

No. 10-2156

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**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**  
Petitioner

v.

**NORTHEASTERN LAND SERVICES, LTD.,  
d/b/a THE NLS GROUP**  
Respondent

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce an Order issued against Northeastern Land Services, Ltd., d/b/a The NLS Group (“the Company”). The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”).

This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices occurred in Rhode Island.

Previously, a two-member panel of the Board issued a Decision and Order in this case on June 27, 2008. *Northeastern Land Servs., Ltd.*, 352 NLRB 744 (2008). In its decision, the Board found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining an overly broad confidentiality rule and by discharging an employee pursuant to that unlawful rule. (D&O 2-3.)<sup>1</sup> The Company petitioned this Court for review of that Order and the Board cross-applied for enforcement. On March 13, 2009, the Court denied the Company's petition for review and entered a judgment enforcing the Board's Order.

The Supreme Court, however, later vacated the First Circuit's decision upon the Company's petition for a writ of certiorari. *Northeastern Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (2009), *cert. granted*, 130 S. Ct. 3498 (2010)). The Company's petition to the Supreme Court challenged the authority of the two-member Board delegee group and the merits of the Board's decision. On June 17,

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<sup>1</sup> Citations are to the documents in the volume of pleadings ("Vol. III") filed by the Board and the Company's Appendix. "D&O" refers to the Board's 2008 Decision and Order, 352 NLRB 744 (2008), which was incorporated by reference in the Board's 2010 decision, 355 NLRB No. 169 (2010). "Tr." refers to the transcript of the unfair labor practice hearing held before the administrative law judge. "GC Ex." refers to the exhibits introduced at the hearing by the Board's General Counsel. "Appx." refers to the Company's Appendix. References preceding a

2010, the Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that a Board delegee group must maintain at least three members in order to exercise the delegated authority of the Board. *Id.* at 2640-42. Consequently, on June 28, 2010, the Supreme Court granted the Company's petition for a writ of certiorari, vacated the First Circuit's March 13, 2009 decision, and remanded the case to this Court for further consideration in light of *New Process. Northeastern Land Servs., Ltd. v. NLRB*, 130 S. Ct. 3498 (2010). On July 30, 2010, the Court remanded the case to the Board for further proceedings.

On September 28, 2010, a three-member panel of the Board issued the Order that is now before the Court, incorporating by reference the Board's 2008 Order. *Northeastern Land Servs., Ltd.* 355 NLRB No. 169 (2010). The Board's Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). On September 30, the Board filed its application for enforcement. The Board's filing was timely, as the Act places no time limit on the institution of proceedings to enforce Board orders.<sup>2</sup>

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semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's brief.

<sup>2</sup> The Company incorrectly suggests (Br. Cover, 2) that this case is also before the Court on a petition for review by the Company.

## **STATEMENT OF THE ISSUES**

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by maintaining an overbroad confidentiality rule that employees would reasonably read to limit their statutorily protected activities.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging employee Jamison Dupuy for violating the Company's unlawful confidentiality rule.

## **STATEMENT OF THE CASE**

Acting on a charge filed by Jamison Dupuy, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act by maintaining a confidentiality rule that prohibited employees from disclosing the terms of their employment to "other parties," which would include union representatives, and by terminating Dupuy's employment pursuant to this unlawful rule. (Vol. III-Complaint 1, 2.) Following a hearing, an administrative law judge issued a decision and recommended order dismissing both allegations. (D&O 9.) On review, a two-member panel of the Board reversed and found that the Company violated Section 8(a)(1) as alleged in the complaint. (D&O 1.) As noted at pp. 3, that Decision and Order was later incorporated by reference by the three-member

panel into the decision currently under review. The facts supporting the Board's Decision, as well as its Conclusions and Order, are summarized below.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. The Company and Employee Dupuy Enter Into a Temporary Employment Agreement Under Which Dupuy is Not To Disclose the Terms of His Employment to "Other Parties"**

The Company is a labor supplier that provides temporary workers to client companies in the natural gas and telecommunications industries. (D&O 1; Tr. 101-02.) Among the workers that the Company provides are right-of-way agents, who acquire land rights for clients where such rights are needed in order to lay, and maintain, natural gas pipelines or fiber optic cables. (D&O 1, 5; Tr. 16-17, 102.) The Company requires its right-of-way agents to sign a temporary employment agreement. (D&O 1 n.4; Tr. 7.) This agreement includes a confidentiality clause that states that "the terms of this employment, including compensation, are confidential to the [e]mployee and [the Company]," and "[d]isclosure of these terms to other parties may constitute grounds for dismissal." (D&O 1; GC Ex. 4, 8, Appx. F.)

Dupuy was employed by the Company as a right-of-way agent from February to November 2000, and from July to October 2001. At the outset of each period of employment, Dupuy signed the requisite temporary employment agreement that contained the above language. (D&O 1, 5; Tr. 18, 41, 74-75.)

