

Nos. 14-1231, 14-1265

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

QUICKEN LOANS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**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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QUICKEN LOANS, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 14-1231, 14-1265
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	28-CA-075857
)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties, Intervenors, and Amici:

1. Quicken Loans, Inc. (“the Company”) was the Respondent before the Board and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

B. Ruling under Review

This case is before the Court on the Company’s petition for review and the Board’s cross-application for enforcement of a Decision and Order issued by the Board on November 3, 2014 and reported at 361 NLRB No. 94.

C. Related Cases

This matter was previously before the Court in *Quicken Loans, Inc. v. NLRB*, D.C. Cir. No. 13-1205, which was dismissed following the Board’s motion.

Board counsel are unaware of any related cases pending in this Court or any other court.

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Dated at Washington, DC
this 23rd day of July, 2015

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GLOSSARY

The Act	The National Labor Relations Act
The Agreement	The Mortgage Banker Employment Agreement
The Board	The National Labor Relations Board
Br.	The principal brief of Quicken Loans, Inc.
The Company	Quicken Loans, Inc.
The Confidentiality Rule	Quicken Loans, Inc.'s "Proprietary/Confidential Information" Rule
JA	Joint Deferred Appendix

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Quicken Loans, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order against the Company. The Board had jurisdiction under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, et seq., which authorizes it to prevent unfair labor practices affecting commerce.

The Board's Decision and Order issued against the Company on November 3, 2014, and is reported at 361 NLRB No. 94. (JA 162-64.)¹ The Order is final under Section 10(e) of the Act, 29 U.S.C. § 160(e). The Company petitioned for review of the Board's Order on November 5, 2014, and the Board cross-applied for enforcement of the Order on December 1. The Court has jurisdiction over the petition and cross-application pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). Both filings were timely because the Act imposes no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUES

1. The Board found that the Company violated Section 8(a)(1) of the Act by maintaining certain provisions of its Proprietary/Confidential Information Rule that unlawfully restrict employees' right to discuss and disclose terms and conditions of their employment and certain information about co-workers. Is the Board's determination reasonable and supported by substantial evidence?

2. The Board found that the Company violated Section 8(a)(1) by maintaining a Non-Disparagement Rule that unlawfully restricts employees' right to publicly criticize their employer and its products. Is the Board's determination reasonable and supported by substantial evidence?

¹ "JA" refers to the Joint Deferred Appendix. "Br." refers to the Company's principal brief. Where applicable, references preceding a semicolon are to the Board's decision; those following, to the supporting evidence.

RELEVANT STATUTORY PROVISIONS

Except for the following, all relevant provisions of the Act are reproduced in the Company's principal brief.

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

. . . 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. . . .

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

After the investigation of a charge filed by Lydia Garza, a former company employee, the Board's Regional Director issued a complaint alleging that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by maintaining two sets of restrictions applicable to its employees: (i) portions of a "Proprietary/Confidential Information" Rule ("the Confidentiality Rule"); and (ii) a "Non-Disparagement" Rule. (JA 5-11.) Following a hearing, the administrative law judge found that the Company violated the Act as alleged. (JA 158-60.)

The Company filed exceptions with the Board. On June 21, 2013, a three-member panel of the Board (Chairman Pearce; Members Griffin and Block) affirmed the judge's findings, amended the remedy, and adopted the recommended

order, as modified (“2013 Decision and Order”). (JA 156-58.) The Company then petitioned this Court for review (D.C. Cir. No. 13-1205).

Before the Board filed the record, the Court sua sponte issued an order placing the case in abeyance in light of then-pending litigation challenging the recess appointments of Members Griffin and Block. On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which invalidated those recess appointments. Subsequently, a properly constituted Board exercised its authority under Section 10(d) of the Act, 29 U.S.C. § 160(d), to set aside the 2013 Decision and Order. (JA 162.) On the Board’s motion, the Court dismissed the case. D.C. Cir. No. 13-1205, Order Granting Mot. to Dismiss (Aug. 26, 2014).

On November 3, 2014, a panel of properly appointed Board members (Chairman Pearce; Members Hirozawa and Schiffer) issued the Decision and Order now before the Court, which incorporates the 2013 Decision and Order by reference and cites additional supporting precedent. (JA 162-64 & nn.1 & 2.)

II. THE BOARD’S FINDINGS OF FACT

A. Background

The Company provides mortgage-loan services and employs approximately 1,700 mortgage bankers throughout the country. (JA 158; JA 53:17-19, 75:21-25.) Mortgage bankers are responsible for processing loan applications and negotiating

the terms of proposed loans. (JA 158; JA 77:11-20.) The Company requires as a condition of employment that all of its mortgage bankers agree to be bound by its Mortgage Banker Employment Agreement (“the Agreement”), which contains the two rules at issue in this case. (JA 158; JA 53:1-3; JA 20-34.)

B. The Confidentiality Rule

Section D.2 of the Agreement reads, in pertinent part:

You agree that:

- (a) You shall hold and maintain all Proprietary/Confidential Information in the strictest of confidence and that you shall preserve and protect the confidentiality, privacy and secrecy of all Proprietary/Confidential Information;
- (b) You shall not disclose, reveal or expose any Proprietary/Confidential Information to any person, business or entity . . . ;
- ...
- (e) You shall take all necessary precautions to keep Proprietary/Confidential Information secret, private, concealed and protected from disclosure, and shall follow and implement the Company’s privacy and security procedures

(JA 158; JA 22.) Section D.1 specifies that the term “Proprietary/Confidential Information” is defined, for purposes of the rule, in Attachment A to the Agreement. Attachment A, in turn, defines covered information as, among other things, “non-public information relating to or regarding the Company’s business, personnel, customers, operations, or affairs.” It then specifies that:

“Proprietary/Confidential Information” includes, but is not limited to, the following categories of information, irrespective of the medium in which it is stored . . . :

. . .

Personnel Information including, but not limited to, all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses;

(JA 158-59; JA 32-33.)

