UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WHOLE FOODS MARKET GROUP INC., **-and-** **UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 919**	**Case No. 01-CA-096965**

WHOLE FOODS MARKET GROUP, INC.
MOTION FOR RECONSIDERATION OF THE BOARD'S ORDER

Pursuant to Section 102.48(c)(1) of the National Labor Relation Board's ("Board" or "NLRB") Rules and Regulations, Whole Foods Market Group, Inc. ("Whole Foods" or the "Company") hereby moves for the Board reconsider its Decision and Order, published at *Whole Foods Mkt., Inc.,* 363 NLRB No. 87 (December 24, 2015) ("Decision and Order"), on the grounds that there are "extraordinary circumstances" warranting reconsideration. These extraordinary circumstances include the Board's recent decision in *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017), which overturned *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), the case upon which the Decision and Order was based.

For the reasons set out below, the Board should grant the Company's motion for reconsideration of the Board's Decision and Order.

I. PROCEDURAL HISTORY

On December 24, 2015, the Board, over the vigorous dissent of then Member Miscimarra, overturned the conclusion of Administrative Law Judge Steven Davis, and found that Whole Foods violated Section 8(a)(1) of the National Labor Relations Act (the "Act") by maintaining a facially neutral workplace rule prohibiting recording.

Whole Foods Mkt., Inc., 363 NLRB No. 87 (Dec. 24, 2015). There, the Board applied the three part test promulgated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (hereinafter "*Lutheran Heritage*") in reaching its decision. The Board also fashioned a broad remedial order, requiring Whole Foods to supply all employees "either with inserts to the General Information Guide stating that the unlawful rules have been rescinded, or with a new and lawfully worded rule on adhesive backing" in addition to "posting of remedial notice at all of Respondent's locations" companywide, an order affecting approximately 76,000 workers at over 350 stores.[1] *Id.* at *5; *Whole Foods Mkt., Inc.*, 197 L.R.R.M. (BNA) ¶ 1518 (N.L.R.B. Div. of Judges Oct. 30, 2013).

Whole Foods appealed the Decision and Order to the Second Circuit Court of Appeals. The Board cross-petitioned the Court to enforce its Decision and Order. *Whole Foods Mkt. Grp., Inc. v. Nat'l Labor Relations Bd.*, 691 F. App'x 49, 50 (2d Cir. 2017). On June 1, 2017, the Court issued a decision in the case affirming the Decision and Order and granting the Board's Petition for Enforcement.[2] *Id.* at 51. The Court's decision did not explicitly address the legality of the Board's *Lutheran Heritage* test or whether it was the appropriate test for assessing the lawfulness of facially neutral handbook policies, and instead merely assessed "whether the Board's determination is supported by substantial evidence and is in accordance with law." *Id.* Importantly, while the Court found that the Decision and Order was "in accordance" with *Lutheran Heritage*, it issued no ruling regarding the Board's remedy in the Decision and Order. There have been no further proceedings in this case since the Second Circuit's decision. The case is still open awaiting compliance.

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[1] As of 2018, Whole Foods has approximately 88,000 employees at over 450 stores.

[2] The decision was re-issued on July 24, 2017 as a Certified True Copy and stamped as a Mandate terminating appellate proceedings.

On December 14, 2017, the Board issued a Decision in *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017) (hereinafter "*Boeing*"), explicitly overruling *Lutheran Heritage* and its test for assessing the lawfulness of a facially neutral workplace rule under Section 8(a)(1) of the Act. *Id.* at *8 ("For the following reasons, we overrule the *Lutheran Heritage* 'reasonably construe' standard."). Notably, in *Boeing*, the Board explicitly cited the Decision and Order as part of its justification for overturning the *Lutheran Heritage* standard. *Id.* at *3 n.9 (citing *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015) and Member Miscimara's dissenting opinion, and stating that "the Board itself has struggled when attempting to apply *Lutheran Heritage*: since 2004, Board members have regularly disagreed with one another regarding the legality of particular rules or requirements....").

The Board further ruled that the new *Boeing* standard would "apply...retroactively to the instant case and to *all other pending cases*." *Id.* at *18 (emphasis added). The Board further explained that its standard procedure is to "apply new policies and standards retroactively 'to all pending cases *in whatever stage*.'" *Id.* at *17 *quoting SNE Enterprises, Inc.*, 344 NLRB 673 (2005) (emphasis added).

