Oral Argument Not Yet Scheduled

Nos. 16–0002 & 16–0346

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WHOLE FOODS MARKET GROUP, 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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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Whole Foods Market Group, Inc. ("the Company") to review, and the National Labor Relations Board ("the Board") to enforce, a Board Order issued against the Company. The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce. The Board's Decision and Order, issued on

December 24, 2015, and is reported at 363 NLRB No. 87 (JA 235-48).[1] The Board's Order is final with respect to all parties. The Court has jurisdiction under Sections 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is proper because the unfair labor practices occurred in Connecticut.

The Company filed its petition for review of the Board's Order on January 4, 2016 and the Board filed its cross-application for enforcement on February 5, 2016. Each was timely because the Act places no time limitation on these filings.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by maintaining overbroad rules prohibiting all forms of workplace recording that would reasonably chill employees in the exercise of their Section 7 rights, which include recording under certain circumstances.

CONCISE STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Based on unfair-labor-practice charges filed by United Food and Commercial Workers Local 919 and the Workers Organizing Committee of Chicago, the Board's General Counsel issued a consolidated complaint alleging

[1] "JA" refers to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to the Company's brief, "A.Br." refers to the Amicus' brief.

that the Company violated Section 8(a)(1) of the Act by maintaining a number of overly broad workplace rules. (JA 235 n. 2, 244; JA 17.) Following a hearing, an administrative law judge issued a decision with his recommended findings and a proposed order dismissing the complaint. (JA 244-248.) The General Counsel filed exceptions to the judge's decision, and the Company filed an answering brief. On review, the Board (one Member dissenting) reversed the judge's findings, and found that two rules prohibiting employees from recording in the workplace without management approval, and the accompanying discharge penalty for those rules, were unlawful. (JA 235-240, JA 235 n.4.) [2]

II. THE BOARD'S FINDINGS OF FACT

The Company is a retailor and distributor of foods. Operationally, it is divided into 12 regions in the United States, Canada, and the United Kingdom. Each region is led by a regional president, regional vice presidents, and regional managers. Within its regions, the Company operates 351 retail grocery stores and employs 76,000 employees. (JA 244; JA 16, 50-52, 64, 107.)

The Company maintains rules in its General Information Guide ("the Guide") that apply to all employees. (JA 235, 236; JA 43-44, 50-52, 96.) Two of these rules prohibit employees from using audio or video devices to make

[2] The parties reached a settlement with respect to all rules except the no-recording rules. (JA 235 n.2.)

workplace recordings without prior management approval. The first appears under the subheading "Team Meetings" and states:

> In order to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust, [the company] has adopted the following policy concerning the audio and/or video of company meetings:
>
> It is a violation of [company] policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to a cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior approval is received from your Store/Facility Team Leader, Regional President, Global Vice President or a member of the Executive Team, or unless all parties to the conversation give their consent. Violation of this policy will result in corrective action, up to and including discharge.
>
> Please note that while many [company] locations may have security or surveillance cameras operating in areas where company meetings or conversations are taking place, their purposes are to protect our customers and Team Members and to discourage theft and robbery. (JA 235; JA 121.) [3]

The second rule appears under the heading "Team Member recordings" and states, in relevant part:

> It is a violation of [Company] policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed. (JA 235; JA 153.)

[3] Employees are also referred to as "Team Members." (JA 236; JA 52.)

The Guide also has a separate section entitled "Major Infractions." One such infraction is "[r]ecording conversations, phone calls or company meetings with any audio or video recording device without prior approval or consent." The Guide states that such infractions "may lead to discharge." (JA 235; JA 149.)

Taken together, the above rules prohibit all recording in the workplace, both audio and video.[4] Further, although the Company's "Team Meetings" rule has an introductory paragraph referencing company meetings, the substance of that rule more broadly prohibits the use of any recording device to record "conversations, phone calls, images, *or* company meetings." (JA 235; JA 121, emphasis added.) The Company's "Team Member recordings" rule further prohibits "recording of conversations." (JA 235; JA 153.) And the Guide's section entitled, "Major Infractions" prohibits recording "conversations, phone calls, *or* company meetings with any audio or video recording device." (JA 235; JA 149, emphasis added.) Accordingly, the Board found, and the Company does not dispute the finding, that the "rules at issue here prohibit the recordings of conversations, phone calls, images or company meetings with a camera or recording device without prior approval by management." (JA 237.)

[4] "Recording" is therefore used throughout this brief to refer to both audio and video recording.

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Member Hirozawa; Member Miscimarra dissenting) found that the Company violated Section 8(a)(1) of the Act by maintaining no-recording rules that would reasonably chill employees in the exercise of their Section 7 rights. To remedy this violation, the Board ordered the Company to cease and desist from the violation found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them under the Act. Affirmatively, the Board's Order requires the Company to revise or rescind its no-recording rules, and to post a remedial notice. (JA 239-240.)

