UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DOLLAR THRIFTY AUTOMOTIVE GROUP, Employer, and COMMUNICATIONS WORKERS OF AMERICA, LOCAL 7777, Union.	Case No. 27-CA-173054

DOLLAR THRIFTY AUTOMOTIVE GROUP'S BRIEF IN SUPPORT OF EXCEPTIONS

Matthew T. Miklave
Robinson & Cole LLP
Chrysler East Building
666 Third Avenue – 20th Floor
New York, NY 10017-4132
Telephone: (212) 451-2900
Facsimile: (212) 451-2999
Email: mmiklave@rc.com
Attorney For Employer

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I. PRELIMINARY STATEMENT

The employer, Dollar Thrifty Automotive Group ("Dollar Thrifty," the "Company," or "Respondent") submits this Brief in Support of Exceptions. For the reasons set forth below, Dollar Thrifty respectfully contends that the Administrative Law Judge erred in failing to dismiss the Complaint in its entirety.

Dollar Thrifty respectfully contends that the time has come for the Board and the Courts to re-examine the current legal standard regarding the interpretation of work rules and workplace policies. That standard not only requires employers to ignore their concomitant obligations under multiple federal and state statutes, but also fails because it provides no meaningful guidance for employers to navigate the complexity of the modern workplace. The General Counsel's own Complaint demonstrates the impossibility of this task. While the General Counsel alleges that certain language violates the Act, the General Counsel completely ignores other nearly identical language elsewhere – showing that even the General Counsel, a supposed "expert" in interpreting and enforcing the Act, cannot consistently apply the current legal standard under the only statute he has a responsibility to enforce. Dollar Thrifty does not mean to disparage his efforts in this regard. On the contrary, while laudable in intent, the failure to be able to distinguish between the lawful and unlawful only demonstrates that the vast majority of employers – especially those which do not have experienced legal professionals at their beck and call – face an impossible burden. Nor does the current standard provide any meaningful guidance for employees to gauge the appropriateness of their own actions.

Dollar Thrifty respectfully contends that the current standard has turned the adoption of employment rules, regulations, policies, and handbooks into a Talmudic exercise which evaluates "magic words" and form over substance. Left unremedied, the Board's standard threatens to overwhelm a system already stretched to the breaking point.

To the extent the Board elects to maintain the current standard, Dollar Thrifty respectfully contends that under established Board precedent, which requires that the validity of an employer's rules be judged by reading the rules in context and in their entirety, the challenged rules may not reasonably be read by employees as restricting their rights under the Act. While two rules prohibiting solicitation or distribution of literature arguably could be read to violate the Act, the record contains no evidence to support the claim that those rules were "maintained" within the six-month period preceding the filing of the charge. As to those two rules, the evidence shows merely that during an unrelated grievance meeting and in response to the Charging Party's request, Dollar Thrifty provided copies of historical documents from an employee's personnel file to the Charging Party.

For these reasons, which are articulated fully below, the Complaint should be dismissed in its entirety.

II. STATEMENT OF THE CASE

Upon an April 1, 2016 charge filed by Communications Workers of America, Local 777 (the "Charging Party"), on June 30, 2016, the General Counsel issued a Complaint and Notice of Hearing challenging 14 rules allegedly maintained by Dollar Thrifty during the Section 10(b) period. (G.C. Ex. 1(a), (d).)[1] On July 28, 2016, Dollar Thrifty filed its answer and notice of defenses. (G.C. Ex. 1(f).) On August 26, 2016, two business days before trial, the General Counsel serve a Notice of Intent to Amend the Complaint to allege four additional rules violated the Act. (G.C. Ex. 2.) The case was tried before Administrative Law Judge Amita Baman Tracy on August 30, 2016. Following the hearing, during which all parties were afforded the opportunity to submit evidence and call or cross-examine witnesses, the Administrative Law

[1] The following references are used throughout this brief: "Tr. __" for transcript page(s.); "R. Ex. __" for Dollar Thrifty's exhibit; "G.C. Ex. __" for General Counsel's exhibit; and "ALJ Ex. __" for Administrative Law Judge's exhibit.

Judge ("ALJ") set an October 4, 2016 deadline for the filing of briefs. On January 27, 2017, the Administrative Law Judge issued a Decision and Recommended Order finding Dollar Thrifty had violated the Act as alleged. On February 13, 2017, the Board granted Dollar Thrifty's request to extend the time for filing exceptions and a supporting brief to March 31, 2017.

III. STATEMENT OF FACTS

Dollar Thrifty respectfully contends that the evidence shows that the challenged rules do not violate the Act. Dollar Thrifty, a sophisticated employer and part of the global Hertz corporate family of rental car brands, seeks to carefully balance the rights of its employees with the myriad of conflicting and ever-changing federal, state, and international legal standards governing its operations.

A. Background of the Hertz Corporation and Dollar Thrifty Brands

Recognized as the largest airport general use rental company on earth, The Hertz Corporation ("Hertz"), a publicly traded Fortune 500 Corporation, operates under the Hertz, Dollar, Thrifty, and Firefly car rental brands. (R. Ex. 13, Annual Report, at 1, 3; Tr. 102.) Hertz offers multiple brands in order to provide customers a full range of rental services with different price points, levels of service, offerings and products. (*Id.* at 2, 4.) Each brand generally maintains separate airport counters, reservation systems, marketing approaches and strategies, and all other customer contact activities. (*Id.* at 4.)

The most recognized brand, Hertz, its top tier, offers premium services to clients. (*Id.*) The Dollar brand prides itself as being the "go-to choice" for the discerning value seeker with elevated expectations. (*Id.*) The Dollar brand's main focus is serving the airport vehicle rental market, which is comprised of business and leisure travelers. (*Id.*) The majority of its locations are on or near airport facilities. (*Id.*) Dollar operates primarily through company-owned locations in the United States and Canada, and also licenses to independent franchisees which

operate under the Dollar brand system. (*Id.*) Recently, Dollar has been expanding internationally, primarily in Europe. (*Id.*)

The Thrifty brand, which is integrated with Dollar, prides itself for its focus on providing value and exceptional service for vacationers and tourists. (*Id.*) Thrifty serves both on airport and off airport markets through company-owned locations in the United States and Canada and licenses to independent franchisees which operate as part of the Thrifty brand system. (*Id.*) As with Dollar, Thrifty has been expanding its brand internationally. (*Id.*)

Collectively, Hertz owns, manages and operates over 9,900 corporate and franchisee locations in North America, Europe, Latin America, Africa, Asia, Australia, the Middle East and New Zealand. (R. Ex. 13, at 1; *see also* HERTZ, *About Hertz*, http://ir.hertz.com/company-overview (last visited Mar. 21, 2017)). The Dollar and Thrifty brands manage over 1,300 corporate and franchisee locations in more than 70 countries, and maintain a presence in every one of the 50 United States. (R. Ex. 13, at 1; Tr. 101.)

Hertz operates over 1,600 airport rental locations in the United States and approximately 1,320 airport rental locations internationally. (R. Ex. 13, Annual Report, at 4.) Hertz' international car rental operations maintain company-operated locations in Australia, Belgium, Brazil, Canada, the Czech Republic, France, Germany, Italy, Luxembourg, the Netherlands, New Zealand, Puerto Rico, Slovakia, Spain, the United Kingdom and the United States Virgin Islands. (*Id.*)

As noted, each Dollar and Thrifty brands both accept car rental reservations separately through independently operated internet sites. (*Id.* at 6.) In addition, customers may secure rental reservations through third-parties such as travel agents or third-party travel websites. (*Id.*) In many of those cases, the travel agent or website will utilize a third-party operated

computerized reservation system, also known as a Global Distribution System ("GDS") to contact the particular brand and make the reservation. (*Id.*) In major countries, including the United States and all other countries with company-operated locations, customers may also reserve cars for rentals through local, national, or toll-free telephone reservations centers, directly through rental locations or, in the case of replacement rentals, through proprietary automated systems serving the insurance industry. (*Id.*) Additionally, all brands accept reservations for rentals worldwide through their websites and through smartphone apps for both the Dollar and Thrifty brands. (*Id.*)

In essence, the seamless integration of the customer experience through technology and individual communication remains an essential component of the Hertz business model, both in the United States and worldwide.

