UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE BOEING COMPANY,

and

Cases 19-CA-090932
19-CA-090948
19-CA-095926

SOCIETY OF PROFESSIONAL ENGINEERING EMPLOYEES IN AEROSPACE, affiliated with INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS, LOCAL 2001

AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

NATIONAL ASSOCIATION OF MANUFACTURERS

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Comes now the National Association of Manufacturers and submits this *Amicus* Brief in the above-captioned matter.

I. INTRODUCTION

On May 15, 2014 Administrative Law Judge Gerald Etchingham issued his Decision in the above-captioned matter (herein simply the "ALJD").[1] The ALJD presents significant issues for employers in all industries and, particularly, for employers engaged in operating manufacturing facilities. While the precise issues for consideration by the Board will be fully articulated below (see Section III, Issues Presented), the ALJD presents significant policy questions regarding the Employer's ability to properly manage its workplace during in-house employee demonstrations and, during the course of such demonstrations, to adequately safeguard employees' participation in such activities and record such participation to further ensure the

[1] The designation "ALJ" shall refer to the Administrative Law Judge Gerald M. Etchingham; the designation "ALJD" shall refer to the Administrative Law Judge Decision of May 15, 2014 and, as appropriate, will include page and line citations; the designation "GC" shall refer to Counsel for the General Counsel; the designation "GC-__" shall refer to Exhibits offered by the GC and received by the ALJ; the designation "RX-__" shall refer to Exhibits offered by Respondent and received by the ALJ; and the designation "TR-__" shall refer to transcript page citations inclusive, as appropriate, of line citations.

safety of employees. The ALJD also presents a significant infringement on the Employer's ability to safeguard proprietary, classified and export controlled materials, employee privacy and both internal and external threats of violence. In this regard, the Consolidated Complaint alleged that one of the Employer's procedures, PRO-2783, entitled "Control of Photographic and Camera Enabled Devices on Company Property," violated Section 8(a)(1) of the Act. The ALJD's conclusion that PRO-2783 violated the Act raises significant policy considerations, including the fact that it dramatically expands the reach of Lafayette Park Hotel, 326 NLRB 824 (1998). The expansion contained within the ALJD is contrary to public policy. Furthermore, faithful application of Lafayette Park compels the conclusion that PRO-2783 is not violative of the Act.

In these circumstances, adoption of the ALJ's analysis and/or conclusions will significantly impair all employers from promulgating and enforcing workplace rules that serve legitimate interests and which do not impair the exercise of Section 7 rights.

II. INTEREST OF THE NAM AS AMICUS CURIAE

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. The membership of the NAM includes a wide-range of employers who employ both union-represented and unrepresented workers. According to the Bureau of Labor Statistics, there were approximately 1,558,000 union-represented employees employed by manufacturers in 2013 – the largest industry group of unionized private sector workers.

The NAM's labor policy is based on the principle that both manufacturers and their employees rely on fairness and balance in our labor law system, and that maintaining the time-tested balance between labor unions and employers is critical to economic growth and job creation. For several decades, the NAM has participated as *amicus curiae* in the large majority

of significant labor cases before the Supreme Court, federal courts of appeal, and the NLRB, where such participation has been permitted.

III. ISSUES PRESENTED

The issues presented by the ALJD which are addressed within this *Amicus* Brief to the Board include the following:

1. Whether the Photographing & Videotaping of Union Members On Company Premises Violates The Act?

2. Whether the Maintenance of PRO-2783 ("Control of Photographic & Camera Enabled Devices On Company Property") Violates The Act?

3. Whether the Employer, through security officers, created an impression among employees that their union and/or protected, concerted activities were under surveillance?

IV. ARGUMENT

A. BOEING DID NOT VIOLATE THE ACT BY PHOTOGRAPHING AND VIDEOTAPING UNION MEMBERS' MASS MARCHES ON COMPANY PREMISES DURING WORKING TIME

Within Paragraph 7, including subparagraphs 7(a), (c) and (d), and Paragraph 9 of the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, Counsel for the General Counsel contends that Respondent engaged in unlawful surveillance in violation of Section 8(a)(1) when it videotaped and/or photographed Union member mass marches that took place on September 19 and December 12, 2012 at the Everett facility; on September 26, 2012 at the Renton facility; and on October 3, 2012 at the Portland facility. (TR-29, lines 5-8 and 16-21). The Board has long held that in determining whether an employer's photographing and/or videotaping of protected concerted activity violates 8(a)(1), the relevant inquiry is whether there was proper justification and whether the photographing and/or videotaping reasonably tends to coerce employees. *See* Timken Co., 331 NLRB 744, 754 (2000) (citing F.W. Woolworth Co., 310 NLRB 1197, 1204 (1993)).

Counsel for the General Counsel contends that Respondent was not justified in videotaping and/or photographing these marches (TR-29, lines 16-21), even though hundreds of employees participated and the marches took place on Respondent's property, in the middle of the work day. (ALJD, page 8, lines 32-34; page 10, lines 28-31; page 13, lines 23-26 and page 14, lines 32-33). In fact, as discussed below, Respondent had multiple legitimate justifications for recording the marches. Moreover, the limited amount and nature of the photographing and/or videotaping did not reasonably tend to interfere with, restrain, or coerce the march participants in the exercise of their Section 7 rights. Further, the ALJ's determination that Respondent's photographing and/or videotaping violated Section 8(a)(1) was based on a misstatement and misapplication of applicable Board precedent. For these reasons, the Board should not adopt the legal conclusions propounded by the ALJ.

1. Boeing Had Multiple Legitimate Reasons to Have Security Officers Accompany and Observe the Mass Marches

At least 150 to 200 employees participated in the September 19 march at the Everett facility while approximately 200 to 300 employees participated in the December 12 march at the same facility. (TR-78, line 9; TR-187, line 20; TR-254, line 2 and TR-284, line 2). Approximately 500 employees participated in the September 26 march at the Renton plant, with approximately half of these also participating in a march that took place outside of the plant. (TR-320, line 8 and TR-322, lines 8-11). Approximately 50 employees participated in the October 3 march at the Portland plant. (TR-39, line 7). Given the large size of the groups participating in these marches, Respondent had numerous justifications for recording the marches.

