ORAL ARGUMENT NOT YET SCHEDULED

No. 15-72894 (L), 15-73101

In the United States Court of Appeals

for the Ninth Circuit

THE BOEING COMPANY,

Petitioner, *Cross-Respondent*

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent, *Cross-Petitioner.*

ON PETITION FOR REVIEW OF A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE PETITIONER

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IDENTITY AND INTERESTS OF THE *AMICUS*

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to economic growth in the United States. The National Association of Manufacturers ("The NAM") received the consent of both parties to file this *amicus* brief in support of the Petitioner, the Boeing Company.

U.S. manufacturers are concerned about the erosion of confidentiality employment-related workplace investigations. The NAM believes that preserving the confidentiality of workplace investigations preserves fairness and equality in the workplace. This brief is submitted in response to what the NAM and its members believe to be an unfounded regulatory burden imposed by the National Labor Relations Board ("NLRB" or the "Board") that, if left to stand, is likely to undermine the ability of employers and employees to engage in confidential workplace investigations for legitimate business purposes. The NAM further

submits that the ability of an employer to recommend that employees keep workplace investigations confidential does not abridge any rights guaranteed to employees under the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. § 157.

STATEMENT ON PARTY COUNSEL AND FUNDING

No party, party's counsel, or person other than the *Amicus*, its members, and its counsel, has: (1) authored this brief in whole or in part or (2) contributed money that was intended to fund preparing or submitting the brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Circuit Rule 29(c), the *Amicus Curiae* hereby certifies that it is a trade association, with a general purpose including the objective of preserving and protecting the rights of employers under the National Labor Relations Act. The *Amicus* hereby certifies that it has no outstanding shares or debt securities in the hands of the public. It further certifies that none of them has any parent companies, nor does any publicly held company have a 10% or greater ownership interest in the *Amicus*.

ARGUMENT

I. THE BOARD'S DECISION PROHIBITING EMPLOYERS FROM RECOMMENDING EMPLOYEE CONFIDENTIALITY DURING WORKPLACE INVESTIGATIONS IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW.

The Board's holding in this case presents an unwarranted extension of the agency's already controversial prohibition against confidentiality requirements in workplace investigations, as expressed in *Banner Estrella Medical Center,* 362 N.L.R.B. No. 137 (2015)*, pet. for review pending,* No. 15-1245 (D.C. Cir. July 30, 2015)*; and Hyundai Am. Shipping Agency, Inc. v. N.L.R.B.,* 805 F.3d 309, 314 (D.C. Cir. 2015)(declining to endorse the Board's "novel view" of confidentiality requirements in workplace investigations). Petitioner Boeing has not ordered employees to keep investigatory information confidential, and has not threatened any discipline for disclosing such information. Instead, Boeing has simply created a form "recommending" that employees "refrain from discussing this case with any Boeing employee other than company representatives investigating this issue or your union representative." Stipulated Facts ¶ 10. Boeing has thus imposed no express or implied restriction on employees' exercise of rights protected by Section 7 of the Act. The Board's decision to the contrary departs from precedent and the realities of the workplace, and should not be enforced.

The Board's decision impermissibly creates a far-reaching presumption that

recommending any investigatory confidentiality is *per se* unlawful unless the employer can meet a virtually insurmountable standard of justification for confidentiality on a case-by-case basis. Applying the same (improper) standard imposed on employers whose policies actually mandate investigatory confidentiality, the Board now says that employers may not even recommend confidentiality of ongoing investigatory interviews unless they "first determine whether in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up." (Dec. at 2). Only if the employer determines that such a corruption of its investigation would likely occur without confidentiality is the employer then free to prohibit or even recommend that its employees refrain from discussing these matters among themselves. *Id*.

The Board's new prohibition against recommending confidentiality is inconsistent with its long established standard for evaluating whether employer work rules violate Section 7's guarantee of employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. When an employer's workplace rule or policy does not explicitly violate the Act, the NLRB's test for validity of the rule is supposed to be whether: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity;

or (3) the rule has been applied to restrict Section 7 activity. *Lutheran Heritage Village- Livonia*, 343 N.L.R.B. 646, 647 (2004). The Board has long distinguished between workplace rules that have been actually applied to restrict the exercise of Section 7 rights, and those which have not. *Id.* As further explained below, the Board's decision here has broad adverse ramifications for the entire business community that militate against enforcement by this Court.

