

363 NLRB No. 87 (N.L.R.B.), 205 L.R.R.M. (BNA) 1153, 166 Lab.Cas. P 16082, 2015 WL 9460031

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

WHOLE FOODS MARKET, INC.

AND

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 919

AND

WORKERS ORGANIZING COMMITTEE OF CHICAGO

Cases 01-CA-096965, 13-CA-103533, and 13-CA-103615

December 24, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

*1 The issue in this case is whether the Respondent violated Section 8(a)(1) of the Act by maintaining rules in its General Information Guide (GIG) prohibiting recording in the workplace without prior management approval.¹ We find, contrary to the judge, that the maintenance of the recording rules is unlawful.²

A. The Rules at Issue

The GIG applies to all of the Respondent's employees and has been distributed to employees companywide. The GIG contains two rules prohibiting recording in the workplace. The first (on p. 25) 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, Whole Foods Market has adopted the following policy concerning the audio and/or video recording of company meetings:

It is a violation of Whole Foods Market 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 Whole Foods Market 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.

The second rule (on p. 57) appears under the heading "Team Member Recordings" and states:

It is a violation of Whole Foods Market 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

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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.

Although there was some confusion earlier in the proceedings,³ we find that both rules are before us for decision.⁴

B. Facts

The sole witness at the hearing was Mark Ehrnstein, the Respondent's global vice president for team member services (human resources). Ehrnstein testified that he drafted the GIG, which has been in effect since at least 2001. It applies to all areas of every store, including the parking lot and the area in front of the store, and applies to both employees and managers. The rule applies to any electronic device that may be used to record images or conversations. Ehrnstein testified that an employee on worktime is precluded from recording a conversation without prior management approval, regardless of whether the employee is engaged in protected concerted activity.

*2 Ehrnstein testified that an essential part of the Respondent's "core values" and "culture" is that employees have a voice and are free to "speak up and speak out" on many issues, work-related or not. The Respondent, Ehrnstein testified, has an open-door policy that encourages employee input into their work lives, and the workers "feel very comfortable" in voicing their opinions. The Respondent holds a variety of meetings at which employees have an opportunity to express their views and opinions on various topics. For example, a "town hall" meeting is held at least once per year at which regional management leadership visit each store and meet with the employees without store management present. At these meetings, an "open forum" is held to discuss work issues. Store management is later advised of the general nature of the employees' comments "in the aggregate," but the identities of the employees who spoke are not disclosed. Ehrnstein testified that the recording of these meetings would "chill the dynamic" because workers would be reluctant to voice their opinions about store management.

The Respondent periodically holds "store meetings" at which employees speak about a variety of issues. "Team meetings" are also held, at which the employees within various departments discuss areas of mutual interest with team leadership. In addition, at some team meetings, the participants vote on whether to add a new employee to the team. Ehrnstein testified that it is important that criticisms voiced at those meetings not be identified as coming from particular employees, in order to avoid disruption in team harmony.

Ehrnstein also testified that the Respondent's internal appeal process for employment termination decisions would be adversely affected without a no-recording policy. When team members are terminated, they can request a review of the decision by a five-member panel of their "peers." The panel meets and reviews documents submitted by the team member, discusses the discipline, and votes on whether to uphold or overturn the termination. Ehrnstein testified that allowing recording would have a detrimental effect on panel deliberations.

The Respondent also holds meetings at which employee requests for assistance from the Respondent's Team Member Emergency Fund are discussed. Those matters are often confidential, involving financial need, family death, illness, or personal crisis. Ehrnstein stated that "open dialogue is critical to the process."

C. Discussion

1. Applicable principles

A rule violates Section 8(a)(1) if it would reasonably tend to chill employees in the exercise of their Section 7 rights.⁵ If the rule explicitly restricts activities protected by Section 7, it is unlawful.⁶ If it does not, there is no violation unless: “(1) employees would reasonably construe the language to prohibit Section 7 activity; [or] (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Lutheran Heritage Village-Livonia*, supra, 343 NLRB at 647; *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip. op. at 6 (2014), enf’d. ___ Fed.Appx. ___ (2d Cir. 2015). In analyzing work rules, the Board “refrain[s] from reading particular phrases in isolation, and . . . must not presume improper interference with employee rights.” 343 NLRB at 646. Any ambiguity in a rule must be construed against the promulgator of the rule, here, the Respondent. See *Lafayette Park Hotel*, supra, 326 NLRB at 828; *Norris/ O'Bannon*, 307 NLRB 1236, 1245 (1992). An employer rule is unlawfully overbroad “when employees would reasonably interpret it to encompass protected activities.” *Triple Play Sports Bar*, supra, 361 NLRB No. 31, slip op. at 7.

2. The judge's decision

*3 Applying the foregoing principles, the judge found that the no-recording rule did not explicitly restrict Section 7 activity because it “does not prohibit employees from engaging in protected, concerted activities, or speaking about them,” and because “[m]aking recordings in the workplace is not a protected right.” Noting that the General Counsel did not allege that the Respondent had promulgated the rule in response to union activity or that the Respondent had applied it to restrict the exercise of employees' Section 7 rights, the judge further found that the rule “cannot reasonably be read as encompassing Section 7 activity.” In so finding, the judge relied in part on the rule's own explanation of its purpose, the elimination of a chilling effect on the expression of views. Accordingly, the judge concluded that the maintenance of the rule did not violate Section 8(a)(1).

3. General Counsel's exceptions

The General Counsel asserts that recording conversations in the workplace is a protected right, and he points out that it is uncontested that the Respondent would apply and enforce the rules at issue in circumstances where employees are engaged in Section 7 activity. Accordingly, the General Counsel argues, employees would reasonably interpret the rules to prohibit their use of cameras or recording devices in the workplace for employees' mutual aid and protection, “such as photographing picketing, or recording evidence to be presented in administrative or judicial forums in employment related matters.”

4. Analysis

The rules at issue here prohibit the recording of conversations, phone calls, images or company meetings with a camera or recording device without prior approval by management. We find, contrary to the judge and our dissenting colleague, that these rules would reasonably be construed by employees to prohibit Section 7 activity.

Photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are 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, slip op. at 4 (2015). Such 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. *Id.*⁷ Moreover, our case law is replete with examples

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where photography or recording, often covert, was an essential element in vindicating the underlying Section 7 right.⁸ Our case law, therefore, supports the proposition that photography and audio and video recording at the workplace are protected under certain circumstances.⁹

*4 The rules at issue here unqualifiedly prohibit all workplace recording. Although the dissent claims that employees would reasonably interpret the rules to protect, not prohibit, Section 7 activity, the rules themselves do not differentiate between recordings protected by Section 7 and those that are unprotected. That the rule contains language setting forth an intention to promote open communication and dialogue does not cure the rule of its overbreadth. The Respondent's witness testified that the rules apply "regardless of the activity that the employee is engaged in, whether protected concerted activity or not." Thus, the Respondent has effectively admitted that the rules cover all recording, even that which is part of the *res gestae* of protected concerted activity. In light of the broad and unqualified language of the rules and the Respondent's admission as to their scope, we find that employees would reasonably read the rules as prohibiting recording activity that would be protected by Section 7. See *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 5 (finding recording rules unlawful because employees "would reasonably interpret these rules to infringe on their protected concerted activity.").¹⁰ Accordingly, we find that the rules would reasonably chill employees in the exercise of their Section 7 rights.¹¹

The Respondent and the dissent rely on *Flagstaff Medical Center*, 357 NLRB No. 65 (2011), *enfd.* in relevant part 715 F.3d 928 (D.C. Cir. 2013), in which a Board majority found that an employer policy that prohibited the use of cameras for recording images in a hospital setting did not violate the Act.¹² The *Flagstaff* majority found that in light of the weighty patient privacy interests and the employer's well-understood HIPAA obligation to prevent the wrongful disclosure of individually identifiable health information, employees would reasonably interpret the rule as a legitimate means of protecting those interests, not as a prohibition of protected activity. The Respondent asserts that, similar to *Flagstaff*, its recording rules are in place primarily to preserve privacy interests, including personal and medical information about team members, comments about their performance, details about their discipline, criticism of store leadership, and confidential business strategy and trade secrets. The Respondent and the dissent further argue that the recording rules are lawful because they contain an embedded rationale--the encouragement of open communication--that would lead a reasonable employee to understand their lawful purpose.¹³

Flagstaff is plainly distinguishable. The Respondent's business justification is not without merit, but it is based on relatively narrow circumstances, such as annual town hall meetings and termination-appeal peer panels, and is not nearly as pervasive or compelling as the patient privacy interest in *Flagstaff*; it thus fails to justify the rules' unqualified restrictions on Section 7 activity.¹⁴ Accordingly, we find that maintenance of the recording rules at issue in this case would reasonably chill the employees in the exercise of their Section 7 rights.¹⁵ For these reasons, we conclude that the rules are overbroad and violate Section 8(a)(1) of the Act.

AMENDED CONCLUSIONS OF LAW

*5 1. Substitute the following for the judge's Conclusion of Law 3.

"3. The Respondent violated Section 8(a)(1) of the Act by maintaining rules in its General Information Guide that prohibit recording without prior management approval."

2. Add the following as Conclusion of Law 4.

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“4. The unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.”

REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, we shall order the Respondent to rescind the unlawful rules.¹⁶ Pursuant to *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005), enfd. in part 475 F.3d 369 (D.C. Cir. 2007), the Respondent may comply with our order of rescission by rescinding the unlawful provisions and republishing its General Information Guide without the unlawful rules. We recognize, however, as we did in *Guardsmark*, that republishing the handbook could be costly. Accordingly, the Respondent may supply the 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 that will correct or cover the unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Any copies of the handbook that include the unlawful rules must include the inserts before being distributed to employees. See, e.g., *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip. op. at 8.

We shall also order a companywide notice posting because the unlawful rules are in effect at the Respondent's other stores in addition to the stores at issue in this case. “[W]e have consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect.” *Guardsmark, LLC*, supra, 344 NLRB at 812. See, e.g., *Laurus Technical Institute*, 360 NLRB No. 133, slip op. at 1 fn. 2 (2014). Accordingly, because the rules found unlawful in this case applied at the Respondent's locations companywide, we shall provide for posting of a remedial notice at all of the Respondent's locations where the General Information Guide containing the unlawful rules is in effect.

ORDER

The National Labor Relations Board orders that the Respondent, Whole Foods Market, Inc., Cheshire, Connecticut and Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

*6 (a) Maintaining rules in its General Information Guide that prohibit the recording of conversations, phone calls, images, or company meetings with any recording device without prior management approval.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Revise or rescind the recording rules on pages 25 and 57 and the references to recording as a “major infraction” on page 53 of the General Information Guide and advise employees in writing that it has done so and that the unlawful rules will no longer be enforced.

(b) Furnish all current employees with inserts for the current General Information Guide that (1) advise that the unlawful recording rules have been rescinded, or (2) provide the language of a lawful policy; or publish and distribute to all current employees a revised General Information Guide that (1) does not contain the unlawful rules, or (2) provides the language of a lawful policy.

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(c) Within 14 days after service by the Region, post at its facilities in Cheshire, Connecticut, and Chicago, Illinois, and at all its facilities companywide where its General Information Guide is in effect, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Directors for Regions 1 and 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 2013.

(d) Within 21 days after service by the Regions, file with the Regional Directors for Regions 1 and 13 a sworn certification of a responsible official on a form provided by the Regions attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 24, 2015

Mark Gaston Pearce
Chairman
Kent Y. Hirozawa
Member

MEMBER MISCIMARRA, dissenting.

My colleagues find that Respondent's no-recording rules unlawfully interfere with, restrain or coerce employees in the exercise of rights protected under Section 7 of the Act. I respectfully disagree because the rules obviously are intended to encourage all communications, *including* communications protected by Section 7.¹

Two nearly identical rules are at issue here. One provides that employees may not "record conversations, phone calls, images or company meetings with any recording device . . . 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." The other states that employees may not "record conversations with a tape recorder or other recording device . . . unless prior approval is received from your store or facility leadership." Both rules contain an explanation of their purpose--"to *encourage* open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust," and "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" (emphasis added).

Not only are these no-recording rules aimed at *fostering* collective activity and free expression, the same rationale *has been fully embraced by the Board* in a line of cases making it unlawful for any party to insist to impasse on a recording or verbatim transcription of collective-bargaining negotiations or grievance meetings. *Bartlett-Collins Co.*, 237 NLRB 770, 773 fn. 9 (1978) ("[M]any experts in the field of labor relations have expressed their opinion that the presence of a reporter during contract negotiations has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining."), *enfd.* 639 F.2d 652 (10th Cir. 1981), *cert. denied* 452 U.S. 961 (1981); *Pennsylvania*

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Telephone Guild (Bell Telephone), 277 NLRB 501, 501-502 (1985) (insisting on recordings in grievance meetings “may have a tendency to inhibit free and open discussions”).

Accordingly, I dissent from the majority's finding that Respondent's no-recording rules violate Section 8(a)(1) of the Act. Unlike my colleagues, I would affirm the judge's decision to dismiss the complaint.