SUMMARY OF ARGUMENT

This is a straightforward case that the Board decided squarely within the parameters of applicable law. Based on the proposition, well supported and illustrated by its prior cases, that workplace recording constitutes protected activity if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present, the Board concluded that the Company's total ban on workplace recording chilled the employees' exercise of their Section 7 rights. In doing so, the Board properly applied the judicially approved and long recognized inquiry under *Lutheran Heritage* that employees would reasonably

interpret the rules as infringing on their right to engage in workplace recordings protected by the Act, and thus the rules were unlawfully overbroad.

Notwithstanding considerable hyperbole, the contentions of the Company and Amicus provide no grounds to disturb the Board's findings. Their claim that workplace recording does not constitute protected activity ignores the Board's reasonable application of its own precedent. The Board also acted well within its discretion by rejecting the Company's and Amicus' claims, repeated before the Court, that employees would not construe the no-recording rules as prohibiting protected activity. Neither the language of the rules themselves nor the Company's asserted business justifications countermand the rules' total ban on workplace recording. Finally, the Company and Amicus' novel contention never presented to the Board that the Court should now—after more than a decade of active approval and application by the Board and courts alike—overrule one prong of the settled standard of *Lutheran Heritage* for assessing whether workplace rules are unlawfully overbroad is jurisdictionally barred and, in any event, without merit.

STANDARD OF REVIEW

The Court gives considerable deference to the Board's legal conclusions, particularly conclusions "based upon the Board's expertise." *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001). *See also Office & Prof'l Employees Int'l Union v. NLRB*, 981 F.2d 76, 81 (2d Cir.1992) ("Congress charged the Board with

the duty of interpreting the Act and delineating its scope."). In particular, the legal conclusion that Section 7 of the Act protects employee activities "implicates the Board's expertise in labor relations." *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005) (quoting *NLRB v. City Disposal Sys., Inc*., 465 U.S. 822, 829 (1984)). Accordingly, the Board's conclusion is entitled to considerable deference. *NLRB v. Parr Ambulance Serv.*, 723 F.2d 575, 577 (7th Cir. 1983) ("We will not reposition a line drawn by the Board between protected and unprotected behavior unless the Board's line is 'illogical or arbitrary.'"); *NLRB v. Lummus Indus., Inc*., 679 F.2d 229, 234 (11th Cir. 1982) ("[P]rimary responsibility for drawing the line between protected and unprotected activity falls on the Board.").

Moreover, "Congress has entrusted the Board with implementing Sections 7 and 8(a)(1) of the Act and determining, in the first instance, when an employer's workplace rules run afoul of those provisions." *Quicken Loans, Inc. v. NLRB*, __ F.3d __, 2016 WL 4056091, at *4 (D.C. Cir. July 29, 2016). Therefore, the Board's determinations regarding the legality of workplace rules are also "entitled to considerable deference," and will be sustained as long as the Board faithfully applies the legal standards, and its textual analysis of a challenged rule is reasonably defensible and adequately explained. *Id*. (citations omitted).

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); *accord NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). Thus, the Board's reasonable factual inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it de novo; as this Court has explained, "[w]here competing inferences exist, we defer to the conclusions of the Board." *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988).

Finally, the Court's standard of review does not change where the Board disagrees with the administrative law judge. *See Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 175 (2d Cir. 1998). Indeed, it is "well-settled" that where, as here, the Board and the judge draw different legal conclusions from the same record evidence, the judge's conclusions "are entitled to no special weight." *Id.* (citing *Local 259, UAW v. NLRB*, 776 F.2d 23, 27 (2d Cir. 1985)). In these circumstances, the Court has held that it is not permitted to draw its own inferences, but rather, consider whether on the record considered as a whole there is substantial evidence to support the Board's findings. *Bryant & Stratton*, 140 F.3d at 175.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING OVERBROAD RULES PROHIBITING ALL WORKPLACE RECORDING

The Board reasonably found that the Company's no-recording rules, which prohibit employees from all recording in the workplace, violate Section 8(a)(1) of the Act because employees would reasonably interpret them as restricting their statutorily protected activity. The Company has failed to present any basis for the Court to disturb the Board's reasonable findings.

A. An Employer's Work Rule Is Unlawful if Employees Would Reasonably Construe It as Prohibiting Activity Protected By Section 7

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 unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. 29 U.S.C. § 158(a)(1).

Section 7 rights "necessarily encompass" employee rights to communicate with one another and with third parties about collective action and organizing a union. *Quicken Loans*, 2016 WL 4056091, at *1 (citing *Beth Israel Hospital v.*

NLRB, 437 U.S. 483, 491 (1978)). In addition, Section 7 encompasses employee rights to seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Section 7 thus protects employee rights to discuss organization and the terms and conditions of their employment, to criticize their employer or their conditions of employment, and to enlist the assistance of others in addressing employment matters. *Quicken Loans*, 2016 WL 4056091 at *1; *accord Triple Play Sports Bar and Grille*, 361 NLRB No. 31, 2014 WL 4182707, at *1, *enforced sub nom. Three D, LLC v. NLRB*, 629 F. App'x 33, 35 (2d Cir. 2015) (summary order).