A. The Board's Decision Arbitrarily Ignores The Plain Difference Between A "Recommendation" And A "Directive."

The Board summarily concluded that the employer's recommendation of confidentiality during investigations was somehow a "directive" that had a "reasonable tendency to inhibit protected activity." (Dec. at 3). The Board equated the employer's confidentiality recommendation with inapposite cases stating that employees "should not" discuss compensation. *Id.* citing *Heck's, Inc.,* 293 N.L.R.B. 1111(1989) and *Radisson Plaza Minneapolis,* 307 N.L.R.B. 94 (1992) *enf'd.* 987 F.2d 1376 (8th Cir. 1993). The Board improperly concluded that because the word "recommend" means "to advise" there was no difference from these cited cases.

In the words of the Dissent, the Board's decision distorts the ordinary meaning of "recommend." (Dec. at 5, Johnson Dissent). Employees can reasonably be expected to understand the difference between "we recommend that

you refrain from discussing this case" (with no threat of discipline) and "you are directed not to discuss this case" (under threat of discipline). In addition to the plain dictionary definitions cited in Petitioner's brief, it is worth noting that the Board's own rules and regulations make it clear that "recommend" is not reasonably interpreted as a mandatory requirement. The most significant difference is that a recommendation may be rejected by the decision maker. For instance, the ALJ's order in this case, and all cases, is "recommended" to the Board. (Dec. at 13). The Board need not accept this recommendation. *See* 29 C.F.R. § 102.45. Clearly, under the Board's own rules, a "recommendation" is not a final directive. The same distinction applies to workplace policies.

B. The Board's Decision Arbitrarily Departs From Precedent Presuming The Reasonableness Of Workplace Policies That Do Not On Their Face Interfere With Protected Employee Rights.

As noted above, a workplace policy that is not directly aimed at or applied to protected Section 7 activity is not unlawful unless the Board proves that employees "reasonably" would believe that the policy prohibits them from engaging in activities protected by the Act. *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. at 647. The Board abandoned that standard of proof in this case, since a mere recommendation cannot cause reasonable employees to fear discipline for engaging in protected concerted activity. The Board's decision should be

overturned because it provided no rationale for its conclusion that Boeing's statement recommending confidentiality violated employees' Section 7 rights. *See Adtranz ABB Daimler-Benz Transportation v. N.L.R.B*, 253 F.3d 19 (D.C. Cir 2001), denying enforcement of a Board order challenging an employer's rule banning "abusive or threatening language." The Court held that employees can reasonably be expected to understand the difference between lawful organizing activity, on the one hand, and "abusive or threatening" conduct directed at coworkers, on the other. *Id. See also Medco Health Solutions of Las Vegas, Inc*. v. N.L.R.B., 701 F.3d 710, 718 (D.C. Cir. 2012) (finding that in *Lutheran Heritage Village* the Board accepted the right of employers to "maintain a civil and decent workplace" and denying enforcement where the Board failed properly to apply the "reasonable employee" test to a facially neutral employer policy).

Here too, employees can reasonably be expected to understand the difference between a "recommendation" of confidentiality and a "directive" subject to discipline. The Board's failure to acknowledge the distinction between a suggestion and a mandate in a workplace policy is itself unreasonable and calls for denial of enforcement.

C. The Board's Novel Standard For Evaluating Employer Requests For Confidentiality Is Impracticable And Fails To Recognize The Realities Of Workplace Investigations.

In removing the ability of employers to recommend confidentiality at the

outset of an investigation, the Board fails to acknowledge the impracticability of its announced standard of proving the need for confidentiality case by case in workplace investigations. In particular, the Board has given no explanation of how employers' management representatives can know enough about the subject matter when they have not actually completed all necessary investigatory interviews to make an informed determination. Until employer representatives conduct their interviews in a particular workplace investigation, most employers will have no way of knowing whether witnesses "need protection" or whether "evidence is in danger of being destroyed," whether testimony is "in danger of being fabricated," or whether there is "need to prevent a cover up." (Dec. at 2).

The *Amicus* submits, based upon its members' extensive collective experience in the day-to-day administration of workplace investigations, that the burden being imposed by the Board on employers is impossible to administer in practice. The need for workplace investigations may arise with little advance notice, and the management staff of many employers often does not have immediate access to legal counsel whose advice may be required to apply the Board's "balancing" test. In any event, the typical management representatives who conduct workplace investigations cannot possibly have sufficient expertise to make the determinations now being required of them by the Board before every investigatory interview, and the lack of guidance from the Board would frustrate

even the most highly trained team of managers. The Board's prohibition against employers making an initial recommendation to employees to keep the investigation confidential, before it accesses the resources and information to make the requisite finding under the Board's new confidentiality test, makes maintaining confidentiality impossible.