**B. Employee Dupuy Encounters Compensation Problems and Discusses Them With Company Officials and With an Official of a Company Client**

In 2001, during his second period of employment with the Company, Dupuy was assigned to work on a project with the Company's client, El Paso Energy ("El Paso"). Dupuy secured this particular assignment by directly contacting El Paso Project Manager Rick Lopez, a former company employee whom Dupuy knew from his first employment with the Company. Lopez told Dupuy to contact the Company to be placed on the El Paso project, and Dupuy did so, getting that assignment in July 2001. (D&O 1, 5; Tr. 40-41.)

In his first few months on the El Paso project, Dupuy repeatedly received his pay late.<sup>3</sup> (D&O 1, 5; Tr. 46-51, 57.) Dupuy brought the problem to the attention of various company officials, including Jesse Green, executive vice president and chief operating officer. (D&O 1; Tr. 46-55, 57.) As the problem persisted, in mid-September, Dupuy explained to Green that the payment delays were creating a "cash flow problem," because Dupuy had to pay for some project expenses, mainly his hotel bills, up front and then seek reimbursement later. (D&O 5-6; Tr. 54, 113.) Dupuy asked if the Company could either make payment of his hotel bill

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<sup>3</sup> The delays apparently stemmed, in part, from errors in the routing information necessary to make the direct deposits of Dupuy's wages to his bank accounts. (Tr. 47-48, 51-54.)

directly to the hotel or provide a per diem that would cover both the hotel bill and his meals. (D&O 5-6; Tr. 54-55, 112-13.) Green replied that the Company could not agree to either of those arrangements. (D&O 6; Tr. 54-55, 112-13.)

Dupuy then stated that he would have “no choice but to call Rick Lopez and tell him I’m going to quit because I am not getting paid on time.” On hearing this, Green said that he would contact Lopez himself and ask if El Paso could pay for Dupuy’s hotel bill, or provide a per diem, to alleviate Dupuy’s cash flow problems. A few days later, Green followed up with Dupuy and said that he had spoken to Lopez, and that Lopez was unwilling to undertake either suggestion. (D&O 1, 6; Tr. 55, 113.)

In early October, Dupuy called Lopez to tell him that his cell phone was not working. In the course of the ensuing conversation, Dupuy mentioned to Lopez that he was not being paid on time and asked if it would be possible to work on the El Paso project through a different labor services provider. Lopez responded that it would not be possible. Lopez then advised Dupuy to contact Norm Winters, an agent of the Company, to resolve the pay issue he was experiencing. (D&O 6; Tr. 58.)

A few days later, Dupuy called Winters. Dupuy told Winters that he had spoken to Lopez, and that Lopez had suggested that Dupuy should contact Winters about his pay problems. Winters seemed upset that Dupuy had passed information

about his pay problems on to Lopez. Winters nonetheless advised him to contact another agent of the Company, Ann Ingham, to have his pay issue resolved. (D&O 6; Tr. 58-59.) Dupuy did so, and following a few further discussions with Ingham, Dupuy received the direct-deposit payments for which he had been waiting. (D&O 6; Tr. 59-62.)

In the same early-October time period as the events described above, Dupuy also experienced difficulties related to the reimbursement of his expenses. Prior to October, the Company had been reimbursing Dupuy at the rate of \$15 per day for the use of his personal computer on work-related matters. This reimbursement was the result of conversations between Dupuy and Lopez regarding Dupuy's computer use on the El Paso project, and Lopez's approval of a \$15-per-day reimbursement for such computer use. Notwithstanding this arrangement between Dupuy and Lopez, to which the Company had acceded, the Company decided, in early October, to reduce Dupuy's computer reimbursement to \$12 per day. The Company cited tax reasons for this change. In an email to the Company dated October 3, Dupuy questioned the appropriateness of the change and copied Lopez on the email, with a request that El Paso "offset" the Company's tax-related reduction of his computer reimbursement. (D&O 1-2; Tr. 62-65, GC Ex. 11.)

**C. The Company Discharges Dupuy for Violating the Confidentiality Provision of His Temporary Employment Agreement**

On October 11, Green told Dupuy that the Company had done its best to accommodate his various requests, but it seemed the Company could never make him happy, and therefore they thought it best to terminate his employment. (D&O 2; Tr. 116.) When Dupuy protested that the Company could not fire him, Green stated that the Company could indeed do so, because Dupuy had “not lived up to [his] end of the bargain.” (D&O 2; Tr. 116-17.) The “bargain” to which Green referred was the confidentiality clause of the temporary employment agreement between Dupuy and the Company, which bound Dupuy to refrain from disclosing “the terms of [his] employment, including compensation,” to “other parties.” (D&O 2; Tr. 124-25, GC Ex. 4, 8.)

