMINISTRATIVE LAW JUDGE. This case is on remand from the Board to reconsider whether the Respondent food distribution company maintained 14 overbroad rules in its January 2014 Associate Handbook in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA). The Board severed the rules allegations from the numerous other 8(a)(1) and (3) allegations of the complaint in June 2018,[1] and subsequently remanded them in January 2019[2] for further consideration under the new analytical framework announced in *Boeing Co*., 365 NLRB No. 154 (2017). Under that new framework, the Board first analyzes whether "a facially neutral policy, rule or handbook provision . . . when reasonably interpreted, would potentially interfere with the exercise of NLRA rights." Id., slip op. at 3–4. If it would not, the rule is lawful. If it would, the Board will weigh any adverse impact on NLRA-protected conduct against the employer's legitimate justifications for maintaining the rule. Id.[3]

Following the Board's remand, on June 7, 2019, the General Counsel filed a motion to amend the complaint and to withdraw 10 of the 14 remanded rules allegations in light of *Boeing*. Absent any opposition, the motion was granted on July 8. This left for reconsideration only the following four handbook rules: (1) Protecting the Company's Confidential Information; (2) Requests by Regulatory Authorities; (3) Blogging; and (4) No Solicitation, No Distribution. A hearing on remand to present additional relevant evidence regarding these four rules under the *Boeing* framework was held on August 26, 2019 in Phoenix, Arizona.[4] The General Counsel, the Charging Party Union, and the Respondent Company subsequently filed briefs on September 30. As discussed below, two of the rules (blogging and no solicitation, no distribution) are unlawfully overbroad under *Boeing*,

[1] *Shamrock Foods Co.*, 366 NLRB No. 117 (2019), enfd. 779 Fed. Appx. 752 (D.C. Cir. 2019), rehearing en banc denied Sept. 6, 2019. My original decision addressing all the consolidated 8(a)(1) and (3) allegations, including the alleged overbroad rules, issued in February 2016, and is attached to the Board's decision.

[2] 2019 WL 656281 (Jan. 9, 2019).

[3] See also *Southern Bakeries, LLC*, 368 NLRB No. 59, slip op. at 1 (2019) (summarizing the new *Boeing* framework).

[4] The parties were allowed to present evidence at the hearing on remand relevant to both (1) the nature and extent of the potential impact of the rules on NLRA rights, and (2) legitimate justifications associated with the rules. The Company's request that the hearing on remand be limited to the latter was denied. See my May 15, 2019 order (GC Exh. 30(f)), citing *Boeing*, slip op. at 15–16 ("Parties may also introduce evidence regarding a particular rule's impact on protected rights or the work-related justifications for the rule. The Board may also draw reasonable distinctions between or among different industries and work settings. We may also take into consideration particular events that may shed light on the purpose or purposes served by the challenged rule or on the impact of its maintenance on protected rights.").

and two (Protecting the Company's Confidential Information and Requests by Regulatory Authorities) are not.

I. PROTECTING THE COMPANY'S CONFIDENTIAL INFORMATION

The General Counsel alleges that the following provisions of the Company's confidential-information rule are unlawful under *Boeing*:

> The Company's confidential information is a valuable asset and includes: information, knowledge, or data concerning . . . associates, . . . Company manuals and policies, . . . [and] compensation schedules . . . [5]
>
> . . . All confidential information must be used for Company business purposes only. Every associate, agent, and contractor must safeguard it. THIS RESPONSIBILITY INCLUDES NOT DISCLOSING THE COMPANY CONFIDENTIAL INFORMATION, INCLUDING INFORMATION REGARDING THE COMPANY'S PRODUCTS OR BUSINESS, OVER THE INTERNET, INCLUDING THROUGH SOCIAL MEDIA.

The General Counsel argues that the foregoing provisions, as reasonably interpreted, interfere with the employees' fundamental rights under the Act to communicate with third parties, including labor organizations, government agencies, and the public, about their wages, hours, and other employment terms and conditions, including those addressed in the Associate Handbook itself.