Photography and audio or video recording in the workplace is protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, 2015 WL 5113232, at *4 (August 27, 2015); *T-Mobile USA Inc.*, 363 NLRB No. 171, 2016 WL 1743244, at *4 (April 29, 2016), *review pending*, *T-Mobile USA Inc. v. NLRB*, Fifth Circuit Nos. 16-60284, 16-60497). [5] Such

[5] As the Board recognized (JA 237 n.9), for employee activity to be protected it must be undertaken in furtherance of group action or, in the absence of group action, undertaken in an effort to enforce a collective-bargaining agreement or to initiate or induce group action. *Meyers Indus. II*, 281 NLRB 882, 884, 887 (1986), affirmed sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); *see City Disposal Systems*, 465 U.S. 822 (1984).

protected conduct includes, for example, recording images of protected picketing, documenting unsafe working conditions, documenting and publicizing discussions about terms and conditions of employment, or documenting potential employer unfair labor practices. *Rio*, 2015 WL 5113232 at *4. Accordingly, an employer violates Section 8(a)(1) of the Act by maintaining work rules that infringe on employees' Section 7 right to make workplace recordings when they are acting in concert for their mutual aid and protection and no overriding employer interest is present. *Id*.

In evaluating an employer's maintenance of workplace rules, the Board examines whether the challenged rule or policy "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). In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board elaborated on this standard, setting forth a specific analytical framework for determining whether a given employer rule "would reasonably tend to chill" Section 7 activity. *Id*.

Under the *Lutheran Heritage* framework, the Board first considers whether an employer's rule "explicitly restricts activities protected by Section 7." 343 NLRB at 646. If the rule explicitly restricts such activities, the Board will find the mere maintenance of that rule violates Section 8(a)(1). *Id*. If the rule does not explicitly restrict such activities, it is nonetheless unlawful "when employees

would reasonably construe the language [of the rule] to prohibit Section 7 activity" (often referred to as the "first prong" of the test).[6] 343 NLRB at 647. The Court has upheld the Board's application of this settled standard. *See Triple Play*, 361 NLRB No. 31, 2014 WL 4182707, at *8-9 (applying first prong of the test), *enforced sub nom. Three D, LLC v. NLRB*, 629 F. App'x 35, 38 (2d Cir. 2015) (summary order) (stating that the Board "correctly identified the *Lutheran Heritage* framework as the governing rule on this question and reasonably applied that rule to the facts of this case"). Other courts have also upheld this prong of the test. *See, e.g., Quicken Loans*, 2016 WL 4056091, at *5; *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014); *Cintas Corp.*, 344 NLRB 943, 943 (2004), *enforced*, 482 F.3d at 470 (D.C. Cir. 2007); *Northeastern Land Servs., Ltd.*, 355 NLRB No. 169, 2010 WL 3797693, at *1 (2010) (adopting prior decision applying first prong of the test), *enforced*, 645 F.3d 475, 483 (1st Cir. 2011). Finally, any ambiguity in a rule must be construed against the promulgator of the rule. *Lafayette Park*, 326 NLRB at 828.

[6] A workplace rule not explicitly restricting Section 7 activity is also unlawful when the rule was "promulgated in response to union activity" or it "has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage*, 343 NLRB at 647 (often referred to as the "second" and "third" prongs of the test). The Board's finding here did not rely on either of these alternate theories.

B. Substantial Evidence Supports the Board's Finding That Employees Would Reasonably Interpret the Company's No-Recording Rules as Infringing on Their Right To Engage In Protected Workplace Recording

Following Board and court precedent establishing that workplace recording constitutes protected activity in certain circumstances, the Board then faithfully applied the well-settled *Lutheran Heritage* test to reasonably conclude that the Company violated Section 8(a)(1) of the Act by maintaining overbroad rules prohibiting all workplace recordings without prior management approval. As we show below, the Board's finding, that employees would reasonably interpret the Company's rules as infringing on protected concerted activity, is entitled to enforcement, and the Company has provided no grounds to disturb this finding.

1. Workplace recording constitutes protected activity if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present

As an initial matter, the Board relied on its recent holding in *Rio*, 362 NLRB No. 190, 2015 WL 5113232, to support its finding that employee recording and photography in the workplace constitute activity protected by Section 7 "if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present." (JA 237). Citing *Rio*, 2015 WL 5113232 at *4, the Board explained that "[s]uch protected conduct may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing

discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions." (JA 237.) In these circumstances, employees making workplace recordings or taking photographs are acting "in concert for their mutual aid and protection" so long as no overriding employer interest is present, and are therefore exercising their rights to communicate about collective action. (JA 237.)

