

Nos. 11-1052, 11-1126, 11-1311, & 11-1335

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FRESH & EASY NEIGHBORHOOD MARKET, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties and Amici: Fresh & Easy Neighborhood Market, Inc.

(“Company”) is the petitioner/cross-respondent before this Court; the Company was the respondent before the Board. The Board is the respondent/cross-petitioner before the Court; its General Counsel was a party before the Board. The United Food and Commercial Workers Union (“Union”) is the Intervenor before this Court; the Union was the charging party before the Board. There are no *amici* in this case.

B. Rulings Under Review: This case is before the Court on petitions for review by Fresh & Easy Neighborhood Market, Inc. (“the Company”) and cross-applications to enforce, the Order of the National Labor Relations Board (“the Board”) in *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 145, 2011 WL 1615652 (April 28, 2011), revising part of its remedial order issued in its decision and order in *Fresh & Easy Neighborhood Market, Inc.*, 2011 WL ., 356 NLRB No. 85304201 (January 31, 2011).

C. Related Cases: This case has not previously been before this or any other court. Board counsel are not aware of any related case.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th St., NW
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Dated at Washington, DC
This 10th day of November 2011

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STATUTES

Statutes: (pages)

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* Section 8(a)(1) 29 U.S.C. § 158(a) (1) 4, 5, 9, 12, 13, 15, 17, 18, 22, 23, 24

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GLOSSARY

A.	Joint Appendix
Act	National Labor Relations Act
Board	National Labor Relations Board
Br.	The Company's Opening Brief
Company	Fresh & Easy Neighborhood Market, Inc.
Everhart	Catherine Everhart
Intervenor	United Food and Commercial Workers Union
Judge	Administrative Law Judge
Petitioner	Fresh & Easy Neighborhood Market, Inc.
Respondent	National Labor Relations Board
Shaw	Barbara Shaw
Sumner	Michelle Sumner
Union	Union Food and Commercial Workers Union
Yousefian	Employee Relations Director, Nahal Yousefian-Abyaneh

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ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on petitions for review by Fresh & Easy
Neighborhood Market, Inc. (“the Company”) and cross-applications to enforce, the

Order of the National Labor Relations Board (“the Board”) in *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 145 (April 28, 2011), revising part of its remedial order issued in *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 85 (January 31, 2011) (A. 19-21, 1-18).¹ The Order is final with respect to all parties. The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (“the Act”),² which authorizes the Board to prevent unfair labor practices affecting commerce.

On February 18, 2011, the Company filed a petition for review of 356 NLRB No. 85. Thereafter, the Court granted the motion of the United Food and Commercial Workers International Union (“the Union”), the charging party below, to intervene. The Union filed a motion with the Board for reconsideration of its notice posting remedy and the Court placed the case in abeyance pending the Board’s resolution of the Union’s motion. On April 28, 2011, the Board granted the Union’s motion for reconsideration, by order reported at 356 NLRB No. 145, revising the posting remedy set forth in its January 31 Order. Thereafter, the Board filed its cross-application for enforcement of 356 NLRB No. 85.

¹ “A.” references are to the Appendix filed by the Company. References preceding a semicolon are to the Board’s findings; references following a semicolon are to the record evidence supporting those findings.

² 29 U.S.C. §§ 151, 160(a).

On September 1, 2011, the Court *sua sponte* ordered the parties to address in their briefs whether the Court has jurisdiction over the Company's challenge to the remedy in 356 NLRB No. 145 in light of *Teledesic LLC v. FCC*, 275 F.3d 75, 82-83 (D.C. Cir. 2001). *See* Docket Item No. 1327452. On September 13, 2011, the Company petitioned for review of the Board's decision in 356 NLRB No. 145, and thereafter, the Board cross-applied for enforcement of the same. That petition for review and cross-application for enforcement have been consolidated with this appeal. *See* Docket Item No. 1330862. The Board agrees with the Company's position (Br. 2 n. 2) that, in light of the Company's petition for review and the Board's cross-application for enforcement of the Board's revised remedial order, the Court's September 1 order is moot. Accordingly, the Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act.³ All petitions for review and cross-applications for enforcement were timely; the Act places no time limit on the institution of proceedings to enforce or review Board orders.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the attached addendum.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by maintaining a facially unlawful

³ 29 U.S.C. § 160(e) and (f).

no-distribution rule in its employee handbook and on its intranet site that prohibited employees from distributing materials in non-work areas.

2. Whether substantial evidence supports the Board's finding that Store Manager Barbara Shaw unlawfully interrogated two employees.

3. Whether substantial evidence supports the Board's finding that Store Manager Barbara Shaw, through her interrogation of two employees, created the impression that those employees' union activities were under surveillance.

4. Whether the Board acted within its broad remedial discretion in ordering the Company to post a remedial notice at each of its Las Vegas area stores (Appendix A) related to the local unfair labor practices and the unlawfully maintained no-distribution policy and to post a remedial notice addressing the unlawfully maintained no-distribution policy on a corporatewide basis in all its other stores (Appendix B).

STATEMENT OF THE CASE

After investigating unfair labor practices charges filed by the Union and an individual employee, the Board's General Counsel issued a consolidated complaint alleging that the Company violated Section 8(a)(1) of the Act⁴ by maintaining an overly broad no-distribution rule, interrogating two employees and creating the impression that employees' union activities were under surveillance, soliciting and

⁴ 29 U.S.C. § 158(a)(1).

promising to remedy employee grievances, and unlawfully discharging two employees for their protected union activities and for participating in Board proceedings. (A. 2-4, 9-10; 384, 386, 412, 414, 437-38.)

Following a two-day hearing, the administrative law judge issued a decision finding that the Company violated Section 8(a)(1) by maintaining an unlawful no-distribution rule in its employee handbook and on its intranet site that prohibited employees from distributing “literature during working time or on Company premises for any reason,” interrogating two employees, and creating the impression that those employees’ union activities were under surveillance. The judge dismissed all other allegations. (A. 9-16; 437-38.) Both the Union and the Company filed exceptions to the judge’s decision.

On January 31, 2011, the Board affirmed the judge’s findings that the Company had violated Section 8(a)(1) of the Act.⁵ The Board ordered that the Company cease and desist from the unlawful conduct and take other affirmative remedial action. (A. 1-2.) The Board modified the judge’s recommended order to require corporatewide posting regarding the unlawful rule and substituted new notices accordingly. (A. 1.) On April 28, 2011, in response to the Union’s motion for reconsideration, the Board clarified and revised its original remedial order “to better express its remedial intent.” (A. 19.) Specifically, the Board agreed with

⁵ 29 U.S.C. § 158(a)(1).

the Union that its notice, set forth in (“Appendix B”) to its decision, designed to be a corporatewide remedial notice, was appropriately posted on a corporatewide level. (A. 19-20.)