First, the marches were extremely disruptive due to the sheer number of participants as well as the time of day they were conducted. Both the September 19 and December 12 Everett

marches took place at 11:00 a.m., when approximately 6,000 production and maintenance employees were working in the factory. (TR-222, line 10; TR-284, line 14 and TR-504, lines 13-14). In addition, both marches took place in production areas, causing production to shut down for a period of time. (TR-573, lines 6-12; TR-574, lines 6-13; TR-581, line 18 to TR-582, line 2; TR-588, lines 17-19 and TR-601, lines 10-15). Specifically, the production line had to shut down for approximately twenty minutes during the December 12 march to allow the participants to move past an airplane on which employees were working. (TR-605, lines 15-22). The September 19 march also blocked vehicle traffic by congregating in a high-traffic area within the factory. (TR-460, lines 21-22; TR-576, lines 1-3 and TR-711, lines 5-9). The September 26 Renton march also took place at 11:00 a.m. and involved the marchers crossing a private roadway trucks use to make deliveries to the factory. (TR-688, lines 19-22 and TR-690, lines 4-12). At least one such delivery truck was delayed in making its delivery because of the march. (TR-689, lines 12-21). Lastly, the October 3 Portland march also took place in a production area, where employees were working. (TR-342, line 23 to TR-343, line 11).

In addition to disrupting the production process, the fact that the four marches took place in production areas also raised several serious safety concerns. For example, the December 12 Everett march proceeded next to a live airplane with high-voltage power undergoing functional tests of powered systems. (TR-601, lines 10-25). Moreover, several participants in the September 26 Renton march did not obey the cross walk signal and crossed a road that experiences a high volume of vehicular traffic against the signal. (TR-690, lines 20-24 and TR-692, lines 12-14).

Not only did these disruptions and safety concerns alone justify Respondent photographing and/or videotaping the mass marches, but Respondent was well within its rights to

document the marches to preserve evidence of the adverse effect the marches had on Respondent's operations. *See* Concord Metal, Inc., 295 NLRB 912, 921 (1989) (determining General Counsel failed to establish photographing picketing was an 8(a)(1) violation where photos preserved proof that a delivery was delayed by pickets blocking an entrance). In addition, had Respondent decided to seek an injunction to prevent the marchers from disrupting production, blocking deliveries, and/or entering unsafe factory areas, Respondent could have used the photos to support such a petition. *See* Lock Joint Pipe Co., 141 NLRB 943, 963 (1963) (taking photos of protected activity to support a potential injunction proceeding does not violate Section 8(a)(1)). *See also*, Larand Leisurelies, Inc. v. NLRB, 523 F.2d 814, 819 (6th Cir. 1975) ("Photographing of pickets does not violate Section 8(a)(1) of the Act where the photographs are taken to establish for purposes of an injunction suit that pickets engaged in violence"); NLRB v. Colonial Haven Nursing Home, 542 F.2d 691, 701 (7th Cir.1976) (holding that "anticipatory photographing .... does not violate [Section] 8(a)(1) of the Act where the photographs are taken to establish for purposes of an injunction suit that pickets engaged in violence"). Any one of these various reasons justified Respondent's recording the mass marches.

2. Boeing Appropriately Limited Its Photographing and Videotaping

The fact that Respondent only took photos and/or videos during the mass marches – when Boeing had productivity and security concerns – further demonstrates Respondent's recording was for legitimate reasons. The Board has held that "continuous scrutiny over substantial periods of time may constitute coercive surveillance." The Timken Co., 331 NLRB 744, 754 (2000). In Timken, the employer photographed and videotaped handbilling continuously, whenever employees were distributing the handbills. *Id.* at 751. The stated reason for the photographing and videotaping was to protect the employer's human resources manager, who was alleged to have assaulted an employee who was participating in the handbilling. *Id.* The

Board determined that the employer violated 8(a)(1) by photographing and videotaping handbilling on a continuous basis as opposed to limiting the recording to when the human resources manager was talking with the employees who were distributing the handbills. *Id.* at 754.

By contrast, here, the fact that Respondent only engaged in photographing and/or videotaping when the marches at issue took place precludes a finding that the photographing and/or videotaping reasonably tended to chill the employees exercising their Section 7 rights. Indeed, Respondent did not engage in any photographing or videotaping when the march participants were beginning to congregate, after they dispersed from the march, when the march was being planned, or at any time other than when the march was actually taking place. Thus, Respondent appropriately limited the recording activity to document the disruption and safety concerns raised by the marches.

3. The ALJD Misapplied NLRB and Court Precedent

The Board should determine that Respondent did not violate Section 8(a)(1) when it photographed and videotaped the mass marches not only because such a finding is consistent with Board precedent, but also to correct the multitude of legal and factual misstatements contained in the ALJD. In addition, the Board should reject the legal conclusions contained in the ALJD. For instance, the ALJ supported his decision by stating that the General Counsel does not have to demonstrate that the respondent's photographing and videotaping of the marches caused actual interference, restraint, or coercion. (ALJD, page 19 at lines 36-40). But the relevant inquiry is whether Respondent's activity reasonably tended to interfere with the protected activity. *See, e.g.,* F.W. Woolworth Co., 310 NLRB 1197, 1204 (1993). Yet the ALJ did not even examine whether the General Counsel made this required showing in his lengthy decision.

Nor did the ALJ sufficiently examine whether Respondent had a sufficient justification for photographing and/or videotaping. For example, the ALJ concluded that disruption could not have justified Respondent's photographing and/or videotaping because none of the USIRs noted any interference with production. (ALJD, page 20 at lines 38-40). But the ALJ did not even mention the other evidence Respondent presented to support its claim that the marches were indeed disruptive and presented security concerns, which warranted recording evidence of same.[2] Indeed, Counsel for the General Counsel conceded that at least one of the marches caused a ten to fifteen minute delay of Machinists' work. (GC's Post-Hearing Brief at page 23, lines 22-23). Yet the ALJD does not contain even a reference to this undisputed fact. Moreover, the ALJD notes how the march that took place outside of the Renton facility could not have caused disruption inside the factory, ignoring the impact the march had on deliveries to the facility.[3] (ALJD, page 20 at lines 45-47).

4. As a Matter of National Labor Policy, the Board Should Not Adopt the ALJ's Legal Conclusions

Determining Respondent violated Section 8(a)(1) when it photographed the mass marches would be contrary to the policies of the Act and the interests of the public in the manufacturing industry. Section 8(a)(1) of the Act is intended to prohibit employer conduct that "necessarily tends to interfere with, restrain or coerce employees in the exercise of Section 7 rights." Sunbelt Manufacturing, Inc., 308 NLRB 780 n. 3 (1992) (determining that employer's videotaping at the end of an election campaign, during which the employer engaged in a variety of unfair labor practices, reasonably tended to interfere with, restrain, and coerce employees'

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2 As detailed above, this evidence included causing the production line to shut down at least once for approximately twenty minutes, blocking vehicle traffic within the factory, and causing delivery trucks to be delayed.

