UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

WHOLE FOODS MARKET GROUP, INC.
REPLY TO THE COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE TO WHOLE FOODS' MOTION FOR RECONSIDERATION

Whole Foods Market Group, Inc. ("Whole Foods" or the "Company") files this Reply to Counsel for the General Counsel's Response to Whole Foods' February 13, 2018 Motion for Reconsideration of the Board's Decision and Order dated February 13, 2018 ("General Counsel's Response" or "Response"). As set forth below, the General Counsel's Response invokes case law which does not squarely address the unique circumstances of this case, blatantly ignores the important policy concerns raised by the Board in *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017) ("*Boeing*") and creates an incredibly inequitable result for the Company. For the reasons articulated here and in the Company's January 31st Motion for Reconsideration ("Motion for Reconsideration"), the Company respectfully submits that the Board grant the Company's motion for reconsideration of *Whole Foods Mkt., Inc.*, 363 NLRB No. 87 (December 24, 2015) ("Decision and Order").

I. THE GENERAL COUNSEL'S RESPONSE IGNORES THE UNIQUE PROCEDURAL POSTURE OF THE INSTANT CASE

First and foremost, the General Counsel's Response overstates its case regarding the Board's lack of jurisdiction to reconsider its order after that order has been enforced by a court.

In fact, a decision cited by the General Counsel, *Dupuy v. N.L.R.B.*, 806 F.3d 556 (D.C. Cir. 2015), *as amended* (Aug. 7, 2015), makes clear that the Board *does have the authority*, should it choose to exercise it, to modify post-court enforced orders.

The court in *Dupuy* began by recognizing, as the General Counsel noted, that the Board has long held that "the Board's own precedent has disclaimed any authority to modify the court's order." *Id.* However, the Court later in *Dupuy* held open a path for the Board to decline to follow this practice and instead review a Board order even after enforcement has been granted by a court. There, the court held that, "[a]ccordingly, in enforcing compliance, the Board must apply the correct legal standards, ground its factual findings in substantial evidence, *and give reasoned explanations for any departure from precedent on the scope of its post-enforcement authority to alter court orders*." *Id.* (emphasis added). The *Dupuy* court ultimately denied the Board's attempt at modifying the court order in that case, but only because the Board did not provide the required reasoned explanation. Specifically, the court held that the Board's decision "falls short" because it "depart[ed] *without any reasoned explanation from longstanding Board precedent* constraining the Board's ability to alter the terms of a judicially enforced Order...." *Id.* at 563 (emphasis added).

Thus, the General Counsel's categorical statement that the Board lacks any jurisdiction in this case is overstated. Instead, as in *Dupuy*, the Board *can* choose to depart from its past precedent of disclaiming the authority to alter a post-enforcement order so long as it provides a "reasoned explanation" for doing so. Furthermore, none of the cases cited by the General Counsel contradict *Dupuy*'s holding, and instead they all simply recognize the Board's longstanding practice of not reviewing an order post-enforcement. Importantly, though, none of

the cases cited by the General Counsel involve an intervening Board decision overturning the standard applied in and essential to the underlying case, as is the case here.

Second, the General Counsel's Response goes on to argue that the instant cases should not be treated as a "pending case at whatever stage" since the Board in *Boeing* held that "[o]ther than the cases addressed specifically in this opinion, we do not pass on the legality of the rules at issue in past Board decisions that have applied the *Lutheran Heritage* 'reasonably construe' standard." At *12 n.51; General Counsel's Response at 5 n.5. Whole Foods does not allege that the Board in *Boeing* ruled on the legality of Whole Foods' handbook policy. Indeed, the entire purpose of the Motion for Reconsideration is to give the Board the opportunity to rule on the legality of Whole Foods' rules under the new *Boeing* standard before all proceedings in the case are over. Additionally, the General Counsel's argument ignores the fact that the Whole Foods Decision and Order was "addressed specifically" in *Boeing* as a case which highlighted the confusion caused by the prior standard. *See The Boeing Co.*, 365 NLRB No. 154 *3 n.9 (Dec. 14, 2017) (citing *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015), and stating that "the Board itself has struggled when attempting to apply *Lutheran Heritage*: since 2004, Board members have regularly disagreed with one another regarding the legality of particular rules or requirements....."). Therefore, Whole Foods' Motion for Reconsideration seeks to have the Board review the legality of Whole Foods' rule under *Boeing* because it was a case "addressed specifically" in *Boeing*.

Finally, the General Counsel's Response also claims that *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958), the decision introducing the concept of retroactive application to all "pending cases in whatever stage," was only meant to apply to cases that have "not reached the Board's level or is at one of the other stages of the administrative process such as the hearing."

