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

DATE: July 6, 2018

TO: Sean R. Marshall, Acting Regional Director
Region 5

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

SUBJECT: The Washington Post
Case 05-CA-206213

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The Region submitted this Section 8(a)(1) and (3) case for advice as to whether an ethics policy ("Ethics Policy") that prohibits employee-reporters from publishing freelance articles with the newspaper-employer's competitors is lawful under *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017) ("*Boeing*"), and whether the policy was lawfully applied to discipline an employee-reporter (the "Reporter") who published an article in a competitor of the newspaper-employer criticizing the newspaper-employer's treatment of its employees.

We conclude that the Ethics Policy is a lawful Category 1 rule under *Boeing* but that the newspaper-employer's discipline of the Reporter was unlawful.

FACTS

The Washington Post (the "Employer") is a daily newspaper, publishing in print, on-line, and podcast media. On October 1, 2013, billionaire Jeff Bezos purchased the Employer. The Washington-Baltimore News Guild Local 32035, CWA (the "Union"), represents more than 2,500 news, information, and non-profit workers, including employees of the Employer.

In the Spring of 2017,[1] the parties began bargaining for a new contract. The parties' collective-bargaining agreement expired on June 10. Article XVII, Section 14

[1] All dates hereinafter are in 2017.

of the expired agreement required that the Employer "have first right of refusal" to purchase any articles prepared "without assignment on the employee's own initiative and off duty time." Should the Employer decide not to publish the article or the editor and employee are unable to agree on a price, "the employee shall be free to sell his/her material elsewhere, except as precluded by Section 1, Article XVII." Section 1, Article XVII provides, *inter alia*, that employees may not "engage in activities . . . in competition with [the Employer], subject to . . . implementing rules. . . ." Further, employees must give the Employer "advance notice of any contemplated outside employment" and the Employer will notify the employee of approval or disapproval. The Employer maintains an Ethics Policy that implements the parties' contract.[2]

On June 15, Bezos tweeted a "request for ideas" for what charities should receive his donations. The next day, the Reporter, who is also the (b) (6), (b) (7)(C) met with an (b) (6), (b) (7)(C) of the Employer's (b) (6), (b) (7)(C) to discuss (b) (6), (b) (7)(C) personal idea of doing a story about how Bezos is celebrated for his charitable work when he should instead use his wealth to compensate his employees more equitably. The (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) passed on the idea of publishing the article and told the Reporter that (b) (6), (b) could tell the (b) (6), (b) (7)(C) that the Reporter had given the Employer the required right of first refusal through their meeting.

In mid-August, the Reporter pitched (b) (6), (b) (7) idea for an article about Bezos to the HuffPost, which agreed to publish the article. Although the parties initially agreed that HuffPost would pay the Reporter (b) (4) for the article, the Reporter later cancelled the payment owed and has not received any money for the article. On August 31, the (b) (6), (b) (7)(C) met with the Reporter and warned (b) (6), (b) (7)(C) that publishing the article would violate the Employer's Ethics Policy because the HuffPost was a competitor of the Employer. The Reporter responded that the rule is unfair because almost everyone is a competitor and, in any event, the article wasn't a typical "freelancing" article but rather was an outgrowth of the Union's struggle with the Employer and a description of how Bezos treats his employees.

In the early morning of September 1, HuffPost published the Reporter's article, titled "Jeff Bezos Wants to Give More Money to Charity. He Should Pay His Workers First: The Washington Post owner wants to make it easier to get rid of workers and cut severance pay."[3] The first sentence of the article summarized its perspective: "One of the wealthiest men in the world is thinking of ways to give back. But he's still taking from the very people who helped him build his fortune." The article discussed

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[2] The Ethics Policy is set forth at length, *infra*, in Part A of the Action section.

[3] *See* https://www.huffingtonpost.com/entry/jeff-bezos-workers_us_59a7220fe4b07e81d354e6e3 (last visited July 5, 2018).