However, as indicated by the Company, handbook rule provisions must be read and evaluated in context rather than in isolation. See, e.g., *Tradesmen Int'l*, 338 NLRB 460, 461–462 (2002); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999); and *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996).[6]

Here, the full text of the confidential-information rule indicates that it applies, not to employee wages, hours, and other terms and conditions of employment that the Company widely circulates to employees, but to confidential proprietary business information or employee private information that has not been voluntarily disclosed to coworkers such as employee addresses, phone numbers, social security numbers, and direct deposit banking information. This is evident from the following additional types of confidential information listed in the first paragraph (which the General Counsel does not challenge):

> costs, commission reports or payments, purchasing, profits, markets, sales, discounts, margins, customer histories or preferences, relationships with vendors, organization structures, . . . customers, surveys, customer lists, lists of prospective customers, customer account records, marketing plans or efforts, sales records, training and service materials, . . . computer programs, software and disks, order guides, financial statements and projections, business plans, budgets, supplier lists, contracts, calendars and/or day-timers that contain customer contact and other customer information, . . . proposals and quotes for business, notes regarding customers and prospective customers and pricing information.

It is also evident from the very next sentence at the beginning of the next paragraph, which states, "This information is the property of the Company and may be protected by patent, trademark, copyright and trade secret laws." Cf. *MediaOne of Greater Florida, Inc*., 340 NLRB 277, 279 (2003) (finding that the employer's nondisclosure rule was lawful notwithstanding that it included "employee information" because the rule addressed disclosure of "proprietary information, including information assets and intellectual property," and "employee information" was listed as an example of "intellectual property.").

This reading of the rule is further supported by evidence developed at the hearing on remand. For example, Jim Kramer, who is the Company's vice president of people operations and has worked for Shamrock since May 2015, testified that the Company does not consider the Associate Handbook to be a confidential "manual" or compilation of confidential "policies" as there is nothing confidential about the information in it (Tr. 100, 119–120).[7] As for "compensation schedules," Kramer testified that they are not the same as wage rates. Rather, they also include the formulae developed and implemented by Shamrock to calculate employee incentive pay, which is paid to the warehousemen and drivers in addition to their base rate to encourage them to increase their productivity and decrease their mistakes. The formulae (such as the pace or number of picks and the number of mistakes or mispicks) vary by job, responsibility, and location, and as indicated in the rule are considered confidential proprietary information. Accordingly, they are not provided to the employees. Employees are only provided with their own incentive pay and the basis for that amount (e.g., their own productivity and mistakes), which they are free to share with anyone. They are not provided with the schedules. (Tr. 101–106, 126–129.) See *Macy's, Inc*., 365 NLRB No. 116, slip op. at 4 (2017) (an employer may lawfully prohibit employees from revealing confidential information in its files even if that information could be used by employees for the purpose of appealing to third parties regarding a labor dispute or their terms and conditions of employment with the employer).

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[5] As discussed infra, this paragraph of the rule also identifies as confidential numerous other types of information, including "calendars and/or day-timers that contain customer contact and other customer information." Although the original complaint alleged that this quoted additional language was also unlawful, the General Counsel moved at the hearing on remand to further amend the complaint to withdraw that allegation and the motion was granted in the absence of any objection (Tr. 11–12).

[6] Although the court in *Aroostook* denied enforcement of the Board's decision in relevant part, the court's opinion was later cited with approval in both *Lafayette Park* and *Tradesmen*.

[7] Former Senior HR Vice President Robert Beake, who worked for the Company in that capacity through about August 2014 and was subpoenaed by the General Counsel, testified to the contrary—that the handbook would be considered confidential by the Company (Tr. 64). However, he never explained why or the foundation or basis for his testimony. And there is no evidence employees have ever been specifically told the handbook is confidential. Accordingly, his testimony has been given less weight.

Moreover, the handbook includes a full-page notice at the end advising employees of their rights under the Act. The notice, which is listed in the handbook's table of contents as a "Government Required Posting," is the standard notice of employee rights that was adopted by the U.S. Department of Labor (DOL) for posting by federal contractors and subcontractors pursuant to Presidential Executive Order 13496 (Jan. 30, 2009). See the DOL website at: https://www.dol.gov/olms/regs/compliance/EO13496.htm.[8] The notice describes in detail employees' rights under the Act, including their rights to discuss their "terms and conditions of employment or union organizing with [their] coworkers or a union" and to "rais[e] work-related issues . . . with a government agency" (GC Exh. 3, p. 85).