The Board buttressed its reliance on *Rio* with ample case law examples of that principle, exhaustively chronicling its prior case law and noting that it "illustrates a wide array of protected uses" for recording and photography devices. (JA 237 n.7.) For example, the Board cited *Hawaii Tribune-Herald*, 356 NLRB 661 (2011), a decision enforced by the D.C. Circuit in *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012). (JA 237 n.7.) In *Stephens Media*, the court upheld the Board's finding that employees engaged in protected activity by planning to record, and actually recording, a meeting with a supervisor in which employees acted in concert to document what they perceived to be a potential violation of their rights. *Stephens Media*, 677 F.3d at 1255-56, *enforcing Hawaii Tribune-Herald*, 356 NLRB at 674-75.[7]

[7] The Board additionally cited numerous cases involving protected uses for recording and photography devices: *See Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991) (finding that an employee engaged in protected activity by

Further supporting its finding that workplace recording constitutes protected activity in certain circumstances, the Board analyzed additional case law "replete with examples where photography or recording, often covert, was an essential element in vindicating the underlying Section 7 right." (JA 237, 237 n.8). These cases include instances where employees' recordings demonstrated unlawful employer conduct such as threats, solicitation of grievances, and unlawful surveillance. *See, e.g.*, *Times-Herald Record*, 334 NLRB 350, 354 (2001) (recording admissible in Board proceedings to support allegations of unlawful employer threats), *enforced*, 27 Fed. Appx. 64 (2d Cir. 2001); *Wellstream Corp.*, 313 NLRB 698, 711 (1994) (recording admissible to support allegations of unlawful solicitation of grievances); *California Acrylic Indus., Inc.*, 322 NLRB 41 (1996) (photographs admitted to support allegations of unlawful employer surveillance), *enforced in relevant part*, 150 F.3d 1095 (9th Cir. 1998). Given this

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carrying a tape recorder in the workplace to aid a federal government workplace investigation), *enforced mem.*, 976 F.2d 743 (11th Cir. 1992); *White Oak Manor*, 353 NLRB 795, 795 n.2 (2009), *reaffirmed and incorporated by reference at* 355 NLRB 1280 (2010) (finding employee did not lose the protection of the Act by taking photograph where the photography was part of a concerted effort to induce group action regarding a dress code), *enforced*, 452 Fed. Appx. 374 (4th Cir. 2011); *Opryland Hotel*, 323 NLRB 723, 723 n.3 (1997) (in absence of valid rule, practice, or prohibition of the use of tape recorders, such use does not constitute misconduct sufficient to defeat reinstatement after an unlawful discharge); *cf. Gallup Inc.*, 334 NLRB 366 (2001) (promulgation of rule prohibiting tape recording was unlawful where it was enacted by employer in response to union organizing efforts), *enforced mem.*, 62 Fed. Appx. 557 (5th Cir. 2003). (JA 237 n.7.)

body of precedent, the Board reasonably found, consistent with its decision in *Rio*, that employee recording in the workplace constitutes protected activity when engaged in for mutual aid and protection and no overriding employer interest is present. (JA 237).

The Company repeatedly asserts (Br. 27-33) that employees would not reasonably construe its no-recording rules as prohibiting employees from engaging in protected activity because making recordings in the workplace is not a protected right. However, the Company's broad-brush assertion (Br. 27) that "making recordings in the workplace is not a protected right" overstates the Board's actual, more specific finding that employees who make workplace recordings are engaged in protected activity in specific circumstances, namely, when they are acting in concert for their mutual aid and protection and no overriding employer interest is present. As we show below, the Company has failed to disturb the Board's reasonable finding.

The Company's initial claim in this regard (Br. 28-29)—that Board precedent affirmatively contradicts the Board's protected activity finding here and in *Rio*—is simply wrong. As an initial matter, the Company's two-page-long discussion of an administrative law judge's decision *in Interbake Foods, LLC*, JD-53-13, 2013 WL 4715677 (NLRB Div. of Judges) (August 13, 2013) is beside the point, because the Board was not asked to review that decision. *See Interbake*

Foods, LLC, 2013 WL 5872060 (stating that Board adopted judge's decision in the absence of exceptions). When the Board is not asked to review portions of an administrative law judge's decision, those portions have no precedential value. *See Stanford Hospital and Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003); *Colgate-Palmolive Co.*, 323 NLRB 515, 515 n.1 (1997). What does have clear precedential value is a discussion by the Board itself, such as the Board's thorough discussion here and in *Rio* explaining how workplace recording is protected in certain circumstances.

Nor does the Company advance its case by relying (Br. 28) on a quotation from the judge in *Flagstaff Medical Center, Inc.*, 357 NLRB 659 (2011) regarding workplace photography. Contrary to the Company's contention (Br. 28), although the Board adopted the judge's decision on exceptions in *Flagstaff*, the judge's passing comment that the Company quotes—"the specific right to take photos in the workplace would not seem to come to mind as an inherent component of the more generalized fundamental [Section 7] rights. . ."— hardly stands as a conclusive holding that workplace recording or photography can never constitute protected activity. In fact, just a few sentences later, the judge states that "taking photos may or may not be concerted activity, depending on the circumstances," *Flagstaff*, 357 NLRB at 683 n.31, which is exactly the Board's holding regarding workplace recording and photography here and in *Rio*.