B. In its Day-to-Day Operations, the Hertz Corporation and Dollar Thrifty Collect a Vast Amount of Confidential Data Regarding Employees and Customers

As of December 31, 2015, Hertz employed approximately 30,000 employees, of which 23,000 were employed in the United States and 7,000 were employed in foreign countries. (*Id.* at 16.) As noted, in the United States, Hertz and Dollar Thrifty operate locations and employ employees in all 50 states. (Tr. 101.)

Through each of its brands, the Company regularly possesses, stores, and handles non-public information concerning uncounted individuals and businesses, including both credit and debit card information, drivers' and other license numbers, contact information, and other sensitive and confidential personal information. (R. Ex. 13, Annual Report, at 25.) In addition, customers regularly transmit confidential information to Hertz via the internet and through other electronic means. (*Id.*)

With respect to their employees, Hertz and Dollar Thrifty collect and maintain in various electronic databases highly confidential and personally identifiable information, including but not limited to, information regarding criminal convictions and incarcerations, drug test results, educational records, medical information and data (including medical information regarding disabilities and illnesses), and financial data (including bank account numbers and information regarding wage garnishments). (Tr. 53, 55-56, 58, 61.) Furthermore, on a case-by-case basis, the Company will also have access to and preserve information concerning domestic violence and abuse allegations, orders of protection, criminal investigations initiated by law enforcement personnel, Company confidential investigations, and other workplace investigations. (*Id.* at 59, 63-65.) Indeed, in some cases, managers will have access to highly inflammatory information regarding employees. For example, one manager testified that during her employment with the Company, she was forced to address issues associated with the suicide of an employee on Company property, a highly confidential matter not generally known to either the public or other employees. (*Id.* at 64.) This manager also testified that during and in connection with her employment, she has been involved with employee sexual harassment and other investigations which were literally "too many to count." (*Id.* at 65-66.)

The evidence further shows that employees often transfer from location to location. For example, Erik Hogan, the General Manager of the Denver International Airport locations for Hertz, Dollar and Thrifty, previously worked as General Manager of the Hertz Houston Airport location, Area Manager for Hertz in Albuquerque, New Mexico, and Hertz City Operations Manager at the Denver Airport. (*Id.* at 99-100.)

C. Background on the Denver Airport Dollar Thrifty Location

The Dollar and Thrifty brands maintain rental car counters at the Denver Airport. (Tr. 49.) In her role as Human Resources Business Partner, Caralyn Lantz testified that she not only

supported the Denver Airport location, but also all locations within the states of Colorado, Utah, Wyoming, Idaho and Montana. (*Id.* at 44-45.) Over 720 employees work within this region alone. (*Id.* at 45.) Within the region supported by Ms. Lantz, Hertz and/or Dollar Thrifty have established bargaining relationships with three (3) different labor organizations: the Charging Party in this matter, representing counter sales representatives of Dollar Thrifty at the Denver Airport; along with bargaining units represented by Teamsters Local 455 in Denver; and Teamsters Local 222 in St. Lake City, Utah. (*Id.* at 47.)

Because Dollar Thrifty is located on the Denver Airport premises, it is subject to enhanced security measures. (*Id.* at 68.) Since Hertz maintains over 1,600 other locations at United States airports, it is reasonable to conclude that those locations are also subject to enhanced security measures. The Department of Homeland Security secures the perimeter of United States airports and, at least in Denver (and likely other locations), secures and maintains a perimeter fence directly across a street from Dollar and Thrifty. (*Id.* at 69.).

D. Dollar Thrifty Policies and Procedures

The evidence shows that in or about October 11, 2015, Dollar Thrifty employed Tesfaye Workneh at its Denver Airport location. In connection with his hiring, Dollar Thrifty gave Mr. Workneh (and Mr. Workneh acknowledged receipt of) its then standard onboarding package, consisting of thirty-eight (38) pages of materials, with internal references to additional materials, policies, and handbooks amounting to over 226 pages of written materials. The General Counsel alleges that some, but not all, of the policies set forth in the onboarding package or elsewhere are unlawful under current Labor Board standards.

The General Counsel alleges that certain aspects of the Company's "Company Information Security Statement and Confidentiality Agreement for Company Employees" ("Security Statement") violate the Act. Initially, it should be noted that through the artful

omission of language the General Counsel wishes to ignore, the General Counsel claims that the Company's definition of "confidential information" violates the Act. For example, in paragraph 3(d) of the Complaint, the General Counsel alleges that the Company defines "personally identifiable information" to mean the following:

> . . . personally identifiable data (PID) . . . about . . . prospective, current, or former employees . . . obtain[ed] in the course of Company [Hertz] business . . . [and as] . . . (iv) information . . . which would cause damage to the Company or . . . reputation if disclosed . . . .

(G.C. Ex. 7 at 8; *see also* G.C. Ex. 1(d), at ¶3(d).) Not only does the General Counsel misquote the language, and by misquoting it alters its meaning, shockingly, the General Counsel entirely ignores the ***very next sentence***. In that sentence, the Security Statement unambiguously excludes from coverage the disclosure of any information for purposes protected by the Act.

> For the avoidance of doubt, notwithstanding any other provision of this agreement, ***it shall not be a violation of this Agreement for employees to discuss or communicate with others regarding matters related to their wages, hours, and other terms and conditions of employment***, provided they do not divulge private or confidential information that they accessed or obtained solely by virtue of the duties they perform for the Company.

(Id.) (emphasis added).

Because the General Counsel intentionally omits from the Complaint any reference to this express exclusion, the General Counsel alleges that the following additional provisions of the Security Statement violate the Act:

> I will not divulge Company Confidential Information to anyone, including without limitation Company employees, customers, contracted temporary workers or service providers, unless he or she requires the information to perform his or her services for the Company or as part of his or her contractual relationship with the Company. Communications of a sensitive or confidential nature (e.g., Company Confidential Information) or of any "Company Information" (as defined in Company Procedure W1-113, Acquisition and Disclosure of Company Information) should not be sent unless first reviewed and approved as required in Company Procedure W1-113, Acquisition and Disclosure of Company Information, and encrypted when necessary.

(G.C. Ex. 7 at 9; *see also* G.C. Ex. 1(d) at ¶3(k).)

> 4. Unless I have specific authorization, ***I will not attempt to gain access to Company Confidential Information, Company facilities or Company computing resources*** and I understand that such access is expressly prohibited.

(G.C. Ex. 7 at 9 (emphasis added); *see also* G.C. Ex. 1(d) at ¶3(l).)

> 7. I will respect the privacy of other individuals. Except as required in the performance of the responsibilities of my position for the Company, ***I will not intentionally seek information on, obtain copies of, modify files, or other data, or passwords belonging to other individuals.*** I will not intentionally represent myself as another individual unless explicitly authorized to do so by that individual.

(G.C. Ex. 7 at 9 (emphasis added); *see also* G.C. Ex. 1(d) at ¶3(m).)

> Visiting internet sites which contain . . . objectionable materials, sending or receiving, via the internet or email, any material that is . . . defamatory, or which is intended to annoy, offend . . . another person, or language including disparagement of others based on their . . . political belief.

(G.C. Ex. 7 at 11; *see also* G.C. Ex. 1(d) at ¶3(f).)

> Soliciting emails that are unrelated to business activities, or soliciting non-company business for personal gain or profit.

(G.C. Ex. 7 at 11; *see also* G.C. Ex. 1(d) at ¶3(g).)

> Other inappropriate uses of computing resources.

(G.C. Ex. 7 at 11; *see also* Ex. G.C. 1(d) at ¶3(n).)

> 23. I understand my obligation to protect Company Confidential Information and will comply with all of the Company policies and procedures regarding the handing of Company Confidential Information. In particular, if I become aware of any authorized access or use of Company Confidential Information or any violations of Company information security policies and procedures, I will immediately notify the Help Desk, my immediate supervisor, or the Computer Emergency Response Team (CERT) . . . .

(G.C. Ex. 7 at 11-12; *see also* G.C. Ex. 1(d), at ¶3(e).)

With respect to a document entitled "Employee Rules and Regulations," the General Counsel alleges that two specific rules contained in that document violate the Act. Specifically, the General Counsel challenges a Company rule prohibiting the intimidation of others. Specifically, the rule provides:

> Although it is difficult to outline all major breaches of substandard performance that do not require progressive discipline, the following are many of the most standard serious breaches for which immediate discharge can be initiated.
>
> * * * *
>
> 9. Action on the part of any individual or group of employees to disrupt harmony, intimidate fellow employees, or to interfere with normal and efficient operations.