**II. THE BOARD’S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Chairman Liebman and Members Becker and Pearce) found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining an overly broad rule and by discharging Dupuy for breaching that unlawful rule. (D&O 1-4.) The Board’s Order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board’s Order requires the

Company to rescind the overly broad confidentiality rule and to notify employees in writing that it did so. It also requires the Company to offer employee Dupuy full reinstatement and make-whole relief, and to remove any reference to Dupuy's unlawful discharge from its files. The Board also ordered the Company to notify Dupuy of its remedial actions and to inform Dupuy that the discharge will not be used against him. Finally, the Board ordered the Company to post a remedial notice. (D&O 3-4.)

### **SUMMARY OF ARGUMENT**

Notwithstanding the Company's considerable hyperbole, this is a straightforward case that the Board decided squarely within the parameters of applicable law. Applying the court-approved analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board properly found that the confidentiality rule in the Company's temporary employment agreement violated Section 8(a)(1) of the Act because employees would reasonably understand it to prohibit them from discussing their compensation and other terms of employment with "other parties," a category necessarily including union representatives. The Company contends that the Board departed from Supreme Court and Board precedent. This contention is both jurisdictionally-barred and, in any event, without merit. Moreover, the Company's remaining challenges, that it

is excused from liability because of its business justification for the rule, and that evidence of an actual chilling effect on employees was needed, are contrary to law.

The Board also reasonably found that the Company violated Section 8(a)(1) of the Act by admittedly discharging employee Dupuy pursuant to the unlawful confidentiality rule. The Board's finding, that a discharge pursuant to an overbroad rule is, by definition, unlawful, is well supported by law and acts to reduce the chilling effect that results from an employer's imposition of an overbroad rule. To challenge the discharge finding, the Company again offers obtuse and meritless arguments. The Company misunderstands the law governing this case in arguing that there was some significance to the fact that Dupuy did not engage in protected activity. Further, the Company incorrectly contends that the Board must analyze such discharges under its dual-motivation test. The Company's remaining, jurisdictionally-barred arguments also provide no grounds to disturb the Board's reasonable findings.

### **STANDARD OF REVIEW**

This Court has stated that it “will enforce a Board order if the Board correctly applied the law and if substantial evidence on the record supports the Board's factual findings.” *Union Builders, Inc. v. NLRB*, 68 F.3d 520, 522 (1st Cir. 1995). *See also C.E.K. Indus. Mech. Contractors, Inc. v. NLRB*, 921 F.2d 350, 355 (1st Cir. 1990) (noting that, under Section 10(e) of the Act (29 U.S.C. §

160(e)), Board's factual findings are "conclusive" if supported by substantial evidence). Accordingly, this Court accords "considerable deference" to the Board's decisions, because "the Board is primarily responsible for developing and applying a coherent national labor policy." *Yesterday's Children, Inc. v. NLRB*, 115 F.3d 36, 44 (1st Cir. 1997). *See also NLRB v. Auciello Iron Works, Inc.*, 980 F.2d 804, 808 (1st Cir. 1992) (stating that the court "reviews the NLRB's orders with considerable deference").

"Substantial evidence," for purposes of this Court's review of factual findings, consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). *Accord Posadas de Puerto Rico Associates, Inc. v. NLRB*, 243 F.3d 87, 90 (1st Cir. 2001) (citation omitted). The Court thus canvasses "the whole record" to determine if a finding is supported by substantial evidence. *Universal Camera*, 340 U.S. at 488. In that process, however, the Court may not displace the Board's choice between fairly conflicting views of the evidence, even if the Court "would justifiably have made a different choice had the matter been before it de novo." *Haas Elec., Inc. v. NLRB*, 299 F.3d 23, 28 (1st Cir. 2002) (internal quotation marks and citation omitted).

In this case, the Board reversed the administrative law judge's legal conclusions, but accepted his findings of fact and credibility determinations with

regard to the witnesses who testified at the unfair labor practice hearing. (D&O 1 & n.1.) It is well settled that “the substantial evidence standard is not modified in any way” in these circumstances. *Universal Camera*, 340 U.S. at 496 (internal quotation marks omitted). *Accord Andino v. NLRB*, 619 F.2d 147, 151 (1st Cir. 1980) (“The standard is not modified when the Board and its administrative law judge disagree.”). Rather, the administrative law judge’s decision is treated as another element of the record under review, and is weighed along with “whatever in the record fairly detracts from” the substantiality of the evidence supporting the Board’s findings. *Universal Camera*, 340 U.S. at 488, 493. *See also C.E.K. Indus. Mech. Contractors*, 921 F. 2d at 355 (citing *Universal Camera*, 340 U.S. at 488). The ultimate question for the Court remains, “whether on this record it would have been possible for a reasonable jury to reach the Board’s conclusion.” *Ryan Iron Works, Inc. v. NLRB*, 257 F.3d 1, 6 (1st Cir. 2001).