The Company also quibbles (Br. 27-32, 35) with the Board's conclusion that pre-*Rio* precedent lends support to the finding in the instant case and in *Rio* that workplace recording is protected in certain circumstances. (*See* Br. 29-30, citing *White Oak*, *Hawaii Tribune-Herald*, *Opryland*, and *Sullivan*). For example, the Company complains (Br. 29-30) that the holdings in those cases imply that had there been an employer rule in place prohibiting recording, the employees' actions would not have been protected. But as the Board found, "we do not hold that an employer is prohibited from maintaining any rules regulating recording in the workplace. We hold only that those rules must be narrowly drawn, so that employees will reasonably understand that Section 7 is not being restricted." (JA 238 n. 9). The Board thereby recognizes that an employer may lawfully prohibit workplace recording so long as it distinguishes between protected and unprotected recording, which the Company did not do here.

Moreover, the Company and Amicus (Br. 32-33, A.Br. 16) are wrong that, other than *Rio*, none of the decisions cited by the Board hold that recording "itself," as opposed to recording plus some other underlying protected activity, constitutes protected activity. Their assertion ignores the holding of *Stephens Media*, upholding *Hawaii Tribune-Herald*, upon which the Board relied. There, the D.C. Circuit held that employees engaged in protected activity by planning to record, and actually recording, a meeting with a supervisor in which an employee

believed the supervisor would deny him the protected right to bring a witness to the meeting. Significantly, the Court found the recording to be protected even absent a finding that the employee actually had a protected right to have a witness present at the meeting. *Stephens Media*, 677 F.3d 1241, 1255-56.

The Company's attacks (Br. 34-36) on *Rio* itself fare no better. Its claim (Br. 34) that *Rio* "depart[ed] from the existing framework for analyzing work rules under *Lutheran Heritage*," is belied by the Board's discussion and application of the first prong of *Lutheran Heritage* in that case. *Rio*, 2015 WL 5113232 at *1 (applying the "reasonably construe" portion of *Lutheran Heritage*, stating "the analysis focuses on whether employees would reasonably read the rule as written as a limit on [protected activities]."). The Company's additional complaint (Br. 35-36) that *Rio* was decided after the judge's decision in the instant matter is unavailing. The Company was free to raise any objections it had regarding *Rio* to the Board after *Rio* issued (*see Reliant Energy*, 339 NLRB 66, 66 (2013) (allowing party to file supplemental authorities with the Board), or to file a motion for reconsideration after the Board's decision relying on *Rio* issued (*see* NLRB Rules and Regulations, 29 CFR § 102.48(d)(2)). The Company did neither.

In any event, the Company has pointed to nothing that would have required the Board to disregard *Rio* in deciding this case. Instead, the Board was eminently reasonable in applying *Rio* in addition to cases dealing with a wide variety of

protected activity related to workplace recording. According, the Company has failed to impugn the Board's expert finding that workplace recording is protected in certain circumstances, as illustrated by numerous cases, and, consequently, that employees would reasonably construe the Company's overbroad no-recording rules as prohibiting protected activity. *See NLRB v. Glover Bottled Gas Corp.*, 905 F.2d 681, 685 (2d Cir. 1990) ("[t]he Board is best suited to interpret its own precedent and to apply it to the facts of a particular case.") [8]

2. Employees would reasonably construe the Company's no-recording rules as infringing on their right to engage in protected workplace recording

In light of the above precedent, the Board was fully warranted in finding that, under *Lutheran Heritage*, the Company violated Section 8(a)(1) of the Act by maintaining overly broad no-recording rules that employees would reasonably construe to prohibit workplace recording that would be protected under the above analysis. (JA 238). *See Lutheran Heritage*, 343 NLRB at 647 (rule unlawful "when employees would reasonably construe the language [of the rule] to prohibit

[8] The Company (Br. 45) and Amicus (Br. 2-12, 21) also more generally attack the Board's interpretation of its precedent regarding employer work rules, with the Amicus resorting to references (Br. 21) to the Board as "Humpty Dumpty" in "Alice in Wonderland." The Board's thorough explanation of its findings belies such exaggeration. The Amicus' critique of Board precedent (Br. 2-12) is also based in part on General Counsel memoranda (Br. 7, 10-11), which are not Board law. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 160 (1975) (noting that the law in Board cases "will ultimately be made not by the General Counsel but by the Board or the courts"); *cf. Geske & Sons Inc.*, 317 NLRB 28, 56 (1995) (advice memoranda do not constitute Board law), *enforced*, 103 F.3d 1366 (7th Cir. 1997).

Section 7 activity"), and cases cited at p. 13. As an initial matter, the Board found, and the Company does not contest, that the no-recording rules "unqualifiedly prohibit all workplace recording." (JA 238; *see also* JA 237, noting that the no-recording rules cover "the recordings of conversations, phone calls, images or company meetings with a camera or recording device").