3 Indeed, as noted above, the Board held in Concord Metal, Inc. that the employer was justified in photographing picketing that blocked a delivery. 295 NLRB 912, 921 (1989).

Section 7 rights). Consistent with the policy behind Section 8(a)(1), the Board has held that an employer must have a justification for photographing employees engaged in protected activity because it tends to intimidate. F.W. Woolworth Co., 310 NLRB 1197 (1993). Here, it is disingenuous to suggest that *one or two* security guards photographing and/or videotaping marches in which hundreds of employees participated would *reasonably* tend to coerce these employees. *See* U.S. Steel Corp. v. NLRB, 682 F.2d 98, 103 (3rd Cir. 1982) (concluding that photographing employee demonstration did not reasonably tend to coerce employees under the circumstances of the case). Moreover, the ALJD is devoid of any determination that Respondent's recording activity *reasonably* tended to interfere with the marching employees' exercise of Section 7 rights – let alone an explanation as to how the recording would reasonably tend to interfere. In fact, if anything, the record establishes that Respondents' activity had the exact opposite effect, as the number of participants in the second march at the Everett facility was nearly double that of the first.

In addition, even if the facts of the Saia Motor Freight Line, Inc. and Washington Fruit and Produce Co. decisions are distinguishable from this case, the rationale articulated by the Board for finding no Section 8(a)(1) violation in each is instructive here. In Saia, the Board determined the employer's photographing thirty to forty handbillers was justified where they blocked traffic and caused the employer to have legitimate safety concerns. 333 NLRB 784 (2001). Similarly here, the number of employees participating in the protected activity far outnumbered the number of individuals participating in the recording, which was justified given the fact that the marches stopped production, blocked deliveries, and took place in dangerous production areas. And in Washington Fruit, the Board found no Section 8(a)(1) violation, determining the possibility that the employer's videotaping of a large rally could have coerced

the employees to be "remote." 343 NLRB 1215, n. 16 (2004). The possibility that hundreds of marching employees would be coerced by one or two security guards taking photos and/or videotaping them on small devices here is, similarly, extremely unlikely.

Lastly, upholding the ALJ's stated rationale would have serious implications for the manufacturing industry. In essence, the Board would be giving its stamp of approval for large demonstrations walking through production facilities where manufacturing is being conducted. Not only does such activity raise serious productivity concerns, as such demonstrations cause production to come to a crashing halt, but mass demonstrations also raise serious safety concerns. The Engineering employees here typically work in an office environment and generally do not work in a production or manufacturing environment. (TR-704, lines 7-12). Thus, they simply are not familiar with the safety and security measures that must be taken in such an environment. If the Board upholds the ALJD, the Board would essentially give such employees carte blanche to wander through production and manufacturing environments with which they are not familiar and not allow Employers the ability to engage in miniscule documentation, the goal of which is limited to protecting legitimate employer interests – not to "chill" the employees' pursuit of Section 7 rights. In fact, the record evidence illustrates that Charging Party took photographs of the marches and published those photographs in a union newsletter (RX-2). The conclusion is obvious, the Employer's limited conduct was similar to that of the Charging Party. In such circumstance, any claim that employees' Section 7 rights were "chilled" is, at best, disingenuous.

Certainly, the NAM recognizes that the Board has legitimate concerns with "garden variety" Employer surveillance of protected, concerted activity and the use of devices (cameras) that capture images and devices of such activity. This is not, however, a "garden variety" case of

surveillance. The instant case presents the open and unabashed exercise of Section 7 rights, literally and figuratively, within the "four corners" of an Employer's facilities. Employer's Security personnel openly accompanied the employees throughout their exercise of those alleged Section 7 rights. The accompaniment has never been alleged as unlawful. Similarly, the limited images taken of that lawful accompaniment are not violative of the Act.[4]

B. THE MAINTENANCE OF PRO-2783 IS NOT VIOLATIVE OF SECTION 8(A)(1) OF THE ACT

1. The Consolidated Complaint Alleges and the ALJ Concluded That PRO-2783 is Violative of Employees' Section 7 Rights

Within Paragraph 6, subparagraphs 6(a) and (b) of the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, Counsel for General Counsel alleges that:

a. On or about November 7, 2011, Respondent promulgated and since then has maintained Procedure PRO 2783 (the Rule) which states that use of employees' personal camera-enabled devices "to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security."

b. Respondent has maintained the Rule to discourage its employees from forming, joining, and/or assisting the Union and/or engaging in other protected, concerted activities.

Paragraph 12 of the Consolidated Complaint alleges that the conduct alleged in paragraph 6 (among other paragraphs) interfered with, restrained and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act. Counsel for the General Counsel's Consolidated Complaint clearly limits the PRO-2783 allegation to the maintenance of a Rule that prohibits employees from engaging in union activity and/or protected concerted activity. Within Counsel for the General Counsel's Opening Statement, however, it was conceded that "the rule itself does not explicitly state as such." (TR-32, lines 3-7).

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4 The "limited" nature of the images is illustrated by the small number of images taken and the lack of images focusing on the faces of individuals.

Notwithstanding the limits of the Paragraph 6 allegations and Counsel for the General Counsel's concession, within the ALJD, the ALJ concluded that the Rule was facially overbroad and ambiguous and would reasonably chill employees in the exercise of Section 7 rights; that an employee would reasonably construe the language to chill protected Section 7 activity and; that, consequently, PRO 2783 violated Section 8(a)(1) of the Act. (ALJD, page 24 at lines 33-40). Neither the facts nor existing Board precedent are supportive of the ALJ's conclusion.

2. The Boeing Company Has Maintained Various Versions of PRO-2783, for Multiple Legitimate Reasons, for Over 35 Years

For multiple legitimate reasons, since at least 1976, Boeing has maintained a procedure/policy prohibiting/limiting camera and photographic equipment on Company premises. (TR-380, lines 12-17; RX-3). As originally implemented, based on the then prevalent technology, the "Camera and Photographic Equipment on Company Premises" procedure provided that:

> a. Employees or visitors shall not carry or use cameras (including those associated with videotape recording) or other photographic equipment in any Company facility ... unless authorized to do so in the performance of work assignments.
>
> A person must have a Camera Permit Badge to use camera, portable television recording equipment, or other photographic equipment on Company premises. A Camera Permit Badge of a Semi-Annual Panel Pass which lists the photographic materials being carried, authorizes possession of cameras, portable television recording equipment and photographic equipment or materials on Company premises and removed from Company premises.

