

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
TWENTY-SEVENTH REGION

SCHWAN'S HOME SERVICE, INC.  
A WHOLLY OWNED SUBSIDIARY OF  
THE SCHWAN FOOD COMPANY

and

Case 27-CA-066674

PATRICK K. WARDELL, an Individual

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**ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO  
THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

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Submitted by:

Renée C. Barker  
Todd D. Saveland  
Counsels for the Acting General Counsel  
National Labor Relations Board  
Region 27  
700 North Tower, Dominion Towers  
600 Seventeenth Street  
Denver, Colorado 80202-5433

Counsels for the Acting General Counsel (General Counsel) of the National Labor Relations Board (Board) submit this Brief in Support of Exceptions to the Administrative Law Judge's Decision and Order in this case.

## **I. STATEMENT OF THE CASE**

Patrick Wardell, an Individual, filed the underlying unfair labor practice charge in this matter against Schwan's Home Service, Inc., a wholly owned subsidiary of The Schwan Food Company (Respondent or Schwan's) on October 12, 2011, as amended on November 20, 2011 (GCX 1(g) and GCX 1(j)).<sup>1</sup> On December 30, 2011, the Board's Regional Director for Region 27 issued a Complaint and Notice of Hearing based on the charge (GCX 1(m)). Thereafter, on January 11, 2012, the Regional Director for Region 27 issued an Order Rescheduling Hearing (GCX 1(p)).

Administrative Law Judge Gerald A. Wacknov (ALJ) heard this matter in Denver, Colorado on March 27, 2012. On June 6, 2012, the ALJ issued a Decision and Order (ALJD). He found that Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) by maintaining in its employee handbook a provision that prohibited solicitation and distribution in work areas during non-work time (ALJD 5:38-39) and by issuing pro-forma suspension notices that limit employees' Section 7 right to discuss matters for which they are being investigated, or for which they are receiving a disciplinary suspension (ALJD 10: 38-41).

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<sup>1</sup> "GCX" refers to exhibits entered by the General Counsel at the hearing on March 27, 2012. "RX" refers to exhibits entered at the hearing by Respondent. "JTX" refers to exhibits jointly entered at the hearing by General Counsel and Respondent. "Tr." refers to the transcript of the hearing. "ALJD" refers to the Administrative Law Judge's Decision and Order.

The ALJ's recommended Order requires Respondent to cease and desist from promulgating and maintaining in effect the employee handbook provision and the standard suspension notice that preclude and interfere with the Section 7 rights of employees to engage in union and protected concerted activity (ALJD 11: 21-23). The recommended Order also requires Respondent to cease and desist from, 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 (ALJD 11: 25-26). Affirmatively, the recommended Order requires Respondent to modify the handbook provision and the standard suspension notice found to interfere with the rights of employees to engage in union and protected, concerted activities under Section 7 of the Act, and advise its employees, nationwide, by appropriate means, that the handbook provision and the standard suspension notice have been revised (ALJD 11:31-35). The ALJ's recommended Order also requires Respondent to post, nationwide, a Notice to Employees (Notice) (ALJD 11:37-38).

As discussed fully below, General Counsel contends that the ALJ erred by misstating the issue that was litigated and that the ALJ erred by failing to find that Respondent violated the Act by maintaining unlawful written prohibitions in its handbook and in other documents. General Counsel further contends that the ALJ erred by failing to order appropriate relief for the violations he found.

## **II. STATEMENT OF THE ISSUES**

- A. Whether the ALJ erred by misstating the issues at trial (Exception 1).
- B. Whether the ALJ erred by failing to find that Respondent violated Section 8(a)(1) of the Act (Exceptions 2, 3, 4, and 5).
- C. Whether the ALJ erred by failing to order appropriate relief (Exceptions 6 and 7).

### III. ARGUMENT

#### A. THE ADMINISTRATIVE LAW JUDGE ERRED BY MISSTATING THE ISSUES AT TRIAL (Exception 1)

In his decision, the ALJ wrote that the issues at trial were whether “the Respondent has promulgated and maintained rules and policies in various documents that restrict employee Section 7 rights in violation of Section 8(a)(1) of the Act.” (ALJD 2: 20-22). This is a misstatement of the issue. The Complaint issued in this matter does not allege that Respondent unlawfully promulgated any rules and policies; only that Respondent unlawfully maintained certain rules and policies (GCX 1(m)).