C. The Non-Disparagement Rule

Section K.2 of the Agreement provides, in relevant part:

. . . The Company has internal procedures for complaints and disputes to be addressed and resolved. You agree that you will not (nor will you cause or cooperate with others to) publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral statement or image (including, but not limited to, any statements made via websites, blogs, postings to the internet, or emails and whether or not they are made anonymously or through the use of a pseudonym). You agree to provide full cooperation and assistance in assisting the Company to investigate such statements if the Company reasonably believes that you are [the] source of the statements. The foregoing does not apply to statutorily privileged statements made to governmental or law enforcement agencies.

(JA 159; JA 29.)

D. The Company Tells Former Employee Lydia Garza That She Remains Bound by the Agreement

Lydia Garza worked as a mortgage banker at the Company’s Scottsdale, Arizona office and signed the Agreement during her employment. (JA 158-59; JA

52:20-25, 55:6-57:6.) After she resigned from the Company on October 18, 2011, the Company sent Garza a letter notifying her that, despite her departure, she had certain “ongoing obligations” under the Agreement, including continued compliance with the Confidentiality Rule and non-competition provisions. (JA 159; JA 35-41.) Shortly after sending that letter, the Company sued Garza and five other former employees for allegedly violating the Agreement’s no-contact/no-raiding and non-competition provisions. (JA 159; JA 59:18-60:20, 67:5-70:22.) Garza subsequently filed the unfair-labor-practice charge in this matter.

III. THE BOARD’S CONCLUSIONS AND ORDER

On November 3, 2014, the Board issued the Decision and Order, which affirmed, with modification, the administrative law judge’s conclusion that the Company had violated Section 8(a)(1) of the Act. Specifically, the Board found unlawful the Company’s maintenance of: (i) the Confidentiality Rule insofar as it applies to certain personnel information described in Attachment A to the Agreement; and (ii) the Non-Disparagement Rule. (JA 162.) The Board stated that it agreed with the rationale set forth in the 2013 Decision and Order and cited additional precedent supporting its conclusions. (JA 162 & n.1.)

The Board’s Order requires the Company to cease and desist from maintaining the unlawful provisions of the Agreement and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise

of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (JA 162.)

Affirmatively, the Order requires the Company to: rescind the unlawful provisions; either (i) furnish all current mortgage brokers with inserts to the Agreement advising them that the unlawful rules have been rescinded or providing the language of lawful rules, or (ii) publish and distribute a revised Agreement omitting the unlawful rules or providing the language of lawful rules; and post a remedial notice. (JA 162-63.)

SUMMARY OF THE ARGUMENT

The Board's decision in this case is straightforward and follows from well-established precedent. Applying the framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and repeatedly approved by this Court, *see, e.g., Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007), the Board found that the Company's maintenance of two rules violated Section 8(a)(1) of the Act because employees would reasonably construe the provisions as restricting their key Section 7 right to engage in protected, concerted activity. Specifically, employees would reasonably read certain provisions of the Company's Confidentiality Rule as prohibiting them from exercising their right to discuss or disclose their terms and conditions of employment, as well as their co-workers' names and contact information. Employees would also read the Company's Non-Disparagement Rule as restricting their right to criticize the Company publicly,

within appropriate limits. While the Company raises a hodgepodge of challenges to the Board's findings, none has merit. Its central contentions rely on comparisons to inapposite cases and conflict with settled principles.

STANDARD OF REVIEW

“The courts accord a very high degree of deference to administrative adjudications by the NLRB.” *Steelworkers, Local 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993). The Board's findings of fact are “conclusive” if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). A reviewing court may not displace the Board's determinations “even though [it] would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488; *accord Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). “In short, [a] court reverses for lack of substantial evidence only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Evergreen Am. Corp. v. NLRB*, 362 F.3d 827, 837 (D.C. Cir. 2004) (internal quotation marks omitted).

The Board's legal determinations and interpretation of the Act are similarly entitled to great deference, and must be upheld if “reasonable and consistent with controlling precedent.” *Cintas Corp. v. NLRB*, 482 F.3d 463, 468 (D.C. Cir. 2007)

(internal quotation marks omitted). In particular, the Board’s conclusions that an employer’s workplace rules unlawfully restrain or interfere with employee activity that the Act protects “are entitled to considerable deference so long as they are reasonably defensible.” *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007) (internal quotation marks omitted) (specifically noting this Court’s deference to the Board’s standard, applied in the present case, for violations of Section 8(a)(1) of the Act); *see also Cintas*, 482 F.3d at 468.

ARGUMENT

Section 7 of the Act guarantees employees 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” 29 U.S.C. § 157. Section 8(a)(1) of the Act makes it an unfair labor practice for employers to “interfere with, restrain, or coerce employees in the exercise of [those] rights” 29 U.S.C. § 158(a)(1). An employer thus violates Section 8(a)(1) when it maintains a workplace rule that “would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). The Board may find such a rule unlawful regardless of whether the employer has enforced it; the “mere maintenance” of the rule violates the Act. *Cintas*, 482 F.3d at 467-68

(“[T]he Board is under no obligation to consider” evidence of enforcement against Section 7 activity.); *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014); *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 481-82 (1st Cir. 2011).

More specifically, a rule is unlawful where “employees would reasonably construe [its] language to prohibit Section 7 activity.” *Lutheran Heritage Vill.-Livonia*, 343 NLRB 646, 647 (2004); *Guardsmark*, 475 F.3d at 374.² In determining whether that is the case, the Board “focuses on the text of the challenged rule.” *Guardsmark*, 475 F.3d at 374. It “give[s] the work rule a reasonable reading and refrain[s] from reading particular phrases in isolation.” *Albertson’s, Inc.*, 351 NLRB 254, 259 (2007). The analysis is an objective one: “[a]s long as its textual analysis is reasonably defensible, and adequately explained, the Board need not rely on evidence” that employees actually interpreted the rule to prohibit Section 7 activity. *Cintas*, 482 F.3d at 467 (internal quotation marks, brackets, and citation omitted); *accord Flex Frac*, 746 F.3d at 209.