Consistent with precedent, the Board then explained that employees would reasonably interpret the rules as restricting protected activity because the rules do not "differentiate between recordings protected by Section 7 and those that are unprotected." (JA 238). *See T-Mobile*, 2016 WL 1743244 at *5 (no-recording rule not narrowly tailored to reasonably exclude Section 7 activity); *Rio*, 2015 WL 5113232 at *4 (same); *Cintas v. NLRB*, 482 F.3d at 469 (confidentiality rule unlawful where company "has made no effort in its rule to distinguish Section 7 protected behavior from violations of company policy"); *Flex Frac*, 746 F.3d at 209 (same). Indeed, as the Board noted, Mark Ehrnstein, the Company's Global Vice President of Team Member Services and the official who drafted the rules, admitted as much in testifying that the scope of the rules apply if they are on work time "regardless of the activity that the employee is engaged in, whether it's protected concerted activity or not." (JA 236, 2388; JA 85).[9]

[9] The Amicus's suggestion (Br. 17) that the Board should have found the rules lawful because Ehrnstein testified that they apply only to working time, and are thus akin to Board cases allowing employers to prohibit the distribution of

As the Board further explained, rules such as these that fail to clearly distinguish between protected and non-protected activity "can have a chilling effect on employees' willingness to engage in protected activity" because employees, who are dependent on the employer for their livelihood, would "reasonably take a cautious approach." (JA 238 n.11, citing *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969)).[10] Accordingly, the Board reasonably concluded that "in light of the broad and unqualified nature of the rules and the [Company's] admission as to their scope," employees would reasonably read the rules as prohibiting recording activity that would be protected by Section 7." (JA 238, citing *Rio*, 2015 WL 5113232 at *5.)[11]

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literature during working time and in working areas, is unavailing. As the Board found in rejecting this argument, the language of the rules themselves "do not differentiate between recording on working and nonworking time." (JA 238 n.10).

[10] The Board also explained, "the fact that these prohibitions are subject to discretionary exemptions [management approval] by the [Company] does not make them any less unlawful." (JA 238 n.10). In addition, the Board found that although the first no-recording rule and the Guide's "Major Infractions" section would allow recordings if the parties to the conversation gave their consent, "the reference to consent in some (but not all) of the rules prohibiting recording makes it no less likely that employees would view them as covering protected activity." (JA 238 n.10). The Company has not argued otherwise.

[11] The Amicus mischaracterizes (A.Br. 16-17) the Board's finding by stating that the Board improperly relied on Ehrnstein's testimony to ascertain his intention in drafting the rule, which Amicus states (A. Br. 17) is "of no probative value." Contrary to the Amicus (A.Br. 17), authority does not hold that the Board can never consider employer intent, but rather that good-faith intent is not an employer defense. *See Flex Frac*, 358 NLRB at 1131-32. In any event, the Board did not

In so finding, the Board reasonably rejected the Company's claim, repeated here (Br. 25-26), that employees would reasonably interpret the rules to protect, not prohibit, Section 7 activity because of language in the rules setting forth an intention to "promote open communication and dialogue" and "eliminate a chilling effect on the expression of views." (JA 235, 238; JA 121, 153, Br. 26). As the Board found, those stated intentions simply do not countermand the rules' unqualified ban on recordings. (JA 238). For example, those stated intentions do nothing in the face of the broad language banning all workplace recording to indicate that employees may engage in protected recording such as that recognized in *Stephens Media*, 677 F.3d at 1255-56 (recording a supervisory meeting in which employees believed their rights were being violated), or in *Sullivan, Long &*

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rely on Ehrnstein's testimony to ascertain his intent, but rather to lend support to its finding that employees would reasonably construe the scope of the rules as infringing on employee recording, regardless whether it was protected activity or not, in the same manner that he did.

The Company (Br. 32-33) and Amicus (A.Br. 16) also mischaracterize the Board's finding that workplace recording is protected in certain circumstances by asserting that the Board improperly relied on Ehrnstein's testimony to "prove" the legal question of what constitutes protected activity. The Board did no such thing. Rather, as discussed above, the Board noted that Ehrnstein admitted that the scope of the Company's rules encompassed all recording, whether protected or not. Therefore, the Board simply referenced Ehrnstein's testimony as an admission in support that the rules were overbroad—not as a substitute for legal reasoning supporting a finding of protected activity.

Hagerty, 303 NLRB at 1013, *enforced mem.*, 976 F.2d 743 (11th Cir. 1992) (carrying a recorder to record a workplace investigation). The Board therefore concluded that the "openness" language "does not cure the rule[s] of [their] overbreadth." (JA 238). *See T-Mobile*, 2016 WL 1743244 at *5 (no-recording rule unlawful where proffered justifications, including of promoting open communication, employee privacy, protecting confidential communication, and were not narrowly tailored to reasonably exclude Section 7 activity).

The Company's claim that the "open communication" language in the rule would lead employees to believe they could engage in other, non-recording, forms of protected activity (asserting that employees would reasonably "read the [policy] to safeguard their right to engage in union-related and other protected conversations" (Br. 26-27)), misses the mark. As shown, employees would still reasonably believe that the no-recording rules prohibit them from engaging in certain types of workplace recording that the Board reasonably found to constitute protected concerted activity.

The Company's reliance (Br. 25-26) on *Target Corp.*, 359 NLRB No. 103, 2013 WL 1952096 at *2-3, is also misplaced. In *Target*, the Board found that a rule requiring employees to notify security if they saw unknown people in the parking lot would be read as a clear attempt to ensure employee safety, rather than as a restriction on employees' right to engage in union activity in the parking lot.