Discussion

The sole question presented here is whether Respondent's no-recording rules “reasonably tend[] to chill employees in the exercise of their Section 7 rights.”² I believe they do not. The judge found, and it is undisputed, that the rules do not expressly restrict Section 7 activity, were not promulgated in response to Section 7 activity, and have not been applied to restrict the exercise of Section 7 rights.³ And I agree with the judge that employees would not reasonably interpret the rules to prohibit Section 7 activity.⁴

To the contrary, as noted above, I believe employees would reasonably read the rules to *safeguard* their right to engage in union-related and other protected conversations. The rules themselves state their purpose: “to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust” and “to eliminate a chilling effect on the expression of views . . . especially when sensitive or confidential matters are being discussed.” The rules are no less solicitous of open, free, spontaneous and honest conversations about union representation or group action for the purpose of mutual aid or protection than of other subjects of conversation. And if employees want to record a conversation, they may do so upon mutual consent.

I believe it strains credulity to find that an employee could reasonably interpret the no-recording rules to prohibit Section 7 activity. But even if such an interpretation *might* occur, this is not sufficient to establish a violation under *Lutheran Heritage Village*. Rather, the Board stated in *Lutheran Heritage Village* that where a workplace rule does not refer to Section 7 activity, the Board “[would] not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.” 343 NLRB at 647 (emphasis in original).⁵ In my view, a reasonable employee would understand that the Respondent's purpose in maintaining these rules is to promote open, free, spontaneous and honest dialogue--including dialogue protected by Section 7--*not* to prohibit Section 7 activity.

This conclusion is strengthened by a consideration of the Respondent's legitimate and substantial reasons for maintaining these rules, a consideration that our precedent instructs us to factor into the determination of how employees would reasonably interpret a disputed rule.⁶ According to Mark Ehrnstein, the Respondent's global vice president for team member services, those reasons are embedded in the Respondent's culture, one in which employees are encouraged to “speak up and speak out” and in which they participate to a remarkable degree in discussions concerning sensitive or confidential matters. For example, employees meet to discuss requests for assistance from the Respondent's team member emergency fund. Such requests often involve private matters, such as a family member's illness or death or a personal crisis of the requesting employee. At “team meetings,” employees may air criticisms of another employee preliminary to voting whether to add him or her to the team. Employees would most likely refrain from stating their views candidly if they were being recorded. At “store meetings,” confidential matters are discussed, including real estate strategies, price competitiveness, competition with new stores, and sales information. At “town hall” meetings, regional managers visiting a Whole Foods store meet with employees outside the presence of the store's managers to “get[] the pulse of the store.” Ehrnstein testified that at some town hall meetings he has attended, employees spoke critically of store management. The judge found, and I agree, that “regional management leadership has an important interest in hearing from employees any difficulty they had with store management,” and that employees “would certainly be inhibited if [they] believed that their remarks were recorded” at meetings where “candor and forthrightness in employee opinion was

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essential.” At still other meetings, five-member “peer” panels convene to review employment termination decisions. The panel members review relevant documents, deliberate, and vote to uphold or overturn the discharge. The importance of protecting the confidentiality of what is said and done at such meetings cannot be overstated. Thus, based on their own experience of the Respondent's participatory culture, employees would understand that the purpose of the rules stated in the rules themselves--“to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust” and “to eliminate a chilling effect on the expression of views . . . especially when sensitive or confidential matters are being discussed”--is indeed their *real* purpose, and they would reasonably interpret the rules as a legitimate means of serving that purpose, not as a prohibition of Section 7 activity. See *Flagstaff Medical Center*, supra.⁷

The Board can hardly disagree with the reasons that prompted the Respondent to adopt its no-recording rules. As noted above, precisely the same reasons have prompted the Board to apply a similar restriction against recordings and verbatim transcriptions in cases involving collective-bargaining negotiations and grievance meetings. The Board has held it is unlawful for any party to insist to impasse on recordings or verbatim transcripts of collective bargaining or grievance meetings, specifically because the use of recordings or transcripts would cause “adverse effects on the bargaining process.” *Pennsylvania Telephone Guild (Bell Telephone)*, 277 NLRB at 501-502; see also *Bartlett-Collins Co.*, 237 NLRB at 773 fn. 9.⁸

As I have said previously, it is not reasonable to “find a party in violation of the Act regardless of what it does.” *Arc Bridges*, 362 NLRB No. 56, slip op. at 6-7 (2015) (Member Miscimarra, dissenting). The rationale underlying *Pennsylvania Telephone Guild* and *Bartlett-Collins* suggests the Respondent might have engaged in unlawful interference with protected concerted activity if it *required* recordings or transcripts of all conversations, phone calls or company meetings. Yet, even though Respondent's no-recording rules have the salutary purpose of encouraging free expression, my colleagues find that the Respondent, by prohibiting recordings, likewise engages in unlawful interference with protected concerted activity.

That employees would not reasonably read the rules to prohibit Section 7 activity is all the more apparent when one considers the limited scope of protected activity potentially covered by the rules. Whether a particular act of recording is protected by Section 7 turns on the specific facts of each case, and making visual and/or audio recordings is often a solitary activity, not a concerted one.⁹ And within the subset of recordings made by two or more employees (or by one employee as a part of or in furtherance of some group action), only those made for the purpose of mutual aid or protection--as opposed, for example, to the purpose of posting the recording on social media to entertain one's Facebook “friends”--would come within the protection of the Act.¹⁰

Most of the cases my colleagues cite in support of their decision not only do not support it, they implicitly contradict it.¹¹ And in *Flagstaff Medical Center*, supra, 357 NLRB No. 65, the Board adopted the decision of the administrative law judge, who stated that “the specific right to take photos in the workplace would not reasonably seem to come to mind as an inherent component of the more generalized fundamental rights of employees set forth in Section 7 of the Act.” *Id.*, slip op at 25-26. For the reasons I have set forth, I believe the majority's decision fails to withstand scrutiny. Employees would reasonably interpret the Respondent's rules to protect Section 7 activity, not to prohibit it.

Accordingly, for these reasons, I respectfully dissent.

Dated, Washington, D.C. December 24, 2015

Philip A. Miscimarra

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Member

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain rules in our General Information Guide that prohibit the recording of conversations, phone calls, images, or company meetings with any recording device without prior management approval.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL revise or rescind the recording rules on pages 25 and 57 and the references to recording as a “major infraction” on page 53 of the General Information Guide and WE WILL advise employees in writing that we have done so and that the unlawful rules will no longer be enforced.

WE WILL furnish you with inserts for the current General Information Guide that (1) advise that the unlawful recording rules have been rescinded, or (2) provide the language of a lawful policy; or WE WILL publish and distribute to all current employees a revised General Information Guide that (1) does not contain the unlawful rules, or (2) provides the language of a lawful policy.

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The Board's decision can be found at www.nlr.gov/case/01-CA-096965 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Rick Concepcion, Esq., for the Acting General Counsel.

Kathleen M. McKenna, Esq. (Proskauer Rose LLP), of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge.

Based upon a charge filed by United Food and Commercial Workers, Local 919 (UFCW), and based on charges and amended charges filed by the Workers Organizing Committee of Chicago (WOCC), a complaint was issued against Whole Foods Market, Inc. (Respondent or Employer)¹ on July 25, 2013.²

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining a rule prohibiting the recording of conversations with a recording device.