D. The Board's Order Infringes Upon The Free Speech Rights Of Employers, In Violation Of Section 8(c) of the Act.

Amicus NAM agrees with the dissent in this case that Boeing's recommendation to employees was "an expression of opinion" as to whether employees should discuss with others matters that are under investigation. (Dec. at 6, Johnson Dissent). Since the notice expresses only the employer's preference, without a threat or promise of benefit, it falls under the protection of Section 8(c). According to the majority, Section 8(c) does not protect Boeing's recommendation because it applies only to "noncoercive expressions of views about union representation in general or a specific union, as well as related labor controversies." (Dec. at 4 *citing N.L.R.B. v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969)). Yet there is no coercion present in Boeing's recommendation of confidentiality.

In *N.L.R.B. v. Gissel Packing Co.,* the Supreme Court established the standards for balancing an employer's Section 8(c) right to express "any views,

argument, or opinion" in communicating his views to his employees, so long as such expression contains "no threat or reprisal or force or promise of benefit," with the employees' right to self-organization. 395 U.S. at 620. Only a statement that "conveys that the employer will act on its own initiative to punish its employees as the result of anti-union animus" falls outside Section 8(c)'s protective scope. *N.L.R.B. v. Pentre Elec., Inc.,* 998 F.2d 363, 371 (6th Cir. 1993). *Gissel* assures us that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *Crown Cork & Seal Co. v. N.L.R.B.*, 36 F.3d 1130, 1138-40 (D.C. Cir. 1994) citing *N.L.R.B. v. Gissel Packing Co,* 395 U.S. at 617. The burden rests on the *Board* to prove that § 8(c) does not protect a particular statement, *not* on the employer to prove the opposite. *NLRB v. Pentre Elec., Inc.,* 998 F.2d at 371 (emphasis added). The Board's reading contradicts the plain language of the statute. Section 8(c) prohibits employer's noncoercive speech from being used as evidence of an unfair labor practice. *Chamber of Commerce of U.S. v. Lockyer*, 463 F.3d 1076, 1091 (9th Cir. 2006), *rev'd on other grounds sub nom. Chamber of Commerce of U.S. v. Brown,* 554 U.S. 60 (2008).[1]

[1] Contrary to the Board's decision, Section 8(c) does more than protect the right of free speech regarding unions. Section 8(c)'s "enactment also manifested a congressional intent to encourage free speech on issues dividing labor and management." *Nat'l Ass'n of Mfrs. v. N.L.R.B.,* 717 F.3d 947, 954-55 (D.C. Cir. 2013) citing *Chamber of Commerce v. Brown,* 554 U.S. at 67.

II. The Board's Standard Fails To Accommodate The NLRA To Other Federal Employment Laws That Require Employers To Conduct Effective Workplace Investigations.

The Board's opinion in this case gives insufficient weight to the legitimate and substantial business justifications for keeping workplace investigations confidential. Until quite recently, Board precedent had long acknowledged "the need for employers to conduct all kinds of investigations of matters occurring in the workplace to ensure compliance with … legal requirements." *IBM Corp*., 341 N.L.R.B. 1288, 1293 (2004).[2] As the Board further held in *IBM*:

> Employer investigations into these matters require discretion and confidentiality. The guarantee of confidentiality helps an employer resolve challenging issues of credibility involving these sensitive, often personal, subjects…. If information obtained during an interview is later divulged, even inadvertently, the employee involved could suffer serious embarrassment and damage to his reputation and/or personal relationships and the employer's investigation could be compromised by inability to get the truth about workplace incidents….

Id.

In *IBM,* the Board also recognized the panoply of business justifications for maintaining confidentiality to preserve the integrity of investigations generally. Certainly, the Board recognized the importance of confidentiality to the resolution

[2] The types of investigations referenced in *IBM* were those intended to address sexual and racial harassment, use of drugs, employee health matters, improper computer and internet usage, and allegations of theft, violence, sabotage, and embezzlement. This did not purport to be an exclusive list. *Id*.

of credibility disputes, avoiding embarrassment to employee witnesses, victims, or accused workers, and damage to reputations or personal relationships. Perhaps most importantly, the Board acknowledged that lack of confidentiality "greatly reduces the chance that the employer will get the whole truth about a workplace event" and "increases the likelihood that employees with information about sensitive subjects will not come forward." *IBM Corp*., 341 N.L.R.B. at 1293.

Prior to the present decision, the Board also recognized other broad justifications for confidentiality, including the importance of ensuring that witnesses did not "tailor accounts" to other witnesses' statements. *See Belle of Sioux City, L.P.*, 333 N.L.R.B. 98, 113-114 (2001).[3] Until the recent, unexplained shift in Board policy, the Board struck a necessary and proper balance between the business need for confidentiality and employee rights, resulting in the confidentiality of ongoing investigations being upheld in all but the most extreme cases.