I. STATEMENT OF THE FACTS

A. Background; the Company Maintains a No-Distribution Rule in Its Employee Handbook and on Its Intranet Site

The Company operates a chain of supermarkets located in Nevada, Arizona, and California. (A. 3; 488.) The Company maintained an employee no-distribution policy at all of its stores effective from its opening in 2006 until September 2, 2009, which it distributed to employees at the time of their hire in “short form” in the employee handbook and in a “long version” on the Company’s intranet site. (A. 4 & n.4; 77-82, 101-02, 301) The “short form” version of the policy stated: “We like to avoid workplace disruptions and conflicts among team members. So we prohibit solicitation of teams members during working time for any purpose. We also prohibit the distribution [sic] of literature during working time *or on Company property for any purpose.* ... And keep in mind that violations of this policy could lead to discipline – they could even cost you your job.” (emphasis added). (A. 4; 437). The “long version” of the no-distribution policy on the intranet mirrored the short version’s distribution policy, stating:

But community activity should take place outside of your time working at [the Company]—that helps us avoid disruptions in the workplace and conflict between our team members. [The Company] prohibit[sic] solicitation of employees by employees during working time for any purpose. [The Company] also prohibits the distribution of literature during working time *or on Company property for any purpose*. [...] If you break the rules, you may be subject to discipline, up to and including termination.

(A. 4; 438.) (emphasis added.) There is no evidence that the Company explained to its employees their right to distribute literature during nonworking time in nonworking areas until after the complaint issued. (A. 9.)

In response to the General Counsel’s complaint, the Company revised its policy on September 3, 2009, to read: “We also prohibit the distribution of literature during working time or at any time in a work area for any purpose.”

(A. 4; 82-83, 439, 488.) The Company implemented this new policy by conducting “team huddles” at each of its stores, posting the revised short form policy in each store, changing the policy’s language on its intranet site, and modifying the employee handbook. (A. 4, 9; 82-84, 298, 347.)

B. The Union Begins an Organizing Drive in the Las Vegas Stores; Store Manager Barbara Shaw Approaches Employee Michelle Sumner at Sumner’s Work Station While Employee Everhart is Present and Requests that They Write a Letter About the Union’s Home Visits

The Union began an organizing drive among the Company’s Las Vegas stores early 2009. Employee Relations Director Nahal Yousefian-Abyaneh (“Yousefian”) supervises the Company’s nine employee relations managers,

including the manager who has responsibility for all the Las Vegas stores. (A. 3; 75-77, 89-90.) Yousefian first discovered that the Union was attempting to organize its Las Vegas area stores around April 2009, when she learned from a team manager that the Union was contacting employees at their homes and some employees were “upset or concerned” about these home visits. (A. 3; 86, 350-51.) At least four of the Company’s employees who worked at various stores in the Las Vegas area, complained to managers about the home visits. The respective managers recommended that the employees write letters to the Union if they wished to complain about the home visits. At her manager’s request, a team lead from the Desert Inn Road store gave her manager a letter to mail on behalf of herself and her husband. And an employee at another Las Vegas store took her manager’s suggestion and sent a letter to both the Union and the Company’s legal department. The Company and individual employees mailed employees’ letters to the Union. (A. 4; 134-46, 164-85, 440-48.)

Barbara Shaw was the Store Manager at the Company’s Store #1247, located in Las Vegas, from its opening until approximately July 2009, when she transferred to a different store. (A. 3; 87, 122-23, 127, 149, 236.) As the store manager, Shaw determined all disciplinary action taken against individual employees, with the Company’s human resource managers acting in only an advisory capacity. (A. 10; 88-89, 104-05.) Sometime after the Union commenced

its organizing drive, around March or April 2009, Shaw approached employees Michelle Sumner and Catherine Everhart at Sumner's work station near the back of the store, where Sumner passed out food samples to customers. Shaw asked the employees to furnish statements about their contacts with the Union. (A. 10; 123-24, 151-52.) According to Everhart, Shaw asked both employees to "write statements because one of the employees was harassed by the Union." (A. 4, 10; 152.) Sumner recalled that Shaw stated: "[E]veryone is writing a statement about the union harassment, and you need to write yours, because everyone has already written theirs." (A. 4, 10; 124, 151-54).

Sumner did not respond to Shaw's request, even though she was generally comfortable speaking up and addressing problems with her supervisor. (A. 4, 10; 124, 127-31.) Everhart told Shaw that she was not writing a statement. (A. 10; 152-53.) Both employees were aware that the Union was making home visits during this time and that some employees had been upset by these visits. (A. 4, 10; 252). At the time of Shaw's questioning, neither employee had expressed their views openly about the Union, nor previously discussed the Union with Shaw. (A. 10-11; 124, 126, 131, 153.)

THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Members Becker and Hayes) found, in agreement with the administrative law judge, that the

Company violated Section 8(a)(1) of the Act⁶ by promulgating and maintaining an unlawful no-distribution rule in its employee handbook and on its intranet site, interrogating employees Sumner and Everhart regarding their union activity, and creating the impression that Sumner and Everhart's union activities were under surveillance. (A. 1.) The Board's Order requires the Company to cease and desist from conduct it found unlawful and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.⁷ (A. 20.) The Board's remedial order, as clarified upon the Union's motion for reconsideration, directs the Company to post a remedial notice relating to the interrogation, impression of surveillance, and unlawful no-distribution rule (Appendix A) at its Las Vegas area stores, and to post a separate remedial notice at all its other stores relating to the unlawful no-distribution rule (Appendix B). The Board further ordered that if the Company goes out of business or closes certain stores, the Company mail the corporatewide notice to current and former employees of closed stores outside of Las Vegas and mail the area-wide notice to former employees of closed stores in the Las Vegas area. (A. 19-20.) Finally, the Board Order requires the Company to electronically post and maintain an appropriate remedial notice through e-mail, posting on an intranet or internet

⁶ 29 U.S.C. § 158(a)(1).

⁷ 29 U.S.C. § 157.

site and/or other electronic means, if the Company customarily communicates with its employees through electronic means.⁸ (A. 1, 19.)

STANDARD OF REVIEW

The Court “applies the familiar substantial evidence test to the Board’s findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the [C]ourt might have reached a different conclusion *de novo*.”⁹ Under that test, the Board’s findings are “conclusive” if they are supported by substantial evidence on the record as a whole.¹⁰ The Court also will “abide [the Board’s] interpretation of the Act if it is reasonable and consistent with controlling precedent.”¹¹ Indeed, this Court has noted that “the very existence of competing

⁸ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9, at *6-7 (October 22, 2010), Member Hayes would not require electronic distribution of either notice. He would also not require a mailing of Appendix B to the former employees of closed stores outside of Las Vegas.

⁹ *United States Testing Co.. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted).