The Respondent's answer denied the material allegations of the complaint, and on August 13, a hearing was held before me in Hartford, Connecticut. On the entire record, including my observation of the demeanor of the sole witness, Marc Ehrnstein, and after considering the briefs filed by counsel for the Acting General Counsel, Respondent, and WOCC, I make the following³

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a corporation having its offices and places of business in Cheshire, Connecticut, and in Chicago, Illinois, has been engaged in the retail sale and distribution of food. During the past year, the Respondent derived gross revenues in excess of \$500,000, and also sold and shipped from its facilities goods valued in excess of \$50,000 directly to points located outside the States of Connecticut and Illinois. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits, and I find that the UFCW and the WOCC are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Facts

1. The Employer's organizational hierarchy

Operationally, the Employer is divided into 12 regions in the United States, the United Kingdom, and Canada, within which it operates 351 stores and employs 76,000 workers. The officers at the highest level of the Respondent include two chief executive officers, executive vice presidents, and 13 global vice presidents for various functional areas. Regional managers are responsible for the various food departments.

Each of the 12 regions are autonomous in certain respects. Each region is run by a regional president, regional vice president, regional managers for each department, and leadership personnel. At the store level, management includes the store team leader and the associate team leader, both of whom are responsible for the operation of the store, department team leaders who are responsible for their department, and the employees, who are called team members.

Mark Ehrnstein, the global vice president for team member services (human resources), stated that the Respondent is essentially decentralized, with each region's management personnel being responsible for that region's stores.

2. The rule

The rule at issue is set forth in the Respondent's general information guide (GIG), a comprehensive handbook which contains the Employer's mission, and information concerning employment and human resources policy.⁴ The GIG is disseminated to all of the Respondent's employees who are required to follow the rules contained therein, including the rule at issue, which applies to all of the Employer's employees in every region of the United States.

The complaint alleges that the Respondent's rule prohibiting the recording of conversations by employees violates Section 8(a)(1) of the Act. The rule, set forth on page 57 of the GIG, states as follows:

Team Member Recordings

It is a violation of Whole Foods Market 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 to 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.

Violation of this policy will result in corrective action up to and including discharge.

3. The scope and application of the rule

Ehrnstein defined the parameters of the rule. The rule itself is silent as to these matters. Ehrnstein stated that the rule applies when an employee is on worktime, defined as when he is being paid for work. It applies to all areas of the store including the parking lot and the area in front of the store.

The rule does not apply when the employee is not at work, or is on nonworktime such as his breaktime. It should be noted that certain rules set forth in the GIG specifically permit employees to engage in certain activities while on their breaktime. For example, employees may make personal phone calls and also sleep on their breaktime but may not engage in either activity while on worktime. The rule at issue is silent concerning the employee's ability to record conversations on breaktime, but they are permitted to do so, according to Ehrnstein.

The rule applies equally to all levels of management and to all employees, prohibiting the recording by an employee of any conversation with another employee or with management personnel. The rule also prohibits the recording of any conversation by management with other management personnel or employees.

Ehrnstein testified that regardless of the activity that the employee is engaged in, whether protected concerted activity or not, if the employee is on worktime he is precluded from recording a conversation without prior management approval. He stated further that an employee's recording of picketing in front of the store would be a violation of the rule.

The rule applies to all devices which may record conversations including a tape recorder, cell phone, any electronic device, and tablet. The purpose of the rule is to prevent the recording of a voice.

4. The reasons for the rule

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Ehrnstein, who drafted the GIG, met with the executive director of team member services and trained him regarding the meaning of the GIG and its application. The executive director and his team then explained it to the employees in their region.

The rule, which prohibits the recording of conversations with a recording device, is currently in effect and has been in effect since at least 2001. As set forth in the rule, “the purpose of this policy is to eliminate a chilling effect to 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.”

Ehrnstein testified that an essential part of the Respondent's “core values” and “culture” is that employees have a voice and are free to “speak up and speak out” on many issues, work related or not. The Employer has an open-door policy which encourages employee input into their work lives, and the workers ““feel very comfortable” in voicing their opinions.

That policy is set forth in the GIG, immediately before the rule at issue, where it is stated:

In order to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust, Whole Foods Market has adopted the following policy concerning the audio and/or video recording of company meetings.

Please note that while many Whole Foods Market 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.

Meetings are held with the workers at which they have an opportunity to express their views and opinions on various topics.

For example, a “town hall” meeting is held at least once per year in which regional management leadership including the regional president and vice president visit each store and meet with store employees without store management being present. At such meetings, an “open forum” is held where work issues are discussed. At those meetings, regional leadership “gets the pulse of the store” and learns what is going on in the store, including issues the employees may have with the store management and its leadership. Ehrnstein stated that at certain town hall meetings he attended, employees spoke critically of store management. For example, employees complained that team leaders or managers did not follow the Employer's policies, a deli manager used products that did not meet the Employer's strict quality standards, and managers were not submitting job reviews on time.

Ehrnstein explained that such a meeting promotes an “out front open dialogue” with the workers, and the absence of store management encourages a free exchange with the employees. He stated that store management's presence at such meetings could “chill” the conversation.

Ehrnstein stated that the recording of such a meeting would “absolutely chill the dynamic” of the meeting. He believed that workers would be reluctant to voice their opinions about store management, would feel “inhibited” in doing so if they knew that their comments were being recorded, and would fear that store management would hear their remarks. Store management is advised of the general nature of the comments of the workers “in the aggregate,” but the identities of the employees who spoke are not given.

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Another type of meeting is the “store meeting” at which the store's employees and store leadership convene periodically. At such meetings, employees speak about various issues, and “keep [the Employer] on track,” ensuring that the Respondent does “what we say we're going to do.” Matters discussed include real estate strategies, price competitiveness, competition with new stores including pricing and produce strategy, and sales and comparable sales information.

“Team meetings” are also held in which the employees of the various departments, such as meat and grocery, discuss areas of mutual interest with team leadership. After a new worker had been employed for 30 to 90 days, that person's team votes, at a team meeting, whether he should be included in the team. At the meeting, during which the nominee is absent, the team members frankly discuss that person's qualifications to join the team.

Ehrnstein stated that such a meeting is designed to “promote team harmony” in that the success of the team is the primary factor. That success is measured, in part, on the ability of the team to be more productive than the amount budgeted for their work, for which it receives additional income. Accordingly, the team is involved in the evaluation of the nominee for the purpose of ensuring that the candidate is someone who will work efficiently and productively, and contribute to its success. If the nominee is declined membership, he could be moved to another team. Ehrnstein testified that it is important that criticisms voiced at the meeting not be identified as coming from a particular employee since team harmony would be disrupted. Rather, comments made at the meeting are conveyed to the nominee “in the aggregate” without identifying the commentator.