(G.C. Ex. 7 at 26-27; *see also* G.C. Ex. 1(d) at ¶3(b).) The General Counsel also challenges a rule prohibiting employees from interfering with its operations. Specifically, the challenged rule prohibits:

> 26. Leading or participating in any activity that would interfere with the Employer's operation including, but not limited to, any unlawful strike.

(G.C. Ex. 7 at 28; *see also* General Counsel 1(d) at ¶3(c).)

Significantly, the General Counsel ***does not*** allege that the following rules (which are contained within the same document) amount to violations of the Act.

> 1. Reading of magazines or books, eating drinking while on duty except where required.

(G.C. Ex. 7 at 25.)

> 8. Use of company telephones, computers and other personal electronic devices for personal reasons while on Company time (i.e. MP3 players, IPODS, pages, audio/video devices, etc.), except in an emergency at which time you must notify a manager.

(*Id.*)

> 9. Horseplay, interference with other employees' work, or socializing while on company time.

(*Id.*)

> 10. Loitering on company property.

(*Id.*)

> 19. Misuse of electronic technology, including but not limited to internet use, in accordance with IT policy and procedure.

(*Id.* at 26.)

10. Gambling, fighting, attempting to fight, disorderly conduct, poor conduct that violates common decency (including obscene or abusive language) and other conduct tending to reflect unfavorably on the Company.

(G.C. Ex. 7 at 27.)

11. Harassment for sex, gender, age, race, color, national origin, disability, religion, sexual orientation, gender identity, marital or domestic partnership status, veteran or military status, genetic information, or other protected classification.

(*Id.*)

17. Use of Company equipment, facilities, or materials without prior managerial approval.

(*Id.*)

23. Indecent and/or immoral conduct while on duty or while on company premises.

(G.C. Ex. 7 at 28.)

29. Failure to cooperate with Human Resources and/or management during an investigation.

(Id.)

30. Violation of or non-compliance with security regulations such as:

* * *

b. Entering or assisting any person to enter company premises or restricted area without proper authorization.

(Id.)

31. Unauthorized duplication and/or destruction of company records or materials.

(Id.)

The General Counsel alleges that two provisions of the Company's policy on media relations violate the Act as well. Specifically, the General Counsel alleges the following statements unlawfully restrict employee rights.

It is the policy of The Hertz Corporation, and all of its global subsidiaries, to cooperate with the media and to assist them by providing information about Company activities and

subjects related to company business. However, employees are not authorized to speak to or otherwise engage with the media and the following guidelines must be adhered to:

> When the media contacts the company, the employee must explain that he/she wishes to be cooperative but is not authorized to disclose information. The employee must either contact Public Affairs and explain the request, or direct the media representative to contact the Public Affairs directly. Local management should also be notified.

* * * *

> No further conversation of any kind or media interview should occur without prior knowledge and guidance of the Public Affairs Department.

* * * *

> **Public Statements and Published Articles**
>
> Public Statements refer to speeches, news releases, press conferences, interviews, postings on public web sites/message boards and news media inquiry responses concerning any aspect of Company's operations, business or policies. All Employees must adhere to the following policy:
>
> Only Public Affairs may release or authorize the release of information to the media. All inquiries from the media must be referred to Public Affairs. Whether the media contacts Company or Company wishes to publicize its activities, all news releases must be authorized, in advance, by Public Affairs.
>
> Under no circumstances may a Company employee approach the media to generate publicity about Company without the prior approval of Public Affairs. This includes news articles written by an employee where the employee's association with Company is disclosed or may be ascertained from the article.
>
> When an employee receives approval to prepare an article for outside publication and if his/her affiliation with Company is disclosed or can be ascertainable or the subject relates to Company or its fields of interest, the article must be reviewed and approved by Public Affairs prior to submission.
>
> All threats by current or former employees, their families and customers or other third parties to involve the media in any matter pertaining to Company should be communicated to Public Affairs and local management, with complete details about the surrounding circumstances.

(G.C. Ex. 7, at 36-37; *see also* G.C. Ex. 1(d), ¶3(j).) As with other critical language, the General Counsel appears to intentionally omit the following language, contained in the same challenged policy:

> . . . If an employee is caught off guard by a film crew, they should respond with 'I am not authorized ***to speak on Company's behalf, our corporate headquarters handles all media inquiries.*** I would be happy to refer you to our Public Affairs Department.
>
> * * * *
>
> Note: Third parties (vendors, business partners, etc.) ***are not permitted to speak on the Company's behalf*** nor are they permitted to issue press statements involving Company without Public Affairs' prior approval and involvement.

(G.C. Ex. 7 at 36-37) (emphasis added).

At the beginning of trial in the underlying case, the General Counsel moved to amend the Complaint to allege that the following provisions of the Dollar Thrifty Employee Handbook violated the Act:

> Formal pay policies have been developed for all pay actions within the Company. Questions regarding these policies should be forwarded to your supervisor or Human Resources.
>
> DTG strives to pay salaries and wages competitive with those in our community and industry. We consider your pay a confidential matter and ***encourage you*** to do the same. For more information on DTG's compensation program, please contact Human Resources.

(G.C. Ex. 2 at 1-2; *see also* G.C. Ex. 4 at 46) (emphasis added).

> In your job, you. may have access to or be exposed to information regarding the Company. Each employee is prohibited from disclosing, directly or indirectly, to any unauthorized person (including other employees), business or other entity, or using, for the employee's own purposes, any confidential information. The protection of confidential business information and trade secrets is vital to the interests and the success of DTG. Such confidential information includes, but is not limited to, the following examples:
>
> • Compensation data . . . .

(G.C. Ex. 2 at 2; *see also* G.C. Ex. 4 at 27.)

> Certain employees of DTG are granted the privilege of accessing e-mail, voice mail and Internet via the Company's computers. ***When it becomes necessary to utilize e-mail, voice mail or Internet via the Company's computers for occasional and infrequent non-business use, good judgment must be exercised.*** Any inappropriate or prohibited Internet, voice mail or e-mail access or use may result in discipline up to and including termination from employment.

> DTG is dedicated to providing a work environment that is free from unlawful harassment. Any Internet access to content or materials which are of an offensive nature, including pornographic or obscene materials and materials that otherwise may reasonably be considered inappropriate, will be considered willful misconduct and will result in disciplinary action up to and including termination.
>
> Transmitting materials which are defamatory, discriminatory, threatening, profane, slanderous, libelous, harassing or otherwise offensive through the Company's e-mail or voice mail systems is also prohibited and will be cause for discipline, up to and including termination from employment. Materials covered by this restriction include documents, messages, jokes, images, cartoons, programs and software. All e-mail messages and attachments, and voice mail messages whether business or personal in nature, are the property of the Company. Employees should expect that anything in an electronic file is always available for and subject to review by the Company.

(G.C. Ex. 2 at 2-3 (emphasis added); *see also* G.C. Ex. 4 at 26.)

> Employee participation in public and community activities is encouraged. However, Corporate Communications and Investor Relations have established excellent relations with the news media on a local, national and international basis. Because the image we portray to this critical audience is very important to our Company, Corporate Communications and Investor Relations must approve any interviews, speeches or articles requested by the media with respect to the Company and its business to assure that the views expressed are accurate, consistent and reflect well in the marketplace. If a member of the news media contacts you for information, always refer them to a member of Corporate Communications or Investor Relations.

(G.C. Ex. 2 at 3; *see also* G.C. Ex. 4 at 41.)

Once again, the General Counsel intentionally omitted the following language from the Employee Handbook.

> The policies, practices and benefits set forth in this Handbook are subject to applicable laws and regulations and may be applied differently in some states in order to comply with such laws. . . . To the extent there is any conflict between a policy of the Company and any material set forth in this Handbook, including any policy summary, the policy of the Company posted at www.dtgnet will control and prevail.

(G.C. Ex. 4 at 5.) Thus, the Employee Handbook expressly directs employees to the more specific policies which govern in the event of any conflict with the Handbook.

