NLRB History May Hint At Future Of Work Rule Test

By **Patrick Depoy** (April 8, 2022)

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The National Labor Relations Board is considering a new approach — or a return to an old approach — to reviewing workplace rules.

A workplace rule or employee handbook provision violates the National Labor Relations Act if it infringes on an employee's right to engage in activities protected by Section 7 of the act — forming a union, or engaging in other protected concerted activities to address work conditions.

However, the framework used to analyze whether a rule violates the NLRA has changed several times in the past two decades, and it may be changing again.

In Stericycle Inc.,[1] the NLRB in January invited parties and interested amici to brief this long-contested topic.

Many expect that the board will overturn its most recent employer-friendly standard, articulated in The Boeing Co. in 2017,[2] and return to the previous framework established in Lutheran Heritage Village-Livonia in 2004.[3]

Employers may be feeling whiplash, but understanding the history on this topic may allow for a glimpse into the future.

The Lutheran Heritage Standard

In Lutheran Heritage, the NLRB considered whether an employer's rule prohibiting abusive or profane language toward other employees infringed on Section 7 rights.

The board held that it did not, concluding that if a rule did not explicitly restrict Section 7 rights — i.e., the rule was "facially neutral" — whether the rule violates the NLRA would depend on demonstrating one of the following:

- Employees would reasonably construe the language to prohibit Section 7 activity;
- The rule was promulgated in response to union activity; or
- The rule has been used/applied to restrict the exercise of Section 7 rights.[4]

In applying this framework, the NLRB held that the rule did not violate the act, because profane language is not an inherent part of Section 7 activity, and a reasonable employee would not construe this rule as prohibiting protected activity.[5] The NLRB reasoned:

> Where, as here, the rule does not refer to Section 7 activity, we 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.[6]

The Obama Era: Lutheran Heritage Unleashed

During the Obama administration, a more employee-friendly board invalidated many workplace rules applying Lutheran Heritage, finding that even relatively common rules could

chill protected activities under the NLRA.

By way of example, the Obama board found the following rules unlawful:

- A rule prohibiting conduct that "impedes harmonious interactions and relationships" because the rule was "sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions" protected by the act;[7]

- A confidentiality rule prohibiting disclosure of personnel information, "[b]ecause the plain language of the confidentiality rule expressly prohibits discussion of wages, discipline, and personnel information, and absent meaningful contextual limitation to its broad scope, the maintenance of the rule violates" the act;[8]

- A rule that prohibited "[d]iscourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public," finding it "sufficiently imprecise" that it could cover any conflict among employees, including those related to working conditions or Section 7 rights. In the same case, the board found lawful a rule prohibiting "[p]rofane or abusive language where the language used is uncivil, insulting, contemptuous, vicious, or malicious," finding the language not so ambiguous that it would curtail a reasonable employee's rights;[9] and

- A rule that required employees to keep "customer and employee information secure," and only use it "fairly, lawfully and … for the purpose for which it was obtained," finding that a reasonable employee would construe the rule to prohibit discussion of wages and terms and conditions of employment, and would not read the rule to be limited only to data privacy issues, as the employer argued.[10]

To its supporters, Lutheran Heritage gave the NLRB the flexibility to consider the context in which a particular workplace rule operated, and an employer's legitimate interests could be met by narrowing the language of a rule to accomplish its business goals without chilling protected activities.

To its critics, Lutheran Heritage ignored employers' legitimate justifications for work rules, and created a vague standard that left interpretation of a rule up to the imagination of a reviewing labor lawyer, not a reasonable employee.

NLRB member Philip Miscimarra argued in one colorful dissent in 2016's William Beaumont Hospital:

> Under Lutheran Heritage, reasonable work requirements have become like Lord Voldemort in Harry Potter: they are ever-present but must not be identified by name.[11]

The Trump Era: Boeing

Shortly after his inauguration, then-President Donald Trump nominated two new board members and elevated Miscimarra to the chair. Lutheran Heritage's days were numbered.

In Boeing, the board examined whether Boeing could maintain a rule prohibiting employees from using camera-enabled devices to capture images or video without a valid business need. The board found that the rule was lawful and, more importantly, overruled Lutheran Heritage.

