

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: May 4, 2016

TO: Marlin O. Osthus, Regional Director  
Region 18

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: United Parcel Service  
Case 18-CA-167042

506-2001-5000  
506-4033-1200  
506-4033-4100  
506-6090-1200  
512-5072-7700  
737-7096

The Region submitted this case for advice as to whether: (1) the Employer violated Section 8(a)(1) when it threatened employees with discipline for blowing whistles as part of a campaign to bring attention to supervisors performing bargaining unit work; (2) a nationwide remedy is appropriate with regard to the Employer's unlawful no-recording rule;<sup>1</sup> and (3) the Employer violated Section 8(a)(1) by instructing the Charging Party to refrain from recording investigative, disciplinary, and grievance meetings with Employer managers and Union representatives. We conclude that: (1) the Employer violated Section 8(a)(1) by threatening discipline for the whistle-blowing because employees were engaged in protected concerted activity and the Employer failed to demonstrate special circumstances that would outweigh employees' right to engage in the activity under the rights-balancing test articulated in *Republic Aviation*;<sup>2</sup> (2) a nationwide remedy is appropriate to remedy the Employer's overbroad no-recording rule; and (3) the Employer did not violate Section 8(a)(1) by instructing the Charging Party to refrain from recording investigatory, disciplinary, and grievance meetings because [REDACTED] was not engaged in concerted activities and the Employer also had an overriding interest in not allowing recording of the post-termination grievance meeting.

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<sup>1</sup> The Region has determined that the Employer's no-recording rule is unlawful.

<sup>2</sup> *Republic Aviation v. NLRB*, 324 U.S. 793 (1945).

## FACTS

United Parcel Service (“the Employer”) operates a sorting and distribution facility in northeast Minneapolis, in addition to other facilities nationwide. Teamsters Local 638 (“the Union”) represents the vast majority of the Employer’s approximately 600 employees at the Minneapolis facility. The Employer and Union have a decades-long collective-bargaining relationship and are parties to a collective-bargaining agreement that expires on July 31, 2018.

### A. The Whistle-Blowing Campaign

For the past several years, a group of bargaining unit employees calling itself “\$15 for UPS” has engaged in various concerted activities to advocate for better wages and safer working conditions.<sup>3</sup> According to the Charging Party, who is (b) (6), (b) (7)(C) of the “\$15 for UPS” group, there have been long-term issues with supervisors performing bargaining unit work at the Employer’s facility. Although the parties’ collective-bargaining agreement prohibits such conduct, the Charging Party claims that violations consistently occur and grievances are filed but do not move forward. To bring attention to the issue, the Charging Party and “\$15 for UPS” created a whistle-blowing campaign.

The Charging Party and others took part in two whistle-blowing events. The first event took place on November 20, 2015.<sup>4</sup> The Charging Party distributed whistles to co-workers with instructions to blow the whistle on supervisors doing bargaining unit work and to call attention to safety concerns.<sup>5</sup> The Charging Party began work wearing the whistle around (b) (6), (b) neck, but (b) (6), (b) supervisor approached (b) (6), (b) (7) and told (b) (6), (b) (7) that the whistle was an article of loose clothing and created a health and

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<sup>3</sup> “\$15 for UPS” is not affiliated with the Union and the Union does not take part in the group’s activities, but the group is not opposed to the Union as its exclusive bargaining representative.

<sup>4</sup> All dates hereinafter are in 2015 unless otherwise stated.

<sup>5</sup> The whistles came on a string with a card attached that said on one side: “[H]ow to use this whistle: Step One: see bullshit[;] Step Two: blow whistle[;] Step Three: watch supervisors cry[;] Step Four: repeat[.] [B]rought to you by the \$15 at [sic] UPS committee. Look us up at [website address.]” The other side of the card read: “BLOW THE WHISTLE ON UNSAFE WORKING CONDITIONS[;] [N]o egress? [O]verflowing belts? [S]upervisors working? [F]alling boxes? [W]e put up with this stuff way too often. Any time you see one today, blow this whistle and let everyone know you’re sick and tired of it. LET’S SEE HOW LOUD IT GETS!”

safety violation. The Charging Party agreed that the whistle created a safety issue, removed the whistle from (b) (6), (b) (7) neck, but continued to wear the whistle on (b) (6), (b) (7) without further supervisory opposition. (b) (6), (b) (7) and other employees proceeded to blow their whistles when they observed supervisors doing unit work. Although the Charging Party was not told by supervisors to refrain from blowing the whistle, (b) (6), (b) (7) claims that other employees who blew a whistle were told that the noise was a health and safety violation and were threatened with discipline if they continued.