Whole Foods files this Motion to allow the Board to apply its decision in *Boeing* retroactively in the present pending case.

II. ARGUMENT

A. Legal Standard

Section 102.48(c) of the Board's Rules and Regulations provides that "A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order." The Board has further explained that a Respondent must demonstrate "material error *or* demonstrated extraordinary circumstances warranting reconsideration...." *The Wang*

Theatre, Inc., 365 NLRB No. 33 (Feb. 14, 2017) (emphasis added) (then-Acting Chairman Miscimarra further noted in a concurring opinion that reconsideration is granted when there are "extraordinary circumstances or new arguments not previously considered by the Board.").

Section 102.48(c)(2) further requires that "[a]ny motion pursuant to this section must be filed within 28 days, *or such further period as the Board may allow*, after the service of the Board's decision or order, except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced." *Id.* (emphasis added).

B. The Board's Decision in *Boeing* Overturning *Lutheran Heritage* Is an Extraordinary Circumstance Warranting Reconsideration and Continued Application of the *Lutheran Heritage* Standard in the Present Case Constitutes Material Error

The Board's decision in *Boeing* overturning *Lutheran Heritage*, the standard applied by the Board in the Decision and Order, constitutes extraordinary circumstances warranting reconsideration. Moreover, the continued application of the *Lutheran Heritage* test in light of the Board's explicit application of the new *Boeing* test in "all...pending cases" would produce a result contrary to the statutory design and equitable principles.

The Board has long held that a change in controlling law constitutes "extraordinary circumstances" warranting reconsideration. *See In Re United Food*, 338 NLRB 1074, 1074 (2003) (holding that "extraordinary circumstances" includes "an intervening Supreme Court decision or newly discovered evidence"); *Int'l Hod Carriers Bldg.*, 135 NLRB 1153, 1173 (1962) (noting that reconsideration can be granted in "exceptional" circumstances, such as "a decision by the Supreme Court with respect to the interpretation of an applicable section of the Act...."). Indeed, when deciding a related issue regarding whether an argument could be raised for the first time on appeal from the Board, the Supreme Court explicitly held that a change in controlling law qualifies as "extraordinary circumstances." *See Sure-Tan, Inc. v. N.L.R.B.*, 467

U.S. 883, 897 (1984) ("We may consider petitioners' First Amendment argument, although not raised before the Board, because the intervening, substantial change in controlling law occasioned by *Bill Johnson's Restaurants* qualifies as an 'extraordinary circumstanc[e].'").[3]

Therefore, the Board's decision in *Boeing*, explicitly overturning *Lutheran Heritage*, constitutes extraordinary circumstances necessitating reconsideration.

C. The Board's New *Boeing* Test, Which Applies Retroactively to "All Other Pending Cases" Must Be Applied Here As This Case is Still Pending

The Board's new test for assessing the legality of facially neutral workplace policies from *Boeing*[4] must be applied in the instant case based on the Board's explicit extension of the *Boeing* standard to "all other pending cases" at the time that decision was issued. *The Boeing Co.*, 365 NLRB No. 154, *18 (Dec. 14, 2017). The Board's explicit application of the standard to "all other pending cases" was based on a finding that retroactive application would not cause "manifest injustice" and instead, "failing to apply the new standard retroactively would 'produc[e] a result which is contrary to a statutory design or to legal and equitable principles.'" *Id. quoting Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Here, the instant case is still pending. The need to apply the *Boeing* test in the present case is only further

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[3] Further, this approach is consistent with Board decisions finding that changes in precedent meets the similar "special circumstances" standard, allowing parties to relitigate issues in a later ULP proceeding that were already litigated in a prior representation case. *See Evangeline of Natchitoches, Inc.*, 323 NLRB 223 (1997) ("we find that *NLRB v. Health Care & Retirement Corp.*, which issued after the underlying representation proceeding in this case, constitutes a special circumstance requiring the Board to reexamine its decision in the representation proceeding."); *Brooklyn Psychosocial Rehab. Inst., Inc.*, 264 NLRB 114 (1982) (finding that intervening Board decisions applying a new supervisory test from *N.L.R.B. v. Yeshiva Univ.*, 444 U.S. 672 (1980) "constitute sufficient 'special circumstances' to warrant review of the determination made in the representation proceeding...."); *Allied Foods, Inc.*, 189 NLRB 513, 515 (1971) (holding that "intervening decision in Case 10-CA-8118 constitutes sufficient 'special circumstances' to warrant review of the determination made in the representation proceeding concerning alleged supervisory participation in the union organizational campaign....").