The evidence shows that Dollar Thrifty maintains these comprehensive policies and procedures, makes them available to all employees, and holds employees responsible for

reviewing them. Among other things, the Company maintains a social media policy which provides, among other things:

> The Company takes no position on the decision of employees to start or maintain a blog or participate in other Social Media activities.
>
> * * * *
>
> 1. The Company respects the right of employees to write blogs and use Social Media sites and does not want to discourage employees from self-publishing and self-expression. The Company also does not discriminate against employees who use Social Media for personal interests and affiliations or other lawful purposes.
>
> * * * *
>
> 2. . . . . If you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company procedure.
>
> * * * *
>
> 5. ***Employees are not authorized to speak on behalf of the Company via Social Media. . . . . You therefore must make clear that you are not speaking on behalf of the Company and that the views expressed are your own and not those of the Company.***
>
> * * * *
>
> 8. Due to certain governmental regulations, employees should avoid making any endorsements or testimonials about the Company or its products or services unless the employee's relationship to the Company is clearly and conspicuously disclosed.
>
> * * * *
>
> 3. ***Nothing contained in this procedure shall be interpreted or applied in a way that interferes with the legal rights of employees to engage in Section 7 activities per the National Labor Relations Act.***

(R. Ex. 2 at 1-5) (emphasis added).

The Company also promulgated its "Standards of Business Conduct," a document cross-referenced in the Employee Handbook. The Code of Conduct provides, among other things:

> Remember, no single document can cover all the situations that we may encounter throughout the course of our work.
>
> * * *
>
> Laws can be complex, and vary from one country to the next. This makes it all the more important that we familiarize ourselves with the laws and regulations that apply to our specific jobs.

(R. Ex. 4 at 2-3.) The Code goes on to provide detailed examples on an employee's obligations to protect confidential information from being disclosed to competitors, from pressuring co-workers to disclose confidential information about former employers which could provide a competitive advantage to the Company, and about the need to safeguard information belonging to third-parties. (*Id.* at 6-8.) To emphasize the importance of these values, the Code provides concrete examples of the types of situations in which confidential information could be compromised (by an HR manager leaving employee files unattended on a copy machine) or used in a manner which could constitute illegal insider trading (through an employee in HR using his knowledge to advise a family member whether to buy, sell or hold Company stock). (*Id.* at 6-8, 10, 13 and 15.)

Additional policies which employees are required to review and with which they are required to become familiar include, Policy W1-46 on privacy (addressing the disclosure of personally identifiably information and noting that the Company does business in many countries and must comply with international legal standards regarding the disclosure of personally identifiable information); Policy W2-31, Disclosure of Employee Information (cautioning that with respect to employment verification, employee salary information cannot be disclosed without the consent of the employee, and that negative employment references or damaging information cannot be disclosed without the permission of Company officials), and Policy W2-37 regarding personnel records (expressly noting that some information even may not be

disclosed to the specific employee, information such as salary increase projections, talent inventory, references, investigation files and planning data). (R. Ex. 11, 1, 13; R. Ex. 12 at 3, 6; R. Ex. 5 at 2-3.)

In addition to these policies, given the amount of data on customers and employees collected and stored by the Company, the Company maintains a comprehensive set of policies dealing with security and security breaches, access to computing resources and global information security. Among other things, these policies make clear that sensitive data can be compromised in many ways; the Company has committed itself to maintain the confidentiality and security of the data entrusted to it by customers, employees and third-parties; and ***every employee*** shares in the duty to maintain the confidentiality of this data. (*See generally* R. Ex. 4 6, 8, 9, and 10.)

Finally, the General Counsel alleges that the Company maintained an overbroad and unlawful no-solicitation, no-distribution policy. The evidence shows that in connection with a grievance filed by the Charging Party over an employee's pay, the Charging Party requested certain information from the employee's file. (Tr. 26.) In response to that request, the Company provided the Charging Party with certain documents admitted into evidence as General Counsel's Exhibit 6. On page 3 of that document, the following rule appears:

> 4. Soliciting, direct/indirect sale of any item, distributing and collecting any papers, materials or contributions on company premises or posting literature or other materials without Management authorization.
>
> * * * *
>
> Soliciting emails that are unrelated to business activities, or soliciting non-company business for personal gain or profit.
>
> * * * *

> Solicitation of an employee by another employee is prohibited while either the person doing the soliciting or the one being solicited is on his or her working time. Furthermore, the distribution of any material of any kind shall not be permitted in the workplace.

(G.C. Ex. 6 at 3, 18-19; *see also* G.C. Ex. 1(d) at ¶3(a), 3(i).) Significantly, a comparison of these rules with G.C. Ex. 7 quickly shows that the two documents are not the same in all respects, and are significantly different with respect to the language of these challenged rules. The no-solicitation, no-distribution rules contained in G.C. Ex. 7 (the onboarding document distributed to Mr. Workneh during the six-month Sec. 10(b) period), contains the following no-solicitation, no-distribution language:

> Distributing or posting literature or other materials in work areas. Soliciting or distributing/posting literature during the employee'[s] working time[.] (Working time does not include meal or designated break periods.)

(G.C. Ex. 7 at 26.) In addition, the Employee Handbook contains a policy outlining its rules with respect to employee and non-employee solicitations. That policy provides:

> Because DTG wishes to maintain a proper business environment and prevent interference with work and inconvenience to others, guidelines for solicitation are listed below:
>
> > Employees must have prior written approval of Human Resources or the city manager before posting a notice or other written solicited material on Company property;
> >
> > Employees are prohibited from circulating or distributing any written or electronically transmitted solicited material in working areas or during work time;
> >
> > Employees are prohibited from selling or attempting to sell goods on Company property during work time; and
> >
> > Individuals who are not employees of the Company are prohibited from distributing literature, selling merchandise, soliciting financial contributions or soliciting for any cause on Company property.

(G.C. Ex. 4 at 41-42.) The General Counsel does ***not*** allege these policies to be unlawful.[2]

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[2] The General Counsel does allege that a single no-solicitation, no-distribution rule contained in G.C. 7 violates the Act. (*See* G.C. Ex. 7 at 11.) As noted above, that rule is contained in the Security Statement, a document which contains an express disclaimer to the

The record contains no evidence showing that Dollar Thrifty adopted any cited rule in response to union or protected activity, applied any rule in such a way as to deprive employees of their Section 7 rights, and were interpreted by any employee to restrict them in their ability to exercise their rights on Section 7 of the Act.

IV. QUESTIONS PRESENTED

1. Should the Board overrule *Lutheran Heritage* on the grounds that it is an unworkable standard, forces employers to ignore their obligations under Federal and State law, violates the Tenth Amendment of the United States Constitution and otherwise deprives employers of proper notice of which rules would violate the Act? (Exception 6)
2. Did the ALJ err in finding that Dollar Thrifty violated the Act by maintaining the rules described in the General Counsel's Complaint ¶¶ 3(a), 3(b), 3(c), 3(d), 3(e), 3(f), 3(g), 3(h), 3(i), 3(j), 3(k), 3(l), 3(m), 3(n), 3(o), 3(p), 3(q), 3(r)? (Exceptions 7 – 45)
3. Did the ALJ err in shifting the burden to Dollar Thrifty to prove that it did not maintain certain policies during the 10(b) period? (Exceptions 3-5, 13-33)
4. Did the ALJ err in issuing the Conclusions of Law, Remedy, and Order? (Exceptions 46-48)

V. ARGUMENT

Dollar Thrifty respectfully contends that the standard adopted by the Board in *Martin Luther Memorial Home, Inc.,* 343 NLRB 646 (2004) *(Lutheran Heritage)*,[3] should be

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effect that nothing contained in the Security Statement should be interpreted to prevent employees from engaging in protected activity. (*See* G.C. Ex. 7 at 8.)

[3] The so-called "first prong" of *Lutheran Heritage* standard holds that a workplace rule or policy which has not been adopted in response to union activity or been applied to restrict the exercise of Section 7 rights nevertheless will be declared unlawful if employees could reasonably construe the language to prohibit Section 7 activity. As the General Counsel's legal theory of the complaint focused solely on this prong of the *Lutheran Heritage* decision, Dollar Thrifty only addresses that aspect of the *Lutheran Heritage* decision.

overturned. Even if the Board were to decide not to overturn that test, however, when read in context and in their totality, the plain meaning of the challenged rules shows they comply with the Act. Given that the materials provided to newly hired employees expressly reference employee rights under Section 7 of the Act and gave numerous examples of the types of misconduct the workplace rules were designed to prohibit, no reasonable employee could read those materials as prohibiting lawful Section 7 activities. While two non-solicitation, no-distribution rules contained in G.C. Ex. 4 may be more problematic, the General Counsel has failed to show those rules were adopted, maintained or enforced during the Section 10(b) period.

