



Newsletters

NLRB Evaluates Personnel Handbook for Section 7 Compliance and finds Moonlighting Policy Unlawful

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Nicholson Terminal & Dock Company
ALJ Decision (07-CA-187907)

An Administrative Law Judge (ALJ) of the National Labor Relations Board (NLRB) recently evaluated Nicholson Terminal & Dock Company's (Nicholson) Personnel Handbook and found certain policies—including a policy prohibiting moonlighting—were unlawful. The Nicholson case is significant for two reasons. First, it is the most recent ALJ decision evaluating facially neutral employer policies since *The Boeing Company*, 365 NLRB No. 154 (2017), which changed the analytical framework for evaluating whether facially neutral employer policies unlawfully inhibit the exercise of Section 7 rights by employees. Second, the decision addresses the lawfulness of anti-moonlighting policies, which are frequently found in employee handbooks in both unionized and non-unionized settings.

The employer in this case operates a commercial dock which processes cargo, and loads and unloads the cargo onto and off ships in a Midwest port. Certain dock employees are represented by the International Association of Machinists Local Lodge 698 (IAM), but the employer also employs non-unionized workers.

Interestingly, the IAM is not a party to the proceedings before the Board. During Nicholson's negotiations with IAM, there was no apparent discussion or objection to the policies in the Personnel Handbook and no grievance was filed by the IAM. The record also shows that no employees had been disciplined pursuant to the policies at issue in the Personnel Handbook.

Still, the Board evaluated the policies in Nicholson's Personnel Handbook, including those concerning strikes and work stoppages; the use of computers and electronic equipment, including work email; the use of personal cell phones at work to take pictures and make recordings; and importantly for purposes of this article, outside work or "moonlighting." The Personnel Handbook applies to both Nicholson's unionized and non-unionized workers.

Following the *Boeing* decision, the Board has generally found any personnel policy which explicitly restricts activities protected by Section 7 to be unlawful. The significance of *Boeing*, however, is the analysis afforded to facially neutral policies which do not explicitly restrict Section 7 activities. In those cases, *Boeing* requires the Board to balance the employer's justification for the contested rule against the potential impact on the Section 7 rights of employees.

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Applying that analysis, the ALJ in the present case concluded that the policy restrictions on strike activity found in Nicholson's Personnel Handbook were too vague and unnecessarily intruded upon Section 7 rights. The ALJ also concluded that the restrictions on the use of company-provided email were unlawful based upon the NLRB's prior decision in *Purple Communications, Inc.*, 361 NLRB 1050 (2014). The policy prohibiting the use of audio and visual recordings at work was also found to be lawful, but the ALJ also stated that, but for the decision in the *Boeing* case, she likely would have ruled the other way.

Of most significance, however, is the ALJ's discussion of the employer's no-moonlighting rule. The policy states:

Employees are expected to devote their primary work efforts to the Company's business. Therefore, it is mandatory that they do not have another job that:

- > Could be inconsistent with the Company's interests.
- > Could have a detrimental impact on Company's image with customers or the public.
- > Could require devoting such time and effort that the employee's work would be adversely affected.

Before obtaining any other employment, you must first get approval from the Company Treasurer. Any change in this additional job must also be reported to the Company Treasurer. (Jt. Exh. 1 at 17)

This facially neutral policy does not explicitly restrict Section 7 activities, so the ALJ balanced the employer's justification for the contested rule against the potential impact on the Section 7 rights of employees. Nicholson attempted to justify the policy by arguing that it expects employees to be alert and attentive at work, especially given the dangerous nature of the dock work. Nicholson feared moonlighting would increase the risk of fatigue—an argument that obviously implicated an understandable safety concern. In addition, Nicholson indicated it did not want employees working for competitors. The ALJ concluded that: (1) these interests could have been better protected by a more *tailored* rule which did not intrude upon Section 7 rights; (2) Nicholson's moonlighting policy prevented employees from partaking in a variety of organizing activities, including working for a union and other protected activities, such as working as a "salt"; and (3) the mere fact that employees must seek permission to engage in protected conduct, according to the ALJ, would have a "significant potential impact on substantial, core Section 7 activities."

We anticipate the matter will be appealed to the NLRB. Anti-moonlighting clauses are common in many industries. They are designed specifically to limit fatigue, promote safety, protect proprietary and confidential information, and prohibit employees from working for a competitor. No employee had been disciplined for violating Nicholson's moonlight policy, and it does not appear that any employee had a moonlighting request rejected. Instead, this case rests on a rather speculative notion of the ALJ that such behaviors would have a chilling effect on Section 7 rights. It is important to note, however, that the ALJ of the Board made a decision on what a "reasonable employee" might construe as reasonably chilling without cited evidence in the record of how employees perceived the policies.

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