¹⁰ See Section 10(e) of the Act, 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

¹¹ *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002) (citing *Local 702, Int’l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000)); accord *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996); *Local 204, U.F.C.W. v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007).

views reinforces the need for reliance on the Board’s experience.”¹² Therefore, the Court’s review of the Board’s findings “is quite narrow.”¹³

Judicial review of the Board’s credibility determinations is particularly circumscribed. The reviewing court must sustain such determinations unless they are “hopelessly incredible or self-contradictory.”¹⁴

SUMMARY OF ARGUMENT

The Board reasonably found that the Company violated Section 8(a)(1) of the Act by maintaining in its employee handbook and on its intranet site a no-distribution rule that contained unlawful restrictions on employee rights protected by Section 7 of the Act. For almost 3 years, the Company maintained a no-distribution rule, that on its face, categorically prohibited employees from distributing literature on Company premises. The Board reasonably found that this rule entrenched on employees’ right to distribute literature during nonworking time in nonworking areas. The Company argues that the rule was lawful because it

¹² *Local 204*, 506 F.3d at 1084 (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 647 (D.C. Cir. 2001), *rev’d on other grounds*, 535 U.S. 137 (2002)).

¹³ *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

¹⁴ *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988); *see also Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1246 (D.C. Cir. 1994) (the Court ““must accept the [administrative law judge’s] credibility determinations, as adopted by the Board, unless they are patently insupportable””) (quoting *NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1297 (D.C. Cir. 1988)).

never enforced the rule and there is no evidence that employees' Section 7 rights were actually chilled, and that, in any event, it effectively cured any violation by revising its policy. Each of the Company's arguments fails. First, Board law and the law of this Court clearly establish that the mere maintenance of a rule that is facially overbroad is likely to chill Section 7 activity and therefore constitutes an unfair labor practice even absent evidence of enforcement. No evidence of an actual chill on employees' rights is required where a rule explicitly restricts Section 7 rights. Second, although the Company revised its rule, its revision was not timely because not only did the revision come nearly 4 months after the Union filed the charge and 1 month after the General Counsel issued complaint, but also the long-standing rule remained in effect during an organizing campaign, and therefore the revision did not "cure" the violation.

Substantial evidence supports the Board's finding that the Company, through Store Manager Shaw, violated Section 8(a)(1) by interrogating employees Sumner and Everhart and creating the impression that those employees' union activities were under surveillance. Applying well-established precedent, the Board reasonably determined that, considering the totality of the circumstances, Shaw unlawfully interrogated Everhart and Sumner by asking that they furnish statements about their contacts with the Union. The Board further reasonably

concluded that Shaw's statement unlawfully created the impression that their union activities were under surveillance.

The Company's primary response to those findings consists of the repeated assertion that Shaw never made the statement. This argument flies in the face of the judge's express crediting of Sumner's and Everhart's testimony. Moreover, the judge appropriately drew a negative inference from Shaw's failure to testify in light of her continued employment with the Company and the absence of any explanation for her absence.

Finally, the Board's notice posting remedies are well within the Board's broad and discretionary remedial power under Section 10(c) of the Act. The Board appropriately ordered the Company to post Appendix B on a corporatewide basis, because the Company had maintained an unlawful handbook rule on its intranet site and in its employee handbook on a corporatewide basis since it first opened its stores. This Court is jurisdictionally barred from considering the Company's challenge to the Board's Order requiring notice posting of Appendix A at its Las Vegas area stores under Section 10(e) of the Act because the Company did not object to it before the Board. In any event, the Board properly ordered an area-wide notice posting because the Union's campaign was directed at all of the Company's Las Vegas area stores.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING A FACIALLY UNLAWFUL NO-DISTRIBUTION RULE IN ITS EMPLOYEE HANDBOOK AND ON ITS INTRANET SITE

A. An Employer’s Work Rule Is Unlawful if It Restricts, Without Justification, Employee Activities Protected by Section 7 of the Act

Section 7 of the Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection”¹⁵ Section 8(a)(1) of the Act implements this guarantee by making it an unfair labor practice to “interfere with, restrain, or coerce employees in the exercise” of Section 7 rights.¹⁶

As this Court has stated “It is long settled that a rule prohibiting employee solicitation and distribution of materials during non-work time and in non-work areas is presumptively invalid ‘absent a showing by the employer that a ban is necessary to maintain plant discipline or production.’”¹⁷ To determine whether an

¹⁵ 29 U.S.C. § 157.

¹⁶ 29 U.S.C. § 158(a)(1).

¹⁷ *United Services Auto Ass’n. v. NLRB*, 387 F.3d 908, 914 (D.C. Cir. 2004) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571 (1978)); *Rest. Corp. of Am. v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987).

employer’s “mere maintenance” of a work rule violates Section 8(a)(1) of the Act, the Board, with court approval, considers whether the rule “‘would reasonably tend to chill employees in the exercise’ of their statutory rights.’”¹⁸ In *Martin Luther Memorial Home*,¹⁹ the Board established a two-step inquiry that focuses on the text of the challenged rule. First, the Board “examines whether the rule ‘explicitly restricts’ section 7 activity;” if it does, the rule violates the Act, and the inquiry ends.²⁰ If the challenged rule does not explicitly restrict a Section 7 activity, the Board moves to the second step to determine whether employees could reasonably construe the rule to restrict Section 7 activity.²¹ As this Court has found, “‘mere maintenance’ of a rule likely to chill section 7 activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice ‘even absent evidence of enforcement.’”²²

¹⁸ *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007) (quoting *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001)). See also *Lafayette Park Hotel*, 326 NLRB 824, 825 (1995), *enforced mem.* 203 F.3d 52 (D.C. Cir. 1999).

¹⁹ 343 NLRB 646 (2004); accord *Guardsmark*, 475 F.3d at 374 (citing *Martin Luther*, 343 NLRB at 646).

²⁰ *Guardsmark*, 475 F.3d at 374 (citing *Martin Luther Mem’l Home*, 343 NLRB at 646).

²¹ *Ibid.* (quoting *Martin Luther*, 343 NLRB at 647).

²² *Ibid.* (quoting *Lafayette Park Hotel*, 326 NLRB at 825); see also *Cnty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003) (citing the Board’s “mere maintenance” rule).

This Court defers to the Board’s interpretation of Section 8(a)(1) of the Act when the Board “‘faithfully applies [the ‘reasonably tend to chill’] standard, and adequately explains the basis for its conclusion.’”²³

B. The Company’s Rule Was Unlawful Because It Explicitly Restricted Employees’ Section 7 Right to Distribute Literature During Nonworking Time on Company Premises

Substantial evidence supports the Board’s finding (A. 1, 9-10) that the Company violated Section 8(a)(1) of the Act by maintaining a no-distribution rule in its employee handbook and on its intranet site that unlawfully restricted employees’ rights protected by Section 7 of the Act. It is undisputed that, until September 3, 2009, the Company’s short form and long version no-distribution rules explicitly restricted employees’ Section 7 right to distribute literature during nonworking time in nonworking areas. The rule expressly “prohibit[ed] the distribution of literature during working time or *on Company premises for any purpose.*” (A. 437-38.) (emphasis added). As discussed above, absent special circumstances not present here,²⁴ a restriction on employee distribution during

²³ *Guardsmark*, 475 F.3d at 374 (quoting *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001)) (brackets in original).