A. The Board Should Overrule the Current *Lutheran Heritage* Standard, as It Remains Unworkable and Conflicts with Federal and State Statutes Imposing Additional Obligations on Employers

The controversy, litigation explosion, and analytical complexity of workplace policies and handbooks under the first prong of *Lutheran Heritage* and its progeny cogently show why the Board should abandon that standard. Dollar Thrifty respectfully suggests that, no matter how well intentioned, the Board erred by using a sledgehammer when a scalpel would have been the wiser tool. Even if it could be said that the *Lutheran Heritage* standard expanded employees' knowledge and understanding of their rights under the Act[4] (and Dollar Thrifty suggests the difficulty experienced by labor professionals, including those responsible for the day-to-day administration of Act, to distinguish between the "lawful" and the "unlawful" shows the Board likely did not achieve this limited objective), the resulting impact of this well-intentioned attempt show that the time has come to abandon the standard.[5]

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[4] Dollar Thrifty contends it took efforts to draft its policies in such a way that a reasonable employee would have known that activity protected by the Act did not violate the cited policies. *See* 29 U.S.C. § 157 (2000).

[5] Dollar Thrifty does not challenge the first or second prongs of *Lutheran Heritage*, namely that an employer will be found to have violated the Act by adopting a rule in response to union-activity or using a facial neutral workplace rule to suppress union activity. The General

The *Lutheran Heritage* standard amounted to a "sea-change" in Board precedent and has resulted in a flood of cases and confusion – leading to a genuine inability by experienced professionals to proactively implement policies which meet the Board's standard. Practitioners, Board staff, ALJs and Board Members themselves find it difficult to articulate a standard which provides guidance in advance of litigation as to permitted and prohibited conduct. This is not simply an issue of selecting one labor policy over another, however. The Board's current approach under *Lutheran Heritage* deprives the public and employers subject to the Act of the very predictability, equal protection of laws and due process rights embodied by the Constitution of the United States. The Board's approach needlessly tramples on the rights reserved to the states and concomitant power of Congress, the Federal Courts and sister administrative agencies to expand workplace protections in light of a rapidly changing workplace.

As Dollar Thrifty shows in detail below, the *Lutheran Heritage* standard conflicts with longstanding, established case authority; imposes an unworkable standard with which the General Counsel, decision-makers and advocates cannot comply; and tramples on the parameters and boundaries of co-jurisdictional federal and state authorities. Especially during a time with decreasing funding, the *Lutheran Heritage* standard threatens to divert scarce agency resources from "core" agency actions – expeditiously conducting secret-ballot elections, vindicating the rights of discriminatees and limiting the impact on commerce caused by illegal secondary activity.

1. Standards Inconsistent with Prior Board Doctrine

Prior to its 2004 decision in *Lutheran Heritage*, the Board routinely validated workplace rules it now finds to be unlawful. In *Desert Palace, Inc.*, 336 NLRB 271 (2001), and *Mediaone*

Counsel does not allege Dollar Thirty engaged in such activities, merely that its maintenance of work rules violated the Act because *some* hypothetical employees in some circumstances could read its rules to ban activity otherwise protected.

of Greater Florida, Inc., 340 NLRB 277 (2003), the Board found an employer's rules prohibiting disclosure of workplace investigations or confidential information to be lawful. *See also Lafayette Park Hotel*, 326 NLRB 824 (1998) (finding employees would not reasonably read rule requiring employees to keep confidential private information, including guest information, trade secrets, contracts with suppliers as chilling employees exercise of Section 7 rights). In *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973) and *Tri-County Medical Ctr., Inc.,* 222 NLRB 1089 (1979), the Board found to be lawful workplace policies prohibiting off-duty employees from access to the employer's premises.

Yet, under the *Lutheran Heritage* standard, the Board simply reversed course. By doing so, the Board ignored the United States Supreme Court's mandate for the Board to balance the rights of employees under the statute with the obligations and justifications of employers. *See generally William Beaumont Hospital,* 363 NLRB No. 162 (2016) (Miscimarra, dissenting).

2. Unworkable Standards

The *Lutheran Heritage* standard requires workplace rules and policies to be read in context. But in practice, the Board has simply ignored that obligation. In the resulting confusion, employers must not only anticipate how *many* of and how *closely* its employees will read the rules, but also whether an employee may misconstrue a rule in such a way that it could be said to chill employee rights. Application of the *Lutheran Heritage* standard shows the difficulty experienced professionals face when applying the standard – difficulties which make it virtually impossible for employers to comply. Rather than establish a standard which encourages the protection of employee rights (a goal which some might suggest should be the core mission

of the Board), the standard makes the well-intentioned employer subject to an expensive, wasteful and time consuming "game" of "Gotchya."[6]

Board decisions addressing the application of the *Lutheran Heritage* standard demonstrate precisely the difficulty experienced labor professionals face when trying to apply it to any particular set of facts. *See e.g., Cellco Partnership,* 365 NLRB No. 38 (2017) (overturning ALJ's finding that employer did not violate the Act by maintaining a policy regarding "Activities Outside of Work" but affirming that employer did not violate the Act by maintaining a workplace rule prohibiting the transmission of "offensive" or "harassing" content); *Valley Health System LLC*, 363 NLRB No. 178 (2016) (reversing ALJ as to the lawfulness of work rule prohibiting offensive conduct); *T-Mobile USA, Inc.*, 363 NLRB No. 171 (2016) (overturning ALJ and finding unlawful rule prohibiting the recording of conversations and requiring employees to maintain a positive work environment conducive to effective working relationships); *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015) (overturning ALJ to find

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6 Transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions. Under *Chevron* [*Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837(1984)] the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute will be declared 'ambiguous' (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed 'reasonable.' Who can even attempt all that, at least without an army of perfumed lawyers and lobbyists? And, of course, that's not the end of it. Even if the people somehow manage to make it through this far unscathed, they must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail. Neither, too, will agencies always deign to announce their views in advance; often enough they seek to impose their 'reasonable' new interpretations only retroactively in administrative adjudications."

Gutierrez- Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, C.J., concurring).

policy prohibiting recording of others unlawful); *Advanced Servs.,* 363 NLRB No. 71 (2015) (reversing ALJ and finding oral confidentiality instruction violated Act). *See also Cmty. Hosps. of Cent. Calif. v. NLRB,* 335 F.3d 1079 (D.C. Cir. 2003) (denying Board's application for enforcement as to handbook rules prohibiting "insubordination" and "disrespectful" conduct or disclosure of "confidential information concerning . . . employees"); *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001) (vacating Board's order); *Aroostook County Regional Ophthalmology Ctr. v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996).

The General Counsel himself has recognized the difficulty faced by many employers and has attempted (in good faith, but without success) to help guide the labor community as to the appropriate line to draw. In his General Counsel Memorandum, NLRB Office of Gen. Counsel, Report of the General Counsel Concerning Employer Rules, Memorandum GC 15-04, (Mar. 18, 2015), the General Counsel sought to distinguish the lawful rule from the lawful rule. This task proved to be difficult, for instance the following seemingly similar rules resulted in different outcomes:

Unlawful	**Lawful**
You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy). (*Id.* at 4-5.)	Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination. (*Id.* at 6.)
Be respectful to the company, other employees, customers, partners, and competitors. (*Id.* at 7.)	Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors. (*Id.* at 9.)
Employees are not "authorized to speak to any representatives of the print and/or electronic media about company matters" unless designated to do so by HR, and must refer all media inquiries to the company media hotline. (*Id.* at	The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news

12.)	media in a timely and professional manner only through the designated spokespersons. (*Id.* at 13.)
Employees may not engage in "any action" that is "not in the best interest of [the Employer]." (*Id.* at 18.)	Employees must refrain "from any activity or having any financial interest that is inconsistent with the Company's best interest" and also must refrain from "activities, investments or associations that compete with the Company, interferes with one's judgment concerning the Company's best interests, or exploits one's position with the Company for personal gains." (*Id.* at 19.)