Id. at 1006; General Counsel's Response at 5 n.5. This claim, however, is controverted by Board decisions and the General Counsel's own recent practice. First, as to Board decisions, in *Mcburney Corp.*, 352 NLRB 241 (2008), cited in Whole Foods' Motion for Reconsideration, the Board explicitly applied an intervening decision to a case in compliance proceedings *after* the Board had already issued an earlier Decision and Order, certainly qualifying as a case that has "reached the Board's level." Furthermore, the General Counsel's own recent practice has similarly demonstrated a willingness to apply decisions with retroactive application even when the case has "reached the Board's level" or is no longer "at one of the other stages of the administrative process...." Notably, on the same day that the *Boeing* decision was issued, the Board also issued its decision in *Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017) ("*Hy-Brand*"), overturning *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015) ("*Browning-Ferris*"), and ruled, with language identical to that in *Boeing*, that the new decision would apply "to all pending cases in whatever stage." At *46. Following *Hy-Brand*, the General Counsel's office requested that the D.C. Circuit Court of Appeals remand the pending appeal in *Browning-Ferris* stating that "the Board may reconsider the case in light of its current precedent established in [*Hy-Brand*]."[1] *See* Motion of the National Labor Relations Board for Remand of the Case to the Board for Reconsideration in Light of New Board Precedent, Nos. 16-1028; 16-1063; 16-1064, (D.C. Cir. Dec. 19, 2017). The Motion was granted. *See* Order Remanding to Board, *per curiam*, No. 16-1028 (D.C. Cir. Dec. 22, 2017). As above, this retroactive application of a new decision clearly occurred in a case that had already "reached the Board's level." Therefore, Board law and Board practice recognizes that

[1] We anticipate the General Counsel may attempt to distinguish the instant case from *Browning-Ferris* based of the fact that a court order had not yet issued in that case before remand was requested. However, this distinction would miss the mark, since based on *Dupuy*, the Board may still exert jurisdiction *after* enforcement of a court order, as is the case in the instant matter.

"all pending cases in whatever stage" encompasses cases far beyond those that have yet to reach the Board or are currently in administrative proceedings.

Finally, in addition to the arguments discussed above, the Second Circuit has recognized that it may recall one of its mandates in certain situations. *See Sargent v. Columbia Forest Prod., Inc.*, 75 F.3d 86, 90 (2d Cir. 1996). Should the Board be prepared to reconsider its Decision and Order without addressing the *Dupuy* jurisdictional issue, it is within the power of the Board to file a motion to recall the mandate with the court.

Therefore, for the reasons discussed above and in the Motion for Reconsideration, the Board should be permitted the opportunity to offer a "reasoned explanation" justifying its review of a post-enforcement order and, because the Board explicitly held that *Boeing* should apply to "all pending cases" and this case is still pending, the Board's should apply *Boeing* here.

II. REQUIRING WHOLE FOODS TO COMPLY WITH THE DECISION AND ORDER WOULD BE INEQUITABLE AND WOULD PRODUCE THE EXACT "CONFUSION" THAT THE *BOEING* DECISION SOUGHT TO AVOID

The application of *Boeing* would also avoid an inequitable result and would avoid the "rampant confusion for employers, employees and unions" the Board sought to avoid in *Boeing*. At *3. The General Counsel's position in its Response exalts form over substance by requiring Whole Foods to rescind a policy that no party denies is lawful under the Board's new standard articulated in *Boeing*. In fact, the Board and the General Counsel have implied the exact opposite. The Board in *Boeing* cited the Whole Foods Decision and Order as an example of a case where the Board has "struggled when attempting to apply *Lutheran Heritage*" and the General Counsel in Memorandum GC 18-02 noted that the General Counsel would want to "provide the Board with an alternative analysis" in cases where "the outcome would be different

if Chairman Miscimarra's proposed substitution for the *Lutheran Heritage* test applied. *See Boeing* at *3 n.9; General Counsel Memorandum GC 18-02, *2 (December 1, 2017).

For the reasons articulated at the Board and the Circuit Court, Whole Foods has extremely strong arguments supporting the legitimate business purposes behind maintaining the rules at issue in this case. Therefore, the Company is extremely interested in maintaining these policies. Given the Company's legitimate business interests in maintaining these policies, if forced to comply with the Decision and Order, the Company would be required to rescind the rules, complete compliance, and then reinstate the exact same rules it had just rescinded. This is highly problematic for two reasons:

First, making such changes to any employer's rules and policies presents administrative and operational challenges. For an employer the size of Whole Foods, with 88,000 employees spread over 450 stores, this represents a monumental administrative and operational challenge that an employer should not be forced to go through where no party contests the legality of the rules under the current standard that it would be rescinding.

Furthermore, requiring a nationwide employer like Whole Foods to rescind the policies for the duration of the sixty day compliance period only to have the employer immediately reinstate such policies after sixty days creates exactly the type of "rampant confusion for employers, employees and unions" that the Board in *Boeing* sought to avoid. At *3. Therefore, acceptance of the General Counsel's position is contrary to the policy behind *Boeing*.

Therefore, in order to ensure the "clarity and certainty" that formed the underpinning of the *Boeing* decision, the Board should apply *Boeing* retroactively.

III. CONCLUSION

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

Dated: New York, New York
February 22, 2018

Respectfully submitted,

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AFFIDAVIT OF SERVICE OF: Reply to General Counsel's Response to Whole Foods' Motion for Reconsideration of the Board's Order

I hereby certify that, on the 22nd day of February 2018, I served the above-entitled document(s) by the methods indicated below, upon the following persons at the following addresses:

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