

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 27-CA-184730

CHARLES SCHWAB & CO., INC.,

Respondent,

and

MICHELLE HUSTON, an Individual,

Charging Party.

**RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION

Respondent Charles Schwab & Co., Inc. (“Schwab” the “Company,” or “Respondent”), pursuant to Rule 102.46 of the National Labor Relations Board’s (“NLRB” or “Board”) rules, respectfully submits this brief in support of its contemporaneously filed Respondent’s Exceptions to the Decision of Administrative Law Judge (“ALJ”) Jeffery Wedekind, dated June 26, 2017 (“ALJD”).¹ The ALJ erred in concluding Respondent violated Section 8(a)(1) of the National Labor Relations Act (“NLRA” or the “Act”) by maintaining a rule in its Business Conduct Policy that prohibits all employees from engaging in “any ‘acts of disrespect . . . , including making disparaging comments to or about co-workers . . .’ in their interactions or business dealings with clients, coworkers, vendors, and the public.” The decisions the ALJ relied on to determine the Company’s work rule violates the NLRA are easily distinguished from the facts of this case. Namely, the decisions cited by the ALJ were all in the context of prohibitions of either disrespect or disparaging comments to or about **supervisors** or **the company**, while Schwab’s rule is expressly limited to **co-workers** and **clients**.

This case also provides the Board an opportunity to overrule its decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The *Lutheran Heritage* decision held facially neutral policies, work rules, and handbook provisions—which do not expressly restrict Section 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity—would be deemed unlawful whenever any employee “would reasonably construe the language to prohibit Section 7 activity.” (Hereinafter the “reasonably

¹ The Administrative Law Judge’s decision is cited as “ALJD” followed by the appropriate page number(s).

construe standard.”) Schwab respectfully asserts the reasonable construe standard was wrongfully decided, is contrary to existing case law, is contrary to the Board’s goal of promoting labor stability, and fails to consider unique characteristics of particular work settings and different industries, or specific events that might be associated with a particular policy, rule or handbook provision. Therefore, *Lutheran Heritage* and its reasonable construe standard should be overruled by the Board or repudiated by the courts.

Under either the *Lutheran Heritage* reasonable construe standard or a more appropriate approach that includes the balancing of an employer’s legitimate interests, Schwab’s work rule does not violate the NLRA.

STATEMENT OF THE CASE

General Counsel issued a Complaint challenging Schwab’s rules prohibiting, among other things, “acts of disrespect or unprofessional or rude conduct, including making disparaging comments to or about co-workers. . .” (ALJD p. 1, fn 2.) General Counsel contended the challenged rule was unlawfully overbroad because it would reasonably be interpreted by employees as prohibiting conduct protected by Section 7 of the NLRA. (ALJD p. 1.) The Respondent contended the rule, on its face and considered in context, would not be reasonably construed to prohibit protected activity. (ALJD p. 1.)

A hearing was held before Administrative Law Judge Jeffrey D. Wedekind on May 9, 2017 in Denver, Colorado. (ALJD p. 1.) Briefs were submitted on June 13, 2017 with supplemental briefs filed on June 21, 2107. (ALJD p.1, fn. 2.) On June 26, 2017, the ALJ issued a decision, finding the portion of Schwab’s policy related to “acts of disrespect” including “disparaging comments” towards co-workers violated the NLRA. (ALJD p. 8.)

QUESTIONS INVOLVED

1. Did the ALJ err and misapply Board decisions resulting in an erroneous finding that Respondent violated Section 8(a)(1) of the Act by maintaining a rule in its Business Conduct Policy that prohibits employees from engaging in “any ‘acts of disrespect . . . including making disparaging comments to or about co-workers’”? [Exceptions 1, 2, 3, 4, 5, 7.]

2. Did the ALJ err by relying on the reasonably construe standard established under *Lutheran Heritage* which was wrongly decided and should be overruled by the Board or repudiated by the courts? [Exceptions 1, 2, 5, 6, 7.]