On December 20, the Charging Party and others decided to do another whistle-blowing event and again distributed whistles with instruction cards attached. The Charging Party again heard that supervisors were telling employees that the whistle blowing was a health and safety violation and threatening employees with discipline. One employee who participated in the December 20 campaign stated that (b) (6), (b) (7) blew the whistle on supervisors doing unit work and where (b) (6), (b) (7) observed unsafe working conditions and leaking boxes. When the employee blew the whistle, other employees would also blow their whistles in response. After approximately 30-45 minutes of intermittent whistle blowing, the employee's part-time supervisor asked (b) (6), (b) (7) to stop blowing the whistle because it was annoying. The employee continued to blow the whistle intermittently when (b) (6), (b) (7) observed alleged contract violations and soon thereafter was approached by (b) (6), (b) (7) full-time supervisor who claimed that the whistles were a safety violation because they were too loud and threatened the employee with discipline if (b) (6), (b) (7) continued.

In its workspaces, the Employer relies on audio signals to inform its workforce of belts starting and stopping, the need for evacuation, or other safety incidents. The Employer asserts that the whistles could confuse employees' recognition of its audio signals and generally interfere with operations. Employees state that the plant has a high level of ambient noise and loud klaxons that often sound. In one employee's estimation, the whistles were as loud as the klaxons but there is no evidence that (b) (6), (b) (7) or others were unable to hear the klaxons or other workplace signals because of the whistles. Employees are allowed to wear headphones to listen to music while working but cannot have headphones or ear buds in both ears at the same time.

There is no evidence that any employees, including the Charging Party, were disciplined for either the November or December whistle-blowing campaigns.

## **B. The Employer's No-Recording Rule and the Charging Party's Attempts to Record Investigatory, Disciplinary, and Grievance Meetings**

The Employer maintains a policy in its Information Security and Privacy Manual prohibiting recordings in the workplace without management permission, which applies to all Employer facilities nationwide:

The use of all recording devices in any UPS facility for any purpose other than authorized UPS business purposes is ***strictly prohibited***. Individuals may possess cell phones with cameras, or other devices capable of recording pictures, video, or audio, while on UPS facilities, provided that the recording capabilities are not used for any purpose other than authorized UPS business purposes. (Emphasis in original.)

In late July, the Charging Party allegedly improperly stopped the sorting belt by (b) (6), (b) work station. According to the Employer, the Charging Party, when confronted by (b) (6), (b) supervisor, denied stopping the belt, but the Employer claims its security office had video surveillance that confirmed the Charging Party stopped the belt for no apparent reason. On July 27, the Charging Party was interviewed by two Employer representatives about the incident. A Union representative was present during the interview.<sup>6</sup> Prior to beginning the interview, the Employer representatives stated they were not recording the meeting. When asked if (b) (6), (b) was recording, the Charging Party stated that (b) (6), (b) was and the Employer representatives asked (b) (6), (b) (7) to stop. The meeting proceeded once the Charging Party complied. The Union representative was silent on the issue.

Two more meetings took place following the Charging Party's initial investigatory interview concerning the sorting belt incident: one additional investigatory meeting later the same day after which the Charging Party was suspended, and a meeting on July 29 during which the Charging Party was terminated for improperly stopping the sorting belt and lying to (b) (6), (b) supervisor. Employer representatives and a Union representative were present during each meeting. Although the Charging Party did not attempt to record subsequent meetings, an Employer representative indicated, prior to commencing each meeting, that the Charging Party should not be recording. The Union representative said nothing about the Employer's recording prohibition during each meeting.

Following the Charging Party's termination at the July 29 meeting, (b) (6), (b) grieved the action according to the contract's grievance process. A grievance meeting took place on July 30 that included the Charging Party and several Employer and Union representatives. At the beginning of the meeting, an Employer representative indicated that the Charging Party should not be recording the meeting and the Charging Party confirmed that (b) (6), (b) was not. During a break, the Charging Party spoke with one of the Union representatives about the Employer's recording prohibition. The representative responded only that (b) (6), (b) was not familiar with the technology and

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<sup>6</sup> The parties' collective-bargaining agreement gives employees the right to have a Union representative present at any investigatory, disciplinary, or grievance meeting.

the Charging Party did not press (b) (6), (b) (7) further. The Charging Party's termination was ultimately reversed through the grievance process.