That policy was amended over the years to reflect evolving technology and, as a result, extends to camera-enabled devices, inclusive of cell phones and personal digital assistants that contain built-in cameras. (TR-382, lines 7-15).

The November, 2011 version of PRO-2783 before the ALJ in this matter consists of eleven (11) pages and the only provision found to have been violative of Section 8(a)(1) is the language providing that:

> ... use of these devices to capture images or video is prohibited without a valid business need and an approved camera permit that has been reviewed and approved by Security. (GC-8, page 3 of 11).

As conceded by Counsel for the General Counsel PRO-2783 does not expressly prohibit Union activity or protected/concerted activity.

Responsibility for application of PRO-2783 rests upon James Harris, Boeing's Senior Security Manager for the Boeing Company. (TR-381, lines 20-22). Prior to employment with Boeing, Harris served for 20 years in the U.S. Marine Corps as an Intelligence Officer, Linguist and Intelligence Collector. (TR-376, lines 4-9). Harris began employment with Boeing in 1987 and initially worked as a Program Security Officer responsible for interpreting government security regulations and their application to classified programs within Boeing (and aided engineering and manufacturing staff to maintain compliance with government regulations for those programs). (TR-376, lines 10-19). Mr. Harris also participated in reviewing and updating Boeing information protection writings. (TR-376, lines 21-23).

In 2001, Harris began work supporting the Chief Security Officer as an "Export Compliance Subject Matter Expert." (TR-376, lines 24-25). In this capacity Harris participated in reviewing, updating and publishing security documents including information protection documents. (TR-377, lines 1-3). This included, from 2003 to 2005, serving as Security Manager for the Boeing Missile Defense Systems (the primary management oversight program Ground-Based Missile Defense Systems for the U.S. Government) and, from 2005 to the present, serving in Boeing's Commercial Airline Security Organization. (TR-377, lines 9-19).

Boeing's implementation and maintenance of policies regarding "Control of Photographic and Camera Enabled Devices on Company Property" is motivated by multiple, legitimate considerations. Those legitimate considerations include the goal to protect classified

information; to protect proprietary information; to protect export controlled information; to protect employee privacy; and to help avoid physical security breaches. (TR-383, line 8 to TR-384, line 20). A brief review of each is instructive.

One, Boeing is a federal contractor for both classified and unclassified programs. In this capacity, Boeing has an affirmative obligation to protect information, hardware, materials and parts that are related to Boeing's performance on those contracts. (TR-383, lines 9-12). In this capacity, Boeing has accreditation requirements that cover the entire Puget Sound Region and Boeing performs classified work within that entire region. To be accredited by the U.S. Government Defense Security Service, Boeing must submit documentation demonstrating that its facilities (whether a room, building or factory) are built to government specifications designed for protection of classified information. (TR-386, lines 9-23). Simply stated, the accreditation process is designed to eliminate or prevent the risk of escape of federal contractor information and PRO-2783 is a layer of that security securing classified information.

Two, Boeing's security measures are also designed to preserve its own proprietary information as well as proprietary information of its customers. To allow unbridled photographing would compromise that competitive edge and marketplace advantage. (TR-383, lines 13-17). This proprietary information includes non-public information of potential economic value that Boeing owns or has an interest in that may be material to the operations, manufacturing and design of Boeing airplanes and equipment. (TR-395, lines 1-9). Such information is found throughout Boeing's facilities, including on the production floor (TR-395, lines 10-14) and includes scheduling, the timing of parts, specific manufacturing methods, and the processes that may be utilized to assemble a part or major assembly. (TR-395, lines 15-20). Even the layout of the production area – for example "Mylar" layouts required to assist

mechanics and technicians on the floor of the manufacturing facility to allow for the proper assembly of an aircraft – exist in any number of forms including papers, documents, notebooks, as well as large screens referred to as the "barge." (TR-395, line 21 to TR-396, line 19). "Tooling" – the items actually used to build, manufacture, frame or shape a particular item for installation on an aircraft is also considered proprietary. (TR-396, line 20 to TR-397, line 7). Similarly, quality control information and organizational charts constitute proprietary information. (TR-397, lines 8-18). Finally, what is or is not proprietary in the context of a factory is not obvious. (TR-400, line 21 to TR-401, line 9).

Three, consistent with its commitment to security, Boeing also has an obligation to maintain an export compliance profile which, in turn, requires Boeing to ensure that export controlled materials are not exposed to an unauthorized person. (TR-383, lines 19-22). "Export Control," refers to the U.S. Government's regulation of all forms of information, hardware and technology that leaves the borders of the United States. Fundamentally, everything that is manufactured in the United States and is sent either outside the United States or delivered to a non-U.S. person is subject to export control. (TR-388, lines 5-10). In terms of dollar value, Boeing is the United States' largest exporter of export controlled materials and exposure, either directly face-to-face or via photographs, must be prevented. (TR-383, lines 18-19 and lines 21-23).

Boeing is required to and takes various measures to prevent the disclosure of export controlled information. Those measures include keeping information in closed/locked rooms; what is referred to as soft-controlled, signage and even "standoff distances" that mitigate access to export controlled materials by either unauthorized persons or non-U.S. persons. (TR-389, lines 10-18). Export Control material or information is found in both Boeing's commercial and

military endeavors and even that technology which underlies composite manufacture is export controlled. (TR-389, line 19 to TR-390, line 13). Export controlled information is located at nearly every site within Boeing's Puget Sound complex. (TR-390, lines 14-16).

Violations of Boeing's export control obligations can result in significant fines – up to $1,000,000 per incident; individuals who participate in an export control violation are subject to individual fines and criminal prosecution; Boeing runs the risk of debarment from performing future government contracts; and Boeing runs the risk of rescission of current contracts. (TR-390, lines 17-25). These risks are not academic. To the contrary, on one occasion Boeing was found to have improperly navigated a navigation chip on a commercial plane. As a result, Boeing was assessed a $45,000,000 fine; was required to have a special compliance officer, at the Company's expense, for a three (3) year period; and was subject to several years of audits with respect to information control/export control systems, processes and approaches. (TR-391, lines 2-19).