The notice is not referenced in the rule or otherwise proximately placed or prominently flagged in the handbook. It is therefore insufficient by itself under past Board decisions to find the rule lawful. Compare *Briad Wenco, LLC, d/b/a Wendy's Restaurant*, 368 NLRB No. 72, slip op at 2–3 (2019) (finding that the employer's mandatory arbitration agreements were lawful because they included and prominently referenced a savings clause that preserved the right of employees to file NLRB charges or participate in an NLRB investigation), with *G4S Secure Solutions (USA) Inc*., 364 NLRB No. 92, slip op. at 6 (2016) (finding the employer's social networking policy unlawful notwithstanding that it included a vague disclaimer stating that the policy would not be construed or applied to interfere with employee rights under "federal law" and that the employer also posted the full-page DOL notice informing employees of their rights under the Act), enfd. 707 Fed. Appx. 610 (11th Cir. 2017), and *First Transit, Inc*., 360 NLRB 619, 621–622 (2014) (finding various handbook rules unlawful, notwithstanding that the handbook included a "freedom of association" policy notifying employees of their organizational rights under the Act, because, among other things, the policy was too narrow, not referenced in the rules, and neither prominent nor proximate to them). Nevertheless, it is a relevant consideration in addition to the circumstances discussed above.

Accordingly, contrary to the General Counsel the confidential-information rule provisions as reasonably interpreted would not potentially interfere with employee rights under the Act. The provisions are therefore not unlawful under *Boeing*.

II. REQUESTS BY REGULATORY AUTHORITIES

The General Counsel alleges that the following sentence in the Company's rule regarding requests by regulatory authorities is unlawful under *Boeing*:

> All government requests for information, documents or investigative interviews must be referred to the Company's Human Resources Department.

The General Counsel argues that this broadly worded provision would reasonably be interpreted to prohibit employees from providing evidence or otherwise cooperating in an NLRB investigation without notifying the employer.

Reading the provision in isolation, the General Counsel's argument is supported by Board law. See *DirectTV U.S*., 359 NLRB 545, 546 (2013) (employer's handbook rule requiring employees to contact the security department if law enforcement wanted to interview or obtain information from them regarding an employee would reasonably be construed to apply to inquiries from NLRB officials about employee wages, hours, and working conditions), reaffd. 362 NLRB 415 (2015), enf. denied on other grounds 650 Fed. Appx. 846 (5th Cir. 2016); and *Management Consulting, Inc*., 349 NLRB 249 (2007), and cases cited there (employer statements that discourage employees from providing information to the NLRB and hinder its investigation of unfair labor practice charges violate Section 8(a)(1) of the Act).[9]

However, as discussed above, the provision must be considered in context.[10] The full text of the rule reads as follows:

> The Company and its associates must cooperate with appropriate government inquiries and investigations. In this context, however, it is important to protect the legal rights of the Company with respect to its confidential information. All government requests for information, documents or investigative interviews must be referred to the Company's Human Resources Department. No financial information may be disclosed without the prior approval of the Company's President or Chief Financial Officer.

Further, the rule is actually a subsection of a section titled "Handling the Confidential Information of Others." The introductory paragraph of that section indicates that it deals with confidential information provided to the Company by "third party" companies and individuals that the Company has, or may eventually have, "business relationships" with. Cf. *Macy's*, above (finding lawful the employer's rule prohibiting the disclosure of information in its confidential records regarding the company's customers and business partners without prior approval of a supervisor and consultation with the law department because it would not reasonably be construed to prohibit protected activity under the Act).

Moreover, as discussed above, the handbook includes a full-page notice at the end advising employees of their rights under the Act, including specifically their right to "rais[e] work-related issues . . . with a government agency." The notice also

[8] The NLRB essentially adopted the same notice when it issued its August 30, 2011 final rule requiring all covered employers to post such notices. See 76 FR 54006–01; and the NLRB website at: https://www.nlrb.gov/news-publications/publications/employee-rights-poster. However, the Board's rule was subsequently invalidated by the courts. See *National Assn. of Manufacturers v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); and *Chamber of Commerce of the U.S. v. NLRB*, 721 F.3d 152 (4th Cir. 2013).

[9] See also *In re FCA US LLC Monostable Electronic Gearshift Litigation*, 2018 WL 4352702, at *4 (E.D. Mich. Sept. 12, 2018), and cases cited there ("all" means all).