There is no evidence that, prior to the July 27 meeting, the Charging Party informed any coworkers or the Union of (b) (6), (b) (7) intention to audio record (b) (6), (b) (7) initial investigatory meeting. Nor is there any evidence that the Charging Party discussed the Employer's requests not to record with coworkers or the Union at any time between the July 27 interview and the July 30 grievance meeting.

### ACTION

We conclude that: (1) the Employer violated Section 8(a)(1) by threatening discipline for the whistle-blowing because employees were engaged in protected concerted activity and the Employer failed to demonstrate special circumstances that would outweigh employees' right to engage in the activity under the rights-balancing test articulated in *Republic Aviation*; (2) a nationwide remedy to the Employer's unlawful recording rule is appropriate because the rule is overbroad and applies to all Employer facilities nationwide; and (3) the Employer did not violate Section 8(a)(1) by instructing the Charging Party to refrain from recording investigatory, disciplinary, and grievance meetings because (b) (6), (b) (7) was not engaged in concerted activities and the Employer also had an overriding interest in not allowing recording of the post-termination grievance meeting.

#### **A. The Employees' Actions in Blowing Whistles During Work Time Was Protected Activity**

As an initial matter, the whistle-blowing campaign was protected concerted activity because the Charging Party and participating employees sought to protest supervisors' performance of unit work, and enforce a provision in their collective-bargaining agreement regarding supervisory performance of unit work, and to call attention to safety concerns. The conduct thus clearly involved "concerted activities for the purpose of . . . mutual aid or protection."

However, the "[o]ppportunity to organize and proper discipline are both essential elements in a balanced society."<sup>7</sup> Thus, the Board must work out "an adjustment between the undisputed right of self-organization assured to employees . . . and the equally undisputed right of employers to maintain discipline."<sup>8</sup> In balancing these

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<sup>7</sup> *Republic Aviation v. NLRB*, 324 U.S. 793, 798 (1945) (upholding right of employees to wear union buttons while on the job by balancing employees' Section 7 rights vis-à-vis employers' managerial rights).

<sup>8</sup> *Id.* at 797-98.

rights, the Board requires that an employer demonstrate substantial evidence of “special circumstances” that justifies limiting otherwise protected Section 7 activity.<sup>9</sup>

The Board utilizes the test set forth in *Republic Aviation* to balance employers’ managerial rights and employees’ right to engage in Section 7 activity, such as to wear attire and insignia that address union and other employment-related issues.<sup>10</sup> The Board has recognized that this balancing test may be used in a variety of circumstances where an employer’s restriction of Section 7 activity is allegedly “necessary in order to maintain production or discipline.”<sup>11</sup> Accordingly, an employer may demonstrate special circumstances that privilege its restriction of protected activity where the activity interferes with production,<sup>12</sup> undermines the maintenance of discipline and order in the workplace,<sup>13</sup> or impairs the safety of employees.<sup>14</sup>

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<sup>9</sup> *AT&T*, 362 NLRB No. 105, slip op. at 3-4, 18 (Jun. 2, 2015); *Escanaba Paper Co.*, 314 NLRB 732, 733 & n.4 (1994) (citing *Government Employees*, 278 NLRB 378, 385 (1986)), *enforced*, 73 F.3d 74 (6th Cir. 1996).

<sup>10</sup> *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (Apr. 30, 2015); *Meijer, Inc.*, 318 NLRB 50, 50 (1995), *enforced*, 130 F.3d 1209 (6th Cir. 1997); *The Ohio Masonic Home*, 205 NLRB 357, 357 (1973), *enforced mem.*, 511 F.2d 527 (6th Cir. 1975).

<sup>11</sup> *Republic Aviation*, 324 U.S. at 803 n.10 (quoting *Peyton Packing Co.*, 49 NLRB 828, 843-44 (1943)).