Finally, any ambiguity in a work rule is construed against the employer as the rule’s promulgator. *Lafayette Park Hotel*, 326 NLRB at 828; *Flex Frac Logistics, LLC*, 358 NLRB No. 127, 2012 WL 3993589, at *2 (2012) (“Board law

² A rule that explicitly restricts Section 7 rights is also unlawful, as are rules promulgated in response to, or applied to restrict, Section 7 activity. *Lutheran Heritage*, 343 NLRB at 646-47 & n.5; *Guardsmark*, 475 F.3d at 374.

is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer.”), *enforced*, 746 F.3d 205 (5th Cir. 2014). As the Board has explained, “[t]his principle follows from the Act’s goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer—instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it.” *Flex Frac*, 2012 WL 3993589, at *2; *see also Ne. Land Servs.*, 645 F.3d at 483 (affirming that “the Board’s rule is intended to be prophylactic and . . . is subject to deference”). Employees “should not have to decide at their own peril” the lawful contours of their employer’s rules. *Flex Frac*, 2012 WL 3993589, at *3 (internal quotation omitted); *cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (assessment of whether employer statements violate Section 8(a)(1) “must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear”).

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S REASONABLE FINDING THAT THE COMPANY'S MAINTENANCE OF THE CONFIDENTIALITY RULE VIOLATES SECTION 8(a)(1) OF THE ACT

A. An Employer May Not Lawfully Maintain a Rule That Employees Would Reasonably Construe As Restricting Discussion of Terms and Conditions of Employment or Other Protected Communications

It is firmly established that the Act protects the right of employees to discuss the terms and conditions of their employment “with other employees . . . and with nonemployees.” *Cintas*, 482 F.3d at 466 (citations omitted); *Flex Frac*, 746 F.3d at 208-10. Consequently, and in accord with the principles outlined above, workplace rules that tend to restrict such activity—such as restraints on disclosing wages and other employee benefits to non-employees, or discussing them with other employees—are unlawful. *Cintas*, 482 F.3d at 468-69 (employer’s unlawful rule prohibited disclosure of “any information concerning” its employees); *Flex Frac*, 746 F.3d at 208 (“A workplace rule that forbids the discussion of confidential wage information between employees patently violates [the Act.]” (internal quotation marks, brackets, and ellipsis omitted)); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, 2014 WL 3778347, at *2-3 (July 31, 2014) (unlawful rule “prohibit[ed] discussion and disclosure of information about other employees, such as wages and [other] terms and conditions of employment”); *Automatic Screw Prods. Co.*, 306 NLRB 1072, 1072 (1992) (unlawful rule barred employee discussion of salary information).

Likewise, Section 7 protects an employee's disclosure of co-workers' names and contact information to a union in order to assist its organizing efforts, as well as the sharing of such information with other employees, which may be crucial to self-organization where employees act concertedly without union involvement. *See Ridgely Mfg. Co.*, 207 NLRB 193, 196-97 (1973) (Act protected employee's right to obtain names of fellow employees on time cards), *enforced*, 510 F.2d 185 (D.C. Cir. 1975); *cf. Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978) (Section 7 "necessarily encompasses the right [of employees] effectively to communicate with one another regarding self-organization at the jobsite."); *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) (recognizing "the importance of freedom of communication to the free exercise of organization rights"). Accordingly, restrictions on the communication of employees' names, addresses, and similar information are unlawful because they "inhibit[] employees from engaging in conduct protected by Sec[ti]on 7." *HTH Corp.*, 356 NLRB No. 182, 2011 WL 2414720, at *42 n.19 (June 14, 2011) (explaining that employer could not lawfully require that "the names and addresses of fellow employees," as opposed to those of hotel guests, be held confidential), *enforced sub nom. Frankl v. HTH Corp.*, 693 F.3d 1051 (9th Cir. 2012); *Albertson's*, 351 NLRB at 259, 366 (finding rule unlawful because it prohibited employee from providing work schedule, which included employee names, to a union).

B. The Company’s Confidentiality Rule Is Unlawfully Overbroad

Ample evidence supports the Board’s reasonable conclusion (JA 162 & n.1; JA 156 & n.3, 160) that the Company violated Section 8(a)(1) by maintaining portions of its Confidentiality Rule restricting employee discussion and communication of terms and conditions of employment, and employee names and contact information. To begin, the rule plainly prohibits employees from discussing covered information, as it requires them to, among other things, “hold and maintain all [such information] in the strictest of confidence,” “preserve and protect the confidentiality, privacy and secrecy of all [such information],” and “take all necessary precautions to keep [such information] secret, private, concealed and protected from disclosure.” (JA 158, 160; JA 22.) The further requirement that employees “not disclose, reveal or expose any [such information] to any person, business or entity” underscores that point and makes clear that the rule applies to communications between employees and between an employee and a union representative or other third party. (*Id.*)

Accordingly, the lawfulness of the Confidentiality Rule turns on whether an employee would reasonably understand it to cover information that employees have a Section 7 right to discuss and disclose. “[P]roperly focus[ing] on the rule’s language,” *Guardsmark*, 475 F.3d at 377, the Board reasonably found (JA 162 n.1; JA 156 n.3, 160) that an employee would so construe certain portions of the

Confidentiality Rule. Specifically, the Board found the rule unlawful as applied to:

(i) “non-public information relating to or regarding the Company’s . . . personnel” and (ii) “personnel information including, but not limited to, all personnel lists, rosters, personal information of co-workers” and “handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses.” (JA 162 & n.1, 163; JA 156 & n.3, 160.) The rule’s express definition of “Proprietary/Confidential Information” as including “personnel lists, rosters,” “home phone numbers, cell phone numbers, addresses, and email addresses” explicitly restricts employees’ Section 7 activities. *See supra*, pp.13-14. And employees would reasonably read the rule’s further inclusion of “non-public information relating to . . . personnel,” “personal information of co-workers,” “handbooks, personnel files, [and] personnel information” as restricting their disclosure of contact information, wages, benefits, and other terms and conditions of employment—information that they have a Section 7 right to discuss and disclose.