[4] The Board's new rule for facially neutral policies "evaluate[s] two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the requirement(s)." *The Boeing Co.*, 365 NLRB No. 154, *15 (Dec. 14, 2017). *Boeing* further identifies "three categories of employment policies, rules and handbook provisions" to provide greater clarity and certainty to employees, employers and unions. *Id.* at *16.

reinforced by the fact that the Board, in the *Boeing* decision, identified the Decision and Order as one where "the Board itself has struggled when attempting to apply *Lutheran Heritage*," further noting that the Decision and Order demonstrated that "Board members have regularly disagreed with one another regarding the legality of particular rules or requirements...." *The Boeing Co.*, 365 NLRB No. 154, *3; n.9 (Dec. 14, 2017).

It is incontrovertible that the present case is still a "pending case" as it is in the compliance phase.[5] As noted above, the Board's standard procedure is to apply decisions retroactively to "all pending cases *in whatever stage*." *Id.* at *17 *quoting SNE Enterprises, Inc.*, 344 NLRB 673 (2005). The Board has held that decisions should be applied retroactively to cases including those in compliance. In *The Mcburney Corp.*, 352 NLRB 241 (2008), the Board had previously upheld a 2001 ALJ's decision finding a violation of the Act. However, in the intervening years a new Board decision, *In Re Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007), was issued that affected the appropriate remedy. The General Counsel and Charging Party filed a motion for reconsideration, arguing that *Oil Capitol* "should not apply to them" because the "retroactive application of *Oil Capitol* would cause manifest injustice here." *The Mcburney Corp.*, 352 NLRB 241, *1 (2008). The Board disagreed, and held that *Oil Capitol* must be applied retroactively, even though the case was in compliance proceedings, stating that "[s]ubsequent to the issuance of *Oil Capitol*, the Board has routinely applied *Oil Capitol* in appropriate pending cases, all of which were instituted well before *Oil Capitol* was decided." *Id.*

Therefore, because the Board explicitly stated that the *Boeing* test should apply to "all pending cases" and this case is still pending, the Board's test from *Boeing* must be applied in the present case.

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[5] The current case is listed as "Open" on the Board website's docket. *See* Docket of *Whole Foods Market, Inc.*, Case No. 02-CA-096965 *available at* https://www.nlrb.gov/case/01-CA-096965.

D. Based On the Unique Facts of This Case, the Board Should Exercise its Discretion and Accept as Timely the Company's Motion for Reconsideration

While it is true that more than 28 days have lapsed since the Decision and Order, this is an appropriate case for the Board to use its discretion and accept as timely a motion for reconsideration filed more than 28 days after the issuance of the Decision and Order. As discussed above, reconsideration of the Decision and Order is appropriate in this case because the Board explicitly overturned the *Lutheran Heritage* standard upon which the Decision and Order was entirely based on. Furthermore, in overturning *Lutheran Heritage*, the Board singled out the instant Decision and Order as a case that demonstrated the difficulty in applying the prior standard. This inclusion in the *Boeing* decision serves to highlight the need for the Board's Decision and Order to be reconsidered. Therefore, the Board should exercise its permissive discretion under Section 102.48(c)(2) to permit a motion for reconsideration past the 28 day period in this case.

III. CONCLUSION

For the foregoing reasons, Whole Foods respectfully requests that the Board grant its motion for reconsideration in light of the new test promulgated in *Boeing*.

Dated: New York, New York
January 31, 2018

Respectfully submitted,

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Date of Filing: January 31, 2018

AFFIDAVIT OF SERVICE OF: Motion for Reconsideration of the Board's Order

I hereby certify that, on the 31st day of January 2018, I served the above-entitled document(s) by the methods indicated below, upon the following persons at the following addresses:

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