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING AN OVERBROAD CONFIDENTIALITY RULE THAT EMPLOYEES WOULD REASONABLY READ TO LIMIT THEIR STATUTORILY PROTECTED ACTIVITIES**

#### **A. A Work Rule that Employees Would Reasonably Interpret To Prohibit Discussion of Wages and Other Terms with Union Officials Violates Section 8(a)(1) of the Act**

It is an unfair labor practice under Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) for an employer “to interfere with, restrain, or coerce employees” in the exercise of any of the rights enumerated in Section 7 of the Act. Section 7 of the Act (29 U.S.C. § 157) guarantees to employees “the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing . . . .”

As the Supreme Court has recognized, these Section 7 rights “are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.” *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). *Accord NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). Courts have accordingly interpreted Section 7 to include the right of employees to discuss wages and other terms of employment with union officials. *Cintas Corp. v. NLRB*, 482 F.3d 463, 469 (D.C. Cir. 2007) (the Act protects “an employee’s right to discuss the terms

and conditions of his employment” with union officials). *See also Central Hardware Co.*, 407 U.S. at 542 (1972) (Section 7 includes the right of union officials to discuss organization with employees).

Of course, Section 8(a)(1) of the Act does not specify which particular employer rules or policies are unlawful. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (noting that Act does not specify “in precise and unmistakable language each incident which would constitute an unfair labor practice”). Rather, the Act leaves “to the Board the work of applying the Act’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.” *Id.*

Acting on the authority thus left to it, the Board has stated, with court approval, that a Section 8(a)(1) violation is shown where an employer maintains a rule or policy that “would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board elaborated on this standard, setting forth a specific analytical framework for determining whether a given employer rule “would reasonably tend to chill” Section 7 activity. Under the *Lutheran Heritage* framework, the Board first considers whether an employer’s rule “explicitly restricts activities protected by Section 7.” 343 NLRB at 646. If the rule explicitly

restricts such activities, the Board will find the mere maintenance of that rule violative of Section 8(a)(1). *Id.* If the rule does not explicitly restrict such activities, the Board proceeds to ask whether: “(1) employees would reasonably construe the language [of the rule] 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.” *Id.* at 647. An affirmative answer to any of these questions will warrant the finding of a Section 8(a)(1) violation. *Id.*

Applying the standards set forth in *Lafayette Park* and *Lutheran Heritage*, the Board will find that an employer violates Section 8(a)(1) of the Act by maintaining a confidentiality rule that employees would reasonably interpret as prohibiting their discussion of wages and other terms of employment with union officials. *See, e.g., Bigg’s Foods*, 347 NLRB 425, 426 n.4 (2006) (finding Section 8(a)(1) violation based on employer confidentiality rule that could reasonably be understood by employees “as prohibiting discussion of salaries with union representatives”); *Cintas Corp.*, 344 NLRB 943, 943 (2005) (finding Section 8(a)(1) violation based on employer confidentiality policy that “could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the Union”), *enforced*, 482 F.3d 463, 468-69 (D.C. Cir. 2007).

**B. The Board Reasonably Found that the Company Violated Section 8(a)(1) of the Act Because Employees Would Reasonably Interpret the Rule To Prohibit the Discussion of Wages and Terms with Union Representatives**

Substantial evidence supports the Board's finding (D&O 1-3) that the Company violated Section 8(a)(1) of the Act by maintaining its overly broad confidentiality rule that prohibited employees from discussing wages and other terms and conditions of employment with union representatives. As shown, all of the Company's temporary employment agreements for right-of-way agents contain substantially the same confidentiality rule, stating that "the terms of this employment, including compensation, are confidential to [e]mployee and [the Company]," and that "[d]isclosure of these terms to other parties may constitute grounds for dismissal." *See* p. 5. Analyzing this confidentiality rule under the framework set forth in *Lutheran Heritage*, the Board properly concluded (D&O 2) that employees would reasonably understand its clear prohibition of compensation-related disclosures to "other parties" as prohibiting protected "discussions of their compensation with union representatives." Accordingly, the Board reasonably found (D&O 2) that the confidentiality provision was unlawfully overbroad in this respect.

In finding this unfair labor practice, the Board hewed closely to its own, well-established precedent. As shown at p. 16, the Board has consistently held that

an employer violates Section 8(a)(1) of the Act by maintaining a confidentiality rule that employees would reasonably interpret as prohibiting their discussion of wages and other terms of employment with union officials. The Board applied that settled law and specifically cited *Bigg's Foods*, 347 NLRB 425 (2006).

In *Bigg's Foods*, a case involving a written confidentiality policy similar to the confidentiality provision at issue, the employer's policy classified "salaries" as confidential information that employees could not share with "anyone outside the company." 347 NLRB at 436. The Board found that this policy effectively "suggest[ed] that an employee could be disciplined for divulging salary information to persons not associated" with the employer, and thus violated Section 8(a)(1) because employees would reasonably understand the rule "as prohibiting discussion of salaries with union representatives." 347 NLRB at 425, 436. Accordingly, the Board's finding of a violation of Section 8(a)(1) in this case is squarely in line with its precedent.