The Respondent's Team Member Emergency Fund enables employees to contribute to a fund which supports a fellow employee who has a financial need, suffered a death in the family, or has an illness or personal crisis. An employee's request for financial assistance is considered by a team member awareness group which reviews the request, discusses the matter, and decides whether to award the funds requested. Ehrnstein stated that the matters discussed at the awareness group meeting involve personal details of the employee making the request.

Ehrnstein stated that as to each of these meetings, feedback and “open dialogue is critical to the process.”

Analysis and Discussion

The complaint alleges that the Respondent's rule prohibiting the recording of conversations with a recording device violates Section 8(a)(1) of the Act.

In determining whether a rule or policy violates the Act, it is necessary to balance the employer's right to implement rules of conduct in order to maintain discipline with the right of employees to engage in Section 7 activity. *Relco Locomotives*, 358 NLRB No. 32, slip op. at 15 (2012).

The Board's standard in evaluating work rules is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004):

The Board has held that an employer violates section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation and it must not presume improper interference with employee rights. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful.

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If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

A threshold question, therefore, is whether the rule explicitly restricts activities protected by Section 7. The General Counsel argues that the rule is facially overbroad. I do not agree. Making recordings in the workplace is not a protected right, but is subject to an employer's unquestioned right to make lawful rules regulating employee conduct in its workplace.

I have found no cases, and none have been cited, in which the Board has found that making recordings of conversations in the workplace is a protected right. In two cases in which recordings were made, the Board carefully limited its holdings concerning employees who made recordings, stating that the employers involved had no rule prohibiting the making of such recordings. *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (2011); *Opryland Hotel*, 323 NLRB 723, 723 fn. 3 (1997).

Even if recording a conversation is a protected right, the Respondent is entitled to make a valid rule, such as the one in question here, to regulate its workplace, and in doing so, prohibit such activity. *Komatsu America Corp.*, 342 NLRB 649, 650 (2004); *Akal Security, Inc.*, 354 NLRB 122, 124 (2009).

The rule does not prohibit employees from engaging in protected, concerted activities, or speaking about them. It does not expressly mention any Section 7 activity. The only activity the rule forbids is recording conversations or activities with a recording device. Thus, an employee is free to speak to other employees and engage in protected, concerted activities in those conversations. "The rule . . . in no way precludes employees from conferring . . . with respect to matters directly pertaining to the employees' terms and conditions of employment." *Lafayette Park Hotel*, 326 NLRB at 826.

There has been no showing that the rule was promulgated in response to union activity or that it has been applied to restrict the exercise of Section 7 rights. "In addition, the Respondent has not by other actions led employees to believe that the rule prohibits Section 7 activity. Thus there is no evidence that the Respondent has enforced the rule against employees for engaging in such activity, that the Respondent promulgated the rule in response to union or protected activity, or even that the Respondent exhibited antiunion animus. See *Lafayette Park*, 326 NLRB 826, relying in part on the absence of such evidence to find that a rule of conduct did not violate Section 8(a)(1)." *Tradesmen International*, 338 NLRB 460, 461 (2002). Accordingly, the only basis on which to find the rule unlawful is if employees would reasonably construe its language to prohibit Section 7 activity.

The General Counsel alleges that the rule could reasonably be interpreted by employees to prevent them from recording statements or conversations that involve activities permitted by Section 7 of the Act. He further argues that the rule is invalid because it prohibits recording of instances where employees are actually engaged in protected, concerted activities such as picketing outside the store. The General Counsel and WWOC also argue that the rule would "reasonably be interpreted by employees as precluding them from using social media to communicate and share information regarding working conditions through pictures and videos obtained at the workplace, such as employees working without proper safety equipment or in hazardous conditions."

I do not agree. "Section 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek to communicate." *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995), cited in *Register Guard*, 351 NLRB 1110, 1115 (2007).

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The General Counsel argues that the rule broadly prohibits recordings in the workplace, but does not state, as Ehrnstein testified, that employees are permitted to make recordings during nonworktime. According to the General Counsel, employees may thus presume that they are not permitted to make recordings during nonworktime. I disagree. This is not a case involving solicitation of employees which may lawfully take place during the employee's nonworktime. This case involves the validity of the Respondent's rule, the question being whether employees would reasonably construe the rule to prohibit Section 7 activity.

The General Counsel asserts that the rule prevents the employee from recording conversations related to protected activities including allegedly unlawful statements made by supervisor, and "recording evidence to be presented in administrative or judicial forums in employment related matters." I agree, but the employee may present his contemporaneous, verbatim, written record of his conversation with the other party, and his own testimony concerning employment-related matters. Only electronic recordings of conversations is prohibited.

The General Counsel also argues that the rule is contradicted by the Respondent's maintenance of surveillance cameras in the same areas as its meetings. I do not believe that the presence of such cameras renders the rule unlawful. The GIG carefully advises employees that the presence of such cameras is for the purpose of protecting customers and employees and to discourage theft and robbery and therefore reassures them of its legitimate business practice in maintaining those cameras.

The plain language of the rule leads to the conclusion that it "cannot reasonably be read as encompassing Section 7 activity and that employees would not reasonably fear that the Respondent would use this rule to punish them for engaging in protected activity." *Flamingo Hilton-Laughlin*, 330 NLRB 287, 289 (1999). There is no basis for a finding that a reasonable employee would interpret this rule as prohibiting Section 7 activity. As the Board stated in *Lutheran Heritage*, above, "we will not conclude that a reasonable employee would read the rule to apply to [Section 7 activity], simply because the rule could be interpreted that way." (Emphasis in original.)

The rule itself clearly explains its purpose--"to eliminate a chilling effect to the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded, and that recordation may inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed." That explanation is a clear, logical, and legitimate description of the reason for the rule.

The prohibition of recording conversations is embedded in a context, above, that clearly states the rule's lawful purpose. *Target Corp.*, 359 NLRB No. 103, slip op. at 3 fn. 8 (2013). Thus, based on that embedded explanation, a reasonable employee would infer that the Respondent's purpose in maintaining the rule is, as set forth in the GIG, "to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust."

Similar to the rules at issue in *Lafayette Park* and its progeny, the Respondent's rule addresses legitimate business concerns. The rule is reasonably addressed to protecting the Respondent's legitimate business interests. As expressly made clear within the rule and the paragraph immediately preceding it, the purpose of the rule is to promote the open discussion of matters of store business, and to encourage employees to present their honest and frank opinions concerning company matters.

Thus, Ehrnstein credibly presented valid reasons for the rule and cited examples of company meetings where candor and forthrightness in employee opinions was essential. Thus, at the town meetings, regional management leadership has an important interest in hearing from employees any difficulty they had with store management. Employee comments would certainly be inhibited if employees believed that their remarks were recorded and possibly replayed for store management. It is clear that the use of recording devices would impede free and open discussion among the members of

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the Employer's work force. Similar evidence was received concerning the importance of frankness and honesty at store meetings where confidential sales information was being discussed and where candidates for inclusion in teams was voted upon. In addition, matters pondered at team member emergency fund meetings involve highly private matters relating to employees' personal circumstances.