STATEMENT OF FACTS

Schwab operates in a highly regulated and professional environment in which securities brokerage and banking professionals work. (ALJD p. 1.) Schwab maintains a Business Conduct Policy at its facilities in Lone Tree, Colorado and other facilities around the country. (ALJD p. 1.) The challenged rule at issue prohibits “acts of disrespect or unprofessional or rude conduct, including making disparaging comments to or about co-workers. . . .” There was no assertion the rule was promulgated in response to protected activity or was applied to restrict protected activity. (ALJD p. 1, fn. 3.)

ARGUMENT

I. The ALJ Misinterpreted and Misapplied Board Precedent.

The ALJ summarily concluded Schwab’s work rule prohibiting “any ‘acts of disrespect . . . including making disparaging comments to or about co-workers’ in their interactions or business dealings with clients, coworkers, vendors, and the public.” . . . violated Section 8(a)(1) of the NLRA. (ALJD p. 8.) In support of the Conclusions of Law (“Conclusions”) set forth in

the decision, the ALJ erroneously cited and misapplied six decisions in support of the Conclusions. The ALJ failed to consider the text and context of the work rules cited in the supporting decisions when compared to the Schwab rule at issue. The six decisions the ALJ cited are all in the context of conduct or comments toward or about either supervisors or the employer. Schwab’s rule, by contrast, expressly states it prohibits such conduct or comments to or about co-workers. Moreover, to eliminate any confusion about the scope of the rule, the Business Conduct Policy—containing the rule—expressly limits its application to employees’ “interactions or business dealings with clients, co-workers, vendors, and the public.” (ALJD, p. 1.) Accordingly, given the plain language of Schwab’s rule and the language limiting the rule to interactions and dealings with clients, co-workers, vendors, and the public, Schwab’s rule is clearly distinguishable from the six decisions the ALJ cited involving conduct and comments related to supervisors or the employer. The ALJ erred by misinterpreting and misapplying these decisions and by failing to consider the narrowly drafted and specific language of the Schwab rule.

A. Board Decisions Striking Down Employer Rules Prohibiting “Disrespectful” Conduct Are Limited to Cases in the Context of Disrespect Toward or About Supervisors and/or the Employer.

In support of the Conclusions, the ALJ stated, “the Board has repeatedly struck down employer rules broadly prohibiting any ‘disrespectful’ conduct.” (ALJD p. 7.) Specifically, the ALJ found support in *Component Bar Products, Inc.* 364 NLRB No. 140, slip op. (2016); *Casino San Pablo* 361 NLRB No. 148, slip op. (2014); and *Knauz BMW* 358 NLRB 1754 (2012). However, the ALJ failed to note the three cited decisions are all in the context of work rules prohibiting disrespectful conduct toward management.

1. *Component Bar Products, Inc.*

The work rule invalidated in *Component Bar Products, Inc.* was—on its face—distinguishable from Schwab’s rule. The *Component Bar* rule prohibited “insubordination and other disrespectful conduct.” 364 NLRB at 7. Noting that the Board has upheld rules prohibiting insubordination generally, the ALJ’s decision in *Component Bar*, which the Board affirmed, reasoned that the “inclusion of ‘other disrespectful conduct’ encompassed Section 7 activity that supervisors may perceive as an affront to their authority . . . include[ing] concerted complaints about supervisors or working conditions.” *Id.* at 10. It was the context of the prohibition of “disrespectful conduct” that rendered the rule unlawful.

Black’s Law Dictionary defines insubordination as refusal to obey some order which a superior is entitled to give and have obeyed. *See* Black’s Law Dictionary (10th ed. 2014). The term refers to a relatively narrow type of conduct. The *Component Bar* rule restricted the refusal to obey orders and other similar “disrespectful” conduct to those acts that supervisors may perceive as an “affront to their authority.” The example of “disrespectful conduct” given in the *Component Bar* decision was “complaints about supervisors or working conditions,” which would not constitute insubordination, but would be something akin to a lesser form of “insubordination”—failing to show proper respect for supervisors. *Id.*

Schwab’s rule contains no reference to insubordination or conduct toward management. Rather, Schwab’s rule is limited to acts of disrespect to or about co-workers or clients. The rule contains a key limitation—limiting the rule to interactions and dealings with clients, co-workers, vendors, and the public. Board precedent does not prohibit restrictions on disrespectful conduct directed towards clients, co-workers, vendors, and the public.