Examples of export control include utilization of closed or separate buildings or, for example at the Company's Auburn, Washington facility, establishment of perimeter control with an exterior fence line. (TR-391, line 20 to TR-392, line 21). As a result a photograph, anywhere within the Auburn facility, risks an export control violation. (TR-392, line 22 to TR-393, line 3). Photographs also compromise existing precautions. For example, as outlined above, Boeing utilizes "stand off distances." Those distances are intended to prevent an individual from discerning via his/her eyesight an export controlled document. The ongoing evolution of cameras and camera-enabled devices has compromised the integrity of the stand off distance. Thus even a 25 foot prohibition created for the naked eye, is insufficient for a camera. (TR-393, line 15 to TR-394, line 16).

Four, as noted above, Boeing also has the duty to protect employee privacy. (TR-383, line 24 to TR-384, line 6). Photographic images of employees are considered personally identifiable information which is protected from disclosure. (TR-383, line 25 to TR-384, line 3). In a workforce as large as Boeing's, it is not surprising that employees are subject to restraining orders. The publication of employee images in a public forum has the potential to compromise their safety. (TR-384, lines 3-6).

Five, Boeing also has an obligation to protect the Company from both internal and external threats. Again, this consideration is not merely intellectual. To the contrary, Boeing has documented evidence that it has been subject to surveillance by potential hostile actors. A successful attack against Boeing could seriously damage Boeing and the economy of the United States, as a whole. (TR-384, lines 7-13).

Six, in addition to the above concerns, Boeing is aware that foreign intelligence agencies have stated their interest in accessing Boeing's proprietary information to gain a technical advantage over Boeing in development of both commercial and military aircraft. (TR-397, line 19, TR-398, line 1). Boeing also receives regular reports on the efforts of foreign government agencies pursuing the task of visiting Boeing and acquiring specific kinds of manufacturing technologies, parts, processes, material usage, etc. (TR-398, lines 2-15). Foreign governments and agencies also utilize public media to sort through what has been publicly posted to gain information to exploit their particular mission. (TR-398, lines 16-21). Consistent with that, Boeing has documented circumstances in which foreign powers "comb" social media to gain knowledge about Boeing's manufacturing techniques, manufacturing processes and material usage that they do not currently possess, with the goal of developing their own aircraft industries. (TR-399, lines 10-21).

Uncontrolled use of devices that capture images or video strikes at the heart of Boeing's legitimate efforts to: (1) protect both classified and unclassified information related to its performance on federal government contracts; (2) protect its own proprietary interests; (3) ensure that "export-controlled materials" are not exposed to unauthorized personnel; (4) comply with its duty to protect employee privacy; (5) comply with its duty to protect itself from both internal and external threats; and (6) address those concerns raised by foreign governments or intelligence agencies that seek critical information at Boeing's facilities. Camera-enabled devices such as cell phones present particular challenges in promulgating and enforcing an effective rule which safeguards the multiple legitimate concerns Boeing has with respect to information disclosure. As testified to at hearing, cell phones are commonplace and it is virtually impossible to purchase a cell phone without a camera-enabled device. (TR-404, lines 18-19). In addition to the record testimony regarding the prevalence of cell phone utilization, the supporting statistics are staggering. For example, a February 27, 2014 Pew Research Center Report states that "Ninety percent of U.S. adults have a cell phone and two-thirds of those say they use their phones to go online." Susannah Fox and Lee Rainie, "The Web at 25 in the U.S., The Overall Verdict: The Internet has been a Plus for Society and an Especially Good Thing for Individual Users." (Pew Research Center Report, February 27, 2014) (http://www.pewinternet.org/2014/02/27/the-web-at-25-in-the-u-s/). This data is consistent with data from a 2009 Marist Poll that 87 percent of U.S. residents owned cell phones and the figure for Americans with jobs was even higher at 92%. Not only is the existence of cell phones widespread but the fact is that cell phones are more surreptitious than a free standing camera and the ability to detect an individual taking a photograph or video via a camera-enabled device is compromised. (TR-404, lines 7-11). Finally, current day cell phones with camera-enabled devices allow even the neophyte user of

technology to transmit sensitive data to, literally, a global audience. Thus the breadth, surreptitious nature of and ease by which global transmission can be achieved (all of which are positive elements for the user) present realistic and logistical nightmares to organizations seeking to avoid breaches of confidential data, trade secrets, matters of organizational security, business security and, in the case of an Employer such as The Boeing Company, national security. Those concerns, not a desire to "chill" the exercise of employees' Section 7 rights, are the focal point of PRO-2783. As Sections 3, 4 and 5, below will illustrate, the proper application of the Board's Lafayette Hotel analytical model to the facts in this proceeding harmonize both the Section 7 rights of employees and the legitimate concerns of organizations seeking to legitimately protect data. This harmonization exists in the instant case without any violation of the Act.

3. The Proper Application of Board Precedent Compels the Conclusion the PRO-2783 Does Not Violate Section 8(a)(1) of the Act

As outlined above, a form of PRO-2783 has been maintained for over 35 years for legitimate business reasons. As the application of Board precedent set forth below illustrates, and contrary to the conclusion of the ALJD, the maintenance of PRO-2783 is not violative of Section 8(a) (1) of the Act.

The Board has held that employee workplace rules violate Section 8(a)(1) only when a rule "reasonably tend[s] to chill employees in the exercise of their Section 7 rights." *See*, for example, Lafayette Park Hotel, 326 NLRB 824, 825 (1998) and Martin Luther Memorial Home, Inc., d/b/a Lutheran Heritage Village – Livonia, 343 NLRB 646 (2004) (herein simply "Lutheran Heritage Village – Livonia"). In evaluating whether a workplace rule is or is not unlawful, the Board has established rules of construction to be utilized. Those rules include the requirement that:

1. In evaluating the Rule, the Rule must be given a reasonable reading;

2. In evaluating the Rule, particular phrases cannot be viewed in isolation; and

3. In evaluating the Rule, the interpreter cannot presume improper interference with employee rights.

Lafayette Park, supra, 326 NLRB at 825, 827; Lutheran Heritage Village – Livonia, 343 NLRB at 646. Consistent with the above rules of construction, the NLRB first assesses whether the rule expressly restricts activities protected by Section 7 of the Act. As acknowledged by Counsel for General Counsel in its Opening Statement, PRO-2783 does not create such a restriction. Given the limited allegations set forth in Paragraph 6 of the Consolidated Complaint, Counsel for General Counsel's concession, by itself, should have resulted in the dismissal of that allegation. Without waiving that fundamental position, to prove a violation where a rule does not expressly prohibit Section 7 activity, there must be a showing of one of the following:

1. Employees would reasonably construe the language to prohibit Section 7 activity;

2. The Rule was promulgated in response to union activity; or

3. The Rule has been applied to restrict the exercise of Section 7 rights.

Lutheran Heritage Village – Livonia, 343 NLRB at 646. None of those standards have been satisfied in this case.