At each of the above meetings, it would be expected that employees would be restrained in their comments if they knew that they were being recorded.

In *Flagstaff Medical Center*, 357 NLRB No. 65 (2011), the Board found no violation in the employer's prohibition of the use of electronic equipment during worktime for recording images of patients and/or hospital equipment, property, or facilities. The Board held that the privacy interests of hospital patients are "weighty," and the employer had a significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography. The Board held that employees would reasonably interpret the rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity.

I find and conclude that the rule does not reasonably tend to chill employees in the exercise of their Section 7 rights, or that an employee would reasonably construe the language to prohibit Section 7 activity. I accordingly find and conclude that the Respondent has not violated the Act by maintaining its rule prohibiting the recording of conversations with a recording device.

CONCLUSIONS OF LAW

1. The Respondent, Whole Foods Market, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Food and Commercial Workers, Local 919, and Workers Organizing Committee of Chicago are labor organizations within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ⁵

ORDER

The complaint is dismissed.

Dated, Washington, D.C. October 30, 2013

Footnotes

- 1 On October 30, 2013, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.
The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.
The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

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- 2 The complaint alleged that 10 handbook rules were unlawful. The parties reached a settlement with respect to nine of those rules, all except the recording rule.
- 3 At the hearing, the parties stipulated that “the rule at issue, the ‘Team Member Recordings’ rule found [on] Page 57, applies to all Whole Foods employees in every region of the country,” and they further “agree[d] that it’s just the first paragraph of the ‘Team Member Recordings’ rule that’s at issue. . . .” Neither party appears to have been aware of the discrepancy between the stipulation and the complaint, which referred to the first rule but not the second. In their posthearing briefs, both parties addressed both rules.
- In his decision, the judge acknowledged the existence of both rules, but stated that the second was “stipulated to be the rule at issue here.” He found that rule to be lawful and said nothing about other one. In exceptions, the General Counsel maintains that both rules were fully briefed and contends that the judge should have ruled on both. In its answering brief, the Respondent acknowledges the confusion and agrees that both rules were discussed in the parties’ posthearing briefs. The Respondent maintains that “the record clearly reflects that the General Counsel’s objection is to the concept of a no recording rule, not the specific text of [either] rule” and that the judge’s analysis is applicable to either rule.
- 4 In addition to the two rules, p. 53 of the GIG contains a list of “major infractions” that may result in discharge. That list includes “[r]ecording conversations, phone calls or company meetings with any audio or video recording device without prior approval or consent.” Our ruling here addresses the inclusion of recording on that list.
- 5 *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999).
- 6 *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).
- 7 Thus, contrary to the dissent, we would not characterize recording or photography as a solitary, nonconcerted act encompassing a “limited scope of protected activity.” Rather, our case law illustrates a wide array of protected uses for such devices. See *White Oak Manor*, 353 NLRB 795, 795 fn. 2 (2009), *reaffirmed and incorporated by reference* at 355 NLRB 1280 (2010) (employee’s photographing of another employee did not cause her to lose the protection of the Act where the photography was part of the *res gestae* of a concerted effort to induce group action concerning the enforcement of a dress code), *enfd.* 452 Fed.Appx. 374 (4th Cir. 2011). See also *Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011) (employer unlawfully terminated employee for secretly recording a meeting with his supervisor where employer did not previously have a policy in place that prohibited such activity), *enfd.* 677 F.3d 1241 (D.C. Cir. 2012); *Opryland Hotel*, 323 NLRB 723, 723 fn. 3 (1997) (in the absence of a rule, practice, or prohibition of the use of tape recorders, such use does not constitute misconduct sufficient to defeat reinstatement after an unlawful discharge); *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991) (refusal to rehire employee in part because he engaged in the protected concerted activity of carrying a tape recorder in connection with a Department of Labor investigation into union election irregularities violated Sec. 8(a)(1), *enfd.* 976 F.2d 743 (11th Cir. 1992)). Cf. *Gallup Inc.*, 334 NLRB 366 (2001) (promulgation of a rule prohibiting tape recording was unlawful where it was enacted by the employer in response to union organizing efforts), *enfd.* *mem.* 62 Fed.Appx. 557 (5th Cir. 2003).
- 8 See, e.g., *Times-Herald Record*, 334 NLRB 350, 354 (2001) (surreptitious audio recording of meeting at which employer unlawfully threatened employees admissible in Board proceeding), *enfd.* 27 Fed.Appx. 64 (2d Cir. 2001); *Painting Co.*, 330 NLRB 1000, 1003 (2000) (covert recording supported allegation that employer unlawfully threatened to close the company), *enfd.* 298 F.3d 492 (6th Cir. 2002); *Arrow Flint Electric Co.*, 321 NLRB 1208, 1219 (1996) (surreptitious recording was admitted in support of unlawful closure threat and discharge allegations); *Wellstream Corp.*, 313 NLRB 698, 711 (1994) (surreptitious recording admissible in support of allegations that employer unlawfully solicited grievances and threatened employee); *McAllister Bros.*, 278 NLRB 601 fn. 2, 605 fn. 3 (1986) (recording of meeting admitted to show that employer unlawfully engaged in direct dealing), *enfd.* 819 F.2d 439 (4th Cir. 1987); *Algreco Sportswear Co.*, 271 NLRB 499, 505 (1984) (surreptitious recording admitted to support allegations of unlawful threats); *East Belden Corp.*, 239 NLRB 776, 782 (1978) (surreptitious recording of a meeting admitted to show that employer unlawfully told employees that it did not intend to sign a contract with the union), *enfd.* 634 F.2d 635 (9th Cir. 1980). See also *California Acrylic Industries, Inc.*, 322 NLRB 41 (1996) (photographs taken by union organizer supported allegation that employer conducted unlawful surveillance of the union agents’ contacts with employees during their lunch period), *enfd.* in relevant part 150 F.3d 1095 (9th Cir. 1998).
- 9 In stating that “[w]hether a particular act of recording is protected by Section 7 turns on the specific facts of each case,” the dissent acknowledges that recording in the workplace constitutes protected activity under certain circumstances. Indeed, as the dissent acknowledges, any act of recording by a single employee that forms part of, or is undertaken in furtherance of, a course of group action constitutes concerted activity within the meaning of Sec. 7. Even in the absence of group action, activity by one individual is deemed concerted if undertaken in an effort to enforce the provisions of a collective-bargaining

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agreement or in order to initiate or induce group action. *Meyers Industries II*, 281 NLRB 882, 884, 887 (1986), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988). See *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). While the dissent seeks to portray such concerted recording activity as “unlikely”-- including by using a uniquely broad definition of “solitary” and presenting several examples as the complete universe of such activity--individual acts of recording have often been deemed concerted protected activity, as illustrated in cases like *Hawaii Tribune-Herald* and other decisions cited above in footnote 7. In any event, we are not making any findings as to whether particular recordings are concerted, let alone finding that recording necessarily constitutes concerted activity. Nor are we holding that all rules regulating recording are invalid. Rather, we find only that recording may, under certain circumstances, constitute protected concerted activity under Sec. 7 and that rules that would reasonably be read by employees to prohibit protected concerted recording violate the Act.

