

**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.

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I. FACTUAL AND PROCEDURAL HISTORY

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 frac sand to oil and gas well sites. The rates Flex Frac charges its customers are confidential.

Each Flex Frac employee is required to sign a document which includes a confidentiality clause. The clause reads as follows:

Confidential Information

Employees deal with and have access to information that must stay within the Organization. Confidential Information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; Silver Eagle Logistics LLC organization management and marketing processes, plans and ideas, processes and plans, our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any Silver Eagle Logistics LLC records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.

In 2010, Flex Frac fired Kathy Lopez and she filed a charge with the NLRB. The Acting General Counsel for the Board subsequently issued a complaint, alleging, *inter alia*, that Flex Frac promulgated and maintained a rule prohibiting employees from discussing employee wages.²

² The complaint also alleged that Flex Frac unlawfully interfered with or restrained Lopez's Section 7 rights when it terminated her; however, the NLRB severed and remanded that portion of the complaint. Thus, Lopez's termination is not currently before us on appeal.

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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

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III. DISCUSSION

As an initial matter, we address a belated constitutional challenge raised by Flex Frac regarding the NLRB's authority to render the decision currently before us. In its reply brief, Flex Frac argued that the NLRB's decision was invalid because the President's appointment of two members of the panel was unconstitutional. According to Flex Frac, the President lacked the authority to make putative recess appointments when the U.S. Senate was not in recess and the vacancies did not occur during an intersession recess. Because two members of the three-member panel were not validly appointed, Flex Frac contended that the NLRB did not have the quorum necessary to issue its decision.

We decline to address the merits of Flex Frac's constitutional argument and instead hold that Flex Frac waived its constitutional challenge by failing to raise it in its initial brief. *See In re Rodriguez*, 695 F.3d 360, 365 n.4 (5th Cir. 2012) ("An appellant abandons all issues not raised and argued in its *initial* brief on appeal." (internal quotation marks and citation omitted)). Ordinarily, arguments raised for the first time in a reply brief are waived. *United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005). Moreover, appellate courts shall not consider objections that have not been raised before the NLRB "unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Flex Frac argues that we should nevertheless consider its belated constitutional challenge because it implicates our jurisdiction. However, another panel of this Court faced a similar issue and concluded that the constitutionality of the President's authority to make recess appointments was not a jurisdictional issue it must consider, especially considering that the challenge was not raised during the parties' initial briefing. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 351 (5th Cir.

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 5464 ing b-0.6(5)6-0.6()-0.66Tc 0 Tv

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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]

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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

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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

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. & 5 th 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