In *Target*, the language of the rule included numerous references to employee safety ("lock your car," "use the buddy system," and "walk in pairs"). 2013 WL 1952096 at *2. In contrast, here, there is no comparable language in the Company's no-recording rules that would suggest to employees that the rules had a purpose other than prohibiting them from engaging in any workplace recording.

3. The Company's asserted business justifications do not excuse it from liability

The Company and Amicus assert (Br. 36-41, A.Br. 17-19, 23-26), as the Company did before the Board, that employees would reasonably interpret the no-recording rules as a legitimate means of protecting privacy and confidentiality concerns during various company meetings, rather than as a prohibition of protected activity. The Company and Amicus attempt to support (Br. 36-41, A.Br. 17-19) their assertion by relying upon the Board's decision in *Flagstaff Medical Center*, 357 NLRB 659 (2011), a case in which the Board upheld a total ban on workplace photography in the unique employment setting of a hospital. *Id*. at 663. As the Board recognized, it held in *Flagstaff* that employees would reasonably interpret the ban on workplace photography in a hospital as a legitimate means of protecting "weighty patient privacy interests and the employer's well-understood HIPAA obligation to prevent the wrongful disclosure of individually identifiable health information," not as a prohibition of protected activity . JA 239, citing *Flagstaff*, 357 NLRB at 663. By contrast, here there is nothing analogously unique

about the Company's grocery store setting that would justify a total employer ban on photography, as in *Flagstaff*, or a total ban on voice recordings, as even the hospital in *Flagstaff* did not propose.

Instead, the Company has merely advanced examples of company meetings in which it argues that its confidentiality or privacy interests support a ban:

- The Company holds a "town hall meeting" at least once a year at which regional management leadership visit each store and meet with employees without store management present. At these meetings, an "open forum" is held to discuss work issues. The identities of employees who speak are not disclosed to store management. (JA 236; JA 52-54.)
- The Company periodically holds "store meetings" and "team meetings" at which employees discuss areas of interest with team leadership. At some team meetings, the participants vote on whether to add a new employee to a team. (JA 236; JA 57-58.)
- The Company also has an internal appeal process for employment discharge decisions. When employees are terminated, they can request review by a five-member panel of their peers. That panel votes on whether to uphold or overturn the discharge. (JA 236; Tr. 60-61.)
- The Company additionally holds meetings in which employees discuss requests for assistance from a Company "emergency fund." Those matters

are often confidential, involving financial need, family death, or personal crisis. (JA 236; JA 62.)

Ehrnstein testified that the Company believed that in these meetings, recording would chill the dynamic, disrupt team harmony, or otherwise have a detrimental effect on the discussions. (JA 236; JA 53-54, 58, 61.)

The Board thoroughly considered the above concerns and explained that while they were "not without merit," they were "based on relatively narrow circumstances, such as annual town hall meetings and termination-appeal peer panels." (JA 239).[12] The Board thus reasonably concluded that the Company's limited concerns regarding company meetings did not justify the rules' "unqualified restrictions on Section 7 activity," and that they were not "nearly as pervasive or compelling as the patient privacy interest in *Flagstaff*." (JA 239).

The Company also complains (Br. 41-44) is that in finding the Company's rules to be unlawful, the Board failed to consider the separate interests underlying collective-bargaining that have led it to conclude that it is unlawful for a party to insist to impasse on recordings of collective-bargaining or grievance meetings.

[12] Contrary to the Company (Br. 39), the Board did not ignore meetings other than the town hall and peer review meetings. The Board noted those only as examples of types of team meetings that the Company asserted, but also considered the emergency fund meetings (*see* JA 238, noting "personal and medical information about team members") and general store meetings (*see* JA 238, discussing "store leadership" and "confidential business strategy").

But as the Board noted, the Company misses the point. (JA 239 n.14). While there may be valid reasons for instituting a rule prohibiting some instances of workplace recording, a broad rule like the one here is unlawful because it also "would be reasonably read to prohibit all recording, including that which we would find to be protected under the Act." (JA 239 n.14). For its part, the Amicus asserts (A. Br. 24-25) that the Board's finding is undercut because the Company possesses an additional business justification—that some states in which it operates have criminal prohibitions against surreptitious recording. However, as the Board noted, the Company's rules do not specify that its recording prohibitions are limited to employees in states with such laws. (JA 238 n.13.)[13]

Accordingly, the Board reasonably concluded that the Company's ban on workplace recording was not narrowly tailored to any of its asserted business justifications. Although a more narrowly tailored ban that does not interfere with protected employee activity may have been "sufficient to accomplish the Company's presumed interest in protecting confidential information," *see Cintas*, 482 F.3d at 470, the Company instead chose to "unqualifiedly prohibit" all workplace recording. (JA 238). As the D.C. Circuit recently stated in *Quicken*

[13] The Amicus' related, confusing assertion (Br. 25 n.15) that the Board's Order "improperly assumes pre-emption" because it applies to all employees, including employees in states with such criminal restrictions, is similarly unavailing. The Board's Order simply states that the rules as they stand, as unlawfully overbroad, must be revised or rescinded. (JA 239-40.)