<sup>12</sup> *E.g.*, *Healthbridge Mgmt.*, 360 NLRB No. 118, slip op. at 2 (May 22, 2014) (employer failed to demonstrate special circumstances that sticker display would potentially disrupt its operation where it provided only speculative testimony that stickers would negatively affect patient care), *enforced*, 798 F.3d 1059 (D.C. Cir. 2015); *Escanaba Paper Co.*, 314 NLRB at 734 (evidence failed to show employer’s proffered special circumstance that production slowed from employees wearing buttons and instead actually showed increase in productivity as compared to earlier in the year).

<sup>13</sup> *E.g.*, *Komatsu America Corp.*, 342 NLRB 649, 650 (2004) (finding employer did not violate the Act by banning offensive t-shirts that compared its outsourcing to the Japanese attack on Pearl Harbor because the ban was necessary to maintain a harmonious workplace).

<sup>14</sup> *E.g.*, *W San Diego*, 348 NLRB 372, 375 (2006) (employer presented health and safety special circumstances and lawfully banned wearing union stickers in hotel kitchen where employer observed stickers peeling from employees’ clothing after only a short while, thus presenting health and safety risk of falling into and contaminating food); *The Kendall Co.*, 267 NLRB 963, 965 (1983) (finding employer did not violate

Here, the whistle blowing campaign is akin to the display of union insignia to support employee protests of employer actions. For example, in *Escanaba Paper Co.*, employees were engaged in protected concerted activity when they began wearing buttons to protest the employer's unilateral implementation of new job flexibility programs.<sup>15</sup> The Board rejected the employer's "special circumstances" argument that employees displaying union buttons would in part cause a breakdown in production where the evidence failed to support that contention.<sup>16</sup> Similarly, here, the employees' action of blowing whistles to protest supervisors performing unit work and unsafe working conditions, which are prohibited by the parties' collective-bargaining agreement but continue to be a problem despite grievances having been filed, was protected concerted activity. And, like in *Escanaba*, the Employer proffered no evidence of special circumstances that would outweigh the employees' right to engage in the whistle-blowing events and privilege the Employer to threaten them with discipline. Indeed, the Employer has not highlighted any special circumstances beyond vague, generalized assertions that employees blowing whistles could lead to confusion among its workforce, compromise safety, or slow its operation.<sup>17</sup> The evidence shows that the whistles could be heard above the plant's high ambient noise level, even with klaxons often sounding, but there is no evidence that employees or management were ever confused by the whistles, mistook them for one of the Employer's work-related audio signals, or failed to hear the work-related signals because of the whistles. Instead, the evidence only shows that a part-time supervisor characterized the whistle blowing as annoying. Moreover, employees are allowed to wear headphones with music playing in one ear, which is arguably as distracting to employees' awareness of klaxon alerts as are whistles sounding. There is simply no evidence that work-flow or any other aspect of production or safety was stymied by the whistles. Accordingly, complaint should issue, absent settlement, alleging that the

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the Act by disallowing union key chains because key chains could become drawn into machinery and endanger employees).

<sup>15</sup> 314 NLRB at 732.

<sup>16</sup> *Id.* at 734.

<sup>17</sup> See *Healthbridge*, 360 NLRB No. 118, slip op. at 2 (providing only speculative evidence of special circumstances not sufficient). Here, the only tangible safety concern was quickly resolved when the Charging Party's supervisor told [REDACTED] that the whistle around [REDACTED] neck was an article of loose clothing and created a safety concern, to which the Charging Party agreed and promptly removed the whistle from [REDACTED] neck. Cf. *W San Diego*, 348 NLRB at 375 (employer demonstrated legitimate special circumstances safety concern where union sticker could easily fall from clothing and contaminate food).

Employer's threats to discipline employees for blowing whistles violated Section 8(a)(1).

**B. A Nationwide Remedy is Appropriate for the Employer's Unlawful Recording Policy**

We agree with the Region that the Employer's no-recording rule is unlawfully overbroad. Because the Employer's unlawful policy applies to all Employer facilities nationwide, a national remedy is appropriate.<sup>18</sup>

**C. The Charging Party's Attempt to Record Meetings With the Employer Was Not Concerted Activity**

Photography and audio or video recording in the workplace are protected by Section 7 if employees undertake the recording in concert for their mutual aid and protection and no overriding employer interest is present.<sup>19</sup> Conduct is for the purpose of mutual aid or protection when the "employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees,'" and the improvements sought would inure to the benefit of employees generally.<sup>20</sup> Given that employee discipline is a significant term and condition of employment that affects employees generally, it is reasonable to assume that the Charging Party's efforts to record (b) (6), (b) meetings met the "conduct for mutual aid and protection" standard.