This Court’s decisions finding unlawful work rules with similarly broad provisions support that conclusion. For example, in *Cintas*, this Court upheld the Board’s finding that an employer’s maintenance of a rule prohibiting the disclosure of “any information concerning . . . [the employer’s] partners” was unlawful because employees would reasonably construe it to restrict their discussion of

wages and other terms and conditions of employment. 482 F.3d at 373, 376-77; *see also Brockton Hosp. v. NLRB*, 294 F.3d 100, 106-07 (D.C. Cir. 2002) (unlawful confidentiality policy prohibited discussion of “[i]nformation concerning patients, associates [that is, nurses], or hospital operations . . . either inside or outside the hospital, except strictly in connection with hospital business”).³ Moreover, the Board has found unlawful rules that, like the Confidentiality Rule, restrict the broad category of “personnel” information, which encompasses information crucial to Section 7 activity. *See Flex Frac*, 746 F.3d at 210 (overbroad rule used term “personnel information”); *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1013 n.1, 1015, 1018 (2001) (unlawful rule stated that all information about “employees is strictly confidential” and defined “personnel records” as confidential). Those decisions are fully consistent with the Board’s finding here. In fact, the Confidentiality Rule is more clearly restrictive than many unlawful

³ The Company’s suggestion (Br. 32, 34) that the lack of union representation or an established bargaining process in this case materially distinguishes it from *Cintas* or any other case is misguided. “An employer who restrains employees in the exercise of rights guaranteed them under Section 7 violates the Act no less because his employees have chosen to exercise their rights independent of union representation.” *Automatic Screw Prods. Co.*, 306 NLRB 1072 (1992) (internal quotation marks omitted). Indeed, discussions such as those prohibited by the Company’s rule “may be necessary as a precursor to seeking union assistance.” *Id.* If anything, the absence of union representation supports the Board’s finding here because “unrepresented employees are entitled to some leeway [with respect to Section 7 rights] to ‘speak for themselves as best they [can].’” *Fortuna Enters., LP v. NLRB*, 665 F.3d 1295, 1301 (D.C. Cir. 2011) (quoting *NLRB v. Wash. Aluminum*, 370 U.S. 9, 14 (1962)).

rules, such as those in *Cintas* and *Brockton Hospital*, because its overbroad restriction on “non-public information relating to . . . personnel”—itself very similar to the language found unlawful in those cases—is strongly reinforced by the specific listing, as examples of “personnel information,” of categories of information undeniably subject to the Act’s protection.

What is more, the Board’s analysis of the Confidentiality Rule does not, as the Company asserts (Br. 25-29), disregard the rule’s context and “presume interference with Section 7 rights.”⁴ Nothing in the language or context of the Confidentiality Rule reasonably suggests to employees that communications protected by the Act lie outside its sweeping prohibition. A comparative analysis of decisions finding such limitations, including those cited by the Company (Br. 26-31), demonstrates that point. Those cases found the reasonable interpretation of facially broad provisions to be limited by the contours of the rules containing the provisions, the particularities of certain workplaces, or common usage, and none of those factors supports a narrow reading of the provisions at issue here.

⁴ Indeed, the Board modified the judge’s recommended order to require that the Company rescind only the offending portions of the rule. (JA 156 & n.3.) That displays an effort to preserve as much of the rule as possible and to avoid broad assumptions. *See Flex Frac*, 746 F.3d at 210 n.4 (noting that the Board’s “order does not impair the majority of the employer’s confidentiality policy”).

For instance, in *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003), the Board found lawful an employer’s rule prohibiting disclosure of “customer and employee information, including organizational charts and databases.” Crucially, the Board relied on the location of the challenged phrase within a larger provision prohibiting disclosure of “proprietary information, including *information assets* and *intellectual property*.” It also cited the rule’s specific classification of the covered information—alongside “business plans,” “marketing plans,” “trade secrets,” “financial information,” “patents,” and “copyrights”—as “intellectual property.” 340 NLRB at 278-79. Thus, the Board found that “employees, reading the rule as a whole, would reasonably understand that it was designed to protect the confidentiality of the [employer’s] proprietary business information rather than to prohibit discussion of employee wages.” *Id.* at 279. Similarly, in *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996), the Court found that a rule restricting discussion of “office business” with “spouses, families or friends” was lawful because it appeared “as the last sentence of a long discussion regarding patient confidentiality in which the term ‘office business’ [was] used to refer to confidential patient medical information, . . . and there [was] nothing to suggest the contrary.” 81 F.3d at 211-13. In those circumstances, the Court found that employees would not have reasonably read “office business” in a manner infringing on their Section 7 activities. *Id.*; *see also*

Fresh & Easy Neighborhood Market, 361 NLRB No. 8, 2014 WL 3778347, at *3 (July 31, 2014) (noting that confidentiality rule the Court found unlawful in *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003), which restricted “confidential information concerning patients or employees[,] . . . applied only to a small subset of highly sensitive information about employees”); *Lafayette Park*, 326 NLRB at 826 (employees would understand rule against disclosing “Hotel-private information” as aimed at protecting “guest information, trade secrets, contracts with suppliers, and a range of other proprietary information,” and not at restricting Section 7 activity).

Here, neither the overall thrust of the Confidentiality Rule, nor any specific phrase, confines its coverage within lawful bounds. The rule covers a much larger swath of information than did *Mediaone*’s intellectual-property-focused rule or *Aroostook*’s medical-confidentiality rule, and fails to provide an appropriately circumscribed context in which to read the challenged provisions. *See Cintas*, 482 F.3d at 469-70 (distinguishing *Mediaone* and *Aroostook*); *Flex Frac*, 746 F.3d at 207, 210 (holding *Mediaone* inapplicable for same reason and invalidating restriction on “personnel information” included under larger category of “confidential information”). Nor are the contours of the Confidentiality Rule’s restriction defined solely by a term such as “confidential information,” which, this Court has found, may lead employees to limit their interpretation in a manner

consistent with ordinary usage of that term.⁵ Rather, the Confidentiality Rule lays out in detail what information it covers, thereby leading employees to reasonably construe it as restricting Section 7 activity. As the Agreement and Attachment A make clear, “Proprietary/Confidential Information” is a term of art for purposes of that document: the unwieldy term is uniformly capitalized, and Attachment A expressly defines it “[f]or purposes of this Agreement.” (JA 32.) Moreover, the definition itself shows that the term, insofar as it includes “personnel” information, encompasses more than “proprietary” or “confidential” information would be understood, in ordinary usage, to cover. By contrast, the *Mediaone* rule’s designation of “organizational charts and databases” as examples of “customer and employee information” was consistent with its narrow focus and thus supported a limited reading of its scope.