While this distinction seems minor, the case law is clear that these are two separate violations and cannot be conflated. In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board articulated the standard for determining whether an employer's maintenance of a work rule violates Section 8(a)(1). If the rule explicitly restricts Section 7 activity, it is unlawful. *Id.* at 646. If the rule does not explicitly restrict Section 7 activity, the Board clarified that it is nonetheless unlawful if (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.

At hearing in this matter, General Counsel did not seek to prove that Respondent unlawfully promulgated any policies designed to prohibit Section 7 activity or that the Respondent applied these rules to restrict the exercise of Section 7 activity. Rather, the only violation General Counsel litigated and proved at hearing was that Respondent maintained unlawful policies nationwide that employees would construe to prohibit Section 7 activity. As

such, General Counsel respectfully requests the Board to modify the ALJ's Decision to correct this error.

**B. THE ADMINISTRATIVE LAW JUDGE ERRED BY FAILING TO FIND THAT RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT (Exceptions 2,3,4 and 5)**

At hearing, the parties jointly entered several documents into evidence, including Respondent's Employee Handbook (Employee Handbook)(JTX 3). The parties stipulated that Respondent's Employee Handbook is maintained for all its employees on a nationwide basis (JTX1). The ALJ concluded that, with regard to all three Employee Handbook rules at issue in these Exceptions, employees reading these rules would reasonably understand that the rules were designed to protect and insulate Respondent from situations which would compromise its financial, trade secret, brand name and other proprietary interests (ALJD 6: 2-7). The ALJ further concluded that he did not believe that the rules, "...singly or collectively, *even though they prohibit disclosure of information regarding employees and also prohibit certain employee conduct*, would reasonably cause *this Respondent's employees* to refrain from protected activity..." (ALJD 6: 7-10)(Emphasis added). The ALJ did not cite any testimony on which to base his conclusions. The case law cited in support of his conclusions is distinguishable.

At the outset, the ALJ's legal conclusion that the challenged rules would not "reasonably cause this Respondent's employees to refrain from protected activity," (ALJD 6:7-11) is an erroneous interpretation of the law. As discussed above, to find a violation under *Lutheran Heritage Village-Livonia*, General Counsel needs only to prove that "employees would reasonably construe the language to prohibit Section 7 activity." *Lutheran Heritage Village-Livonia* at 647. The ALJ acknowledged that the challenged rules "prohibit[ed] disclosure of

information regarding employees” as well as “prohibit[ed] certain employee conduct,” but concluded that *this* Respondent’s employees would not refrain from Section 7 activity. The *Lutheran Heritage Village-Livonia* test examines what employees in general would reasonably construe the rule to be and, under the ALJ’s own analysis, employees reading the rules at issue would reasonably interpret the rules as prohibiting Section 7 activity. As such, it is irrelevant that the ALJ believes that the particular employees of the Respondent in this case will not refrain from engaging in Section 7 activity.

As a general matter, Board law holds that an employer violates Section 8(a)(1) of the Act through the maintenance of a work rule that would “reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). As noted above, the Board has developed a two step-inquiry to determine if a work rule would have such an effect. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647. As further noted above, General Counsel contends that the three handbook rules at issue in these Exceptions are unlawful only because employees would reasonably construe the language to prohibit Section 7 activity.

**Exception 2.** The Administrative Law Judge erred by failing to find that Respondent violated the Act by maintaining the rule “Security of Company Information” in its Employee Handbook.

Respondent’s “Security of Company Information ” rule provides (unlawful portion in **bold**):

**You are not permitted to reveal information in company records to unauthorized persons or to deliver or transmit company records to unauthorized persons.**

**Trade secret information including**, but not limited to, information on devices, inventions, processes and compilations of information, records,

specifications, and **information concerning** customers, vendors or **employees shall not be disclosed, directly or indirectly, or used in any way, either during the term of employment or at any time thereafter, except as required in the course of employment with Schwan.** Employees will abide by Schwan's policies and practices as established from time to time for the protection of its trade secret information.

**Schwan's business shall not be discussed with anyone who does not work for Schwan** or with anyone who does not have a direct association with the transaction. (JTX 3)

Respondent's rule regarding the security of information is comprised of three paragraphs. Paragraphs one and three of the rule prohibit disclosure of information in "company records" and "information about Schwan's business". Paragraph two of Respondent's rule prohibits the disclosure of "trade secret" information. The ALJ dismissed the allegations that each of Respondent's rules at issue in these Exceptions were unlawful, finding them all to be similar to the rules examined in *Lafayette Park Hotel, supra* (holding lawful the rule that listed as unacceptable: "Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information); and *Super Kmart*, 330 NLRB 263 (1999)(holding lawful the rule that stated: "Company business and documents are confidential. Disclosure of such information is prohibited."); and *Mediaone of Greater Florida*, 340 NLRB 277 (2003)(holding as lawful a lengthy rule entitled 'Proprietary Information' and discussing in great depth what constitutes intellectual property and proprietary information, including 'customer and employee information, including organizational charts and databases')(ALJD: 10-12).