²⁴ To the extent the Company suggests (Br. 4) that its parking lots and break areas are work areas, it did not argue for a special circumstances exception before the Board and the Board made no finding on whether those areas were working areas.

nonworking time in nonworking areas is presumptively invalid.²⁵ Based on the rule's express and overly broad prohibition on distributing in any area of the Company's premises, including nonworking areas, the Board reasonably found (A. 1, 9-10) that the rule was unlawful on its face, and the Company's maintenance of the rule violated Section 8(a)(1) of the Act.

The Company defends the rule on two erroneous grounds. First, it argues (Br. 14-16), contrary to established law, that its conduct was lawful because there is no evidence that it enforced the rule and that there was no evidence of an actual chilling effect on employees' Section 7 rights. Second, it argues (Br. 16-17), again contrary to established law, that its revision of its long-standing rule in response to the General Counsel's complaint was timely and therefore "cured" its earlier "technical violation" of the Act.

The Company's first argument (Br. 15) shows a fundamental misunderstanding of the law, because, as discussed above at 15-16, the Board does not require evidence that a facially unlawful rule actually chilled employees' statutory rights. An overly broad rule, such as this one, prohibiting distribution of literature in nonworking areas is presumptively invalid and violates the employees' Section 7 rights. The Board has held "[t]he mere existence of an overly broad rule

²⁵ *United Services Auto Ass'n. v. NLRB*, 387 F.3d 908, 914 (D.C. Cir. 2004); *Stanford Hosp. and Clinics v. NLRB*, 325 F.3d 334, 338 (D.C. Cir. 2003). See generally *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[which is not restricted to working time and work areas] tends to restrain and interfere with employees' rights under the Act, even if the rule is not enforced."²⁶

Moreover, none of the cases on which the Company relies advance its arguments. Indeed, in the underlying Board decision in *NLRB v. Silver-Spur Casino*,²⁷ the Board, with court approval, expressly rejected the claim the Company advances here that a rule cannot be unlawful absent evidence of enforcement. Additionally, in *Wal-Mart Stores, Inc.*,²⁸ the case rested on the judge's credibility finding that the supervisor never made the statement, and the case does not mention the absence of a chilling effect or enforcement as grounds for not finding a violation.

The Company also cites a variety of other cases, none of which involve the type of facially unlawful rule at issue here. For example, the Company relies on cases involving the alleged oral promulgation of ambiguous rules,²⁹ and cases

²⁶ *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001).

²⁷ 623 F.2d 571, 581 (9th Cir. 1980), *enforcing in relevant part*, 227 NLRB 414, 417 (1976).

²⁸ 349 NLRB 1095, 1098-1103 (2007).

²⁹ *NLRB v. Rooney*, 677 F.2d 44, 46 (9th Cir. 1982) (employer did not orally promulgate an unlawful rule where employer made the statement to the employee when she was soliciting during work time and the employer subsequently clarified the prior statement by issuing her a written reprimand containing a facially valid statement of her rights under the no-solicitation rule); *BJ's Wholesale Club, Inc.*, 297 NLRB 611, 615 (1990) (although employer did violate the Act by threatening

where the rule was not facially unlawful and the Board was therefore required to examine the manner in which the rule was enforced as part of the inquiry as to how employees would reasonably construe the rule.³⁰ Likewise, the Company relies on cases where the employer either never relayed the purportedly unlawful rule to any employee,³¹ or it effectively disclaimed the rule to employees when it hired them.³² Thus, these cases stand in marked contrast to the instant rule, which not only was facially unlawful, but was distributed without clarification in the Company handbook given to employees when they were first hired and maintained on the Company intranet.

The Company's second argument (Br. 16-17)—that it effectively repudiated or “cured” any “technical violation” by revising the rule—fails because, as the Board found, the Company's revision was not timely. The applicable standard

to discipline an employee for engaging in protected activity, that threat was not an oral promulgation of an unlawful rule where employer uttered statement only once in a private meeting with that employee, employees knew that they could solicit during their breaks, the statement was ambiguous, and the rule was not enforced).

³⁰ *Aroostook County Reg'l Ophthalmology Ctr.*, 81 F.3d 209, 213 (D.C. Cir. 1996); *Fiesta Hotel Corp.*, 344 NLRB 1363, 1367 (2005); *Safeway, Inc.*, 338 NLRB 525, 525-26 (2002); *K-Mart*, 330 NLRB 263, 263 (1999); *see, e.g., Guardsmark*, 475 F.3d 369, 375-76 (2007) (explaining that where lack of enforcement is discussed, it is “only after first concluding that the challenged rules were not likely to chill section 7 activity and that their mere maintenance was not an unfair labor practice.”).

³¹ *SMI of Worcester*, 271 NLRB 1508, 1509 (1984).

³² *Standard Motor Products*, 265 NLRB 482, 484 (1982).

governing a repudiation defense such as the Company's, is set forth in *Passavant Memorial Area Hospital*,³³ which has been approved by this Court and the majority of courts that have considered it.³⁴ Under that standard, for a repudiation of prior unlawful conduct to be effective, it "must be 'timely,' 'unambiguous,' 'specific in nature to the coercive conduct,' and 'free from other . . . illegal conduct.'"³⁵ Here, it is undisputed that the Company's unlawful no-distribution policy remained effective from its opening in 2006 until September 2, 2009 (A. 4 & n.7; 80). As the Board noted, the rule was in effect during the 10 months from the charge through the issuance of the complaint, including, significantly, the period during which the Union was involved in an organizing campaign. Here, the Company concedes (Br. 5) that it revised its rule only after being prompted by the General Counsel's complaint. As such, it cannot establish that its revision was

³³ 237 NLRB 138 (1978).

³⁴ See, e.g., *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 107-99 (D.C. Cir. 2003); *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 946 (D.C. Cir. 1999); *Cintas Corp. v. NLRB*, 589 F.3d 905, 915 (8th Cir. 2009); *Webco Industries, Inc. v. NLRB*, 217 F.3d 1306, 1314 n.4 (10th Cir. 2000); *Sam's Club v. NLRB*, 141 F.3d 653, 661 (6th Cir. 1998); *Evergreen Am. Corp.*, 348 NLRB 178, 181 (2006), *enforced*, 531 F.3d 321 (4th Cir. 2008).

³⁵ *Passavant Mem'l Area Hosp.*, 237 NLRB at 138 (citations omitted). Accord *Cintas Corp. v. NLRB*, 589 F.3d at 915; *Evergreen Am. Corp.*, 348 NLRB at 181.

timely under *Passavant*. Indeed, in *Passavant*, a purported disavowal 7 weeks after the unlawful threat was held untimely.³⁶

The Company's reliance on *Grondorf, Field, Black & Co. v. NLRB*,³⁷ a Section 8(a)(5) case, as the sole support for its position is woefully misplaced. In that case, the employer essentially made a typographical error when it presented a benefits plan to employees and corrected that error within four days. Here, the Company is not asserting that it made a typographical error in its rule, immediately revised the rule, and informed its employees of its mistake. Instead, in sharp contrast to *Grondorf*, the Company maintained its rule for years and only revised it a month after the General Counsel issued a complaint. As the Board found (A. 10), the Company's repudiation was not timely but was instead "too little too late." As such, the Company's argument that it cured or repudiated the rule fails.