The Company contends (Br. 29-31) that the rule’s use of the phrase “non-public information” would lead reasonable employees to understand that they could discuss pay-and-benefits information and employee contact information, because such information is publicly available. The judge excluded as irrelevant

⁵ In *Community Hospitals*, the Court found that, because “[c]onfidential information is information that has been communicated or acquired in confidence,” employees would not construe a restriction on disclosing “confidential information concerning patients or employees” as “prevent[ing] [them] from saying anything about [themselves] or [their] own employment.” 335 F.3d at 1089.

much of the evidence on which the Company relies. (JA 156 n.2.)⁶ But even if the Company's representations—that it publicizes its terms and conditions of employment broadly and provides much employee information on its intranet site—are accepted as fact, they do not show that the “non-public” qualifier adequately narrows the Confidentiality Rule's coverage. According to its own descriptions (Br. 3-7), the Company makes public only generic compensation figures consisting of averages and ranges, which would hardly dispel employees' reasonable reading of the rule as prohibiting employees from disclosing specific, individualized information. Moreover, while the Company purports (Br. 4, 6-7) to provide much information, including employee contact information, on its intranet site, access to that forum is confined to those within the Company, so employees

⁶ When the Company sought to introduce evidence regarding its recruitment efforts, it did so to show a “business justification” for the rule and did not assert that the evidence had any relevance to the definition of “non-public.” (JA 77:21-78:8.) But, as noted below, *see* p. 24, whether the Company had a business justification for the rule is irrelevant because: (i) the violation here depends on how employees would construe the rule, not the Company's reasons for it, and (ii) even assuming such a justification existed, the rule is not lawfully tailored to accomplish it. The judge therefore properly sustained the objection to the relevance of the evidence. *See Bremerton Sun Publ'g Co.*, 311 NLRB 467, 470 n.8 (1993) (declining to find judge erred by excluding evidence because employer failed to make offer of proof of “evidence, which, if credited, would warrant a different result”). Nor did the judge abuse his discretion in sustaining an objection to the relevance of testimony the Company sought to elicit describing the information on its internal intranet system. He excluded that testimony as irrelevant to defining “non-public” after the witness in question specifically testified that the intranet site was accessible to “team members of [the] [C]ompany.” (JA 81:1-84:2.)

would not reasonably understand intranet information to be “public” enough to disclose to, for example, a union representative.⁷

Nor, given the various categories of information covered by the Confidentiality Rule, is there any merit to the Company’s contention (Br. 23-24) that an employee familiar with the Company’s business concerns respecting proprietary information would construe the Attachment A definitions as limited to protecting trade secrets, confidential client information, and the like. Once again, from the perspective of a reasonable employee, the structure of the overall Confidentiality Rule undermines those assertions because separate provisions of the rule are devoted only to proprietary concerns, in contrast to the unlawful portions of the rule. *See MCPc, Inc.*, 360 NLRB No. 39, 2014 WL 495815, at *9, *11 (Feb. 6, 2014) (distinguishing “proprietary business information” from information regarding employees’ terms and conditions of employment), *petition for review filed*, 3d Cir. Nos. 14-1379 and 14-1731.

⁷ Thus, even if the judge’s exclusion of the evidence was in error, the Company has failed to show that it was prejudiced by the rulings or that the Board erred by refusing to overturn the judge’s rulings as an abuse of discretion. *See Sunshine Piping, Inc.* 351 NLRB 1371, 1374 (2007) (“Both the courts and the Board review rulings excluding evidence for an abuse of discretion.”); *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005) (abuse of discretion standard), *petition for review denied sub nom. Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008); *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996) (“The burden of showing prejudice from assertedly erroneous rulings is on the party claiming injury.”).

The Company's related argument (Br. 27-29), that the Board failed to consider that the Confidentiality Rule is in fact aimed at protecting legitimate business interests such as protecting information subject to privacy laws and proprietary information in a competitive industry, is also unavailing. First, the crucial inquiry is how employees would reasonably understand the rule, not whether the Company had some reason for it. *See Guardsmark*, 475 F.3d at 376-78, 380 (employer rules unlawful despite asserted justifications). Second, "[a] more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company's presumed interest in protecting" that information. *Cintas*, 482 F.3d at 470.⁸

The Company also argues (Br. 20, 22-24, 43-44) that the Board improperly failed to consider the lack of evidence that Garza or any other employee actually read or interpreted the Confidentiality Rule (or the Non-Disparagement Rule, discussed further below) to restrict Section 7 activity. However, it is well settled

⁸ *See also Flex Frac*, 746 F.3d at 210 n.4 (noting that the Board's "order . . . does not prevent [the employer] from redrafting its policy to maintain confidentiality for employee-specific information like social security numbers, medical records, background criminal checks, drug tests, and other similar information"); *Guardsmark*, 475 F.3d at 380 (finding that even where employer had legitimate interest in restricting certain conduct, "it had an obligation to demonstrate its inability to achieve that goal with a more narrowly tailored rule that would not interfere with protected activity"); *Ne. Land Servs.*, 645 F.3d at 483 (rejecting employer's "legitimate business reasons" defense and observing that "a more narrowly drafted provision" would accomplish employer's goal of maintaining confidentiality).

that the Board was not required to prove that individual employees actually construed the rules to restrict Section 7 activity and/or were aware of the provisions.⁹ As noted above, pp.10-12, the Board's determination of whether employees would reasonably construe a workplace rule as prohibiting Section 7 activity is an objective one. Accordingly, this Court flatly rejected an employer's identical argument in *Cintas*, stating that, under the analysis applicable in this case, no evidence regarding "employees' actual interpretation of the confidentiality rule . . . is required to support the Board's conclusion that the rule is overly broad." 482 F.3d at 467.