Finding Lutheran Heritage to be "predicated on false premises that are inconsistent with the Act and contrary to the Board's responsibility to promote certainty, predictability and stability,"[12] the NLRB crafted a new framework.

Going forward, the board would consider: (1) the nature and extent of the potential impact of a rule on the rights protected by the act, and (2) legitimate justifications put forward by the employer.[13]

In conducting this balancing test, the NLRB reasoned that

> an employer may lawfully maintain a particular rule, notwithstanding some possible impact on a type of protected Section 7 activity, even though the rule cannot lawfully be applied against employees who engage in NLRA-protected conduct.[14]

To foster the kind of predictability the board found lacking under Lutheran Heritage, the NLRB set forth categories for different types of rules, outlined below.

Category 1: Categorically Lawful

This refers to rules that, when reasonably interpreted, do not prohibit or interfere with Section 7 rights, or the potential adverse impact on protected rights is outweighed by employer justifications.

Category 2: Individual Review Required

This refers to rules that warrant individualized scrutiny as to whether they would prohibit or interfere with Section 7 rights, and if so, whether any impact on protected activity is outweighed by legitimate business or employer justification.

Category 3: Categorically Unlawful

This refers to rules that the board designates unlawful because they would prohibit or limit protected conduct, and the adverse impact on Section 7 rights is not outweighed by employer or business justifications associated with the rule.[15]

LA Specialty Produce and Other Pro-Employer Changes

Later, in LA Specialty Produce Co.,[16] the board in 2019 clarified that the initial burden is on the board's general counsel to prove that a facially neutral rule would be interpreted by a reasonable employee to interfere with Section 7 rights.

The Trump NLRB followed Boeing and LA Specialty Produce with a series of rulings in 2019 and 2020 that held some workplace rules are always lawful:

- Apogee Retail LLC: Tules requiring employees to maintain confidentiality of workplace investigations during the investigation are categorically lawful, because while the rule may impact protected activity, investigative confidentiality serves critical interests, for employers and employees, including preventing retaliation.[17]

- Motor City Pawn Brokers Inc.: A rule prohibiting employees from disparaging their employer to customers or third parties, regardless of "whether any such communication [was] true or founded in facts," did not violate the act. Any interference with Section 7 rights was outweighed by an employer's legitimate interests, including protecting customer relationships.[18]

- Nicholson Terminal & Dock Co.: Rules prohibiting outside employment, or moonlighting, that could present a conflict of interest or have a detrimental impact on the employer's image did not violate the act.[19]

Stericycle: Back to the Future

After four years of employer victories, President Joe Biden entered the White House having campaigned on a pro-union, pro-worker agenda, and wasted no time reshaping the board.

First, he named board member Lauren McFerran as chair of the board. Then, Biden appointed two new members, shifting the balance of the NLRB to three Democrats and two Republicans.

Finally, Biden appointed Jennifer Abruzzo, special counsel to the Communication Workers of America, one of the largest labor unions in the country, as the board's general counsel.

With this new team in place, it comes as no surprise that the NLRB is reexamining Boeing.

For example, in a blistering dissent, McFerran called the Boeing standard "a jurisprudential jumble of factors, considerations, categories, and interpretive principles" providing anything but clarity to employers and employees.[20]

Agreeing with the chair's dissent, Abruzzo pulled no punches in her brief: Boeing was wrongly decided, and created a standard that "fails to protect employees from the chilling effects of overbroad rules on the exercise of statutory rights."[21] In its stead, the NLRB should resurrect Lutheran Heritage, but refine it in a few key respects:

- Recognize that a reasonable employee may not be aware of their rights under the act, and therefore, if one reasonable interpretation of a rule would chill Section 7 rights, that rule is unlawful, even if that is not the only reasonable interpretation of the rule.[22]

- Revise the language of the Lutheran Heritage standard: "the Board should add the word 'unlawfully' so that the test states as follows: a rule is unlawful if 'employees [c]ould reasonably construe the language to [unlawfully] prohibit Section 7 activity." This would remove any appearance of a conflict between Lutheran Heritage and lawful restrictions of Section 7 activity, such as facially neutral rules limiting solicitation to nonworking time.[23]
- Explicitly state that even if one reading of a rule would violate the act, in a small minority of situations employers may assert an affirmative defense that an overriding employer interest based on special circumstances outweighs any potential infringement on Section 7 rights.[24]