³⁶ 238 NLRB at 139.

³⁷ 107 F.3d 882, 887 (D.C. 1997), *denying enforcement in pertinent part to* 318 NLRB 996, 1001-02 (1995).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING TWO EMPLOYEES

A. An Employer Violates Section 8(a)(1) of the Act by Coercively Interrogating Employees about union activities

An employer violates Section 8(a)(1) when it coercively interrogates its employees about their union activities or sentiments.³⁸ The test for evaluating the legality of an interrogation is whether, under the totality of the circumstances, the employer's statement reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.³⁹ In assessing the totality of the circumstances, the Board examines several relevant factors, commonly known as the *Bourne* factors, including: the background under which the questioning occurred, including the employer's hostility to unionization; the nature of the information sought; the identity of the questioner; the place and method of the interrogation; and the truthfulness of the employee's reply.⁴⁰ No one criterion is determinative; rather, the "flexibility and broad focus" of the test make clear that these criteria serve only

³⁸ *Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991).

³⁹ *Rossmore House*, 269 NLRB 1176, 1177 (1984), *enforced sub nom. HERE v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

⁴⁰ *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

as a useful “starting point for assessing the totality of the circumstances.”⁴¹

Significantly here, the test is whether the employer’s statement reasonably tends to coerce, not whether the employee was in fact coerced.⁴²

In reviewing the Board’s finding of unlawful interrogation, this Court “‘must recognize the Board’s competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.’”⁴³

B. The Company Unlawfully Interrogated Employees Everhart and Sumner

Substantial evidence supports the Board’s finding (A. 1) that the Company violated Section 8(a)(1) when Store Manager Shaw coercively interrogated Sumner and Everhart about their protected activities when she approached them at Sumner’s work station and asked them to furnish statements about their contacts with the Union. The employees’ statements, which credibly dovetailed with each other, include Sumner’s credited testimony that Shaw stated that “everyone is writing a statement about the union harassment, and you need to write yours, because everyone has already written theirs” while Everhart recalled that Shaw asked them to “write statements because one of the employees was harassed by the

⁴¹ *Perdue Farms*, 144 F.3d at 835 (quoting *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987)).

⁴² *Rossmore House*, 269 NLRB at 1178 n.20.

⁴³ *Southwire Co. v. NLRB*, 820 F.2d 453, 456 (D.C. Cir. 1987) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)).

Union.” (A. 10; 124, 151-54.) Examining the *Bourne* factors, the Board found that in the totality of the circumstances, Shaw’s statements had a reasonable tendency to coerce the employees.

First, as the Board noted, Shaw was the store manager, who “to a very large extent, controlled [Sumner’s and Everhart’s] future” with the Company because she directly determined disciplinary action involving the store employees, consulting only with the Company’s human resource managers. (A. 10; 88-89, 104-05.) Second, the Board found that when Shaw asked the employees to furnish statements, “she was really questioning them about their contacts with the Union and their support for the Union’s organizational campaign.” (A. 11.) As this Court has noted, “any attempt by an employer to ascertain employees’ views and sympathies regarding unionization generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge upon his Section 7 rights.”⁴⁴ At the time of her statement, Shaw had no knowledge of the employees’ union views or sympathies. (A. 10; 124, 126, 131, 153.) The very nature of the information Shaw sought by her open-ended request could ultimately inform her of the employees’ views and thus was likely to interfere with Sumner and Everhart’s exercise of their Section 7 rights.

⁴⁴ *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1359 (D.C. Cir. 1997) (quoting *Struksnes Construction Co.*, 165 NLRB 1062, 1062 (1967)); accord *W&M Props. of Connecticut, Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2007).

Moreover, Shaw's inquiry took place at Sumner's work station and her statement indicated her displeasure with the Union's home visits and her expectation that the employees would give their reactions. Although Everhart was more candid and direct with her reply to Shaw, Sumner—an individual who felt “comfortable with going to just about anybody and telling them how [she] feel[s],” and who had previously voiced her unhappiness over working conditions to Shaw 6 or 7 times in 6 months—gave no response to Shaw's request. (A. 10; 124, 128, 152.) Sumner's silence suggests that she was coerced by the request because she sought to conceal her contact with the Union as well as her position as to unionization.⁴⁵ Thus, under the totality of the circumstances, the Board reasonably found that Shaw unlawfully interrogated the employees regarding their union activity.

The Company's primary, and repeated, argument (Br. 18-19, 20, 27) that Shaw “never made the alleged request” is a direct attack on the judge's credibility findings. However, the Company has failed to meet its heavy burden of showing that the judge's decision to credit Sumner and Everhart's testimony was

⁴⁵ See *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, *1-2 (Apr. 29, 2011) (silence in response to question about union support indicated an attempt to conceal and weighed in favor of interrogation finding); *Sproule Constr. Co.*, 350 NLRB 774, 774 n. 2 (2007) (same).

“hopelessly incredible or self-contradictory.”⁴⁶ Contrary to the Company’s argument, it was not unreasonable for the judge to credit the two employees and draw a negative inference from the Company’s failure to call Shaw as a witness. Consistent with established precedent, the judge drew a negative inference from Shaw’s failure to testify and concluded that Shaw would have confirmed the employees’ testimony. As the Board stated in *Property Resources Corp.*, a decision upheld by this Court, “[a]n adverse inference is properly drawn regarding any matter about which a witness is likely to have knowledge if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party.”⁴⁷ The Company, which still employed Shaw at the time of trial, did not explain its failure to call Shaw to testify. (A. 10; 123, 127, 149.)

Moreover, contrary to the Company’s argument (Br. 18-19), the employees’ testimony was consistent with each other, particularly given the approximately 7

⁴⁶ *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988).

⁴⁷ 285 NLRB 1105, 1105 n. 2 (1987), *enforced*, 863 F.2d 964, 966 (D.C. Cir. 1988) (citing 2 Wigmore, Evidence at 286 (2d ed. 1940)); *Pur O Sil, Inc.*, 211 NLRB 333, 337 (1974)). *See generally Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 174 (1973) (adverse inference appropriate where a party fails to question a witness within its control who has knowledge of an issue); *see also Alois Box Co. v. NLRB*, 216 F.3d 69, 75 (D.C. Cir. 2000) (adverse inference appropriate when party fails to present pertinent evidence within its control); *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1341 (5th Cir. 1980) (adverse inference appropriate where the employer failed to call a supervisor as a witness).

months that had elapsed between Shaw's questioning and the hearing. (A. 10.) In crediting Sumner's and Everhart's testimony, the judge noted that their respective recollections about what Shaw said were mostly consistent with the other's testimony and "[b]oth versions of the conversation supported the central theme that Shaw asked them to furnish statements about their contacts with the Union." (*Id.*) The Company cannot establish that this credibility determination was "hopelessly incredible or self-contradictory," particularly in the absence of any testimony from Shaw.