Bezos' wealth; chronicled his mistreatment of workers both at Amazon and the Employer; and explained how, in prior negotiations at the Employer, Bezos had "slashed retirement benefits" and frozen employees' lucrative pension plan. It also heavily criticized Bezos' conduct in current ongoing negotiations, specifically, for seeking greater discretion to fire workers regardless of seniority or performance and seeking to cut severance and make it dependent on waiving legal claims against the Employer. The Reporter then put Bezos' strategy of focusing public attention on his charitable giving in historical context, accusing Bezos of engaging in "petty theft from the people who work for him" and urging him to "remember that his vast wealth came in part from labor, and he should do more to share that wealth with workers."

Later on September 1, the (b) (6), (b) (7)(C) asked the Reporter if [redacted] had tried to "pull the plug" on publishing the article after their meeting the day before. The Reporter responded that [redacted] hadn't. On September 5, the Employer issued the Reporter a written warning for violating the Employer's "standards and ethics policy by freelancing for a competing publication without permission." There is no evidence of any other reporter having published an article in a competing publication.

ACTION

We conclude that the Ethics Policy is a lawful Category 1 rule under *Boeing*, but that the Employer's discipline of the Reporter was unlawful.

A. The Ethics Policy is Facially Lawful

Boeing[4] set out the Board's new test for determining the lawfulness of work rules. Under *Boeing*, if a rule would be reasonably interpreted to interfere with the exercise of NLRA rights, the Board must consider not only the rule's potential impact on NLRA rights but must also balance those interests against the employer's legitimate justifications for maintaining the rule.[5] If the rule would not reasonably be

[4] 365 NLRB No. 154 (overturning the "reasonably construe" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)). *See generally* Memorandum GC 18-04, "Guidance on Handbook Rules Post-*Boeing*" (June 6, 2018).

[5] 365 NLRB No. 154, slip op. at 5 ("Since *Lutheran Heritage*, the Board has far too often failed to give adequate consideration and weight to employer interests in its analysis of work rules. Accordingly, we find that the Board must replace the *Lutheran Heritage* test with an analysis that will ensure a meaningful balancing of employee rights and employer interests.").

interpreted as restricting NLRA rights, however, the rule is lawful and no balancing is necessary.[6]

As noted above, the Employer maintains an Ethics Policy that implements the parties' contract provisions requiring that a reporter give the Employer the right of first refusal with respect to any potential freelancing project, and if refused, not publish the article with any of the Employer's competitors. The Ethics Policy provides, *inter alia*, that to avoid conflicts of interest:

(b) (4)

The Ethics Policy is lawful under *Boeing*. As explained in GC Memorandum 18-04, conflict-of-interest rules banning disloyal conduct in competition with the employer fall in Category 1 because they do not meaningfully implicate Section 7 rights and employers have a substantial interest in ensuring that their employees do not undermine their business by working for a competitor.[7] Moreover, it is even clearer that the Ethics Policy in this case would not reasonably be interpreted to infringe on employees' Section 7 rights since it implements the terms of the collective-bargaining agreement that the Employer and Union had agreed upon.

Although the Employer's rule is facially lawful, the *Boeing* Board made clear that discipline under a lawful rule may still be unlawful. The Board explained that "even when a rule's *maintenance* is deemed lawful, the Board will examine the circumstances where the rule is *applied* to discipline employees who have engaged in NLRA-protected activity, and in such situations, the discipline may be found to violate the Act."[8]

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[6] *Id.*, slip op. at 3.

[7] Memorandum GC 18-04, "Guidance on Handbook Rules Post-*Boeing*," at 15.

[8] *Boeing*, 365 NLRB No. 154, slip op. at 4-5 (emphasis in original); *see also id.*, slip op. at 16.

B. The Employer's Discipline of the Reporter Was Unlawful

We first conclude that the Reporter engaged in protected concerted activity when [redacted] published the article in HuffPost. The article focused exclusively on critici s of the employees' working conditions during contract negotiations, seeking to pressure the Employer to increase compensation, and improve other terms and conditions of employment such as pensions and severance payments.[9] Moreover, the Employer concedes that it would not have disciplined the Reporter but for the article [redacted] published, which was part of the res gestae of [redacted] protected conduct.