However, the two paragraphs of Respondent's rule that prohibit the disclosure of "information in company records" and "information about Schwan's business" are far more ambiguous than the rules in the cases cited by the ALJ. Both "information in company records"

and “information about Schwan’s business” necessarily include information about employees, including information that employees are lawfully permitted to discuss among each other and disclose to others. The rules in the cases cited by the ALJ refer to, for example, “Hotel-private” information” and “organizational charts and databases”, which more clearly define what the employer considered to be confidential information. Board law holds that if the suspect rule could be considered ambiguous, any ambiguity in the rule must be construed against the employer as the promulgator of the rule. *Lafayette Park Hotel*, 326 NLRB at 828 citing *Norris/O’Bannon*, 307 NLRB 1236, 1245 (1992).

In *Karl Knauz BMW, d/b/a Knauz Auto Group*, 358 NLRB No. 164 (September 28, 2012), the Board used *Flex Frac Logistics*, 358 NLRB No. 127 (2012) to find the rule in *Karl Knauz BMW* unlawful. The Board wrote:

Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer. This principle follows from the Act’s goal of preventing employees from being chilled in the exercise of their Section 7 rights [,] whether or not that is the intent of the employer...

Under well-established Board law, Respondent’s ambiguous rules prohibiting employees from disclosing information in “company records” and “information about Schwan’s business” are unlawful.

Paragraph two of Respondent’s rule regarding the security of company information is even more problematic. Respondent’s prohibition against its employees disclosing trade secret information, which is defined as “information concerning customers, vendors or employees”, is unlawful. *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80, slip op. at 12 (2011) (holding unlawful a rule that prohibited “[a]ny unauthorized disclosure from an employee’s personnel file”) and *Iris U.S.A., Inc.*, 336 NLRB 1013, 1013 fn. 1, 1015, 1018 (2001) (holding

unlawful a rule that stated all information about “employees is strictly confidential” and defined “personnel records” as confidential).

Recently, in *Costco Wholesale Corporation*, 358 NLRB. No. 106 (2012) the Board held that the employer’s maintenance of a rule that prohibited employees from “sharing ‘confidential’ information, such as employees’ names, addresses, telephone numbers, and email addresses” violated the Act. Slip op at 1. Similarly, in *Flex Frac Logistics, supra*, the Board found that the employer’s prohibition of the disclosure of confidential information defined as “information that is related to: our customers, suppliers, distributors; [our] organization management and marketing processes, plans and ideas, processes and plans; our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; *personnel information and documents*, and our logos, and art work.” Slip op at 1 (emphasis in original). The Board in *Flex Frac* wrote:

[T]he Board has repeatedly held that nondisclosure rules with very similar language are unlawfully overbroad because employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives--an activity protected by Section 7 of the Act.... We apply well-established precedent here in finding the Respondent's rule unlawful.

Slip Op at 1.

Applying the relevant and timely case law, Respondent’s prohibition against employees disclosing “information concerning employees” is unlawful.

**Exception 3.** The Administrative Law Judge erred by failing to find that Respondent violated the Act by maintaining the rule “Use of the Company Name” in its employee handbook.

Respondent’s “Use of the Company Name” rule provides (unlawful portion in **bold**):

You are not permitted to purchase any material as a charge to the company without authorized management approval.

**Any articles, speeches, records of operation, pictures or other material for publication, in which the company name is mentioned or indicated, must be submitted, through your supervisor, for approval or disapproval by the Corporate Communications and Law Departments prior to release.**

You are not permitted to negotiate or sign any lease, purchase agreement, bill of sale, contract or other legal document as a representative of the company, unless authorized to do so by management nor are you permitted to express or imply to any vendor the intention of the company to purchase, rent or lease any tangible property, equipment, material, space or services. (JTX 3)