The Board's refusal to allow an employer to recommend confidentiality during workplace investigations fails to accommodate the requirements of the myriad employment laws that employers confront daily in the workplace. Since the

[3] *See also Charles Schwab & Co*, Case No. 28-CA-19445, 2004 NLRB LEXIS 739 (2004), in which the Administrative Law Judge noted that a confidentiality requirement served the legitimate business purpose to "protect [witnesses] against retaliation, protect the integrity of the investigation, and encourage witnesses to come forward." *Id.* at *61.

passage of the original Wagner Act in 1935, Congress has enacted many other statutes regulating the workplace, including Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 627; the Occupational Safety & Health Act ("OSHA"), 29 U.S.C. § 651; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101; the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601; and the Uniformed Service Employment & Reemployment Rights Act ("USSERA"), 38 U.S.C. § 4334.

The D.C. Circuit has recognized that requirements of confidentiality under these other statutes may justify an employer's request for confidentiality, even under the NLRB's new standard. *Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d at 314. Certainly, there is no inherent conflict between these laws and the NLRA, and no provision of the NLRA prohibits employers from recommending that employees maintain the confidentiality of investigations whose purpose is to comply with such other employment laws. The Board's interpretation of the NLRA creates an unnecessary conflict with employer obligations under the other laws referenced above.

As noted in Petitioner's Brief, it is well settled that the NLRA must be interpreted in a way that is consistent with other federal employment laws. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 251 (1970); *Hoffman Plastic*

Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 144 (2002); *see also Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives"). As this Court has likewise previously held: "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task*." Idaho Bldg. & Const. Trades Council v. Inland Pacific Chapter of Associated Builders & Contractors,* 801 F.3d 950, 962 (9th Cir. 2015) (citations omitted); *N.L.R.B. v. Lee Hotel Corp.,* 13 F.3d 1347, 1351 (9th Cir. 1994) (If the Board fashions a remedy under the NLRA that ignores equally important Congressional objectives, courts should refuse to enforce that order). Federal courts, not the NLRB, retain the power to interpret and balance the statutes. *Rivera v. NIBCO, Inc.,* 364 F.3d 1057, 1068 (9th Cir. 2004).

Employers certainly have an obligation under Title VII to investigate allegations of sexual and other forms of harassment in the workplace. *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998). The U.S. Equal Employment Opportunity Commission ("EEOC") has determined that confidentiality is essential to conducting such investigation: "[A]n anti-harassment policy and complaint

procedure should contain, at a minimum, the following elements: … Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible." *See* http://www.eeoc.gov/policy/docs/harassment.html. [4]

Employers also have an obligation under the Americans With Disabilities Act and related laws to maintain the confidentiality of medical information that is obtained from employees for purposes such as whether the employee is able to perform the functions of the job or is entitled to a reasonable accommodation, *See* 42 U.S.C. § 12112(d)(3)(B). FMLA regulations issued by the U.S. Department of Labor also specifically provide that medical information obtained in order to determine whether the employee is entitled to take FMLA leave must be kept as separate confidential medical records. *See* 29 C.F.R. § 825.500(g). If an employer fails to ensure that such information is kept confidential, the employer may be liable for injuries suffered by the employee as a result of the disclosure, including emotional distress. *See E.E.O.C. v. Ford Motor Credit Co.*, 531 F. Supp.2d 930 (M.D.Tenn. 2008).

The NLRB recognizes the importance of confidentiality to its own investigations of alleged unfair labor practices under the NLRA. Indeed, the NLRB has vigorously defended the confidentiality of affidavits taken from employee

[4] See also *Roby v. CWI, Inc.*, 579 F.3d 779, 786 (7th Cir. 2009) (in which the court indicated that the employer's instruction to interviewees that the interview was confidential demonstrated "reasonable care" under Title VII).

witnesses and has argued, successfully, that they are exempt from disclosure under the Freedom of Information Act ("FOIA"). *See NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978). In *Robbins Tire*, the Board pointedly argued to the Supreme Court that "a particularized, case-by-case showing is neither required nor practical, and that witness statements in pending unfair labor practice proceedings are exempt as a matter of law from disclosure while a hearing is pending." *Id.* at 222. *See also* NLRB Case Handling Manual, Section 10060.9 ("In order to enhance the confidentiality of the affidavit, instruct the witness not to share the affidavit with anyone other than his/her attorney or designated representative.").

CONCLUSION

For each of the reasons stated above and in Petitioner's Brief, the Petition for Review should be granted and the Board's decision should be denied enforcement.

Respectfully submitted,

May 23, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify pursuant to FRAP 32(a)(7) that the foregoing brief contains 3,103 words of proportionally-spaced 14-point type, and the word processing system used was Microsoft Word 2010.

May 23, 2016 /s/ *Maurice Baskin*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amicus Curiae* the National Association of Manufacturers in in Support of the Petitioner with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 23, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellant CM/ECF system.

May 23, 2016 /s/ *Elizabeth D. Parry*