Once the Board has determined that an employee was disciplined or discharged for conduct that is part of the res gestae of protected concerted activity, it examines whether the employee's actions were so egregious as to be unprotected nonetheless.[10]

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[9] *See, e.g.*, *Dougherty Lumber Co.*, 299 NLRB 295, 297-98 (1990) (letter to the editor of a local newspaper related upcoming contract negotiations and was therefore protected concerted activity), *enforced per curiam*, 941 F.2d 1209 (6th Cir. 1991); *see also Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443-44, 448-49 (1984) (employee discharged for speaking with a reporter about the employees' reasons for striking engaged in protected concerted activity).

[10] *See, e.g., KHRG Employer, LLC, d/b/a Hotel Burnham & Atwood Café*, 366 NLRB No. 22, slip op. at 2 & n.5 (Feb. 28, 2018)("When, as here, an employer defends a discharge based on employee misconduct that is a part of the res gestae of the employee's protected concerted activity," i.e., breaching hotel's security by leading a group to a secured area to present a petition to management, "the employer's motive is not at issue. Instead, such discharges are considered unlawful unless the misconduct at issue was so egregious as to lose the protection of the Act."); *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002) (refusing to apply *Wright Line* where it was undisputed that the employer discharged the employee because of articles he wrote in a union newsletter, as "the only issue is whether [the employee's] conduct lost the protection of the Act. . . ."), *enforced per curiam*, 63 F. App'x 524 (D.C. Cir. 2003); *Tampa Tribune*, 351 NLRB 1324, 1327 n.14 (2007) (finding employee's discharge for making profane statements while criticizing employer's communications concerning negotiations to be unlawful, explaining that "[c]ontrary to Respondent's contentions, we do not apply *Wright Line* . . . in the absence of a dispute about the Respondent's motive," and noting that profanity is "part of the res gestae of the otherwise-protected conversation") (internal citation omitted), *enforced in part*, 560 F.3d 181 (4th Cir. 2009). Moreover, contrary to the Employer's argument, the Board has applied a res gestae analysis to 8(a)(3) allegations. *See, e.g.*, *Beverly Health & Rehabilitation Center*, 346 NLRB 1319, 1321, 1322 (2006), *overruled on other grounds*, *E.I. Dupont De Nemours,* 364 NLRB No. 113 (Aug. 26, 2016). In other cases, it has applied a res

In so determining, the Board applies the Supreme Court's *Jefferson Standard*[11] decision to employee communications intended to appeal directly to third parties and examines whether the communications are so "disloyal, reckless, or maliciously untrue" that their intent was to disparage the employer's product or service rather than to appeal for support in a labor dispute.[12] In *Santa Barbara News-Press*, for example, the Board found that newspaper employees' appeals to the public to boycott the employer constituted protected activity because the communications were "expressly linked to an ongoing labor dispute."[13] In contrast, in *Five Star Transportation*,[14] the Board found that prospective school bus drivers' letters to a school committee disparaging a bus company's ability to safely transport children were unprotected where the letters had no relation to drivers' labor concerns and used inflammatory language.

In the instant case, the Employer does not claim that anything in the Reporter's HuffPost article was untrue, much less that it contained recklessly or knowingly false statements. Moreover, the Reporter did not use inflammatory language, and the content of the article was directly related to the parties' contract negotiations. Finally, far from acting disloyally, the Reporter never disparaged the Employer's newspaper,[15] and even followed the Employer's own internal procedures by requesting first that the Employer publish [redacted] article. Accordingly, the Reporter's conduct was not unprotected.

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gestae analysis to find an 8(a)(1) violation without reaching 8(a)(3). *See, e.g.*, *Mast Advertising*, 304 NLRB 819, 820 n.7 (1991).

[11] *NLRB v. IBEW, Local No. 129 (Jefferson Standard)*, 346 U.S. 464, 472 (1953) (finding communication impugning employer's product demonstrated such "detrimental disloyalty" as to make it unprotected under the Act).

[12] *Santa Barbara News-Press*, 357 NLRB 452, 455 (2011), *vacated on other grounds*, 702 F.3d 51 (D.C. Cir. 2012).