The Board's straightforward finding of this Section 8(a)(1) violation is even more strongly illustrated when viewed in contrast to other Board and court decisions in which similar or even less explicit employer prohibitions on employee discussions have been found unlawful. In *Cintas Corp.*, for example, the D.C. Circuit affirmed the Board's finding of a Section 8(a)(1) violation based on an employer's rules classifying "any information concerning" employees as

confidential and warning that employees may be sanctioned for their “unauthorized release of confidential information.” 482 F.3d at 468-69. Similarly, in *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249 (10th Cir. 2005), the Tenth Circuit affirmed the Board’s finding of a Section 8(a)(1) violation based on an employer’s rule classifying “salary information” as confidential and forbidding disclosure of such confidential information to “those outside the Company” unless a “valid need to know” was shown. *Id.* at 1259-60.

None of the cases that the Company cites (Br. 31-34, 41-42) require a different result. Indeed, most of them involve more narrowly drafted confidentiality rules than the one at issue here. *See, e.g., K-Mart*, 330 NLRB 263, 264 (1999) (prohibition on disclosing “company business and documents” did not by its terms include employee wages or working conditions and made no reference to employee information); *Lafayette Park Hotel*, 326 NLRB at 826 (rule banning discussion of “hotel-private” information that did not on its face cover employee wage discussion). Even more significantly, the Company utterly ignores the Board’s citations (D&O 2) to *Bigg’s Foods* and *Cintas Corp.*—both of which are post-*Lutheran Heritage* cases that are on all fours with the instant case. *See* pp.16-18. Given that precedent, the Board reasonably found that the confidentiality provision here violated Section 8(a)(1) of the Act.

**C. The Company’s Various Arguments Challenging the Board’s Finding That the Rule is Overbroad Are Meritless**

To challenge the Board’s straightforward finding, the Company spills a great deal of ink (Br. 29-43) presenting a welter of often repetitive arguments under a variety of headings. Its claims appear to boil down to three, all of which are mistaken: (1) that the Board “abandoned” a balancing test that the Company claims is required, (2) that the Company should be released from liability because of its claimed business justification, and (3) that evidence of an actual chilling effect on employees was needed to support the Board’s finding of an unlawful rule. As discussed below, nothing the Company has put forth warrants setting aside the Board’s finding.

**1. The Company’s argument that the Board failed to use a required balancing test is jurisdictionally-barred and otherwise meritless**

The Company claims (Br. 34-38, 40-41) that in finding its rule to be overly broad in violation of Section 8(a)(1) of the Act, the Board “abandoned” a balancing test that the Company asserts was mandated by the Supreme Court in *Republic Aviation* and also by *Lutheran Heritage*. As a threshold matter, these arguments are not properly before the Court because the Company did not first raise them to the Board. *See* Section 10(e) of the Act (29 U.S.C. §160(e)) (“[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless

the failure or neglect to urge such objection shall be excused because of extraordinary circumstances”); *Edward Street Daycare Center, Inc. v. NLRB*, 189 F.3d 40, 44 n.4 (1st Cir. 1999) (the “plain language [of Section 10(e)] evinces an intent that the [Board] shall pass on issues arising under the Act, thereby bringing its expertise to bear on the resolution of those issues”).

The Company could have alerted the Board to its asserted abandonment of a balancing test in a motion for reconsideration. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (finding that employer “could have objected to the Board’s decision in a petition for reconsideration or rehearing”). Because it failed to file such a motion, the Company deprived the Board of the opportunity to register its informed opinion as to the proper interpretation and application of Supreme Court precedent and one of its own decisions. Accordingly, this Court does not have jurisdiction to consider these arguments. *See Woelke & Romero*, 456 U.S. at 666 (finding that employer’s failure to raise objection before the Board, in a petition for reconsideration or rehearing, “prevents consideration of the question by the courts”).

In any event, neither *Republic Aviation* nor *Lutheran Heritage* requires the Board to perform the balancing analysis that the Company urges. First, in *Republic Aviation*, the Supreme Court did not require that the Board perform a balancing analysis in every case where a rule restricting Section 7 activity is at

issue; rather, the Supreme Court merely recognized that, where such rules are concerned, the Board's findings with regard to them reflect "an adjustment between the undisputed right of self-organization assured to employees under [Section 7] and the equally undisputed right of employers to maintain discipline in their establishments." 324 U.S. at 797-98. Far from stating that the necessary "adjustment" must take the form of a balancing test, the Court emphasized that it is for the Board to determine how to "apply the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Id.* at 798.

Moreover, the Supreme Court in *Republic Aviation* stated that the Board "may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven." *Id.* at 800. The Court thus left the Board free to make reasonable inferences regarding, for example, the tendency of a given work rule to unlawfully chill Section 7 activity. *See Lafayette Park Hotel*, 326 NLRB at 825. Nowhere did the Court state, as the Company suggests (Br. 23 n.4, 27-29), that such an inference must be made pursuant to a balancing analysis.