Similarly beside the point is the dissent's argument that the “Respondent's rules would accommodate this scenario by permitting the recordings if the parties to each recorded conversation gave their consent.” Of course, whether employees' recording activity is concerted does not turn on whether they obtained the consent of all parties to the conversation. But again, the ultimate issue presented in this case is whether employees would reasonably read the rules to prohibit Sec. 7 activity. 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.

The dissent also asserts that the cases we cite in support of our decision implicitly contradict it, because those cases imply that employers may lawfully maintain rules or policies regulating recording. But 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 Sec. 7 activity is not being restricted. As explained below, the rules at issue here are impermissibly overbroad.

- 10 The Respondent contends that the rules are not unlawful because they are limited to recording that takes place on working time, and do not apply when the employee is not at work, or is on nonwork time such as break time. We reject this argument. The rules do not differentiate between recording on working and nonworking time.

We also find that the rules are unlawful because they require employees to obtain the employer's permission before engaging in recording activity on nonwork time. The Board has stated that any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful. See *Brunswick Corp.*, 282 NLRB 794, 795 (1987) (rule found unlawful that required employees to obtain the employer's permission before engaging in union solicitation in work areas during nonworking time and required the employer's authorization in order to solicit in the lunchroom and lounge areas during breaks and lunch periods); *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978) (finding unlawful rule requiring employees to obtain permission before distributing union literature in nonwork areas on nonworking time), *enfd.* 600 F.2d 132 (8th Cir. 1979). See also *Rio All-Suites Hotel & Casino*, *supra*, 362 NLRB No. 190, slip op. at 4 fn. 10 (“Of course, the fact that these prohibitions are subject to discretionary exemptions by the Respondent does not make them any less unlawful.”).

- 11 Where reasonable employees are uncertain as to whether a rule restricts activity protected under the Act, that rule can have a chilling effect on employees' willingness to engage in protected activity. Employees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Sec. 7 activity for fear of running afoul of a rule whose coverage is unclear. See generally *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (“Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. . . . And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.”).

- 12 The *Flagstaff* policy prohibited the use of electronic equipment, including cameras, during work time, as well as “[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities.” 357 NLRB No. 65, slip op. 4-5, 25.

- 13 The Respondent also argues that nonconsensual recording is unlawful in many of the states in which it operates. The Respondent's rules, however, are not limited to stores in those states; they apply companywide. Moreover, the Respondent's rules do not refer to those laws and do not specify that the recording restrictions are limited to recording that does not comply with State law.

- 14 The dissent also relies on cases holding that it is unlawful for any party to insist to impasse on recordings of collective-bargaining or grievance meetings. This argument is unpersuasive. Again, we do not disagree with the dissent's assertion that

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employers may have valid policy reasons for instituting a recording rule. And, as stated above, we do not hold that employers are forbidden from maintaining narrowly drawn restrictions on recording. Thus, we are not, as the dissent suggests, finding the Respondent in violation of the Act “regardless of what it does.” Rather, we find the rules at issue here to be unlawful because they would reasonably be read to prohibit all recording, including that which we would find to be protected under the Act.

15 Chairman Pearce adheres to his dissent in *Flagstaff* and would find the rules at issue here unlawful because they constitute an absolute prohibition on all recordings that employees would reasonably construe to include protected recordings. 357 NLRB slip op. at 13. However, for the reasons set forth above, Chairman Pearce agrees that *Flagstaff* is distinguishable.

16 Our Order requiring the rescission of the unlawful rules encompasses the reference to recording in the major infraction list on p. 53, in addition to the recording rules on pp. 25 and 57.

17 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

1 Sec. 7 of the National Labor Relations Act (NLRA or Act) gives 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,” and it also gives employees “the right to refrain from any or all of such activities,” subject to an exception, not at issue here, relating to union-security agreements.

2 *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

3 Cf. *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (2011) (finding rule prohibiting employees from making secret audio recordings of conversations unlawful because rule was promulgated in response to protected activity), enfd. 677 F.3d 1241 (D.C. Cir. 2012); *Gallup, Inc.*, 334 NLRB 366, 366 (2001) (finding rule prohibiting audio or videotaping at work unlawful because it was promulgated immediately after the employer discovered the union's organizing efforts), enfd. mem. 62 Fed.Appx. 557 (5th Cir. 2003).

4 See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004). I have previously expressed my disagreement with the first prong of the *Lutheran Heritage* standard, under which a workplace rule is deemed unlawful where the rule was neither promulgated in response to nor applied to restrict Sec. 7 activity, if “employees would reasonably construe the language [of the rule] to prohibit Section 7 activity,” without regard to an employer's legitimate reasons unrelated to the NLRA for maintaining the rule. See, e.g., *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 fn. 3 (2015); *Conagra Foods, Inc.*, 361 NLRB No. 113, slip op. at 8 fn. 2 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014), enfd. mem. sub nom. *Three D, LLC v. NLRB*, No. 14-3284, 2015 WL 6161477 (2d Cir. Oct. 21, 2015). I would reexamine the *Lutheran Heritage* standard in an appropriate future case. I agree with the judge, however, that the rules at issue here are lawful under the *Lutheran Heritage* standard.

5 Despite the Board's clear rejection of the view that a rule is unlawful where it is merely possible that employees *could* read the rule to restrict Sec. 7 activity, my colleagues' recitation of applicable law includes the statement that “[a]ny ambiguity in a rule must be construed against the promulgator of the rule.” The word *ambiguous* means “capable of being understood in two or more possible senses or ways.” <http://www.merriam-webster.com/dictionary/ambiguous>. Thus, a rule is ambiguous if it *could* be read to prohibit Sec. 7 activity, among other possible interpretations, regardless whether employees reasonably *would* read it that way. Under *Lutheran Heritage Village*, however, mere ambiguity is not enough to deem a rule unlawful.