Finally, the Company argues (Br. 33, 37-40) that the Board wrongly failed to consider that it did not enforce the rules to restrict Section 7 activity. That argument is meritless because this Court has held that "the Board is under no obligation to consider whether the disputed restriction has ever been enforced against employees exercising their [S]ection 7 rights." *Id.* at 467-68; *see also Lafayette Park*, 326 NLRB at 825 ("Where the rules are likely to have a chilling

⁹ Equally irrelevant is the Company's argument (Br. 24) that Garza's motive for filing her unfair-labor-practice charge was to gain an advantage in an unrelated lawsuit. In addition to the absence of record evidence supporting that argument, the Supreme Court has directly held that "[d]ubious character, evil or unlawful motives, or bad faith" of the charging party does not prevent the Board from proceeding with the matter. *NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9, 18 (1943). Once "a Board complaint issues, the question is only the truth of its accusations." *Id.*

effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.”).¹⁰

In *Mediaone*, *Lafayette Park*, *Albertson's*, and *Aroostook*, the determination that employees would not reasonably read the challenged rules to restrict Section 7 rights was separate from consideration of whether the employer had ever enforced those rules against employees' Section 7 activities. *Mediaone*, 340 NLRB at 279 (considering evidence of enforcement only *after* finding that rule would not be reasonably construed in an unlawful manner); *Lafayette Park*, 326 NLRB at 826-27 (same); *Albertson's*, 351 NLRB at 259 (separately evaluating whether off-the-job-conduct and other misconduct rules were enforced and whether they would reasonably be read to prohibit Section 7 activity); *Aroostook*, 81 F.3d at 211, 213-14 (finding private-grievance requirement not reasonably read to restrict Section 7

¹⁰ In that connection, and contrary to the Company's contention (Br. 42-45), the judge properly excluded evidence the Company sought to introduce. (JA 64:18-65:18; 66:20-23; 67:1-4; 71:22-73:22; 77:21-78:8; 83:5-84:2.) That included evidence of how individual mortgage bankers actually construed the unlawful provisions, including whether Garza had read the Agreement, and what she believed the Agreement prohibited. *See Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970) (“[T]he proper question is not whether an employee actually felt intimidated but whether the employer engaged in conduct which may reasonably be said to tend to interfere with the free exercise of employee rights under the Act.” (internal quotation marks omitted)). And, in any event, the Company has not shown prejudice or an abuse of discretion. *See* n.7, *supra*.

activity before considering enforcement evidence).¹¹ The Company's contention that those cases required the Board to consider evidence of enforcement here (Br. 27, 37-38) is thus incorrect. Here, the Board did not consider whether the Company enforced the rule because it found that employees would construe the rule's language and context as restricting their statutory rights. *See Lutheran Heritage*, 343 NLRB at 646-47 (whether provision not explicitly restricting protected activity violates Act depends upon satisfying "one" of three prongs, including the "reasonably construe" test *or* that "the rule has been applied to restrict the exercise of Section 7 rights").

In sum, the Board's finding that the Confidentiality Rule's language is unlawfully overbroad "is reasonably defensible, and adequately explained," *Cintas*, 482 F.3d at 467, and entitled to deference.

¹¹ Thus, although the Company suggests that, under *Aroostook*, a rule can only be found unlawful if there is evidence of its application (Br. 39-40), that case, properly read, does not stand for a principle so out of step with the caselaw. *See, e.g., Cintas*, 482 F.3d at 467-68 (application of rule not required to find violation); *Guardsmark*, 475 F.3d at 374 (same).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S REASONABLE FINDING THAT THE COMPANY'S MAINTENANCE OF THE NON-DISPARAGEMENT RULE VIOLATES SECTION 8(a)(1) OF THE ACT

A. An Employer May Not Lawfully Maintain a Rule That Employees Would Reasonably Construe As Restricting Their Section 7 Right To Publicly Criticize Their Employer within Appropriate Limits

Section 7 of the Act protects employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employer-employee relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Thus, employees have the right to communicate with the public about ongoing labor disputes and to seek support from nonemployees. *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003); *Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1252 (2007), *enforced sub nom. Nevada SEIU Local 1107 v. NLRB*, 358 Fed. App'x 783 (9th Cir. 2009). For example, employee communications to newspaper and television reporters regarding labor disputes have been found to be protected. *See Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995) (newspaper reporter); *Cnty. Hosp. of Roanoke Valley*, 220 NLRB 217, 222-23 (1975) (television interview), *enforced*, 538 F.2d 607 (4th Cir. 1976). Likewise, this Court has upheld the right of employees to protest their employer's "unfair labor practices by carrying signs and distributing leaflets to customers." *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1177 (D.C. Cir. 1993); *see also Santa Fe Hotel & Casino*, 331 NLRB 723,

730 (2000) (“[T]he fact that the off-duty employee distributions . . . were to customers rather than to other employees appears to be a distinction without a difference and is an irrelevant consideration.”); *NCR Corp.*, 313 NLRB 574, 576 (1993) (“Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations.”).

As a general matter, then, the Act protects employees’ right to communicate with the public about workplace matters. A narrow exception applies when the employees attack their employer in a manner “so disloyal, reckless, or maliciously untrue as to lose the Act’s protection.” *Valley Hosp.*, 351 NLRB at 1252; *see also NLRB v. Local Union No. 1229, Int’l Bhd. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464, 472 (1953) (statements unprotected where made “at a critical time in the initiation of the company’s” business and where they constituted “a sharp, public, disparaging attack upon the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income”). The Board is “careful to distinguish between disparagement of an employer’s product and the airing of what may be highly sensitive issues.” *Prof’l Porter & Window Cleaning Co.*, 263 NLRB 136, 139 (1982), *aff’d mem.*, 742 F.2d 1438 (2d Cir. 1983); *see also NLRB v. Circle Bindery*, 536 F.2d 447, 452 (1st Cir. 1976) (“[A]ctivity that is otherwise proper

does not lose its protected status simply because [it is] prejudicial to the employer.”); *Richboro Cmty. Mental Health Council*, 242 NLRB 1267, 1268 (1979) (employee’s “right to appeal to the public is not dependent on the sensitivity of [the employer] to [the employee’s] choice of forum.”).