Similarly mistaken is the Company's assertion that *Lutheran Heritage* requires a balancing test. Rather, *Lutheran Heritage* simply states that in assessing the lawfulness of an employer work rule, the Board must "give the rule a

reasonable reading,” “refrain from reading particular phrases in isolation,” and “not presume improper interference with employee rights.” 343 NLRB at 646.

Moreover, the Board’s caselaw applying *Lutheran Heritage*, which has met with court approval, confirms that proper application of the *Lutheran Heritage* test does not entail the specific balancing analysis contemplated by the Company. *See, e.g., Cintas Corp.*, 482 F.3d at 468-70 (upholding the Board’s application of *Lutheran Heritage* to employer’s confidentiality rule and finding rule unlawful without weighing employer justification for rule); *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374-77 (D.C. Cir. 2007) (enforcing Board’s application of *Lutheran Heritage* to employer’s “chain-of-command” rule and finding rule unlawful without weighing employer justification for rule); *Tecumseh Packaging Solutions*, 352 NLRB No. 87 (2008) (applying *Lutheran Heritage* and finding employer’s no-loitering rule unlawful without weighing employer justification for rule).

Accordingly, the Company’s contention that the Board abandoned a required balancing test would be without merit, if not already jurisdictionally barred.

## **2. The Company’s purported business justification for its rule does not excuse it from liability**

The Company also attempts (Br. 30-31) to elevate the significance of its purported business justification by claiming that the Company rule was lawful because the judge found that the Company “had legitimate and substantial business

justifications” for its rule. Here, however, the Company’s business justification does not excuse it from liability given that a more narrowly drafted provision would be sufficient to accomplish the Company’s confidentiality goal in bidding for contracts. *See, e.g., Cintas Corp.*, 482 F.3d at 470 (“A more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company’s presumed interest in protecting confidential information”).

**3. The Company’s contention that evidence was required that the rule actually chilled employees is contrary to law**

The Company (Br. 43) complains that the Board’s finding is not supported by substantial evidence because there was no evidence that the contested rule actually chilled employees in the exercise of their Section 7 rights. No such evidence, however, is required. As one court explained in rejecting an identical argument, “[t]he Board is merely required to determine whether employees would reasonably construe the [challenged] language to prohibit Section 7 activity . . . and not whether employees have thus construed the rule.” *Cintas Corp.*, 482 F.3d at 467 (citations omitted); *See Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992) (“the finding of a violation is not premised on . . . subjective impact”), *enforced*, 987 F.2d 1376 (8th Cir. 1993).

In sum, “[t]he Board is best suited to interpret its own precedent and to apply it to the facts of a particular case.” *NLRB v. Glover Bottled Gas Corp.*, 905 F.2d 681, 685 (2d Cir. 1990). Here, the Board acted reasonably and well within the parameters of settled law. This Court should therefore uphold the Board’s finding that the Company’s overbroad rule violated Section 8(a)(1) of the Act.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING EMPLOYEE DUPUY FOR VIOLATING THE UNLAWFUL CONFIDENTIALITY RULE**

**A. It Is Unlawful for an Employer To Discipline an Employee Pursuant to an Unlawfully Overbroad Rule; the Company’s Discharge of Dupuy Was Therefore Unlawful**

It is well settled that discipline imposed pursuant to an unlawfully overbroad rule is itself unlawful. *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004), *enforced*, 414 F.3d 1249 (10th Cir. 2005); *Asociacion Hospital Del Maestro, Inc., v. NLRB*, 842 F.2d 575, 577-78 (1st Cir. 1988) (same). *See also Republic Aviation*, 324 U.S. at 805 (finding discharge pursuant to unlawfully overbroad no-solicitation rule unlawful); *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001) (collecting cases). By prohibiting employers from discharging an employee for failing to comply with a rule that is itself unlawful under Section 8(a)(1), the Board ensures that employees are not deterred in the exercise of their rights out of fear that they might be disciplined for violating the invalid rule.

*Double Eagle Hotel & Casino*, 414 F.3d at 1258 (the Board’s policy “reduces the chilling effect that results from imposition of overly broad rules”).

Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) by discharging Dupuy. The Company’s main witness, Executive Vice President and Chief Operating Officer Green, credibly testified (Tr. 116-17, 124-25) that the Company discharged Dupuy because Dupuy failed to maintain his end of the “bargain,” and that “bargain” meant that it expected him to abide by the confidentiality rule. Because this confidentiality rule was unlawfully overbroad, the Board properly found that the discharge of Dupuy pursuant to the unlawful rule violated Section 8(a)(1) of the Act.