Finally, the General Counsel's decision in the case at bar shows just how difficult application of the *Lutheran Heritage* standard has become. While the General Counsel issued a complaint alleging that Dollar Thrifty's "harmony" rule violated the Act, the General Counsel did not issue a complaint challenging rules prohibiting fighting, poor conduct, and indecent and immoral behavior, among other things. *Compare* Complaint, at §3(b) with G.C. Ex. 6, at 4, 5 (rules prohibiting "fighting, . . . fight, disorderly conduct, poor conduct that violates common decency (including obscene or abusive language) and other conduct tending to reflect unfavorably on the Company" and "[i]ndecent and/or immoral conduct while on duty or while on company premises.")

These cases teach that when seeking the proper balance between protecting the rights of workers under the Act and respecting the rights and obligations of employers, lines may often be subtle and difficult to discern. Reasonable professionals may differ in good faith as to where that line must be drawn. Yet, only the employer bears the penalty of being labelled a "law breaker" for making the "wrong" decision.

3. The Board's Evolving Standards Impinge on Concomitant Jurisdiction of Other Federal Agencies and the States in Violation of the Tenth Amendment to the United States Constitution

In the complaint, the General Counsel alleged and the Administrative Law Judge found that several rules promulgated by Dollar Thrifty, rules requiring employees to respect the privacy of employees and customers, as well as rules requiring employees to treat others with dignity and respect, violated the Act.[7] In reaching this conclusion, the ALJ noted language contained within the rules which sought to make clear that Dollar Thrifty's policies were not intended to be read in such a manner as to deprive employees of their rights under federal and state law.[8] The ALJ opined that, to be effective, Dollar Thrifty had to do much more to describe permissible conduct that would otherwise violate the rules.

Dollar Thrifty respectfully submits that the Board's approach to workplace conduct rules embodied in *Lutheran Heritage* tramples the obligations imposed on Dollar Thrifty by other federal and state statutes, as well as the efforts by sister federal agencies to expand the scope of workplace protections.

With respect to the obligations imposed by federal laws other than the Act and initiatives by federal agencies to expand workplace protections, the Board's approach fails to give

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[7] *See e.g.* Complaint, at ¶3(b) ("9. Action on the part of any individual or group of employees to disrupt harmony, intimidate fellow employees, or to interfere with normal and efficient operations"); *Id.* at ¶3(l) ("Unless I have specific authorization, I will not attempt to gain access to Company Confidential Information, Company facilities . . . and I understand that such access is expressly prohibited"); *Id.* at ¶3(m): ". . . I will not intentionally seek information on, obtain copies of, or modify files, or other data, or passwords belonging to other individuals").

[8] *See e.g.,* G.C. Ex. 7 at 8 ("For the avoidance of doubt, notwithstanding any other provision of this Agreement, ***it shall not be a violation of this Agreement for employees to discuss or communicate with others regarding matters related to their wages, hours, and other terms and conditions of employment***, provided they do not divulge private or confidential information that they accessed or obtained solely by virtue of the duties they perform for the Company.") (Emphasis added). *See also* G.C. Ex. 4 at 6 ("The policies, practices and benefits set forth in this Handbook are subject to applicable laws and regulations and may be applied differently in some states in order to comply with such laws").

sufficient deference to the concurrent jurisdiction and equally compelling interests of sister federal agencies. For example, the *Lutheran Heritage* standard fails to take into account the obligations of employers to comply with privacy obligations imposed by federal law. Currently, federal law does not define "personally identifiable information" ("PII") in a uniform manner. Each federal agency has its own definition, depending on the statute being enforced.[9] As these agencies seek to expand the scope of employee workplace protections, the Board's *Lutheran Heritage* standard fails to take into account an employer's other federal obligations to protect data from disclosure. The explosion of incidents of data theft or "hacking" shows the significant challenges faced by employers seeking to protect confidential information and protect the privacy of its employees, customers, suppliers, and partners. Employers have a compelling reason for broadly defining data protection policies to keep up with the rapidly changing environment.

The same can be said with respect to policies requiring employees to threat others with respect. Both the United States Department of Labor, to combat workplace violence, and the Equal Employment Opportunity Commission, to combat workplace harassment, have taken steps to combat workplace "bullying." The United States Department of Labor's "Workplace Violence Program" identifies as a warning sign of workplace violence "verbal abuse including offensive, profane and vulgar language; and threats (direct or indirect), whether made in person or through letters, phone calls, or electronic mail." U.S. Dep't of Labor, DOL Workplace

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[9] *See LabMD, Inc.*, Docket No. 9357, 2016 FTC LEXIS 128 (July 28, 2016); FTC Staff, Comments Before the Federal Communications Commission: Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, FCC 16-39, WC Docket No. 16-106 (May 27, 2016), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-federal-trade-commission-federal-communications-commission/160527fcccomment.pdf.

Violence Program, https://www.dol.gov/oasam/hrc/policies/dol-workplace-violence-program.htm. The EEOC has taken a similar approach. *See* EEOC, Proposed Enforcement Guidance on Unlawful Harassment for Public Input, EEOC-2016-0009-0001, (proposed January 10, 2017), https://www.regulations.gov/document?D=EEOC-2016-0009-0001.

With respect to the obligations imposed on Dollar Thrifty by state constitutions or statutes, the Board's approach runs afoul of the Tenth Amendment to the United States Constitution.

The Tenth Amendment to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X. Preservation of our federal system of freedom encompassed by the Constitution rests at the root of the Tenth Amendment. The Federal Constitution represents a grant of *limited* power in our system and the Supreme Court of the United States has consistently held that state constitutions and laws may be more protective of individual rights.[10]

The Board's *Lutheran Heritage* standard threatens to trample the efforts of the states to expand the protections offered to its employees. For example, 45 states adopted or have pending laws protecting individuals from data theft, including data theft of records maintained by employers.[11] An additional two states (California and Tennessee) adopted laws banning

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[10] *See* Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491 (1984).

[11] *See* Alaska Stat. § 45.48.010 et seq.; Ariz. Rev. Stat. Ann. § 44-7501; Ariz. Rev. Stat. Ann. § 44-1373; Ark. Code Ann. § 4-110-101 et seq.; Ark. Code Ann. § 4-86-107; Cal. Civ. Code § 1798.80 et seq.; Cal. Health & Safety Code § 1280.15; Cal. Civ. Code § 1798.85 et seq. Cal. Lab. Code § 226; Colo. Rev. Stat. Ann. § 6-1-716; Colo. Rev. Stat. Ann. § 6-1-715; Conn. Gen. Stat. § 36a-701b; Conn. Gen. Stat. § 42-470; Conn. Gen. Stat. § 42-471; Del. Code Ann. tit. 6 § 12B-101 et seq.; Del. Code Ann. tit. 18 § 3353 and § 3569; D.C. Code § 28-3851 et seq.; Fla. Stat. 501.171; Ga Code Ann. § 10-1-911 et seq.; Ga. Code Ann. § 10-1-393.8; Ga. Code Ann. § 10-15-1 et seq.; 9 Guam Code Ann. § 48.10 et seq.; Idaho Code § 28-51-104 et seq.; Idaho Code

workplace "bullying" and an additional twenty (20) states have considered or are considering laws to do so.[12] These anti-bullying statutes expand the obligation of an employer to take action to make sure no employee engages in "bullying" behavior, even if the motivation for the bullying behavior involves union organizing. Yet, the Board's ban on the adoption of workplace policies designed to comply with these laws and combat the very harm cited effectively prohibits employers from complying with state law.

