JD(NY)–50–13
Cheshire, CT
Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

WHOLE FOODS MARKET, INC.

and **Case No. 01-CA-096965**

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 919

and **Case Nos. 13-CA-103533**
13-CA-103615

WORKERS ORGANIZING COMMITTEE OF CHICAGO

***Rick Concepcion, Esq.,* for the Acting General Counsel.**
Kathleen M. McKenna, Esq. (Proskauer Rose LLP),
New York, NY, 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 following:[3]

Findings of Fact

I. Jurisdiction and Labor Organization Status

The Respondent, a corporation having its offices and places of business in Cheshire,

---

[1] The Respondent's brief 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 No. 01-CA-096965 on January 23. Charges were filed by WOCC in Cases Nos. 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.

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:

> (i) Team Member Recordings
> It is a violation of Whole Foods Market policy to record conversations with a tape recorder or other recording device

[4] The allegedly offensive rule set forth in complaint paragraph 8(i) and on page 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 page 57 of the GIG, is set forth herein. It is that rule upon which this Decision is based.

> (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 work time, 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 non-work time such as his break time. It should be noted that certain rules set forth in the GIG specifically permit employees to engage in certain activities while on their break time. For example, employees may make personal phone calls and also sleep on their break time but may not engage in either activity while on work time. The rule at issue is silent concerning the employee's ability to record conversations on break time, 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 work time 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

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.

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.
>
> 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.3rd 317, 318 (7th Cir. 1995), cited in *Register Guard,* 351 NLRB 1110, 1115 (2007).

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 non-work time. According to the General Counsel, employees may thus presume that they are not permitted to make recordings during non-work time. I disagree. This is not a case involving solicitation of employees which may lawfully take place during the employee's non-work time. 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 acidity." *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 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 work time 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]

[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

Continued

ORDER

The complaint is dismissed.

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

Steven Davis
Administrative Law Judge

waived for all purposes.