[10] See also *DeKalb County v. Federal Housing Finance Agency*, 741 F.3d 795, 799 (7th Cir. 2013) (there are often implicit exceptions to "all"); and *Energy Consulting & Management v. Western States Equipment Co*., 2012 WL 4470869, at *3 (D. Idaho Sept. 27, 2012) (rejecting argument that the phrase "any and all" in a trust agreement meant all, as such a construction disregarded other parts of the agreement), affd. 574 Fed. Appx. 763 (9th Cir. May 21, 2014).

specifically states, "[I]f you believe your rights or the rights of others have been violated, you should contact the NLRB promptly . . . You may inquire about possible violations without your employer or anyone else being informed of the inquiry." Again, while the notice is not enough by itself to find the rule lawful, it is a relevant consideration in addition to the circumstances discussed above.

Thus, although the rule could have been worded better,[11] as reasonably construed in context the rule would not potentially interfere with the employees' right to provide information to the NLRB regarding their wages, hours, and working conditions. Accordingly, the rule is not unlawful under *Boeing*.

III. BLOGGING

The General Counsel alleges that the following provisions of the Company's blogging rule are unlawful under *Boeing*:

> The following rules and guidelines apply to blogging, whether blogging is done for Shamrock on company time, on a personal Web site during non-work time, or outside the workplace. The rules and guidelines apply to all associates.
>
> [1][12] Shamrock discourages associates from discussing publicly any work-related matters, whether confidential or not, outside company-authorized communications. Nonofficial company communications include Internet chat rooms, associates' personal blogs and similar forms of online journals or diaries, personal newsletters on the Internet, and blogs on Web sites not affiliated with, sponsored, or maintained by Shamrock.
>
> [2] Associates have a duty to protect associates' home addresses . . . and other personal information and . . . financial information . . . and nonpublic company information that associates can access.
>
> * * *
>
> [10] Shamrock discourages associates from linking to Shamrock's external or internal Web site from personal blogs.[13]

At the hearing on remand, the Company admitted that the first paragraph (par. [1]) of the rule is unlawful (Tr. 8). Accordingly, the Company's maintenance of that provision violated Section 8(a)(1) of the Act as alleged.

As for the second paragraph, the General Counsel argues that the provision as reasonably interpreted unlawfully restricts employees' use of employee addresses and personal and financial information. However, again, the quoted language must be considered in context. The full text of the paragraph states:

> Associates have a duty to protect associates' home addresses, social security numbers, birth date, driver's license number, and other personal information and the confidentiality of Shamrock trade secrets, marketing lists, customer account information, strategic business plans, competitor intelligence, financial information, business contracts, and other proprietary and nonpublic company information that associates can access.

Considered as a whole, like the confidentiality rules discussed above, this provision as reasonably interpreted only restricts the disclosure of "personal," "proprietary," and "nonpublic" information contained in the Company's confidential or private files. Accordingly, it would not interfere with employee rights under the Act and is not unlawful under *Boeing*. See *Macy's*, above. See also *Cook County College Teachers Union*, 331 NLRB 118, 121 (2000), discussing *Roadway Express,* 271 NLRB 1238, 1239 fn. 11 (1984) and *Ridgely Mfg. Co*., 207 NLRB 193, 197 (1973) (employees do not have a protected right to access and disclose information contained in the employer's confidential or private files regarding employees' names and addresses).

However, a different conclusion is warranted with respect to the tenth paragraph's restriction on including a link to the Company external or internal website. As indicated by the General Counsel, employees have a right under the Act to use social media to communicate with each other and with the public to improve their terms and conditions of employment. See, e.g., *Three D, LLC*, 361 NLRB 308 (2014), affd. 629 Fed. Appx. 33 (2d Cir. 2015). On its face the tenth paragraph of the blogging rule potentially interferes with that right by effectively discouraging employees from using the common and most efficient method of identifying and directing coworkers and others to the Company's website to obtain further information and communicate directly with the Company in support of the employees' work-related concerns or disputes. Cf. *UPMC*, 362 NLRB 1704, 1704–1705 and fn. 5 (2015) (employer's prohibition against employees using its logos or other copyrighted or trademarked materials on social media unlawfully interfered with employee rights under the Act).[14]

The Company argues that the provision is saved by the very next paragraph of the blogging rule which states, "Shamrock will not construe this policy nor apply it in a manner that interferes with associates' rights under Section 7 of the NLRA." However, this general statement says nothing about whether including a link to the Company website on a blog is a right protected by the NLRA. Thus, it is insufficient under past Board decisions. See *Solar City Corp*., 363 NLRB No. 83, slip op. at 5 (2015), and cases cited there.

The Company also argues that the provision is clarified by the full-page notice of employee rights under the Act that is included at the end of the handbook. However, while more detailed, that notice also does not address employees' use of social media or

[11] Company Vice President Kramer conceded this at the hearing on remand (Tr. 131–132).