The Company erroneously argues (Br. 21-26) that because certain *Bourne* factors were not met, the Board was incorrect in finding unlawful interrogation. The Board, with this Court's approval, does not require that each criterion in its test be satisfied before finding an unlawful interrogation. Rather, the criteria are simply a useful "starting point for assessing the totality of the circumstances."⁴⁸ Moreover, in finding an unlawful interrogation, the Board found several of the *Bourne* factors were met.

The Company's argument that the Board erred because Shaw was not a high-ranking official (Br. 24-25) misses the mark. The more relevant fact, as the Board found, was that Shaw, as the store manager with disciplinary authority over

⁴⁸ *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998); see *Rossmore House*, 269 NLRB 1176, 1178 n.20 (1984), *enforced sub nom. HERE v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

Sumner and Everhart, “controlled their future” with the Company. (A. 10; 88-89, 104-05.) The Board, with court approval, has repeatedly found that where the questioner has the authority to fire or otherwise discipline employees, that authority weighs in favor of finding that an unlawful interrogation occurred.⁴⁹ Accordingly, Shaw’s place in the larger Company hierarchy did not lessen the coercive tendency of her statements to these two employees.

Likewise the Company’s claim (Br. 24-25)—that Everhart and Sumner had a “friendly” relationship with Shaw and therefore Shaw’s request was nothing more than a friendly exchange—utterly ignores the supervisor-employee relationship the parties shared and the power that Shaw had over their future with the Company. (A. 10.) Contrary to the Company’s argument (Br. 26), Sumner did “feel the need to evade Shaw’s alleged request.” She met the request with silence and inaction, contrary to her responses to Shaw on other workplace issues. Thus, the apparent friendly relationship does not neutralize the supervisor-employee

⁴⁹ See *Multi-Ad Servs., Inc. v. NLRB*, 255 F.3d 363, 371 (7th Cir. 2001) (substantial evidence supported Board’s finding that the interrogation was coercive where it was conducted by managers with the authority to fire employees); *NLRB v. Camco, Inc.*, 340 F.2d 803, 806 (5th Cir. 1965) (“[A]ssuming the authority of the interrogators to speak for the Company, the crucial question is not their rank but whether to the employees the interrogators represent the Company.”) (citing *Hendrix Mfg. Co. v. NLRB*, 321 F.2d 100 (5th Cir. 1963)).

relationship or render Shaw's questioning any less coercive.⁵⁰ Likewise, the fact that Shaw sought the information from the employees "only" one time fails to neutralize the coercive nature of her statement.

Finally, the Company's argument (Br. 19-21) that Shaw was seeking information regarding unlawful or unprotected activity is simply not supported by the facts. Here, there is no evidence that the Union's home visits were unlawful or unprotected under the Act. Neither employee had approached Shaw complaining about the visits. As such, the Company's claims (Br. 21) that the employees did not take Shaw's statement to be "asking about protected activity" is without any foundation. Although some employees may have been annoyed at the solicitation, the Act allows union representatives to engage in union solicitation even when it annoys or disturbs the employees who are solicited.⁵¹

⁵⁰ See *NLRB v. Brookwood Furniture, Div. of U.S. Indus.*, 701 F.2d 452, 459 & n.60 (5th Cir. 1993) (fact that interrogator and employee were cousins does not preclude finding of coercion); *Acme Bus Corp.*, 320 NLRB 458, 458 (1995), *enforced mem.* 198 F.3d 233 (2d Cir. 1999) (supervisor's purported friendly relationships with employees would actually increase the likelihood that employees would be coerced because employees would understand the message that the employer opposed unionization); *Southwire Co.*, 282 NLRB 916, 918 (1987) (a supervisor's statement concerning an employee's union activities can be coercive despite the friendly relationship between the individuals and the well-intentioned nature of the statements).

⁵¹ *Ryder Transp. Services*, 341 NLRB 761 (2004), *enforced* 401 F.3d 815 (7th Cir. 2005).

The cases on which the Company relies to support its suggestion that Shaw was merely requesting that the employees report unlawful activity, provide support for the Board's conclusion. In each of the cases, the Board allowed that under its well-established standard, an employer engages in unlawful conduct when it solicits employees to report using a "standard so vague as to invite reports concerning vigorous and insistent but nevertheless perfectly legal union solicitations."⁵² Here, Shaw did exactly that, demanding that the employees submit letters about their contacts with the Union "about union harassment." Moreover, the cited cases involve distinct factual situations or statements not presented here, including: an employer's letter to employees during a strike written in response to an actual threat to an employee,⁵³ an employer's letter to employees requesting that employees report conduct that "consists of both confrontation and compulsion or confrontation and intimidation,"⁵⁴ and a speech in which the Board found that the employer lawfully invited employees to report intimidating or threatening conduct.⁵⁵

⁵² *Ithaca Indus.*, 275 NLRB 1121, 1126 (1985); *accord First Student*, 341 NLRB 136, 136-37 (2004).

⁵³ *River's Bend Health and Rehab. Serv.*, 350 NLRB 184, 186-87 (2007).

⁵⁴ *First Student*, 341 NLRB at 136-37.

⁵⁵ *Ithaca Indus.*, 275 NLRB 1121, 1126 (1985).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY CREATING THE IMPRESSION OF SURVEILLANCE

A. Applicable Principles

An employer's conduct violates Section 8(a)(1) if it creates the impression among employees that they are subject to surveillance.⁵⁶ It is "an unfair labor practice for an employer to create the impression that it is subjecting employees lawful union activities to surveillance 'because it could inhibit the employees' right to pursue union activities untrammelled by fear of possible employer retaliation.'"⁵⁷ The Board's test for determining whether an employer has created an impression of surveillance is "whether the employee would reasonably assume from the statement that his union activities had been placed under surveillance."⁵⁸

B. The Company Unlawfully Created the Impression of Surveillance

The Board reasonably found (A. 1, 10-11) that the Company unlawfully created the impression of surveillance when Store Manager Shaw told employees

⁵⁶ *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 420 (D.C. Cir. 1996) (citing *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 266 (D.C. Cir. 1993)).

⁵⁷ *Miss. Transp., Inc. v. NLRB*, 33 F.3d 972, 978 (8th Cir. 1994) (citation omitted).

⁵⁸ *Mountaineer Steel, Inc.*, 326 NLRB 787, 787 (1998), *enforced mem.* 8 Fed. Appx. 180 (4th Cir. 2001) (citing *United Charter Service*, 306 NLRB 150 (1992)). *See also Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 266 (D.C. Cir. 1993) (citing *Road Sprinkler Fitters Local Union v. NLRB*, 681 F.2d 11, 19 (D.C. Cir. 1982)).

Everhart and Sumner that they had to write statements about their contacts with the union “because everyone has already written theirs” or “because one of the employees was harassed by the union.” As the Board noted, neither employee had approached Shaw and complained about unwanted home visits from union organizers, and neither employee discussed the Union with Shaw prior to her statement. (A. 10-11; 124-31, 152-54). Accordingly, Shaw’s statement left the employees with “the impression that management believed that union organizers had been to see them.” (A. 11.) Thus, Sumner and Everhart were left in “an untenable position, believing that management was watching employees and was interested in knowing whether they had any contacts with the Union.” (*Id.*) In these circumstances, the Board reasonably found that employees would reasonably believe that the Company was surveilling their union activities.