Flying in the face of Green’s credited admission, the Company belatedly attempts (Br. 45, 52-54) to spin other alleged problems with Dupuy into independent reasons for his discharge.<sup>4</sup> To be sure, Green testified that he also told Dupuy that the Company could never seem to make Dupuy happy, and the only way to make Dupuy happy would be to terminate him. Such a vague statement, however, is woefully inadequate to disturb the Board’s well-supported finding (D&O 3) to the contrary that, based on Green’s credited admission, Dupuy was

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<sup>4</sup> The Company’s suggestion (Br. 24) in its Statement of Facts that Dupuy “admitted” that his discharge was unrelated to the overbroad rule, is neither here nor there. As shown, the Company itself, through Green, admitted that the reason for his discharge was his violation of the overbroad rule.

discharged solely because he did not abide by the unlawfully overbroad rule as specified in his employment agreement.<sup>5</sup> After all, the Court may not displace the Board’s choice between fairly conflicting views of the evidence, even if the Court “would justifiably have made a different choice had the matter been before it *de novo*.” *Haas Elec., Inc. v. NLRB*, 299 F.3d 23, 28 (1st Cir. 2002) (internal quotation marks and citation omitted).

**B. The Company’s Remaining Challenges to the Board’s Discharge Finding Are Meritless**

Again in scatter-shot form, the Company presents (Br. 44-55) its remaining challenges to the Board’s unlawful discharge finding in a confusing series of assertions. Once collected, the Company’s remaining challenges appear to be three: (1) a claim, contrary to law, that a different result is mandated because Dupuy did not engage in protected activity, (2) a legally infirm contention that the Board should have, but failed to, apply a dual-motive analysis, and (3) two jurisdictionally-barred and otherwise meritless arguments accusing the Board of violating due process by creating a “conclusive presumption” and of exceeding its remedial authority. All of these challenges fail.

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<sup>5</sup> The Company’s related argument (Br. 49, 54, 55)—that Dupuy is not entitled to a remedy because he was fired for “cause,” citing Section 10(c) of the Act (29 U.S.C. § 160(c))—is yet another jurisdictionally-barred claim that the Company failed to raise to the Board. See pp. 20-21, discussing Section 10(e) jurisdictional

**1. The Company's claim that Dupuy's discharge was lawful because he did not engage in Section 7 activity is contrary to law**

The Company's assertion (Br. 44-49, 50-53, 54) that Dupuy's discharge was lawful because the activity in which he engaged was not itself protected by Section 7 is simply contrary to settled law that discipline imposed pursuant to an unlawfully overbroad rule is itself unlawful. *Cf. Jeannette Corp. v. NLRB*, 532 F.2d 916, 920 (3d Cir. 1976) (holding that a rule that is invalid on its face under Section 8(a)(1) "cannot be enforced" and an employee's discharge for violating the rule "cannot be sustained" regardless of whether the employee was engaged in concerted activity), and cases cited at pp. 25-26. Moreover, the policy underpinning this law is well recognized: by prohibiting employers from discharging an employee for failing to comply with a rule that is itself unlawful, "regardless of whether the employer could have validly prohibited the employee's behavior with a different rule," the Board ensures that employees are not deterred in the exercise of their rights out of fear that they might be disciplined for violating the invalid rule. *Double Eagle*, 414 F.3d at 1257-58.<sup>6</sup> Thus, where, as here, an

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bar). In any event, as shown, substantial evidence supports the Board's finding that Dupuy was discharged, not "for cause," but for violating the rule.

<sup>6</sup> The Company's reliance (Br. 44) on *Yesterday's Children, Inc. v. NLRB*, 115 F.3d 36 (1st Cir. 1997), is misplaced. That case did not involve the issue of whether an overly broad employer rule would reasonably tend to chill employees' protected conduct. Rather, that case involved the very different issue of an

employer has discharged an employee pursuant to an overbroad rule, that discharge itself is unlawful.<sup>7</sup>

**2. The Company wrongly asserts that the Board should have engaged in a dual-motive analysis**

Contrary to both the credited evidence and the law, the Company complains (Br. 52-54) that the Board should have engaged in a dual-motive inquiry under *Wright Line*, 251 NLRB 1083, 1089 (1980),<sup>8</sup> *enforced*, 662 F.2d 899 (1st Cir. 1981), because, in addition to his violation of the rule, Dupuy was also discharged because the Company “could not make him happy” for unstated reasons. As shown at pp. 26, the Company admitted, and the Board found, that the sole reason

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employer’s disciplining an employee for engaging in particular misconduct. *Id.* at 45-46.

<sup>7</sup> In its brief, the Company now alleges (Br. 44, 46-49), for the first time, that the specific deficiency in the Board’s reasoning is that it relies on “obiter dicta” in these cases. This new “twist” on the argument, at the very least, skirts the outer edge of the jurisdictional bar against arguments not previously raised before the Board. *See* Section 10(e) of the Act, and cases cited at pp. 20-21. In any event, as shown, well-settled law amply supports the Board’s reasoning.