In accord with these principles and those outlined above, pp.10-12, workplace rules that tend to restrict employees from making statements to third parties regarding work-related matters and from engaging in other public activities protected by Section 7 of the Act, are unlawful. *Hills & Dales Gen. Hosp.*, 360 NLRB No. 70, 2014 WL 1309713, at *2-3 (Apr. 1, 2014) (rule requiring that employees “represent [the employer] in the community in a positive and professional manner” unlawful because it would discourage employees from engaging in activity “that may not be ‘positive’ towards the [employer] but is clearly protected by Section 7”); *NLRB v. S. Md. Hosp. Ctr.*, 916 F.2d 932, 940 (4th Cir. 1990) (rule prohibiting “derogatory attacks on . . . hospital representative[s]” found unlawful); *Beverly Health & Rehab. Servs.*, 332 NLRB 347, 356-57 (2000) (rule that prohibited “[m]aking false or misleading work-related statements concerning the company, the facility or fellow associates” found unlawful), *enforced*, 297 F.3d 468 (6th Cir. 2002). On the other hand, employers may lawfully restrict truly malicious public attacks, such as disloyal statements made under circumstances suggesting malicious motives due to particularly

sensitive timing, disparagement of the employer's product, and a failure to reference any labor controversy. *See Jefferson Standard*, 346 U.S. at 471-72, 476-77.

B. The Company's Non-Disparagement Rule Is Unlawfully Overbroad

The Board concluded (JA 162 & n.1; JA 156 & n.3, 160) that the Company's maintenance of the Non-Disparagement Rule violated Section 8(a)(1) of the Act. As it explained, the rule's requirement that employees not "publicly criticize, ridicule, disparage or defame the Company or its products, services, policies . . . through any written or oral statement" is "unlawful because employees would reasonably construe its broad prohibitions as encompassing Sec[ti]on 7 activity."¹² In particular, employees would reasonably read the rule as restricting them from "criticiz[ing] their employer and its products . . . in appealing to the public, or to their fellow employees, in order to gain their support"—activity in which, "[w]ithin certain limits," they have a right to engage. (JA 160.)

¹² The Company's objection to the judge's use of the phrase "could reasonably," rather than "would reasonably," (Br. 35) is meritless. Although the judge wrote that an employee "could reasonably construe" the provision as restricting Section 7 activity (JA 160), the Board's decision correctly states its conclusion that "employees *would* reasonably construe" (emphasis supplied) the rule in that manner. (JA 162 n.1; JA 156 n.3.) In any event, this Court rejected an identical argument in *Cintas*, stating that "[w]e find slippage between 'would' and 'could' inconsequential here given the Board's use of the modifier 'reasonably.' . . . Both preclude possible, but unreasonable, interpretations of company rules, and therefore merit our deference." 482 F.3d at 467 n.1.

The Board's finding is reasonable and supported by substantial evidence. The text of the Non-Disparagement Rule, particularly its very broad command that employees neither "publicly criticize" the Company or its policies, nor "cause or cooperate with others to" do so, clearly encompasses protected, concerted employee communications protesting the Company or otherwise appealing to the public during a labor dispute. Indeed, it is difficult to imagine an employee appeal for public support in a dispute with the Company that would not arguably constitute prohibited "criticism" because nothing in the rule reasonably suggests that its proscription is limited to conduct that is "so disloyal, reckless or maliciously untrue [as] to lose the Act's protection." *Valley Hosp.*, 351 NLRB at 1252 (internal quotation marks omitted) (relying on *Jefferson Standard*).

Moreover, two other aspects of the Non-Disparagement Rule reinforce the reasonableness of the Board's finding that it would be understood as covering Section 7 activity. First, the rule leads with a reference to the Company's "internal procedures for complaints and disputes" immediately before barring public critiques. Contrary to the Company's suggestion (Br. 38), the rule's mention of that "open door policy" does not make clear that employees may exercise their Section 7 right to criticize company practices. Rather, the juxtaposition of the internal complaint mechanism and the ban on external complaints suggests that the Company would interpret any public airing of employment "complaints and

disputes,” even those protected by Section 7, as criticism within the meaning of the Non-Disparagement Rule.¹³ Second, the safe-harbor provision (Br. 38) for “statutorily privileged statements made to governmental or law enforcement agencies” is strictly limited to a few very specific situations that are in no way coterminous with Section 7 activity. In fact, when read in light of the rule’s broad prohibition, the two narrow exceptions reinforce the Board’s conclusion that employees would reasonably see the rule as restricting them from engaging in protected public criticism of the Company. In short, neither provision overcomes the Board’s finding that the Non-Disparagement Rule is unlawfully overbroad.¹⁴

The reasonableness of the Board’s conclusion is underscored by Board and court cases finding similar rules unlawful. For instance, the Fourth Circuit in *NLRB v. Southern Maryland Hospital Center* upheld the Board’s determination that a rule prohibiting “derogatory attacks on . . . hospital representative[s]” was

¹³ The Company also may not restrict employees from engaging in some forms of Section 7 activity just because it provides alternative outlets for grievances (such as through the open-door policy or litigation). See *Richboro Cmty. Mental Health Council*, 242 NLRB at 1268 (The “right to appeal to the public is not dependent on the sensitivity of [the employer] to [the employee’s] choice of forum.”). To the extent the Company suggests as much (Br. 38), it is wrong.

¹⁴ The Company suggests (Br. 38-41) that the lack of evidence showing that it enforced the rule is an important consideration. As noted above, pp. 25-26, this Court squarely rejected that argument in *Cintas. Hills & Dales General Hospital*, 360 NLRB No. 70, 2014 WL 1309713 (Apr. 1, 2014), relied upon by the Company, is not to the contrary. The Board there specifically noted that it found the challenged rules “facially unlawful,” *id.* at *1.

unlawful. 916 F.2d at 940. As the court explained, “certain types of derogatory remarks may sound quite similar to maliciously false and defamatory speech, . . . [but] derogatory remarks may also include truthful union propaganda that places hospital personnel in an unfavorable light. . . . It may very well be true that derogatory attacks destroy . . . ‘the positive work atmosphere,’ but the values of free speech and union expression outweigh employer tranquility in this instance.”