The ALJ found this rule in its entirety to be lawful. However, the middle paragraph of this rule is unlawful because it is overly broad. Prohibiting employees from posting pictures of Respondent’s locations and facilities would reasonably be interpreted by employees to restrict Section 7 activities because it would prevent employees from communicating and sharing information regarding protected, concerted activities such as lawful picketing or handbilling. In the absence of any examples or further explanation, employees would reasonably understand the rule to prohibit the use of Respondent’s name or logo in their Section 7 activities including leaflets, picket signs, electronic notices and postings, cartoons or photos. Board law has established that employees have a Section 7 right to use their employer’s name or logo in conjunction with protected, concerted activity to communicate with fellow employees or with the general public about a labor dispute. See *Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019-20

(1991), *enfd.* 953 F.2d 638 (4<sup>th</sup> Cir. 1992)(holding that a prohibition against employees wearing company logo or insignia while engaging in union activity during non-working time and away from the plant to be unlawful) and *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007)(holding that a nurse’s third-party statements regarding staffing levels and workloads to be protected where the context of the statements related to the labor dispute and to terms and conditions of employment).

The middle paragraph of this rule is also unlawful because it requires employees to secure Respondent’s permission before engaging in protected activity. Any employer rule that prohibits employee communications to the media or requires prior authorization for such communications is unlawfully overbroad. *Trump Marina Associates*, 355 NLRB No. 107 (2010) incorporating by reference 354 NLRB No. 123 slip op. at 3 (2009)(holding that employer’s policy requiring prior authorization before speaking to the news media to be unlawful). Based on the foregoing, the General Counsel submits that Respondent’s rule prohibiting any publication of its name without prior permission is unlawful.

**Exception 4.** The Administrative Law Judge erred by failing to find that Respondent violated the Act by maintaining the rule “Conflicts of Interest” in its employee handbook.

Respondent’s “Conflicts of Interest” rule provides (unlawful portion in **bold**):

Employees shall avoid activities that could appear to influence their objective decisions relative to their company responsibilities.

**Continued employment with the company is dependent upon strict avoidance of:**

- a. Conflicts of interest or the appearance of such conflicts.
- b. **Conduct on or off duty which is detrimental to the best interests of the company or its employees.**

- c. Employees shall avoid activities that might appear to result in fraud or waste.
- d. Employees may not engage in any activity, on or off company premises, or be employed in any capacity at Schwan which creates an actual or perceived conflict of interest (e.g. an employee may not supervise an immediate family member or a person with whom they have an intimate relationship; an employee may not have a financial interest in a supplier or competitor).

Please contact your local Human Resource representative for specifics on how the employment of relatives is handled in your facility. (JTX 3)

The ALJ found this rule in its entirety to be lawful. However, subparagraph (b) of this rule is unlawfully overbroad because it fails to provide any examples of what Respondent deems to be conduct which is detrimental to the best interest of the company or employees, such as working for a competitor or engaging in illegal conduct. It is possible that Respondent views the formation of a union as being in conflict with its best interests or its perceived best interests of an employee, especially if union formation is accompanied by lawful picketing, handbilling, leafleting, and other organizational activity. The possibility of employees attributing this view to Respondent is strengthened by Respondent's "Company Policy on Labor Unions", also found in its Employee Handbook, which outlines Respondent's opposition to having its workforce unionized (JTX 3, ALJD 5: fn 5).

In *Costco Wholesale Corp, supra*, the Board found, contrary to the judge, that the employer violated the Act by maintaining a rule that prohibited employees from electronically posting statements that "damage the Company...or damage any person's reputation." The Board stated: "...[T]he broad prohibition against making statements that 'damage the Company, defame any individual or damage any person's reputation' clearly encompasses concerted communications protesting [the Respondent's] treatment of its employees. Indeed there is

nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule.” Slip Op at 2.

In addition to being overly broad, subparagraph (b) is unlawfully ambiguous. Rules that are ambiguous regarding their application to Section 7 activity and contain no limiting language or context that would clarify to employees that they do not restrict their Section 7 rights are unlawful. See *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001)(work rule that prohibited disrespectful conduct found to be unlawful because it contained no limiting language that removed the rule’s ambiguity and limits the rule’s broad scope), *enf. denied in pertinent part*, 335 F.3d 1079 (D.C. Cir. 2003). This rule places employees in the position of refraining from lawful activity because, with no clarification, they would reasonably consider Section 7 activity to be detrimental to the best interest of the Company. The rule in subparagraph (b) is therefore unlawfully overbroad and ambiguous.

**Exception 5.** The Administrative Law Judge erred by failing to find that Respondent violated the Act by prohibiting the disclosure of information pertaining to “wages, commissions, performance or identity of employees.”