6 See *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 5 (2011), petition for review granted in part and denied in part 715 F.3d 928 (D.C. Cir. 2013). In *Flagstaff Medical Center*, the Board found lawful a rule prohibiting taking photographs of patients or hospital property. In so finding, the Board emphasized the “weighty” privacy interests of the hospital's patients and the hospital's “significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography.” 357 NLRB No. 65, slip op. at 5. Taking those interests into consideration, the Board found that “[e]mployees would reasonably interpret FMC's rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity.” *Id.* My colleagues cite *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 (2015), where a panel majority struck down rules banning the use of cameras, camera phones, audio visual recording equipment and other recording devices. There, the majority relied on the fact that the employer did not expressly “tie [] [the rules] to any particularized interest, such as the privacy of its patrons.” *Id.*, slip op. at 4. Here, by contrast, the Respondent did expressly tie the rules at issue here to stated legitimate interests. I did not participate in *Rio All-Suites Hotel & Casino*, but I agree with former Member Johnson that reasonable employees in that case would have understood the obvious

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reasons for the Hotel and Casino's camera-related rules without having them spelled out in express terms and would have "reasonably interpret[ed] [the rules] as a legitimate means of safeguarding guest privacy and the integrity of the Respondent's gaming operations, not as prohibitions of protected activity." 362 NLRB No. 190, slip op. at 5 fn. 12.

7 My colleagues distinguish *Flagstaff Medical Center* on the basis that the Respondent's business justification for the rules at issue here is "not nearly as pervasive or compelling as the patient privacy interest in *Flagstaff*." However, saying as much does not explain why the Respondent's employees would reasonably interpret as *prohibiting* Section 7 activity rules that clearly explain their express purpose of *encouraging* freedom of expression.

8 Board precedent also holds that recordings of conversations that are part of negotiations and made without notice to a party to the conversation are excluded from evidence in Board proceedings. *Carpenter Sprinkler Corp.*, 238 NLRB 974, 975 (1978), *enfd.* in relevant part 605 F.2d 60 (2d Cir. 1979). In adopting this rule, the Board relied on the very same reason the Respondent relies on here, stating that it was "convinced that a rule permitting the introduction into evidence of surreptitiously prepared tape recordings of negotiations *would inhibit severely the willingness of parties to express themselves freely* and would seriously impair the smooth functioning of the collective-bargaining process." *Id.* (emphasis added).

9 By "solitary" recording activity, I mean an individual's recording activity that is unconnected to group action. Such a recording, under well-established principles, would not involve "concerted" activity, which means making the recording--or prohibiting it--would not implicate the Act's requirements. It is true that, in some circumstances, the action of a single individual employee may constitute "concerted activity," but the individual action is "concerted" only if it is linked to group action in some way. For example, when an individual employee asserts a right grounded in a collective-bargaining agreement, his or her conduct is deemed concerted on the basis that it is an extension of the concerted action that produced the agreement. See *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984). No right grounded in a collective-bargaining agreement could be asserted through the making of a recording here; the Respondent's employees are not represented by a union. In addition, an employee engages in concerted activity when he or she brings "truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), *affd.* sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988). In the instant case, it is possible that an employee may wish to bring group complaints to management's attention by recording his or her coworkers' statements and then giving the recording to a manager. Even if such an unlikely case arises, however, the Respondent's rules would accommodate this scenario by permitting the recordings if the parties to each recorded conversation gave their consent. Finally, an employee also engages in concerted activity when he or she seeks "to initiate or to induce or to prepare for group action," *Meyers II*, *supra*, but such activity necessarily involves at least two individuals, a speaker and a listener, *id.* (citing *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964)). The making of a recording does not necessarily involve this type of "concerted" activity, nor does the record include any evidence that such activity occurred in the instant case.

10 Note that the Respondent's employees are at liberty to record anything said in the workplace by writing it down. Only *electronic* recordings are prohibited. See *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995) ("Section 7 of the Act protects organizational rights--including the right to oppose the union's campaign--rather than particular means by which employees may seek to communicate.").

11 In *White Oak Manor*, 353 NLRB 795 (2009), reaffirmed and incorporated by reference at 355 NLRB No. 211 (2010), the Board found that an employee who engaged in protected concerted activity "by seeking to initiate or induce group action among the [r]espondent's employees in an effort to compel the [r]espondent to fairly enforce its dress code" *did not lose the Act's protection* by photographing a coworker and showing the photo to other employees. 353 NLRB at 795 fn. 2. In so finding, the Board relied in part on the respondent's failure "to establish that it disseminated, prior to [the employee's] discharge, a rule *prohibiting employees from taking photographs of other employees without their permission*." *Id.* (emphasis added). Far from supporting the majority's decision, *White Oak Manor* implies that a no-photographing rule would have been lawful.

So does *Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011), where the employer discharged employee Smith for tape recording an interview Smith believed could result in his discipline. Similar to *White Oak Manor*, the Board found that Smith did not lose the Act's protection by tape recording the meeting "where the [r]espondent *had no rule barring such recording* and where it was not unlawful [under state law]." *Id.*, slip op. at 1 (emphasis added). The Board did find the employer violated the Act by "promulgating and maintaining a rule prohibiting employees from making secret audio recordings of conversations," but only on the basis that the rule was promulgated "*in response to protected activity*." *Id.* (emphasis added).

Again, in *Sullivan, Long & Hagerty*, 303 NLRB 1007 (1991), in which the Board adopted the decision of the administrative law judge, the judge found the employer violated the Act when it refused to rehire former employee Blazer in part because

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Blazer had carried a tape recorder on the jobsite, where the employer failed to show that such activity “*violated any of [its] valid policies.*” Id. at 1013 (emphasis added).

Finally, in *Opryland Hotel*, 323 NLRB 723 (1997), the Board required the employer to offer employee Garramone reinstatement and pay him backpay despite its discovery, through after-acquired evidence, that he had secretly tape-recorded conversations with supervisors. Id. at 723 fn. 3, 732. In so ordering, the Board reasoned that the employer had failed to establish that making the tape recordings “would have resulted in a lawful discharge,” which it could have done by showing it had a “*rule, prohibition, or practice against employees using or possessing tape recorders at work.*” Id. at 723 fn. 3 (emphasis added). Again, the clear implication is that such a rule or prohibition would have been lawful. (Even absent a rule prohibiting tape recording, Chairman Gould would have denied Garramone backpay from the time the employer became aware of the tape recording. In his view, “it is not consistent with the policies of the Act or public policy generally to reward . . . parties who engage in such conduct.” Id.)

- 1 The R. Br. states that its correct name is Whole Foods Market Group, Inc.
- 2 All dates hereafter are in 2013. A charge was filed by UFCW in Case 01-CA-096965 on January 23. Charges were filed by WOCC in Cases 13-CA-103533 and 13-CA-103615 on April 23, and were amended on June 21.
- 3 Hereafter, the counsel for the Acting General Counsel shall be referred to as the General Counsel.
- 4 The allegedly offensive rule set forth in complaint par. 8(i) and on p. 25 of the GIG differs from the rule stipulated to be the rule at issue here and which was litigated and briefed. That rule, set forth on p. 57 of the GIG, is set forth herein. It is that rule upon which this decision is based.
- 5 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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