[12] The paragraphs are not numbered in the handbook but are numbered here for ease of reference.

[13] The original complaint alleged that the third, sixth, seventh, and eighth paras. of the blogging rule are also unlawful. However, those allegations were withdrawn pursuant to the General Counsel's June 7, 2019 motion to amend.

[14] Although the rule states that the Company "discourages" (rather than "prohibits") such website links, this makes no difference. See *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992) (whether a rule is unlawful "is not premised on mandatory phrasing"), enfd. 987 F.2d 1376 (8th Cir. 1993). Compare also *Heck's, Inc*., 293 NLRB 1111, 1114, 1119 (1989) (finding unlawful the employer's "request" that employees not discuss their salary); and *NLRB v. Koronis Parts, Inc*., 927 F. Supp. 1208 (D. Minn. 1996) (granting the Board's request for interim injunction requiring the employer to revoke a handbook provision that "ask[ed]" employees not to discuss their wages with other employees). And the Company does not argue otherwise.

their right to include a link to an employer's website on a blog. Moreover, the notice is not referenced in the rule and, as discussed above, is neither proximately placed nor prominently flagged in the handbook. Thus, it is likewise insufficient by itself under past Board decisions to save the provision.

Finally, contrary to the Company's contention, the provision's impact on employee rights is not outweighed by legitimate justifications associated with the rule. The justification presented at the hearing on remand was that the Company wants to protect its brand from being associated with racist or other offensive blogs (Tr. 134–135). However, the Company's concern about being associated with views expressed on employee blogs is directly addressed in the fourth paragraph of the rule, which states:

> Associates who maintain blogs on their own or another Web site and choose to identify themselves as associates of Shamrock are strongly encouraged to state explicitly, clearly, and in a prominent place on the site that views expressed in their blogs are associates' own and not those of Shamrock or of any person or organization affiliated or doing business with Shamrock.

The tenth paragraph sweeps far more broadly, discouraging employees from including a link where readers can access an employer's website regardless of the employee's reason for doing so or the context or manner in which the employee does so. Thus, the Company's asserted justification is insufficient to legitimize the rule. See *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 549 (D.C. Cir. 2016) ("Quicken's claim that some *sub-portion* of the covered information could properly be protected does nothing to legitimate the blunderbuss sweep of its existing rule."). Accordingly, the provision is unlawful under *Boeing*.

IV. NO SOLICITATION, NO DISTRIBUTION

The General Counsel alleges that the following provisions in the first two paragraphs of the Company's no solicitation, no distribution rule are unlawful:

> [T]he conducting of non-company business related activities is prohibited during the working time by either the associate doing the soliciting or the associate being solicited or at any time in customer or public areas. Associates may not solicit other associates under any circumstances for any non-company related activities.
>
> The distribution of non-company literature, such as leaflets, letters or other written materials by an associate is not permitted . . . any time in working areas or in customer and public areas.[15]

At the hearing on remand, the Company admitted that the foregoing provisions of the rule are unlawful (Tr. 9). Accordingly, the Company's maintenance of those provisions violated Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

1. The Company violated Section 8(a)(1) of the Act by maintaining the following provisions in its 2014 Associate Handbook since at least October 15, 2014:

(a) a blogging rule that broadly discourages employees from publicly discussing on the

internet "any work-related matters, whether confidential or not, outside company-authorized communications" and "linking to Shamrock's external or internal Web site from personal blogs."

(b) an overbroad no solicitation, no distribution rule.

2. The Company's foregoing unfair labor practices affect commerce within the meaning of Section 2(2) and 2(7) of the Act.

3. The Company has not violated the Act by maintaining in its 2014 Associate Handbook other provisions in its rules on blogging, protecting the company's confidential information, and requests by regulatory authorities.

REMEDY

The appropriate remedy for the violations found is an order requiring the Company to cease and desist from its unlawful conduct and to take certain affirmative action. Specifically, to the extent it has not already done so,[16] the Company must rescind its unlawful blogging and no solicitation, no distribution rules, notify all employees in writing that it has done so, and republish its employee handbook without the rules or supply employees with inserts to the handbook which state that the unlawful rules have been rescinded or set forth new and lawfully worded rules on adhesive backing that will correct or cover the unlawful rules. The Company must also post a notice at all its locations in both English and Spanish notifying employees of their rights under the Act and this decision and order. See, e.g., *Core Recoveries, LLC*, 367 NLRB No. 140 (2019); and *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369, 380–381 (D.C. Cir. 2007).