Contrary to the Company’s claims (Br. 28-29), Shaw did not specifically indicate the basis for her request that the employees supply written statements against the Union. As such, its reliance on Board precedent where the employer identified how it received the information—for example, from other named employees or from a not-secret union meeting—is misplaced.⁵⁹ In such

⁵⁹ *Park ‘N Fly*, 349 NLRB 132, 133 (2007) (supervisor’s question to employee was not unlawful surveillance where statement also noted that another employee had voluntarily informed the supervisor that he saw the employee speaking with a union representative); *North Hills Office Servs., Inc.*, 346 NLRB 1099, 1103 (2006) (supervisor’s statement did not create the impression of surveillance where

circumstances, a reasonable employee would not consider that the employer had her activities under surveillance. In sharp contrast here, there is no evidence that Shaw volunteered the specific source of her information, Sumner and Everhart had not volunteered any information or complained about union visits, and the open ended request for statements suggested that the employees' activities were under surveillance.

IV. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ORDERING THE COMPANY TO POST A REMEDIAL NOTICE AT EACH OF ITS LAS VEGAS AREA STORES (APPENDIX A) AND TO POST A REMEDIAL NOTICE ADDRESSING THE UNLAWFULLY MAINTAINED NO-DISTRIBUTION POLICY ON A CORPORATEWIDE BASIS IN ALL ITS OTHER STORES (APPENDIX B)

A. The Board has Broad Authority to Tailor its Remedies to the Violations Found

Section 10(c) of the Act⁶⁰ directs the Board, upon finding that a party has committed an unfair labor practice, to issue an order requiring the party “to cease and desist from such unfair labor practice and to take such affirmative action . . . as will effectuate the policies of [the] Act.” A Board order issued under Section 10(c)

statement made it clear that another employee had volunteered the information). *Waste Mgmt. of Arizona, Inc.*, 345 NLRB 1339, 1339-40 (2005) (supervisor’s statement was not unlawful where there was no evidence that the meeting was held in secret or that the supervisor indicated that he learned of meeting in unlawful or covert manner).

⁶⁰ 29 U.S.C. § 160(c).

of the Act has always been accompanied by a remedial notice to employees informing them of their rights under the Act, and assuring them that the unlawful conduct will cease.⁶¹ Moreover, the Board's remedial power under Section 10(c) is "a broad, discretionary one, subject to limited judicial review."⁶² Accordingly, the Board's remedial order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."⁶³

The scope of a Board order is not overly broad "where the Board might reasonably have concluded from the evidence that such an order was necessary to prevent the employer from continuing to engage in unfair labor practices."⁶⁴ Accordingly, courts have endorsed the Board's imposition of cease-and-desist orders requiring employers to post a remedial notice on a nationwide or companywide basis where the facts of the case indicate that posting is necessary to remedy or prevent the employer's continuing or future unfair labor practices.⁶⁵

⁶¹ See, e.g., *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 52 (1935).

⁶² *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); accord *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 380 (D.C. Cir. 2007).

⁶³ *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

⁶⁴ *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 846 (7th Cir. 2000) (citing *May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 390 (1945)).

⁶⁵ See *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 380-81 (D.C. Cir. 2007); *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 317 F.3d 316, 326-27 (D.C. Cir. 2003);

B. The Board Acted Within its Broad Remedial Discretion in Ordering Separate Posting Notices to Remedy the Different Violations

To remedy the Company's maintenance of an unlawful rule in its corporatewide employee handbook and on its intranet site that restricted the employees' exercise of their Section 7 rights, the Board ordered (A. 20) that the Company physically and electronically post in all of its stores outside of Las Vegas a notice, which provides in pertinent part: "WE WILL NOT maintain in our employee handbook or on our intranet site a no-distribution rule that prohibits you from distributing literature on our property for any purpose." (A. 21.) To remedy the Company's violations during the Las Vegas area union campaign, which additionally consisted of unlawfully interrogating employees, and creating the impression that their union activities were under surveillance, the Board ordered (*Id.*) that the Company physically and electronically post in all of its Las Vegas area stores a notice, which provides that the Company will not engage in the activity that the Board found unlawful or interfere with, restrain, or coerce employees in the exercise of their Section 7 rights in any like or related manner.

In determining that a corporatewide posting of the remedial order (Appendix B) was necessary to remedy the Company's unfair labor practice, the Board

Beverly Cal. Corp., 227 F.3d at 846-47; *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251, 259 (4th Cir. 1994); *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 960-61 (2d Cir. 1988).

emphasized that the Company — which operates a chain of supermarkets in Nevada, Arizona, and California — gave all of its employees the employee handbook containing the unlawful rule when it hired them, and maintained the unlawful rule on its intranet site until September 2009. (A. 19.) Moreover, although the Company revised its rule in September 2009, the Board found, in disagreement with the judge, that the Company had not demonstrated that the revision of its rule “was well-disseminated to employees and employees were appropriately informed that it was a replacement for the earlier distribution language.” (A. 1 n.1.) Nor, the Board concluded, would the rule’s revised language serve as notice to the employees of their right to distribute literature in accordance with Section 7 of the Act. (*Id.*) In these circumstances, the Board concluded that a corporatewide remedy was “permissible and necessary to ensure that all affected employees will be informed of the [Company’s] violation and the nature of their rights under the Act.” (A. 20.) In ordering this remedy, the Board acted well within its broad discretion in crafting a remedy “to effectuate the policies of the Act.”⁶⁶ Moreover, ordering a corporatewide posting, where, as

⁶⁶ *Virginia Elec. & Power Co.*, 319 U.S. at 540; *see also Kinder-Care Learning Ctrs.*, 299 NLRB 1171, 1176 (1990) (companywide posting ordered where employer’s unlawful rule was maintained as a companywide posting).

here, the Company's overbroad rules are maintained company wide (A. 4; 77-82, 101-02), is fully consistent with this Court's precedent.⁶⁷

The Company claims (Br. 30-32) that the Board abused its discretion because it could only issue a corporatewide remedial notice upon a finding that the Company was a recidivist with an extensive history of committing unfair labor practices that would rival that of the recidivist employer in *Beverly California Corp. v. NLRB*.⁶⁸ However, the Board expressed rejected this view, noting (A. 20) that "corporatewide remedies are not reserved only for recidivists." Indeed, the Board "tailors its posting requirements to adapt to varying circumstances on a case-by-case basis."⁶⁹ The remedy was both "permissible and necessary" here, in view of the widespread publication of the unlawful rule in the handbooks and on the intranet, to ensure that all affected employees were informed of the violation

⁶⁷ *Guardsmark, LLC*, 475 F.3d at 371 ("only a company-wide remedy extending as far as the company-wide violation can remedy the damage" where employer's unlawful rule was distributed to all employees nationwide); *United States Postal Serv. v. NLRB*, 969 F.2d 1064, 1072-73 (D.C. Cir. 1992) (nationwide posting was appropriate where the service manual containing the unlawful provision, and the relevant collective-bargaining provision, applied to all employees nationwide).