[13] *Id.*

[14] 349 NLRB 42, 46 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008).

[15] *Cf. Ampersand Pub., LLC v. NLRB*, 702 F.3d 51, 57 (D.C. Cir. 2012) (finding unprotected an appeal to the public suggesting that the newspaper's editorial policies could negatively impact the "once-proud institution" of the paper as this appeal "went directly to the quality and managerial policies of the newspaper" and were therefore unprotected "public disparagement of [the employer's] product.").

We would similarly find that the Employer's discipline of the Reporter violated the Act under a *Wright Line*[16] analysis. To establish a violation under *Wright Line*, the General Counsel has the initial burden of showing that the employees' union or protected concerted activities were a "motivating factor" for the employer's adverse action against them.[17] To satisfy this initial burden, the General Counsel must show that the employees were engaged in union or protected concerted activities, the employer had knowledge of those activities, and the employer exhibited animus or hostility toward those activities.[18] Once the General Counsel makes that initial showing, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the employees' protected activities.[19]

As discussed above, the Reporter engaged in protected concerted activities when [redacted] published the article critical of [redacted] Employer's working conditions during negotiations. Moreover, the Employer admits that it had knowledge of these activities and that it would not have disciplined [redacted] had [redacted] not published the article. The Employer argues that it can satisfy its *Wright Line* rebuttal burden because it terminated the Reporter for violating its lawful Ethics Policy and not because [redacted] engaged in protected concerted activity. However, the Board has rejected employers' reliance on alleged violations of even valid handbook rules where the conduct alleged by the employer to violate its rules was protected under the Act.[20] Moreover, the Reporter's conduct was not even covered by the Ethics Policy, which precludes reporters from selling "freelance" articles to competitor news outlets; because the

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[16] 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

[17] *Id*. at 1089.

[18] *Id*. at 1090, 1096.

[19] *Id*. at 1089.

[20] *See Tri-County Mfg. & Assembly*, 335 NLRB 210, 215, 218-20 (2001) (employee unlawfully discharged for threatening coworker—in contravention of valid rule—in course of otherwise-protected union solicitation), *enforced*, 71 F. App'x 1 (6th Cir. 2003); *Consumers Power*, 282 NLRB 130, 132, 137 (1986) (employee unlawfully discharged for allegedly "assaulting" supervisor—in contravention of valid rule—in the course of otherwise protected concerted activity); *Circle K Corp.*, 305 NLRB 932, 932-35 (1991) (employee unlawfully discharged for "interfering" with co-workers—in contravention of valid rule—in the course of otherwise-protected concerted activity of sharing a letter seeking to organize a union), *enforced*, 989 F.2d 498 (6th Cir. 1993).

Reporter was never paid by HuffPost, [redacted] had no freelance business relationship with it. Since the Reporter was not paid for the article and did not violate the no-freelancing rule, [redacted] conduct was no different from that of any employee speaking out about working conditions in a letter to the editor of a newspaper or other communication with the public.[21]

CONCLUSION

Based on the foregoing, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by disciplining the Reporter for engaging in protected concerted activities.

/s/
J.L.S.

ADV.05-CA-206213.Response.WashingtonPost.[redacted]

[21] Given the Employer's reliance on its Ethics Policy in unlawfully disciplining the Reporter, an argument could be made that the rule itself has been rendered invalid by its unlawful application. *See Lutheran Heritage Village-Livonia*, 343 NLRB at 647. That aspect of *Lutheran Heritage* was not directly overturned in *Boeing*. However, since the Employer has a strong business justification for the Ethics Policy, and since the policy as written clearly would not be understood to prohibit protected concerted activities, we conclude that the better approach would be to permit the Employer to continue to maintain this rule but to cease and desist from applying it to protected conduct such as the Reporter's conduct here. *See Cayuga Medical Center at Ithaca, Inc.*, 365 NLRB No. 170, slip op. at 2 n.8 (Dec. 16, 2017) (Chairman Miscimarra, in dissent, arguing that the proper remedy for the unlawful application of a facially lawful rule against Section 7 activity was to cease and desist from so applying it, not to rescind the rule itself).