The Company's posthearing brief argues that requiring the notice to be posted at all its facilities is improper because (1) the General Counsel and the Union did not except to my original February 11, 2016 recommended order requiring the notice to be posted only at the Phoenix, Arizona warehouse (the record at that time did not include any evidence that the 2014 Associate Handbook was applicable at Shamrock's other warehouses); and (2) the Board's remand was limited to reconsidering whether the subject 2014 handbook rules are unlawful and did not include whether the original remedy was appropriate.

There is some case support for the Company's position. See *Colonna's Shipyard*, 293 NLRB 136 fn. 2 (1989) (upholding the ALJ's refusal in his supplemental decision to grant a general bargaining order given the limited scope of the Board's remand order and the absence of any exceptions to the judge's original order). But see *McBurney Corp*., 352 NLRB 241, 241 fn. 4 (2008) (Members Liebman and Schaumber) ("remedial issues are always before the Board" regardless of whether they were raised in exceptions or included within the scope of the Board's prior remand order), invalidated for lack of a quorum by *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

[15] The original complaint also alleged that certain provisions in the third para. of the rule are unlawful. However, that allegation was withdrawn pursuant to the General Counsel's June 7, 2019 motion to amend.

[16] The record on remand indicates that the Company issued a substantially revised handbook in June 2017, which "supersede[d]" the 2014 handbook and was distributed to employees and posted electronically. (See Tr. 91–95; and R. Exh. 100.)

However, in *Colonna's Shipyard* no additional evidence supporting the requested bargaining order was presented on remand. Here, in contrast, the General Counsel presented evidence at the hearing on remand regarding the handbook's application at all of the Company's other facilities. Further, the Company stated no objection to receiving that evidence at the time. Indeed, company counsel indicated a willingness to stipulate that the handbook was applied at other facilities. (See Tr. 34–40.) Accordingly, the Company's argument is rejected.

Finally, the General Counsel and the Union also request certain special notice and other remedies. However, none of these requested special remedies is supported by Board precedent in the circumstances or on the grounds asserted by the General Counsel and/or the Union here. Accordingly, the requested special remedies are denied.

ORDER[17]

The Respondent, Shamrock Foods Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining blogging and no solicitation, no distribution rules that unlawfully interfere with the exercise of employee rights under Section 7 of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) To the extent it has not already done so, rescind the unlawful blogging and no solicitation, no distribution rules in its 2014 Associate Handbook, revise the handbook to delete the unlawful rules, advise employees in writing that it has done so and that the rules will no longer be enforced, and republish its handbook without the unlawful rules or provide employees with inserts to the handbook which state that those rules have been rescinded or set forth new and lawfully worded rules on adhesive backing that will correct or cover the unlawful rules.

(b) Within 14 days after service by the Region, post at its Phoenix, Arizona warehouse, and all other Company facilities nationwide where the unlawful rules have been maintained, copies of the attached notice marked "Appendix" in both English and Spanish.[18] Copies of the notices, on forms provided by the Regional Director for Region 28, 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 English and Spanish 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, Respondent has gone out of business or closed a facility, Respondent shall duplicate and mail, at its own expense, a copy of the notices to all current and former employees employed by Respondent at the closed facility or facilities at any time since October 15, 2014.

(c) 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.

IT IS FURTHER ORDERED that the amended complaint is dismissed to the extent it alleges that rule provisions other than those specifically found unlawful also violated the Act.

Dated, Washington, D.C., October 7, 2019

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 a blogging rule that discourages you from publicly discussing on the internet any work-related matters, whether confidential or not, outside company-authorized communications and linking to our external or internal Web site from personal blogs.

WE WILL NOT maintain a no solicitation, no distribution rule that unlawfully interferes with your exercise of the rights listed above.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL , to the extent we have not already done so, rescind the unlawful blogging and no solicitation, no distribution rules in our 2014 Associate Handbook, revise that handbook to delete the unlawful rules, advise you in writing that we have done so and that the rules will no longer be enforced, and republish our handbook without the unlawful rules or provide you with inserts to the handbook which state that those rules have been rescinded or set forth new and lawfully worded rules on adhesive backing that will correct or cover the unlawful rules.

[17] 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.

[18] 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."

SHAMROCK FOODS COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-150157 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.