IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 24, 2014
Lyle W. Cayce
Clerk

No. 12-60752

FLEX FRAC LOGISTICS, L.L.C.; SILVER EAGLE LOGISTICS, L.L.C.,

Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

Petition for Review and Cross Petition for Enforcement
of an Order of the National Labor Relations Board

Before STEWART, Chief Judge, and HIGGINBOTHAM and JONES, Circuit Judges.

CARL E. STEWART, Chief Judge:

Flex Frac Logistics, L.L.C. and Silver Eagle Logistics, L.L.C. (collectively, "Flex Frac")[1] petition for review of an order by the National Labor Relations Board ("NLRB") holding that Flex Frac's employee confidentiality policy is an unfair labor practice in violation of Section 8(a)(1) of the National Labor Relations Act ("NLRA"). The NLRB cross-petitions for enforcement of the order. We DENY Flex Frac's petition for review and ENFORCE the NLRB's order.

[1] For purposes of this appeal, we treat Flex Frac Logistics, L.L.C. and Silver Eagle Logistics, L.L.C. as joint employers.

I. FACTUAL AND PROCEDURAL HISTORY

A. Facts

Flex Frac is a non-union trucking company based in Fort Worth, Texas. Flex Frac relies on its employees as well as independent contractors to deliver

The administrative law judge ("ALJ") found that although there was no reference to wages or other specific terms and conditions of employment in the confidentiality clause, the clause nonetheless violated

III. DISCUSSION

As an initial matter, we address a belated constitutional challenge raised by Flex Frac regarding the NLRB's aut

2013). We agree. Accordingly, we proceed to address Flex Frac's remaining arguments.

Flex Frac argues that the NLRB's order should be set aside because it was unreasonable, not supported by substantial evidence, and inconsistent with precedent. Under Section 8(a)(1) of the NLRA, it is "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158. These rights include self-organization; forming, joining, and assisting labor organizations; collective bargaining; and engaging "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

A "workplace rule that forb[ids] the discussion of confidential wage information between employees . . . patently violate[s] section 8(a)(1)." *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990). When determining whether a workplace rule violates Section 8(a)(1), we must first decide "whether the rule *explicitly* restricts activities protected by Section 7." *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. e.8 546 ing b-0.6(5)6-0.6()-0.66Tc 0 Tw

therefore limit our discussion to whether employees would reasonably construe Flex Frac's confidentiality provision to prohibit Section 7 activity.

Flex Frac's contention that the NLRB's interpretation of the confidentiality clause was unreasonable is without merit. As the NLRB noted, the list of confidential information encompasses "financial information, including costs[, which]

omitted)). Moreover, "the Board need not rely on evidence of employee interpretation consistent with its own to determine that a company rule violates section 8 of the Act." *Id*. Nor is the employer's enforcement of the rule determinative. *See Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998) ("[T]he appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect . . . , the Board may conclude that their maintenance

specifically identifying "personnel information" as a prohibited category, Flex Frac has implicitly included wage information in its list, especially in light of its prohibition against disclosing costs.

Moreover, the NLRB's decision here does not conflict with its decision in *Mediaone*. In *Mediaone*, a divided panel of the NLRB agreed that an employer's prohibition against disclosure of "proprietary information . . . includ[ing] . . . customer and employee information, including organizational charts and databases [and] financial information" would not chill employees in the exercise of their Section 7 rights. 340 N.L.R.B. at 278–79. The NLRB noted that the prohibitions were listed as examples of "intellectual property," and thus employees who read the rule as a whole would not believe it extended to terms and conditions of employment. *Id*. at 279.

Mediaone is distinguishable from the confidentiality provision at issue here. In *Mediaone*, the information was listed as a sub-set of "intellectual property." Therefore, employees would not reasonably understand their wages to be a form of intellectual property. Flex Frac's confidentiality provision contains no limitation on the type of "personnel information" that is prohibited. Instead, it is a part of the larger category of "confidential information."

Flex Frac's remaining attempts to justify its confidentiality provision are equally unavailing. Flex Frac contends that its rule prohibits only disclosure of confidential personnel information, not all personnel information; however, it fails to point to any language making this distinction. Moreover, Flex Frac defines confidential information as including personnel information. Therefore, contrary to Flex Frac's contentions otherwise, we hold that the NLRB's order does not contravene its precedent.[4]

[4] By its terms, the NLRB's enforcement order acknowledges that the employer is only prohibited from "[p]romulgating and maintaining an overly broad and ambiguous confidentiality rule that . . . may reasonably be read to prohibit employees from discussing

IV. CONCLUSION

Accordingly, based on the foregoing reasons, we DENY Flex Frac's petition for review and ENFORCE the NLRB's order.

wages or other terms and conditions of employment." The order does not impair the majority of the company's confidentiality policy. Further, the order does not prevent Flex Frac from

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BILL OF COSTS

NOTE: The Bill of Costs is due in this office *within 14 days from the date of the opinion, See* FED. R. APP. P. & 5TH CIR. R. 39. Untimely bills of costs must be accompanied by a separate motion to file out of time, which the court may deny.

_____ v. _____ No. _____

The Clerk is requested to tax the following costs against: _____

COSTS TAXABLE UNDER Fed. R. App. P. & 5th Cir. R. 39	REQUESTED				ALLOWED (If different from amount requested)			
	No. of Copies	Pages Per Copy	Cost per Page*	Total Cost	No. of Documents	Pages per Document	Cost per Page*	Total Cost
Docket Fee ($450.00)								
Appendix or Record Excerpts								
Appellant's Brief								
Appellee's Brief								
Appellant's Reply Brief								
Other:								
				Total $ _____				Costs are taxed in the amount of $ _____

Costs are hereby taxed in the amount of $ _____ this _____ day of _____, _____.

, CLERK

State of
County of _____

By _____
Deputy Clerk

I _____, do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This _____ day of _____, _____.

_____
(Signature)

***SEE REVERSE SIDE FOR RULES GOVERNING TAXATION OF COSTS**

Attorney for _____

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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NEW ORLEANS, LA 70130

March 24, 2014

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 12-60752 Flex Frac Logistics, L.L.C., et al v. NLRB
USDC No. 16-CA-027978

Enclosed is a copy of the court's decision. The court has entered judgment under FED R. APP. P.

referenced. For multi-record cases, the parties will have to identify which record is cited by using the entire format (for example, ROA.YY-NNNNN.###).

Parties may not use the new citation formats for USCA5 paginated records. For those records, parties must cite to the record using the USCA5 volume and or page number.

In cases with both pagination formats, parties must use the citation format corresponding to the type of record cited.

Explanation: In 2013, the court adopted the Electronic Record on Appeal (EROA) as the official record on appeal for all cases in which the district court created the record on appeal on or after 4 August 2013. Records on appeal created on or after that date are paginated using the format YY-NNNNN.###. The records on appeal in some cases contain both new and old pagination formats, requiring us to adopt the procedures above until fully transitioned to the EROA.

The recent amendment to 5TH CIR. R. 28.2.2 was adopted to permit a court developed computer program to automatically insert hyperlinks into briefs and other documents citing new EROA records using the new pagination format. This program provides judges a ready link to pages in the EROA cited by parties. The court intended the new citation format for use **only** with records using the new EROA pagination format, but the Clerk's Office failed to explain this limitation in earlier announcements.

The judgment entered provides that petitioners pay to respondent the costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Joseph M. Armato, Deputy Clerk

Enclosure(s)

Ms. Beth S. Brinkmann
Mr. Jared David Cantor
Ms. Linda Dreeben