⁶⁸ 227 F.3d 817 (7th Cir. 2000).

⁶⁹ *Technology Service Solutions*, 334 NLRB 116, 117 (2001) (In exercising its broad remedial authority, the Board "crafts its posting requirements to ensure that [an employer] actually apprises its employees of the Board's decision and their rights under the Act.").

and their rights under the Act.⁷⁰ The Board ordered the corporatewide posting to remedy the Company's unlawful corporatewide maintenance of the invalid rule. Accordingly, it was well within the Board's broad remedial discretion to order the corporatewide posting.

Before the Court, the Company (Br. 30-32) argues for the first time that the Board erred in requiring it to post Appendix A, which addresses all of the unfair labor practices found, in all of its Las Vegas area stores. However, the Court is jurisdictionally barred from considering that claim because it was not made to the Board. Section 10(e) of the Act⁷¹ provides in relevant part that "no objection that has not been urged before the Board . . . shall be considered by the Court," absent extraordinary circumstances not present here. That statutory provision creates a jurisdictional bar against judicial review of issues not raised before the Board.⁷² This Court enforces that bar strictly, consistently holding that a litigant's failure to present a question to the Board in the first instance precludes this Court from considering it on appeal.⁷³ Additionally, this Court has held that generalized

⁷⁰ *Id.* at 117.

⁷¹ 29 U.S.C. § 160(e).

⁷² *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

⁷³ *W&M Properties of Connecticut, Inc. v. NLRB*, 541 F.3d 1341, 1345-46 (D.C. Cir. 2008); *Local 204, U.F.C.W. v. NLRB*, 506 F.3d 1078, 1087 (D.C. Cir. 2007).

objections, such as those objecting to the remedy's "excessive breadth"⁷⁴ or to a remedial order "in its entirety,"⁷⁵ are too broad to preserve challenges to the Board's remedy.

Here, the Company failed to preserve its claim that posting Appendix A was inappropriate. In its "summary of exceptions," before its specific exceptions, the Company excepts to two of the judge's unfair labor practice findings and conclusions including "to his proposed notice postings." However, in its 13 specific exceptions to the judge's decision and recommended order, the Company failed to file a specific exception to this remedy. Likewise, in its brief in support of exceptions the Company makes only two broad references to the judge's proposed notice. (A. 487-88.) Specifically, the Company stated in the "statement of the case" portion of that brief that the judge's "findings, conclusions, recommended order, and notices are not supported by the record evidence or the law" (A. 487), and the judge's "findings, conclusions, recommended order, and notice should be vacated" (A. 488.) Those references are the functional equivalent of the generalized objection to a remedy's "excessive breadth"⁷⁶ or to a remedial

⁷⁴ *Highlands Hosp. Corp., Inc. v. NLRB*, 508 F.3d 28, 32-33 (D.C. Cir. 2007).

⁷⁵ *Prime Serv., Inc. v. NLRB*, 266 F.3d 1233, 1241 (D.C. Cir. 2001).

⁷⁶ *Highlands Hosp. Corp.*, 508 F.3d at 32-33.

order “in its entirety”⁷⁷ that this Court has previously found too broad to preserve challenges to the Board’s remedy. The Company also failed to object to the area-wide remedy in its opposition to the Union’s motion for reconsideration in this case and challenged only the corporatewide remedy. (A. 550-52.) The Company therefore failed to challenge the area-wide notice posting before the Board, and this Court is jurisdictionally barred from reviewing that challenge.

In any event, the Company’s contention is simply without merit because the Board was well within its broad remedial authority under Section 10(c) when it ordered a notice posting in the Las Vegas area that included references to both the interrogation and surveillance violation as well as the unlawful no-distribution rule. (A. 20-21.) The judge, as affirmed by the Board (A. 1), determined that all Las Vegas area stores constituted the appropriate locations for the notice because “the Union’s organizing campaign during which those unfair labor practice were committed, was directed at all the [Company’s] Las Vegas area stores.” (A. 3.) The same human resources manager was responsible for all the Las Vegas area stores, and he testified that one of the other store managers had informed him of the union’s home visits and an employee complaint that they objected to these visits. In light of the organizing drive among the Las Vegas area stores, a remedy informing the employees that the Company would not coercively question them

⁷⁷ *Prime Serv., Inc.*, 266 F.3d at 1241.

about their activities on behalf of the Union; that the Company would not make it appear that the Company was watching their involvement in Union activities; and that the no-distribution rule was unlawful, was warranted. The Board concluded that a remedial notice for all the violations found should be posted at all the stores in the Las Vegas area because that was “where most of the violations occurred.”

(A. 19.)

The Board, with Court approval, has similarly ordered postings in other cases where Companies have engaged in unlawful conduct at some, but not all, of its facilities within a close geographic region, and where the employer’s personnel policies were not determined at each individual store.⁷⁸ Accordingly, here, where the Company’s unfair labor practices occurred within close proximity of other stores that were the focus of the Union’s organizing campaign and the violations were directly related to that organizing drive, the Board’s Order was a permissible exercise of its remedial authority under the Act.

⁷⁸ See *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292, 304 (2d Cir. 1967) (companywide posting was appropriate where the employer’s “policies were not determined at individual plant alone”); see also *Beverly Health & Rehab. Svcs., Inc.*, 317 F.3d at 326-27 (employer’s “centralized structure for dealing with labor issues” constituted an “overall corporate policy” that justified imposition of a companywide posting requirement).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court grant its cross-applications for enforcement, deny the Company's petitions for review, and enter a judgment enforcing the Board's Order in full.

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Sec. 8(a) of the Act (29 U.S.C. § 158 (a))

Section 10 of the Act (29 U.S.C. § 160)

Section 7 of the Act (29 U.S.C. § Sec. 157) provides in relevant part:
[Rights of employees as to organization, collective bargaining, etc.] Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [Section 158(a)(3) of this title].

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

(a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title].

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]. . . .

(e). [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f). [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United

States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRESH & EASY NEIGHBORHOOD MARKET,)
INC.)
)
Petitioner/Cross-Respondent) Nos. 11-1052, 11-1126,
) 11-1311 & 11-1335
)
v.) Board Case No.
) 28-CA-22520 et al.
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)
)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 9,963 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 10th day of November 2011

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NATIONAL LABOR RELATIONS BOARD)	Board Case Nos.
)	28-CA-22520 et al.
Respondent/Cross-Petitioner)	
)	
and)	
)	
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION)	
)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2011, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and sent to the Clerk of Court, by first-class mail, the required number of paper copies.

I certify that the foregoing document was served on all those parties or their counsel of record through the appellate CM/ECF system. As a courtesy, hard copies also served upon the following counsel at the addresses listed below:

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