To be sure, where the United States Congress has acted to expressly ban actions by an employer or union through the express language of the Act (say, for example, by banning "hot cargo" clauses or other unlawful boycotts), the Tenth Amendment cannot be used to shield a respondent's otherwise unlawful conduct. The same cannot be said when the legal standards

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§ 28-52-108; 815 Ill. Comp. Stat. Ann. 530/1 et seq.; 815 Ill. Comp. Stat. Ann. § 505/2RR; § 505/2QQ; § 530/01 et seq.; 740 Ill. Comp. Stat. Ann. 14/1; Ind. Code § 24-4.9-1-1 et seq.; Iowa Code. § 715C.1 et seq.; Kan. Stat. Ann. § 50-7a01 et seq.; Kan. Stat. Ann. § 75-3520; La. Rev. Stat. Ann. § 51:3071 et seq.; Md. Code Com. Law § 14-3501 et seq.; Md. Code Ann. Com. Law § 14-3401 et seq.; Md. Code Ann. Lab. and Empl. § 3-502(d); Mass. Gen. Laws ch. 93H §1 et seq.; Me. Rev. Stat. Ann. tit. 10, § 210-B-1346 et seq.; Me. Rev. Stat. Ann. tit. 10 § 208-A-1271 et seq.; Mich. Comp. Laws Ann. 445.61 et seq.; Mich. Comp. Laws Ann. § 445.81 et seq.; Minn. Stat. § 325E.61; Minn. Stat. § 325E.59; Minn. Stat. § 325E.64; Mo. Rev. Stat. § 407.1500; Mo. Rev. Stat. § 407.1355; Mont. Code Ann. § 30-14-1704; Mont. Code Ann. § 30-14-1701 et seq.; Neb. Rev. Stat. § 87-801 et seq.; Neb. Rev. Stat. § 48-237; Nev. Rev. Stat. 603A.010 et seq.; Nev. Rev. Stat. § 239B.030; Nev. Rev. Stat. § 603A.215 et seq.; N.H. Rev. Stat. Ann. § 359-C:19 et seq.; § 332-I:5; N.J. Stat. Ann. § 56-8-161 et seq.; N.M. Stat. Ann. § 57-12B-1 et seq.; N.Y. Gen. Bus. Law § 899-aa; N.Y. Gen. Bus. Law § 399-ddd; N.Y. Lab. Law § 203-d; N.C. Gen. Stat. § 75-60 et seq.; N.D. Cent. Code § 51-30-01 et seq.; Ohio Rev. Code Ann. § 1349.19; Okla. Stat. § 24-161 et seq.; Okla. Stat. § 40-173.1; Or. Rev. Stat. § 646A.600 et seq.; 73 Pa. Stat. Ann. § 2301 et seq.; 74 Pa. Stat. Ann. § 201 et seq.; 10 P.R. Laws Ann. § 4051 et seq.; 42. R.I. Gen Laws § 6-48-8; §6-13-15, 6-13-17 and 6-13-19; 42 R.I. Gen. Laws § 11-49.3-1 et seq.; S.C. Code Ann. § 39-1-90; S.C. Code Ann. § 37-20-180; Tenn. Code Ann. § 47-18-2101 et seq.; Tex. Bus. & Com. Code Ann. § 521.001 et seq.; Tex. Bus. & Com. Code Ann. § 501.001 et seq.; Utah Code Ann. § 13-44-101 et seq.; Utah Code Ann. § 13-45-301; Va. Code Ann. § 18-2-186.6; § 32-1-127.1; Va. Code Ann. § 59.1-443.2; VT Stat. Ann. tit. 9 § 2430 et seq.; V.I. Code tit. 14 § 2200 et seq.; Wash. Rev. Code § 19.255.010 et seq.; W. Va. Code, § 46A-2A-101 et seq.; Wis. Stat. Ann. 134.98; Wyo. Stat. Ann. 40-12-501 et seq.

[12] *See* Cal. Gov't. Code §12950.1 and Tenn. Code Ann. § 50-1-501 et seq.; *see also* ALJ Ex. 2 at tabs 6-26).

adopted by the Board reflect the shifting policy views of administrative agencies. Particularly here, where as shown above, the Board's pronouncements as to the legality of workplace conduct standards have changed over time and where those responsible for administering the Act have as much difficulty applying those standards as anyone else.[13]

If Dollar Thrifty cannot implement and maintain work rules that broadly prohibit the revelation of PII and broad rules that seek to prevent workplace violence and bullying, it cannot satisfy its many other legal obligations.

B. Under Current Standards, Dollar Thrifty's Rules Do Not Violate the Act

Even were the Board to decide to maintain the *Lutheran Heritage* standard, Dollar Thrifty contends that its workplace policies, when read in context and in their totality, cannot reasonably be read to prohibit Section 7 activity. Dollar Thrifty's policies and work rules contain numerous references to employee rights under the Act and state law, and contain specific examples of the types of conduct which would violate the rules – conduct which makes clear to the reasonable employee that lawful Section 7 activity will not be found to violate the policies.

In determining whether the maintenance of a work rule violates Section 8(a)(1) of the Act, the Board has adopted the following currently applicable legal standard:

> [A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. . . . In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. . . . Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful.

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[13] *Gutierrez-Brizuela*, 834 F.3d at 1152. *See also TransAm Trucking, Inc. v. Admin. Review Bd., United States DOL,* 833 F.3d 1206 (10th Cir. 2016); *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015).

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

Martin Luther Memorial Home, Inc., 343 NLRB 646 (2004).[14] In applying this standard, the Board has made clear that an employer's rules must be read in their totality and in context. *Id.; see also Tradesmen International*, 338 NLRB 460 (2002); *see also* NLRB Office of Gen. Counsel, Report of the General Counsel Concerning Employer Rules, Memorandum GC 15-04, (Mar. 18, 2015).

Under the *Lutheran Heritage* standard, Dollar Thrifty contends that its rules do not violate the Act.

With respect to the challenged rules which appear in the Security Statement,[15] the Security Statement expressly advises employees that, notwithstanding anything contained in it, the document cannot be read to prohibit employees from disseminating or disclosing information for purposes protected by the Act.

> For the avoidance of doubt, notwithstanding any other provision of this Agreement, ***it shall not be a violation of this Agreement for employees to discuss or communicate with others regarding matters related to their wages, hours, and other terms and conditions of employment***, provided they do not divulge private or confidential information that they accessed or obtained solely by virtue of the duties they perform for the Company."

(G.C. Ex. 7 at 8) (emphasis added). By expressly incorporating the statutory protections contained in the Act, Dollar Thrifty has done precisely what the Board has called on all employers to do – draft its rules to make sure that the rules are read by employees consistent with the Act.

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[14] The General Counsel does not allege either that the challenged rules were adopted in response to protected activity or were applied in a manner to deprive employees of the right to engage in protected activity.

[15] *See* G.C. Ex. 7 at 8, 9, 11-12; G.C. Ex. 1(d), at ¶¶3(d), (e), (f), (g), (k), (l), (m), (n)).

In addition, Dollar Thrifty has promulgated many other policies and rules all of which, when read together, clearly shows its attempt to balance the protected Section 7 rights of its employees with the need to maintain workplace discipline. For example, the Social Media policy expressly advises employees:

> ***Nothing contained in this procedure shall be interpreted or applied in a way that interferes with the legal rights of employees to engage in Section 7 activities per the National Labor Relations Act.***

(R. Ex. 2 at 5) (emphasis added). The Code of Conduct provides, among other things:

> Remember, no single document can cover all the situations that we may encounter throughout the course of our work.
>
> * * *
>
> Laws can be complex, and vary from one country to the next. ***This makes it all the more important that we familiarize ourselves with the laws and regulations that apply to our specific jobs.***

(R. Ex. 4 at 2-3) (emphasis added). The Employee Handbook similarly advises employees:

> The policies, practices and benefits set forth in this Handbook are subject to applicable laws and regulations and may be applied differently in some states in order to comply with such laws. . . . To the extent there is any conflict between a policy of the Company and any material set forth in this Handbook, including any policy summary, the policy of the Company posted at www.dtgnet will control and prevail.

(G.C. Ex. 4 at 6.) Finally, throughout the policy statements and materials, Dollar Thrifty has done more than simply articulate a set of "rules" to follow. Rather, the Company attempted to educate its employees by providing real world examples of conduct, by employees and managers alike, which could conflict with the rights of others. Whether leaving confidential employee files unattended for others to see, or disclosing confidential information about an upcoming acquisition so a relative can decide whether to trade stock, or pressuring an employee to disclose the confidential information of a former employer and now competitor, the Company seeks to have its employees comply with the strict ethical, moral and legal obligations undertaken.

Furthermore, Dollar Thrifty's rules with respect to contacts with the media similarly make clear, when read in context, that Dollar Thrifty refers to contacts with the media where the speaker purports to be speaking ***on behalf of the Company***, rather than as an individual.