Loans regarding an employer's rule that was similarly untailored to its justifications, "[the employer's] claim that some sub-portion of the covered information could properly be protected does nothing to legitimate the blunderbuss sweep of its existing rule." 2016 WL 4056091, at *1.

C. The Company's Challenge to the First Prong of *Lutheran Heritage* Is Jurisdictionally-Barred and, In Any Event, Without Merit

Finally, the Company (Co. Br. 14, 17-24) challenges the first prong of the *Lutheran Heritage* for the first time on appeal. Basing this claim, in large part, on Member Miscimarra's dissent, the Company and Amicus (A.Br. 2-3, 12-21, 22-27) belatedly urge the Court to overrule the standard that a work rule is unlawful "when employees would reasonably construe the language [of the rule] to prohibit Section 7 activity." *Lutheran Heritage*, 343 NLRB at 647. However, the Company failed to raise this issue before the Board; indeed, it took the direct opposite tack throughout this litigation—arguing below that *Lutheran Heritage* was the proper test. Nor did the Company file a motion for reconsideration concerning the issue after the Board issued its decision. The Court, therefore, is without jurisdiction to consider this belated challenge.

Under Section 10(e) of the Act (29 U.S.C. § 160(e)), "[n]o 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." *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665

(1982). *Accord Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 115 (2d Cir. 2001). Section 10(e) accords with the general principle that "'[s]imple fairness ... requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.'" *Local 900, IUE v. NLRB*, 727 F.2d 1184, 1191-92 (D.C. Cir. 1984) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

Here, the Company presented no challenge to the first prong of *Lutheran Heritage* before the judge or the Board, and the judge did not address any such challenge. Indeed, the Company agreed below that the first prong of *Lutheran Heritage* was the proper test to apply. (*See* Company's Answering Brief to General Counsel's Exceptions).[14]

"There may be circumstances in which a motion for reconsideration is the first opportunity a party has to raise objections—where, for example, the Board sua sponte decides an issue not expressly presented to it by the parties or addressed by the [administrative law judge]." *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011). In these cases, "the objections will be preserved by a timely motion to reconsider." *Id.* at 349

[14] The Company inadvertently failed to include its Answering Brief to the General Counsel's Exceptions in the Joint Appendix. This document is part of the record on appeal that was sent to the Court on February 17, 2016, and appears on the Board's certified list. (JA 5).

(footnote omitted); *see also* NLRB Rules and Regulations, 29 CFR § 102.48(d)(2) (motions for reconsideration "shall be filed within 28 days . . . after service of the Board's decision and order"). However, the Company did not preserve any objections to the Board's reliance on *Lutheran Heritage*—based either on the Board's decision or on Member Miscimarra's dissent—because it failed to file a motion for reconsideration. *See Woelke*, 456 U.S. at 665-66 (issue barred by party's failure to file a motion for reconsideration).

Finally, the Company cannot save its otherwise waived claim by any assertion that Member Miscimarra's dissent, itself, served to preserve the issue for court review. Section 10(e) is not satisfied by discussions among Board members. As the D.C. Circuit has explained in rejecting a similar claim, "[t]he [employer] relies on § 10(e)'s passive voice as an indication that Congress did not require that the parties themselves actually raise the issue before the Board, as long as the members themselves engage in its discussion. [The employer], however, offers no support for its view and probably for good reason--there is not any." *Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061-62 (D.C. Cir. 2003). *Accord Enterprise Leasing v. NLRB*, __ F.3d. __, 2016 WL 4150930, at *11, citing *HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016). Accordingly, under well-established precedent, the Court lacks jurisdiction to consider the challenges to

Lutheran Heritage articulated for the first time in the Company's and Amicus's briefs.

In any event, the Company and Amicus' challenges lack merit. As discussed above at p.13, numerous courts, including this one, have cited *Lutheran Heritage* with approval, and specifically applied the first prong of that test that designates a work rule as unlawful if employees would reasonably construe it as restricting Section 7 activity. To the extent the Company and Amicus complain (Br. 19-21, A.Br. 22-23) that the first prong of the *Lutheran Heritage* test departs from a required balancing test involving the employer's justification for the rule, citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), they are wrong. As the First Circuit has held, "[nothing] in *Republic Aviation* compelled the Board to apply a balancing test [in this case involving the *Lutheran Heritage*'s "reasonably construe" standard]." *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 483 (1st Cir. 2011). In addition, the Board has routinely—including in the instant case—included the employer's business justification in its *Lutheran Heritage* analysis concerning whether employees would reasonably construe a rule as restricting protected activity. *See* JA 238, 239 (considering employer arguments that the employer's rationale for the rule "would lead a reasonable employee to understand their lawful purpose"); *see also T-Mobile*, 2016 WL 1743244, at *4 (same). Accordingly, the Company's late-raised challenge to the first prong of *Lutheran*

Heritage would be without merit, even if not already jurisdictionally barred from review.

CONCLUSION

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

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August 2016

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WHOLE FOODS MARKET GROUP, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16–0002 & 16–0346
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	01-CA-096965
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,082 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 26th day of August, 2016

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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	)	
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	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC
this 26th day of August, 2016