4. Employees Would Not Reasonably Construe PRO-2783 As Interfering With Section 7 Activity

In determining whether employees would reasonably construe the language of PRO-2783 to prohibit Section 7 activity, Lafayette Park provides that a rule must be given a reasonable reading; particular phrases cannot be viewed in isolation; and the interpreter of a rule cannot presume interference with Employee rights. Lafayette Park, supra, 326 NLRB at 825, 827. To

uphold the ALJ's finding that PRO-2783 is violative of the Act, however, would require this Board to ignore each of those interpretive standards.

The ALJD failed to provide a reasonable reading of PRO-2783 by failing to note the intent of the Rule to protect "Proprietary, export-controlled, other-company's proprietary information or sensitive materials at risk of unauthorized disclosure." (GC-8, page 5 of 11). Similarly, PRO-2783 references "Related Writings" inclusive of POL-13, "Intellectual Property Management and Information Protection;" PRO-2227, "Information Protection;" PRO-2777, "Non-Employee Control and Identification;" PRO-3439, "Release of Information Outside the Boeing Company;" D200-10015-1, "The Boeing Security Manual for Safeguarding Classified Information;" and D200-10025-37, "Information Protection Standards Manual." (GC-8, pages 9-10 of 11). PRO-2783 also contains an Exhibit A, which notes the responsibilities commensurate with obtaining a camera permit and encourages the permittee to "[r]espect the concerns, privacy and rights of employees, customers and visitors while using a camera or camera-enabled device." (GC-8, page 11 of 11). Finally, each and every page of PRO-2783 contains a footnote that the use and distribution of PRO-2783 is subject to PRO-2227 "Information Protection" and PRO-3439 "Release of Information Outside the Boeing Company." (GC-8, pages 1-11, inclusive).

A reasonable reading of PRO-2783, which is a requirement of Board precedent, is that the Rule has nothing to do with Union activity and/or protected concerted activity. To the contrary, a reasonable reading of the Rule establishes that it mirrors those concerns ably articulated by Boeing's Senior Security Manager, that classified and unclassified material, proprietary information; information sensitive to security; and information that may infringe on the privacy of employees, are all subject to protection by the Employer. Thus, when reasonably

read, PRO-2783 is fully supportive of the conclusion that it is intended to protect reasonable interests and that it does not seek to infringe on employee rights.

Interestingly, the Employer's "reasonable read" of PRO-2783 is also consistent with the analysis of both Counsel for the General Counsel and the ALJ. Counsel for the General Counsel and the ALJ asserted that PRO-2783 would be lawful if the Rule had simply included a phrase that it did not apply to conduct protected by the Act. (*See* footnote 14 of GC's Post-Hearing Brief and footnote 15 of the ALJD). In so doing, both Counsel for General Counsel and the ALJ expressly cite, as lawful, PRO-3439. What Counsel for the General Counsel and the ALJD ignore, however, is that PRO-3439 is expressly incorporated into PRO-2783. Thus the very caveat applauded by both Counsel for the General Counsel and the ALJ is expressly referenced on each and every page of PRO-2783. This repeated reference to a Policy which contains the caveat blessed by the ALJD allows for only one conclusion – PRO-2783 would not reasonably be construed as prohibiting Section 7 activity.[5]

Not only does the ALJD fail to give a "reasonable reading" to PRO-2783 but it also violates the remaining rules of construction outlined by Lafayette Hotel. Closely related to the "reasonable reading" requirement is the requirement that "particular phrases not be read in isolation." The ALJD violates this canon by failing to consider PRO-2783 as a whole and by failing to acknowledge PRO-2783's incorporation of PRO-3439 – the very rule on confidential information that both Counsel for the General Counsel and the ALJ acknowledge is legal and which is referenced on each and every page of PRO-2783.

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5 In this regard it cannot be ignored that GCs Post-Hearing Brief asserts that Respondent's Rule is overbroad under the first prong of the Lutheran Heritage Village – Livonia analysis because employees could reasonably construe the language as prohibiting the use of personal camera-enabled devices for Section 7 activity. (*See* GC's Post-Hearing Brief at page 26, line 16). The suggested speculative "could" analysis espoused by GC is not the appropriate analytical standard. To the contrary, the proper standard is whether employees would view the rule as prohibiting camera-enabled devices for Section 7 activity.

Finally, the ALJD ignores the Rule of Construction that in evaluating a Rule, the interpreter "must not presume improper interference with employee rights." The record is devoid, however, of any evidence that PRO-2783 interfered with employee rights. In fact, the record evidence illustrates that photographs of union activity were taken and included in a newsletter of Charging Party (RX-2). Thus, the record affirmatively illustrates that photos of alleged protected activity were taken and there is no record evidence that discipline occurred. In short, not only is a "presumption" inappropriate under the teaching of Lafayette Hotel but the record bears out the fact that PRO-2783 was not utilized as a means to interfere with the Section 7 rights of employees.

In short, a reasonable reading of PRO-2783 conveys the clear message that it is intended to prohibit the inappropriate disclosure of confidential or proprietary information and/or to prevent the improper disclosure of employee privacy. PRO-2783 does not prohibit the use of camera-enabled devices in recording Section 7 activity and, in fact, on each and every page incorporates a policy which the ALJ found adequately exempted Section 7 activity from the Rule's reach. Thus a reasonable reading of PRO-2783, where phrases are not read in isolation and where a "presumption" of Section 7 inference is not applied, favors the conclusion that employees would not regard PRO-2783 as applying to Section 7 activity.

Counsel for the General Counsel did not allege that PRO-2783 was promulgated in response to union activity. Given the fact that the camera rule was initially adopted in 1976 and revised in November 2011, any contention that PRO-2783 was promulgated in response to calendar year 2012 activity would be without merit. Similarly, Counsel for the General Counsel presented no evidence that PRO-2783 was applied to restrict the exercise of Section 7 rights. In

short, application of Lutheran Heritage Village – Livonia requires the conclusion that PRO-2783 is not violative of the Act.