The evidence adduced at hearing established that Respondent requires all of its employees to execute an “Employment, Confidentiality, Ownership & Noncompete Agreement” (Employment Agreement)(JTX 1-2) and that all of Respondent’s employees are bound by the terms of the Employment Agreement (Tr. 16-17). Respondent’s Employment Agreement restricts employees from disclosing to “any person not in the employ of the Employer” any “Confidential or Proprietary” information. Respondent’s Employment Agreement defines “Confidential and Proprietary” information to include “any information pertaining to the wages, commissions, performance, or identity of employees of Employer.” (JTX 2)

The ALJ concluded that employees entering into the Employment Agreement would reasonably understand that Respondent did not want competitors to recruit away its employees. He therefore found that Respondent's prohibition against disclosing information about employees' identities and wages was lawful (ALJD 7: 4-9). The ALJ's finding is erroneous. An employer's confidentiality rule that is shown to infringe on Section 7 rights may be found to be unlawful unless the employer articulates and establishes a legitimate and substantial business justification for the rule that outweighs the infringement on employee rights. See e.g. *Phoenix Transit System*, 337 NLRB 510 (2002); *Caesar's Palace*, 336 NLRB 271 (2001). However, the record here is devoid of any evidence of an established legitimate and substantial business justification. Although Respondent's witness testified, and the ALJ found, that Respondent would prefer its employees to not be easily recruited away from Respondent, this does not constitute a legitimate and substantial business justification under Board law.

Moreover, the case the ALJ relied on to make his finding is distinguishable and does not support his conclusions. The ALJ cited *Mediaone of Greater Florida*, 340 NLRB at 277, but the rule at issue in *Mediaone* is significantly different than the rule in the instant matter. The rule in *Mediaone* cautioned employees against misuse of proprietary information, including intellectual property, and included a lengthy list of what the employer considered to be intellectual property. *Id.* at 278. Nowhere on the list was the explicit prohibition against discussing wages, commissions, performance, or identity of employees that is found in Respondent's Employment Agreement.

The proper analysis of Respondent's Employment Agreement is the test set forth in *Lutheran Heritage Village-Livonia*, supra at 647. In *Lutheran Heritage Village-Livonia*, the first inquiry under the two-step inquiry is whether the rule explicitly restricts Section 7 activities and,

if so, the rule is unlawful. Respondent's prohibition explicitly restricts employees from discussing their wages and commissions and identities. It is well-established that employees have a protected right to discuss and to distribute information regarding wages, hours and other terms and conditions of employment. *Mobile Exploration & Producing U.S. Inc.*, 323 NLRB 1064, 1068 (1997) *enfd.* 156 F.3d 182 (5<sup>th</sup> Cir. 1998). An employer's rule which prohibits employees from discussing their compensation is unlawful on its face. *Danite Sign Co.*, 356 NLRB No. 124, slip op. at 1 fn. 1 (2011), citing *Fruend Baking Co.*, 336 NLRB 847 (2001). See also *Biggs Foods*, 347 NLRB 425 (2006), 435 fn. 4 (2006)(holding that a rule prohibiting employees from discussing their own or their co-workers' salaries with anyone outside the company violated the Act); and *Double Eagle Hotel & Casino*, 341 NLRB 112, 114-15 (2004), *enfd.* 414 F.3d 1249 (10<sup>th</sup> Cir. 2005)(holding that an employer's express prohibition of discussion of wages is unlawful). Respondent's prohibition against disclosure of "wages, commissions, performance, or identity of employees" is unlawful on its face.

**C. THE ADMINISTRATIVE LAW JUDGE ERRED BY FAILING TO ORDER THE APPROPRIATE RELIEF (Exceptions 6 and 7)**

In his decision, the ALJ ordered the Respondent to cease and desist from:

Promulgating and maintaining in effect the employee handbook provision and the standard suspension notice that preclude and interfere with the Section 7 rights of employees to engage in union and protected concerted activity. (ALJD 11: 21-24)

The ALJ ordered Respondent to take the following affirmative action:

Modify the employee handbook provision and the standard suspension notice found to interfere with the rights of employees to engage in union and protected concerted activities under Section 7 of the Act, and advise its employees, nationwide, by appropriate means, that the handbook provision and the standard suspension notice have been revised. (ALJD 11:31-35)

The ALJ ordered Respondent to post a Notice to employees at its facilities nationwide, containing the following language:

WE WILL modify our employee handbook provision that limits your right to engage in the above activities during nonwork time in work areas of our facilities.