Id.; see also *Richboro Cmty. Mental Health Council*, 242 NLRB at 1268

(employer’s sensitivity to public forum does not cause employee’s conduct to lose Act’s protection). Considered next to the *Southern Maryland Hospital* rule’s unlawful restriction on “derogatory attacks,” a phrase that implies particularly biting denunciation, the “public[] critici[sm]” prohibited by the Non-Disparagement Rule defines a category of speech even more firmly within Section 7’s protection. See *Claremont Resort & Spa*, 344 NLRB 832 (2005) (rule prohibiting “negative conversations about associates and/or managers” found unlawful); *Beverly Health & Rehab. Servs.*, 332 NLRB 347, 347 n.5, 348 (2000) (rule prohibiting “[m]aking false or misleading work-related statements concerning the company, the facility or fellow associates” found unlawful), *enforced*, 297 F.3d 468 (6th Cir. 2002).

Conversely, the cases relied upon by the Company (Br. 37-40) did not examine rules prohibiting employees from making protected public appeals, and so

fail to support its position. For example, the Court in *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), upheld a rule that prohibited employees from “[u]sing abusive or threatening language to anyone on Company premises.” *Id.* at 319 (internal quotation marks omitted). There, the Court distinguished rules discouraging “‘abusive or threatening language’ more generally” from unlawful rules “barr[ing] false, vicious, profane or malicious statements *about the employer.*” *Id.* at 322-23 (emphasis in original). It explained that requiring employees to “comply with generally accepted notions of civility” in the workplace was “quite different” from restricting speech “arguably related to protected activities,” which might “well constitute an unfair labor practice in the proper context.” *Id.* at 323. Thus, the Court in *Adtranz* limited its holding to rules restricting abusive or threatening, and thus generally unprotected, statements made on the employer’s premises, and expressly distinguished the rule it found lawful from rules comparable to the Non-Disparagement Rule. In *Lutheran Heritage*, the Board found a similar rule restricting abusive and profane language lawful, for the same reasons as the Court in *Adtranz*. 343 NLRB at 647.

Here, the Non-Disparagement Rule is unlike the rules in *Adtranz* and *Lutheran Heritage*. It is not limited to regulating generally unprotected language or aggression in the workplace, but instead restricts employees’ communications to the public criticizing their employer and working conditions. Such public criticism

is a virtually inextricable part of employees' Section 7 right to appeal to the public for assistance in improving terms and conditions of employment. While the Company accurately observes (Br. 36) that employees' public appeals may lose the protection of the Act in certain very limited circumstances, that in no way cures the Non-Disparagement Rule's unlawful overbreadth, which depends not on "imagining 'horrible hypothetical situations'" (Br. 40), but on a straightforward assessment of the rule's text. *See Adtranz*, 253 F.3d at 323 (granting that rules whose prohibitions "may well constitute an unfair labor practice in the proper context" are unlawful).

The Company also misreads (Br. 37-40) the Board's holdings in *Lafayette Park*, *Ark Las Vegas*, and *Albertson's* as supporting a different outcome here. None of the rules found lawful in those cases prohibited public criticism of an employer, as the Non-Disparagement Rule does, and each was focused on genuine misconduct clearly unprotected by the Act. *See Lafayette Park*, 326 NLRB at 827 (rule precluded "[u]nlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community"); *Ark Las Vegas Rest. Corp.*, 335 NLRB 1284, 1291 (2001) (rules prohibited "[c]onducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the [c]ompany" and "any conduct, on

or off duty, that tends to bring discredit to, or reflects adversely on, yourself, fellow associates, the Company, or its guests . . .”), *enforced*, 334 F.3d 99 (D.C. Cir. 2003); *Albertson’s*, 351 NLRB at 258-59 & n.18 (rules prohibited “[o]ff-the-job conduct which has a negative effect on the [c]ompany’s reputation or operation or employee morale or productivity” and “[a]ny other misconduct which, in the [c]ompany’s judgment, warrants immediate discharge”). *Ark Las Vegas*, for instance, specifically found that the rules were aimed at conduct “related to crimes or other misconduct,” 335 NLRB at 1291, which is not even arguably the case here. *See also Lafayette Park*, 326 NLRB at 827 (employees would understand rule aimed at “serious misconduct, not conduct protected by the Act”); *Albertson’s*, 351 NLRB at 259 (same).

Finally, the Court lacks jurisdiction to consider the Company’s claim (Br. 45-46) that the Board “rubber stamp[ed]” the judge’s decision without “meaningful analysis,” because the Company did not raise it before the Board, even in a motion for reconsideration of the Board’s decision. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); 29 C.F.R. § 102.48(d)(1), (2) (moving party has 28 days after the Board issues its decision to request reconsideration); *Chevron*

Mining, Inc. v. NLRB, 684 F.3d 1318, 1328-30 (D.C. Cir. 2012). The Company has not so much as suggested that any extraordinary circumstance excuses that failure. *See NLRB v. KSM Indus., Inc.*, 682 F.3d 537, 544 (7th Cir. 2012) (refusing to consider employer’s due process argument that “Board failed to properly review the matter”).

In any event, it is well established that “[w]here, as here, the Board adopts the [judge]’s findings and conclusions as its own, [a court] appl[ies] the same deferential standard to those findings and conclusions [as it does to those made directly by the Board].” *Weigand v. NLRB*, --- F.3d ---, 2015 WL 1740081, at *5 (D.C. Cir. Apr. 17, 2015); *see also KSM Indus.*, 682 F.3d at 545 (“It takes much more for [a court] to intervene than a disappointed party’s hunch that the Board gave a cursory review to its case.”); *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1202 (D.C. Cir. 2003) (finding that the Board “dealt fairly with petitioner’s challenges to the ALJ’s review of the facts,” noting that “[t]he Decision and Order reflects the Board’s own independent review of the record, which the Board affirmatively states that it conducted”).

CONCLUSION

The Company’s Confidentiality and Non-Disparagement Rules broadly restrict employees’ activity and contain no language limiting their coverage or exempting protected activities. The Board thus reasonably determined that

employees would construe both rules as proscribing their exercise of important rights under the Act. The Board's decision is amply supported by substantial evidence, as well as its own precedents and those of this and other courts.

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

Respectfully submitted,

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July 2015

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

QUICKEN LOANS, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 14-1231, 14-1265
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	28-CA-075857
)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,157 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007 and 2010.

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Dated at Washington, DC
this 23rd day of July, 2015

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)	

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2015 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not, by serving a true and correct copy at the address(es) listed below:

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