5. As a Matter of National Labor Policy, the Board Should Not Adopt the ALJD's Conclusions With Respect to PRO-2783

As noted in the preceding section, the ALJD's conclusions with respect to PRO-2783 are not consistent with existing Board precedent. For that reason alone, the NAM respectfully submits that the ALJ's Conclusions of Law, Remedy and Order with respect to PRO-2783 must be reversed.

In addition, there are compelling policy reasons for reversing the ALJ's conclusions with respect to PRO-2783. Certainly, the NAM respects the binding nature of Lafayette Hotel, supra and the analytical model it provides for determining whether a Company implemented Rule does or does not violate Section 8(a)(1) of the Act. The ALJD, however, illustrates an expansion of Lafayette Hotel beyond its analytical model. That unwarranted expansion is initially illustrated by the attempt in Counsel for the General Counsel's Post-Hearing Brief to construe the analytical model as whether an employee "could" (as opposed to Lafayette Hotel's utilization of the phrase "would") reasonably construe the language of a challenged rule to interfere with Section 7 activity. While the ALJD admittedly utilized the correct "would" verbiage, it is clear that the conclusion was not based on record evidence, but was based on a presumption that an employee may view the Rule as interfering with Section 7 activity. The use of such a presumptive analysis is not only contrary to the Lafayette Hotel analysis but fails to provide clear direction to either employees, unions or employers.

Nor can it be ignored that the cases cited within the ALJD or within GC's Post-Hearing Brief do not call for an opposite conclusion. The ALJD cites Flex Frac Logistics, LLC, 358 NLRB No. 127 (2012), which involved an overbroad "Confidential Information" provision that

would prevent the discussion of wages and other terms and conditions of employment; Hills and Dales General Hospital, 360 NLRB No. 70 (2014), which challenged an employer's Values and Standards of Behavior Policy which prevented "negative" comments, required employees to represent the employer in a "positive and professional" manner in every opportunity, and prevented employees from engaging in or listening to "negativity or gossip;" and Marriott International, Inc., 359 NLRB No. 8 (2012), which challenged an employer's access rule under the Tri-County Medical Center, 222 NLRB 1089 (1976) analysis.

The policies considered within those cases cited by the ALJ all address classic examples of Section 7 activity. To wit, discussing wages and terms and conditions of employment; commenting "negatively" about an employer with respect to wages, terms and conditions of employment; and meeting with employees during non-working time to discuss Section 7 related matters. None of these cases address the issue raised by PRO-2783 – the Employer's legitimate attempt to protect dissemination of proprietary information. Moreover, none of the cases address policies that, like PRO-2783, are properly limited to confidential information. *See* Community Hospitals of Central California v. NLRB, 335 F.3d 1079, 1089 (D.C. Cir. 2003) (determining a reasonable employee would not believe that a prohibition on disclosing confidential information about patients or employees would unlawfully restrict Section 7 rights).

Similarly Counsel for the General Counsel's citation of White Oak Manor, 353 NLRB No. 83 (2009) is not persuasive. In that case, Charging Party's taking of photos of various employees constituted protected activity where those photos were utilized to demonstrate the unequal enforcement of a dress code. Charging Party was discharged for taking such an employee photo, without the employee's permission and, in turn, showing that photo to other employees. The record evidence illustrated that other employees' pictures were taken on various

special days and that such photos were placed on bulletin boards. In affirming the ALJ's decision, the Board's focus was on whether the taking of photos constituted conduct so egregious as to remove it from the protection of the Act. In considering this issue, the Board noted that prior to the incident in question, that employer had no rule prohibiting the taking of photos of other employees without their permission. In short, White Oak Manor provides no direction on the proper scope of a photo limitation.

The NAM respectfully submits that the ALJ's conclusion that "Respondent's manufacturing process is no more in need of protection than an automobile assembly line" (ALJD at page 23, lines 32-34), represents an overbroad statement that adversely impacts many Employers throughout the United States. Certainly, as a manufacturer of aircraft (both military and commercial) The Boeing Company may have some confidentiality concerns that other manufacturers may not possess. However, virtually all employers have proprietary information that they may legitimately seek to protect from sharing with third parties and, as a result, adopt rules designed to prevent information dissemination. The need to allow for such protection underscores the need for a reasoned approach to the issue presented by PRO-2783 – an approach which balances Section 7 rights and the proper interests of an Employer.

The NAM recommends that the Board recommit to the Lafayette Hotel analytical model and reject the creation of a case-by-case quagmire that provides no direction to employees, unions and/or employers as to whether a particular rule is or is not consistent with Section 7 of the Act. As illustrated above, the proper application of Lafayette Hotel model compels the conclusion that PRO-2783 does not violate the Act. In addition, the Board should consider recognizing an Employer safe-haven that, in implementing rules, an Employer can either maintain a separate "catch-all" policy statement that Rules will not be applied in derogation of

Section 7 rights or that the Rule in question incorporate (as Respondent did on each page of PRO-2783) reference to policies that include the notation that a policy will not be applied inconsistent with the Section 7 rights of employees. Such an analysis would establish yet another reason for the dismissal of the current allegation with respect to PRO-2783, would clarify to employees that rules would not be applied in violation of rights under the Act and, simultaneously, would underscore an Employer's recognition of the Act's application.

Certainly, while this proposed framework is not perfect, it would allow for a much more compelling outcome than the one produced by the ALJD and provide greater direction to all. Issues would still arise as to whether activity is protected and/or concerted. However, a minimum, the approach outlined above, coupled with the faithful application of Lafayette Hotel's analytical model, provides additional direction and certainty to employees, labor organizations and employers.

C. SECURITY OFFICER LOPEZ'S ALLEGED COMMENTS DID NOT VIOLATE SECTION 8(A)(1)

In Paragraph 9 of the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, Counsel for the General Counsel alleges that Respondent unlawfully created an impression of surveillance among its employees through two brief conversations Security Officer Lopez had with bargaining unit employees Shannon Moriarty and Sandra Hastings during the Everett march on December 12, 2012. (TR-30, lines 13-17). Notably, Moriarty initiated the conversation with Lopez by asking him why he was taking photos of the march. (TR-523, lines 12-20). While there is inconsistent testimony regarding Lopez's proffered explanation as to why he had been directed to take the photos, the ALJ credited Moriarty's testimony that Lopez stated management directed him to document all union activities. (ALJD at page 18, lines 14-18). After this brief exchange, Hastings also approached Lopez and also asked why he was taking

photos. (TR-288, line 6). Lopez responded by stating that it is Respondent's practice to take photos of non-Boeing activity. (TR-288, lines 7-9). No evidence was presented that any of the other approximately 200 employees who participated in the march overheard either conversation. Nor was any evidence presented demonstrating that Moriarty or Hastings disseminated Lopez's statements to other march participants or bargaining unit employees.