<sup>8</sup> In *Wright Line*, the Board set forth a test for analyzing violations of Section 8(a)(3) or Section 8(a)(1) that “turn[] on employer motivation.” *Wright Line*, 251 NLRB at 1089. Under this test, the Board first requires “that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision” to take some action adverse to an employee. *Id.* If the General Counsel makes this showing of motivation underlying the adverse action, the burden of proof shifts to the employer “to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Id.* Where the employer carries its burden of proof under *Wright Line*, its adverse employment action is upheld as lawfully motivated. *See id.*

for Dupuy's discharge was his violation of the unlawful rule, and thus the Company's claim that there were other reasons for his discharge is contrary to the credited evidence. In any event, even if two reasons for his discharge had been factually established, the Company's assertion (Br. 52-54) that *Wright Line* would be applicable is contrary to law. As shown, a discharge based on an unlawful rule is, by definition, unlawfully motivated. Accordingly, the Board does not apply the *Wright Line* test to infer employer motivation in analyzing such a discharge. See *Double Eagle*, 414 F.3d at 1258; *Saia Motor Freight*, 333 NLRB at 785 (finding that because employee was disciplined pursuant to unlawful rule, discipline constitutes a violation of the Act, "without consideration of *Wright Line*'s dual motivation analysis").<sup>9</sup>

**3. The Company's claims that the Board relied on an invalid "conclusive presumption," and exceeded its remedial authority, are jurisdictionally barred**

The Company concludes its brief by, yet again, raising arguments that are jurisdictionally barred from review because they were not raised to the Board. For example, its brand-new claim (Br. 49-51) that the Board's unfair labor practice

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<sup>9</sup> An employer can nevertheless justify a discharge pursuant to an overly broad rule by demonstrating that the employee interfered with the employer's business operation, "and that this rather than violation of the rule was the reason for the discharge." *Miller's Discount Dep't Stores*, 198 NLRB 281, 281 (1972), *enforced on other grounds*, 496 F.2d 484 (6th Cir. 1974). Cf. *MTD Products, Inc.*, 310

finding is based on some “conclusive presumption” proscribed by the Constitution’s due process clause was never raised to the Board, is thus not properly before this Court, and accordingly must be summarily disregarded. *See* pp. 20-21, discussing the Section 10(e) jurisdictional bar. The Company is similarly barred from raising its new claim (Br. 55-56) that the Board should eliminate the remedial notice requirement from its Order because of the amount of time that elapsed between the administrative law judge’s decision and the Board’s decision. Finally, the Company’s related claim—that Dupuy’s backpay should be “capped at the termination of the Dracut project”—is not only jurisdictionally barred, but premature. The Board’s established practice is to handle the particulars of its backpay remedy in a subsequent compliance stage of the case if they are contested. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984). Accordingly, the Company has provided no grounds to disturb the Board’s Order.<sup>10</sup>

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NLRB 733, 733 (1993) (employee interfered with safe operation of manufacturing plant). The Company has made no such demonstration here.

<sup>10</sup> In its brief, the Company summarily and belatedly asserts (Br. 10 n.6) that the newly-constituted three-member panel of the Board improperly “rubber-stamped” the 2008 two-member panel’s decision. This unsupported assertion presented without argument or development in the Company’s Statement of the Case is not properly before the Court because it was only summarily raised. *See* Fed. R. App. P. 28(a)(9) (party must raise contentions and reasons for them with citations to authority). Moreover, even if the Company had fully made this argument in its brief, it would nevertheless be jurisdictionally barred from raising it to the Court

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having failed to first raise it to the Board in a motion for reconsideration. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (holding that the court of appeals lacked jurisdiction to consider an issue not raised by either party before the Board, either during the initial proceedings or in a motion for reconsideration). In any event, the Company has provided no grounds whatsoever to undercut the three-member panel’s assurance (355 NLRB No. 169, slip op. at 1) that it properly considered the record, including the exceptions and briefs, before issuing a decision. *See Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 462 (D.C. Cir. 1967) (the court “cannot allow the recital by an administrative agency that it has considered the evidence and rendered a decision according to its responsibilities to be overcome by speculative allegations.”) *See also NLRB v. Donnelly Garment Co.*, 330 U.S. 219 (1947) (rejecting argument that the Board failed to consider additional evidence upon remand where the Board assigned the case to the same trial examiner, and the Board, in turn, issued virtually the same order as it had the first time). The Company’s claim is mere unfounded speculation that must be disregarded.

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board

March 2011

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

NORTHEASTERN LAND SERVICES, LTD,  
d/b/a THE NLS GROUP

Respondent

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\*  
\* Nos. 10-2156  
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\*  
\* Board Case No.  
\* 1-CA-39447  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,485 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

/s/Linda Dreeben

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Dated at Washington, DC  
this 18 day of March, 2011

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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	*
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d/b/a THE NLS GROUP	*
	*
Respondent	*

**CERTIFICATE OF SERVICE**

I hereby certify that on March 18th, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF:

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