However, there is no evidence that the Charging Party acted in concert to record (b) (6), (b) meetings with the Employer. In the *Meyers* cases, the Board explained that an activity is concerted when an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself."<sup>21</sup> This definition

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<sup>18</sup> See, e.g., *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 5 (Dec. 24, 2015) (where employer's overbroad rule is maintained company-wide, appropriate remedy is to require nationwide notice-posting at all facilities where rule has been or is in effect); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005) (same), *enforced in relevant part*, 475 F.3d 369 (D.C. Cir. 2007).

<sup>19</sup> *Whole Foods*, 363 NLRB No. 87, slip op. at 3.

<sup>20</sup> *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3, 5 (Aug. 11, 2014) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

<sup>21</sup> *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), *remanded sub nom., Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *supplemented and aff'd by Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), *aff'd sub nom., Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

of concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action . . .”<sup>22</sup> Under the *Meyers* definition of concert, an employee’s individual actions will not constitute concerted activity if the employee did not first engage in “some kind of communication between individuals” prior to embarking on the purported concerted activity.<sup>23</sup>

For example, in *Hawaii Tribune Herald*, an employee who surreptitiously recorded an employer meeting where he was denied a union witness was engaged in concerted activity because he conferred with fellow employees prior to the meeting, who suggested he record it.<sup>24</sup> The Board explained that the employee’s recording of the meeting was protected concerted activity because he acted in concert with other employees to document what they perceived as a potential rights violation under *Weingarten*.<sup>25</sup>

Here, unlike in *Hawaii Tribune*, there is no evidence that the Charging Party discussed (b) (6), (b) (7)(C) intentions to record the July 27 investigatory interview with anyone. Nor is there evidence that the Charging Party discussed the Employer’s instructions not to record in subsequent disciplinary meetings. Indeed, the grievance meeting on July 30 following the Charging Party’s termination was the first time (b) (6), (b) (7)(C) affirmatively brought up the recording issue to anyone, i.e., when (b) (6), (b) (7)(C) asked one of the Union representatives present about the Employer’s instruction not to record the meeting. The representative responded only that (b) (6), (b) (7)(C) was not familiar with the technology and the Charging Party did not press (b) (6), (b) (7)(C) further. Therefore, the Charging Party’s attempt to record the July 27 meeting, and any desire (b) (6), (b) (7)(C) may have had to record subsequent meetings, were not concerted activity because the Charging Party did not engage in conversations, or communications of any kind, with fellow employees or the Union about (b) (6), (b) (7)(C) intention to record or (b) (6), (b) (7)(C) reasons for wanting to record.<sup>26</sup>

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<sup>22</sup> *Meyers II*, 281 NLRB at 887.

<sup>23</sup> *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

<sup>24</sup> 356 NLRB 661, 661, 670 (2011), *enforced sub nom.*, *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012).

<sup>25</sup> *Id.* at 661. *See generally NLRB v. J. Weingarten*, 420 U.S. 251 (1975). *See also, e.g., White Oak Manor*, 353 NLRB 795, 795 n.2, 798 (2009) (employee was engaged in protected concerted activities when she spoke with other employees about the disparate enforcement of the employer’s dress code and then took pictures of employees violating dress code).

<sup>26</sup> The Charging Party’s attempt to record cannot be deemed “inherently concerted” because even “inherent” concert involves at least a conversation regarding the

Further, the Charging Party's actions were not concerted under the Board's *Interboro*<sup>27</sup> doctrine because there is no contractual right to record meetings and no evidence that the Charging Party attempted to invoke some other contractual right. In *NLRB v. City Disposal Systems, Inc.*,<sup>28</sup> the Supreme Court affirmed the Board's long-standing *Interboro* doctrine, stating that, where an employee asserts rights under a collective-bargaining agreement, the activity is concerted even if the individual acts alone, because the assertion of a collectively-bargained right is an integral part of the collective activity that gave rise to the agreement. Under this doctrine, an employee need not be correct in his position that there has been a breach of the collective-bargaining agreement and it is not necessary that he file a formal grievance nor that he invoke a specific provision of the collective-bargaining agreement; the activity is concerted if the employee honestly and reasonably invokes collectively bargained rights.<sup>29</sup> But the fact that the employee is invoking a contractual right must be "reasonably clear" to the person to whom the claim is communicated.<sup>30</sup>