- Formulate "a model prophylactic statement of rights" that advises employees of their Section 7 rights, which employers may include in their handbooks and policies as a kind of savings clause to mitigate the risk of chilling protected activities.[25]

Abruzzo also argued that the NLRB's ruling in Apogee, regarding confidentiality of investigations, should be overturned, and that rules imposing confidentiality during an investigation be evaluated on a case-by-case basis, where the employer bears the burden of proving confidentiality was

> necessary for a particular investigation … based on objectively reasonable grounds for believing that the integrity of an investigation would be compromised without it.[26]

Business groups and employer advocates were just as forceful in their insistence that the NLRB stick to Boeing.

For example, the U.S. Chamber of Commerce argued that Lutheran Heritage led to arbitrary and unpredictable results, in that "[i]ts subjective approach frequently led to the invalidation of common, reasonable rules that employers had legitimate reasons to maintain."[27]

The HR Policy Association and Retail Litigation Center argued that the pre-Boeing application of Lutheran Heritage "made it practically impossible to predict what policies and rules employers could adopt and implement."[28]

Boeing is likely doomed. The standard that takes its place may be a marginal improvement over Lutheran Heritage, but employers will still be faced with defending reasonable workplace rules before the NLRB.

Employers may reasonably take a wait-and-see approach until the board issues a ruling in Stericycle.

However, once the board has acted, employers will need to quickly review their handbooks and policies to identify potentially unlawful provisions, and make revisions that align with the new standard — whatever that might be.

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[1] Stericyle, Inc. & Teamsters Loc. 628, "Notice and Invitation to File Briefs," 371 NLRB No. 48 (Jan. 6, 2022).

[2] 365 NLRB No. 154 (Dec. 14, 2017).

[3] Martin Luther Mem'l Home, Inc., 343 NLRB 646 (2004).

[4] Id. at 647.

[5] Id.

[6] Id.

[7] See William Beaumont Hosp., 363 NLRB 1543, 1544 (2016).

[8] Victory II, LLC d/b/a Victory Casino Cruises II & Donald Morgan, 363 NLRB 1578 (2016).

[9] See First Transit, Inc., 360 NLRB No. 72 (2014).

[10] Fresh & Easy Neighborhood Mkt. & United Food & Com. Workers Int'l Union, 361 NLRB 72, 73 (2014).

[11] William Beaumont Hosp., 363 NLRB 1543, 1550 (2016) (Miscimarra, dissenting).

[12] The Boeing Co., 365 NLRB No. 154 (Dec. 14, 2017), slip op. at 9.

[13] Id., slip op. at 3.

[14] Id., slip op. at 16.

[15] See id., slip op. at 15.

[16] LA Specialty Produce Co., 368 NLRB No. 93 (2019).

[17] Apogee Retail LLC, 368 NLRB No. 144, (2019), slip op. at 4.

[18] Motor City Pawn Brokers, 369 NLRB No. 132 (2020), slip op. at 6-7.

[19] Nicholson Terminal & Dock Co., 369 NLRB No. 147 (2020).

[20] See Boeing Co., 365 NLRB No. 154, slip op. at 37 (McFerran, dissenting).

[21] Stericycle Inc., Case No. 04-CA-137660, Gen. Counsel's Br. at 1 (Mar. 7, 2022).

[22] See id. at 12.

[23] See id. at 12-13.

[24] See id. at 13.

[25] See id. at 14.

[26] See id. at 19-20.

[27] See Stericycle Inc., Case No. 04-CA-137660, Chamber of Commerce of the United States of America, Br. at 6 (Mar. 7, 2022), available at https://www.uschamber.com/assets/documents/US-Chamber-Stericycle-Inc.-Amicus-Brief.pdf.

[28] See Stericycle Inc., Case No. 04-CA-137660, HR Policy Association and Litigation

Center, Br. at 8 (Mar. 7, 2022), available
at https://apps.nlrb.gov/link/document.aspx/09031d45836d84eb.