> . . . If an employee is caught off guard by a film crew, they should respond with 'I am not authorized ***to speak on Company's behalf, our corporate headquarters handles all media inquiries.*** I would be happy to refer you to our Public Affairs Department.
>
> * * * *
>
> Note: Third parties (vendors, business partners, etc.) ***are not permitted to speak on Company's behalf*** nor are they permitted to issue press statements involving Company without Public Affairs' prior approval and involvement.

(G.C. Ex. 7 at 36-37) (emphasis added). The repeated references to the effect that, unless authorized, individuals cannot hold themselves out as speaking for the Company is implicit in every aspect of the challenged policy. Similarly, the Social Media policy makes crystal clear the Company's concern – preventing employees from holding themselves out as Company representatives – not in prohibiting employees from speaking as individuals.

> Employees are not authorized to speak on behalf of the Company via Social Media. . . . . You therefore must make clear that you are not speaking on behalf of the Company and that the views expressed are your own and not those of the Company.

(R. Ex. 2 at 4.)

Accordingly, when read in context, Dollar Thrifty contends its rules and policies do not violate the Act.

Dollar Thrifty anticipates that the General Counsel may argue its Security Statement violates the Act despite its disclaimers because the Security Statement excludes from protection the disclosure of information obtained as a result of an employee's duties. Dollar Thrifty contends that it may appropriately prohibit employees from using for their own purposes information regarding others obtained in the course of their employment. As the record shows, Dollar Thrifty employees have access to highly confidential and potentially harmful information

about coworkers – credit and debit card information, criminal conviction information, ongoing criminal investigations, medical disabilities (including mental disabilities or handicaps), illnesses, or even suicidal behavior. While in theory one could envision a situation where that information could be used to support "concerted" activity, no employee should be given the right to "hack" data belonging to others and use it for their own purposes. This Board has never permitted such a result and should not do so here. *Bethany Medical Center*, 328 NLRB 1094 (1999) (concerted activity not protected if unlawful, violent, in breach of contract, or otherwise indefensible). Dollar Thrifty respectfully contends that releasing the details of a co-workers on premises suicide or life-threatening medical condition, even if for purposes of organizing, would be "indefensible."

C. General Counsel's Allegations in Paragraphs 3(A), (B), (C), (D), (F), (G), (H), (I) and (J) of the Complaint Are Untimely under Section 10(B) of the Act

The General Counsel alleges that certain no-solicitation, no-distribution rules contained in G.C. Ex. 6 violate the Act. (*See* G.C. Ex. 1(d), at ¶¶3(a), (i).) As shown below, Dollar Thrifty respectfully contends that the General Counsel has failed to show these rules were promulgated or maintained during the Section 10(b) period.

Settled law holds that Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." In order for a complaint to issue challenging the lawfulness of a work rule, the rule must have been (1) promulgated; (2) maintained; or (3) enforced during the 10(b) period. National Labor Relations Board Office of General Counsel, Case No. 7-CA-26678, 1987 NLRB GCM LEXIS 149, at *8 (Oct. 30, 1987); *Alamo Cement Co.,* 277 NLRB 1031, 1037 (1985).

Here, the General Counsel has offered no evidence that ***any of the rules*** contained in G.C. Ex. 6 were maintained during the Section 10(b) period.[16] The only testimony offered on this point was the vague and unsubstantiated testimony of the Charging Party's representative, Debra Media. Ms. Medina testified that during an unrelated grievance meeting over the pay treatment of a bargaining unit employee, she requested and Dollar Thrifty provided copies of materials from the employee's personnel file. Those documents contained the challenged rules. There is absolutely no evidence that the Company ever claimed the no-solicitation, no-distribution rule was still in effect. Indeed, the Company seemingly never referenced any specific policy at all.

In finding that Dollar Thrifty failed to show that it ***had not maintained*** the challenged rule, the ALJ simply gave "lip service" to the obligation of the General Counsel to prove the allegations of his own complaint. Namely, the General Counsel *alleged* that Dollar Thrifty had *maintained* the challenged rule. Dollar Thrifty expressly *denied* that it had done so and affirmatively alleged that the allegation were barred by Section 10(b). Yet, in her legal analysis, the ALJ concluded that because Dollar Thrifty admitted that ***some*** challenged rules had been maintained during the Section 10(b) period (but denied that this challenged rule had been so maintained), that Dollar Thrifty assumed the responsibility of disproving the General Counsel's non-existent case.

The General Counsel's and the ALJ's analysis amounts to nothing more than an assertion that because some document was in a file which was handed over to the Union at its request (in connection with an unrelated grievance over a pay dispute), then it must mean that ***every word of every document contained in the file*** must be "still active." The fact that an outdated policy

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[16] The ALJ erroneously states that Dollar Thrifty did not assert a 10(b) affirmative defense, but it indeed did in its Answer. *See* G.C. Ex. 1(f) at 3.

may have been located in ***one person's personnel file*** cannot substitute for evidence that such a policy was maintained either during the Section 10(b) period or on a ***nationwide basis.*** *See e.g. American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, fn. 17 (2006) ("[A] date on a memo does not establish that the policy was actually operative on that date or at the time of events herein.").

To be sure, the General Counsel had a witness on the stand who obtained the material from Dollar Thrifty. Counsel for the General Counsel could have asked, but did not, whether Dollar Thrifty's representatives had said anything about the applicability of the policies and rules turned over. Counsel for the General Counsel could have asked, but did not, whether Dollar Thrifty's representatives had made any mention of the challenged rule at all. Counsel for the General Counsel could have subpoenaed, but did not, copies of all such rules contained in the personnel files of all of the other bargaining unit employees. Counsel for the General Counsel did none of those things. Significantly, Counsel for the General Counsel had a copy of the no-solicitation, no-distribution policy maintained during the Section 10(b) period and ***expressly declined to allege that it violated the Act.*** In contrast to G.C. Ex. 6, G.C. Ex. 7 contains very different language on this topic – language which the General Counsel has elected not to challenge because he has considered it to be lawful.

The ALJ's effort to rescue the allegation warrants mention, but nothing more. To find the violation, the ALJ asserted that because Dollar Thrifty relied on a different work rule contained in the personnel file (the ALJ did not say which work rule nor did she even bother to identified the ***which piece of paper contained the mystery work rule***). Of course, such an contention is patently absurd. An employee may have an W-4 form in her or his file which contains a home address, but that does not mean the employee still lives at that address. A

personnel file may contain salary information, but that document does not mean the employee still makes that same salary. A medical file may contain information showing the employee had a loathsome disease. But just because the document has not been removed does not mean the employee still has that disease.

At the end of the day, the General Counsel alleged that Dollar Thrifty maintained the allegedly unlawful no-solicitation, no-distribution rule during the six month period preceding the filing of the charge. When Dollar Thrifty denied the allegation, the Counsel for the General Counsel had to ***prove*** the claim. By not introducing any evidence, these allegations simply fail.

VI. CONCLUSION

Because the allegations of the General Counsel's Complaint are unsupported and the Board's standard is not viable, Dollar Thrifty respectfully requests that the Complaint be dismissed.

Dated: March 30, 2017

DOLLAR THRIFTY AUTOMOTIVE GROUP

By: _____

MATTHEW T. MIKLAVE
Robinson & Cole LLP
Chrysler East Building
666 Third Avenue – 20th Floor
New York, NY 10017-4132
Telephone: (212) 451-2900
Facsimile: (212) 451-29999
Email: mmiklave@rc.com
Attorney for Employer

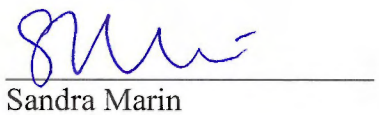
CERTIFICATION

I hereby certify that a true copy of the foregoing DOLLAR THRIFTY AUTOMOTIVE GROUP'S BRIEF IN SUPPORT OF EXCEPTIONS was served on the interested parties in this action on this 30th day of March 2017, to the following:

VIA EMAIL:

Todd Saveland
Counsel for the General Counsel
National Labor Relations Board, Region 27
Byron Rogers Federal Building
1961 Stout Street, Suite 13-103
Denver, CO 80294
todd.saveland@nlrb.gov

Debra Medina
Vice President
Communications Workers of America,
Local 7777
2840 South Vallejo Street
Englewood, CO 80110
dmedina@cwa7777.org



Sandra Marin