Here, the Charging Party did not invoke any contract right to support [REDACTED] attempted recording of the July 27 meeting. Indeed, the Charging Party did not give any reason at all as to why [REDACTED] wanted to record that meeting, and did not even affirmatively seek to record the later meetings. One might surmise that, with regard to the investigatory and disciplinary meetings, [REDACTED] was interested in obtaining evidence for use in a later grievance proceeding. But even assuming that would be sufficiently related to a contractual right to meet the *Interboro* test, the Charging Party did not provide that reason to the Employer and the Employer therefore could

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particular subject between two or more people. *Hoodview Vending Co.*, 362 NLRB No. 81 (Apr. 30, 2015), *reaff'g* 359 NLRB No. 36, slip op. at 4 n.16 (Dec. 14, 2012) (recess Board).

<sup>27</sup> *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966) (even if an individual employee acted alone in pursuing complaints about hours, work assignments, and equipment, conduct was concerted because it was made in an attempt to assert rights under collective-bargaining agreement), *enforced*, 388 F.2d 495 (2d Cir. 1967).

<sup>28</sup> 465 U.S. 822 (1984).

<sup>29</sup> *Id.* at 840 (individual safety complaints concerted because rooted in collective-bargaining agreement); *Lorac Construction Services, Inc.*, 318 NLRB 1034, 1035 (1995) (individual complaints about lack of equipment held concerted because grounded in collective-bargaining agreement).

<sup>30</sup> *City Disposal*, 465 U.S. at 840.

not have had a “reasonably clear” understanding that a contract right was being asserted.<sup>31</sup>

Finally, assuming that an attempt to record the grievance meeting would have been concerted under *Interboro*, and the Charging Party actually had asserted a contractual right to record, the Employer’s interest in preventing the Charging Party from recording the meeting outweighed [REDACTED] right to record it. The Board in *Bell Telephone* explained that grievance meetings are informal mechanisms used to address employee concerns with the ultimate goal of reaching an agreement or settlement; thus, one party’s insistence on recording grievance meetings “may have a tendency to inhibit free and open discussions” and creates a “chilling effect on the expression of views.”<sup>32</sup> Therefore, even if the Charging Party had been engaged in concerted activity, the Employer had an overriding concern to maintain the “spontaneous, informal discussion that is essential to the grievance-adjustment process” that made lawful its requirement that the Charging Party not record the grievance meeting.<sup>33</sup>

Accordingly, for the foregoing reasons, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by threatening employees with discipline for engaging in a protected, concerted whistle-blowing campaign. The Region should also seek a national remedy for the Employer’s unlawfully overbroad no-recording policy. However, the Region should dismiss,

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<sup>31</sup> See *The Hertz Company*, 19-CA-66115, Advice Memo dated April 12, 2012, at 9 (employees were not invoking a contract right when they left for prayer breaks without clocking out but instead *failed* to clock out rather than invoking a contract right by *refusing* to clock out).

<sup>32</sup> *Pennsylvania Telephone Guild (Bell Telephone)*, 277 NLRB 501, 501-502 (1985) (union’s insistence to impasse on tape-recording grievance meetings was unlawful insistence on nonmandatory subject of bargaining), *enforced*, 799 F.2d 84 (3d Cir. 1986). See also *Food & Commercial Workers Local 345-50 (Pathmark Stores)*, 339 NLRB 148, 150 (2003) (“The prospect of meetings being tape-recorded . . . surely tended to formalize [the employer’s] dealings with union representatives and to inhibit the type of spontaneous, informal discussion that is essential to the grievance-adjustment process”).

<sup>33</sup> See *Pathmark Stores*, 339 NLRB at 150; *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3 (recording in the workplace is protected by Section 7 if employees act in concert for mutual aid and protection and there is no overriding employer interest present).

absent withdrawal, the Charging Party's allegation that the Employer unlawfully instructed [REDACTED] not to record [REDACTED] investigatory, disciplinary, and grievance meetings.

/s/  
B.J.K.

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