WE WILL modify our standard suspension notice form that limits the right of suspended employees from engaging in the above activities during periods of disciplinary suspension or when they are suspended pending investigation (ALJD 11:37-38).

The ALJ's Order and Notice both fail to inform the parties, or any reader of the order and notice, including Respondent's employees, what the ALJ found to be unlawful or what needed to be remedied. As such, the ALJ erred by failing to order the appropriate relief.

First, while the ALJ ordered Respondent to cease and desist from certain actions, the ALJ's notice fails to include the standard language describing the violation, beginning with the words "WE WILL NOT". Since at least 1945, the Board has included notices which include the "WE WILL NOT/WE WILL" language. See *Federal Engineering Co., Inc.*, 60 NLRB 592, 595 (1945). The ALJ erred by failing to include this language in his recommended Notice.

Second, the ALJ cited *UPS Supply Chain*, 357 NLRB No. 106 (2011) to support his finding that the solicitation policy was unlawfully overbroad, but the ALJ's remedy strayed from the remedy ordered in *UPS Supply Chain*. In *UPS Supply Chain*, the Board made a finding, similar to the ALJ's finding in this case, that the employer maintained an overly broad no-solicitation rule that would be reasonably understood by employees to prohibit solicitation in work areas during nonworking time. In that case, the Board ordered the employer to cease and desist from maintaining [and announcing] an overly broad no solicitation rule prohibiting employees from engaging in protected solicitation during nonwork time in work areas and the Board ordered the employer to rescind the overly broad no-solicitation rule prohibiting

employees from engaging in protected solicitation during nonwork time in work areas. This language is much more explicit and better serves the remedial purposes of the Act by putting all parties on notice of the specific violation and the appropriate remedy.

Similarly, the ALJ cited *Hyundai America Shipping Agency*, supra, to hold that a blanket prohibition on discussing an employee's suspension violates section 8(a)(1) of the Act. In *Hyundai America Shipping Agency*, the Board ordered the employer to cease and desist from promulgating, maintaining, or enforcing an oral rule prohibiting employees from discussing with other persons any matters under investigation by its human resources department. Again, this language in the Board's order is more specific than the language in the ALJ's order.

Given the similarities between the facts of this case and those in *UPS Supply Chain* and *Hyundai America Shipping Agency*, General Counsel respectfully requests the Board to modify the ALJ's Order and Notice to employees to incorporate clearer language and to order appropriate relief for the violations found.

#### **IV. CONCLUSION**

For the reasons set forth above, General Counsel respectfully requests that the Decision of the Administrative Law Judge be adopted as modified to clarify that the issue at hearing was only whether Respondent maintained unlawful rules in its Employee Handbook. General Counsel further respectfully requests that the Decision of the Administrative Law Judge be adopted as modified to include a finding that the rules in the Respondent's Employee Handbook violate the Act, and that his recommended Order be adopted as modified to accurately reflect the violations found.

Dated at Denver, Colorado, this 12<sup>th</sup> day of October, 2012.

Respectfully submitted,



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Renée C. Barker



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Todd D. Saveland

Counsels for the Acting General Counsel  
National Labor Relations Board  
Region 27  
700 North Tower, Dominion Towers  
600 Seventeenth Street  
Denver, Colorado 80202  
(303) 844-3551

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the **ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**, together with this Certificate of Service, was E-Filed or E-mailed or mailed, as indicated below, to the following parties on: October 12, 2012.

Mr. Lester A. Heltzer  
Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington D.C. 20570-0001  
**E-FILED** at: [www.nlr.gov](http://www.nlr.gov) with the Office of the Executive Secretary

Ms. Amy J. Zdravecky, Esq.  
Franczek Radelet P.C.  
300 South Wacker Drive, Suite 300  
Chicago, IL 60606-6757  
**E-MAILED** at: [ajz@franczek.com](mailto:ajz@franczek.com)

Mr. Thomas Scott  
Depot Manager  
Schwan's Home Service, Inc.  
3660 Draft Horse Drive  
Loveland, CO 80538-9008  
**USPS Mail**

Mr. Patrick K. Wardell  
1016 49<sup>th</sup> Court, #1  
Greeley, CO 80634  
**E-Mailed** at: [koolpk@q.com](mailto:koolpk@q.com)



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Todd D. Saveland  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 27  
600 17<sup>th</sup> Street, 700 North Tower  
Denver, CO 80202-5433  
(303) 844-3551  
[Todd.Saveland@nlrb.gov](mailto:Todd.Saveland@nlrb.gov)