To establish that an employer violated Section 8(a)(1) by creating an impression of surveillance, "the General Counsel bears the burden of proving that the employees would reasonably assume from the statement in question that their union activities had been placed under surveillance." Heartshare Human Services of New York, Inc., 339 NLRB 842, 844 (2003). As discussed below, the General Counsel failed to present sufficient evidence that Respondent's employees would assume from Lopez's brief alleged conversations with two employees that Respondent had placed their union activities under surveillance.

1. The Alleged Statement Did Not Restrain, Coerce, or Interfere with the Section 7 Rights of the Mass March Participants

Counsel for the General Counsel contends that by commenting that he had documented 250 employees participating in Union activities – activities that were held out in the open, on Respondent's property – Lopez created the unlawful impression of surveillance. (GC's Post-Hearing Brief at page 24, line 21 to page 25, line 1). As made clear by the undisputed record, Lopez did not attempt to hide his presence or his actions at the march. (TR-290, lines 12-15 and TR-227, lines 6-19). Nor were his comments related to "secret" Union activities that were held off Respondent's property or outside of working hours – they were instead limited to the march that was taking place. (TR-523, lines 12-16). As such, neither Moriarty nor Hastings – let alone the hundreds of other bargaining unit members and march participants who were not even aware

of the comments – could reasonably assume that their Union activities had been placed under surveillance.

The Board has long held that when an employer makes comments concerning protected activities held out in the open, it is not reasonable for the employee to assume that the employer acquired knowledge of the protected activities through surveillance. Gemco, 279 NLRB 1138 (1986); Clark Equipment Co., 278 NLRB 498, 503 (1986) (determining comment regarding open union activity that had been observed by the employer could not reasonably convey the impression that employer had placed union activity under surveillance). Here, the comment on which the General Counsel relies – that Lopez documented 250 individuals participating in Union activities – concerned the December 12 mass march that took place out in the open, on Respondent's property. It is implausible to suggest that either Moriarty or Hastings reasonably believed that Lopez learned that this large group of employees was participating in the march through some sort of surreptitious surveillance.

The ALJ determined that Respondent created an unlawful impression of surveillance by answering two employees' questions during a mass march. The Board should not adopt that finding as it would prohibit a security guard from merely answering employee questions simply because the employee may be engaged in protected concerted activity. If the Board adopts the ALJD, it would lead to the nonsensical result that the only way a security guard in Lopez's shoes could comply with the Act would be to remain silent in response to a question posed by a bargaining unit employee who is participating in protected concerted activity. Not only was the Act not intended to lead to such absurd results, but the comments at issue here do not even come close to the interfering, restraining, and coercive comments the Act was intended to prohibit. *See*, Ozburn-Hessey Logistics, LLC, 359 NLRB No. 109, at *19 (2013) ("Where an employer

tells employees that it knows about their union activities but fails to cite its information source, Section 8(a)(1) is violated because employees are left to speculate about how such information was obtained and assume that surveillance occurred."). Lopez simply truthfully answered questions posed by two employees who were participating in a mass march that was taking place on Respondent's property and commented on the number of participating employees, which was easily observable by anyone present at the factory that day. Given this context, the comments could not reasonably be interpreted as interference, restraint, or coercion.

2. The General Counsel Presented No Evidence that the Alleged Comments Were Disseminated, Widely or Otherwise

In addition, Lopez's innocuous comments could not reasonably be interpreted by Respondent's other employees as creating an unlawful impression of surveillance. While Counsel for the General Counsel contends Lopez's comments and the circumstances surrounding the comments "objectively conveyed to employees the impression that their protected concerted Union activities were under surveillance," (GC's Post-Hearing Brief at page 25, lines 12-13) neither the Counsel for the General Counsel's Post-Hearing Brief or the ALJD conclude that the comments were disseminated to other unit employees. The General Counsel presented no evidence pertaining to the number of employees who likely overheard the comments, how many employees were present when the comments were made, unit employees with whom Moriarty and Hastings discussed Lopez's comments, comments Lopez made to employees other than Moriarty and Hastings, or any other evidence that the comments Lopez made to two employees were disseminated to unit employees as a whole. *See* Cardinal Home Products, Inc., 338 NLRB 1004, 1011 (2003) (concluding there was insufficient evidence of dissemination where witness failed to testify as to how many employees likely overheard the incident at issue or were present when the incident occurred. The witness further testified he did not talk with any other

employees about the incident). Nor did Counsel for the General Counsel present any evidence as to how other employees – besides the two with whom Lopez spoke – were affected by the comments, further evidencing the inappropriateness of a Board remedy. *See* T-West Sales & Service, Inc., 346 NLRB 118, 121-22 (2005) (determining that bargaining order was not appropriate because only two employees out of a 31-employee unit were affected by unfair labor practice and there was no evidence of dissemination).

3. The Comments Are *De Minimis* and Not Worth of a Board Remedy

Finally, Lopez's comments do not warrant a Board remedy because, given the context and the number employees affected, they are *de minimis*. First, the comments were made during negotiations for a successor contract – a contract that was eventually agreed to by the Union and Respondent on October 2012. Indeed, the Union had been the collective bargaining representative for the employees in question here for over forty years. Lopez's comments – which were heard by only two bargaining unit employees – had absolutely no effect on the terms of the collective bargaining agreement reached between the Union and Respondent. Nor did the Counsel for the General Counsel present contend that the comments had such an effect.

Moreover, the number of bargaining unit employees who participated in the marches – nine-hundred (900) total for all four marches – compared to the number of employees who heard the comments – two – further evidences the *de minimis* nature of the comments. *See* Caron International, Inc., 246 NLRB 1120 (1979) (comments heard by a single employee out of an 850-employee unit employed at multiple locations "too minimal" to warrant a Board remedy).

V. CONCLUSION

The instant case raises fundamental issues that go to the core of an Employer's ability to regulate its workplace and protect confidential and proprietary confidential and proprietary information. Current Board precedent, properly applied, requires reversal of the ALJD in the underlying case. Significantly, reversal of the ALJD will allow the Board to underscore its commitment to the analytical model set forth in Lafayette Hotel.

Respectfully Submitted,

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