2. *Casino San Pablo*

Similar to the rule at issue in *Component Bar*, the rule invalidated in *Casino San Pablo* contained a reference to insubordination. 361 NLRB at 2. The *Casino* rule prohibited “[i]nsubordination or other disrespectful conduct (including failure to cooperate fully with Security, supervisors, and managers).” *Id.* The *Casino* rule took one step further than the rule in *Component Bar* by listing examples of “other disrespectful conduct.” *Id.* at 3. The *Casino* rule was intended to capture not only “insubordination” in the narrowly defined sense, but also something similar to—but less than—insubordination. The examples, “failing to cooperate fully with Security, supervisors, and managers” bespeak the fact that the rule was intended to prohibit any conduct that could be interpreted as an affront to management’s authority. A reasonable employee, therefore, could interpret such a rule as limiting concerted activity. In *Casino*, the Board reasoned the rule at issue could be deemed to prohibit behavior that is “insufficiently deferential to a person in authority—in other words, as referring to something *less* than actual insubordination.” *Id.* (emphasis in original.) The Board listed possible examples of rule violations as “the act of concertedly objecting to working conditions imposed by a supervisor” or “collectively complaining about a supervisor’s arbitrary conduct.” *Id.* Moreover, the Board stated, “a ‘failure to cooperate fully with’ management representatives easily encompasses conduct less than actual insubordination, including opposition Section 7 activity that managers deem uncooperative. . . .” *Id.*

The text and context of the *Casino* “disrespectful conduct” work rule—inserted between prohibitions of “insubordination” and a “failure to cooperate fully”—is vital to understand why the “disrespectful conduct” prohibition in *Casino* was unlawful and could reasonably be

interpreted as chilling Section 7 rights. The text and context of Schwab’s rule, on the other hand, contains no reference to insubordination or to failing to cooperate with management. Schwab’s rule is limited, by its terms and by limiting language contained in Schwab’s Business Conduct Policy, to clients, co-workers, vendors, and the public. The rule is limited to parties other than management and supervisors. Nothing in Schwab’s rule prohibits conduct that management may deem as an affront to authority.

3. *Knauz BMW*

The ALJ also cited *Knauz BMW* for the sweeping assertion that the Board repeatedly strikes down all rules prohibiting “disrespectful conduct.” In contradiction to the ALJ’s Conclusions, the rule in *Knauz BMW* expressly refers to a concern not present in the language of Schwab’s rule. The *Knauz BMW* work rule prohibited “disrespectful” language or other language that “injures the image or reputation of the [employer].” 358 NLRB at 1754. As in *Component Bar and Casino*, the *Knauz BMW* decision did not discuss the “disrespectful” portion of the rule in isolation. The Board determined an “employee reading this rule would reasonably assume that the [employer] would regard statements of protest or criticism as ‘disrespectful’ or ‘injur[ious]’ [to] the image or reputation of the [employer].” *Id.* The example of language that could injure the company as a violation of the rule demonstrates the *Knauz BMW* rule prohibiting “disrespectful” conduct was categorically different than Schwab’s rule. Schwab’s rule does not contain any language that could reasonably be interpreted as prohibiting Section 7 activity. The rule does not contain language related to injury to Schwab. As described above, the rule is limited to acts of disrespect toward or about co-workers or clients.

4. Board Precedent Not Cited by the ALJ Confirms Schwab's Rule Did Not Violate Section 8(a)(1).

In *Copper River of Boiling Springs, LLC*, 360 NLRB 459 (2014) the Board declined to conclude “that a reasonable employee would read [a] rule to apply to [Section 7] activity simply because the rule *could* be interpreted that way.” *Id.* at 471 (emphasis in original). The rule at issue in *Copper River* was similar to Schwab's provision because it prohibited “lack of respect” and required “cooperation with fellow employees or guests.” *Id.* at 469. The Board held the rule's reference to a negative impact on other staff and on guests should be read in context of an intention to protect the company's legitimate business interests. *Id.* The Board recently cited *Copper River* indicating the rule was “non-violative . . . because it included effects upon guests.” *Cordia Rests., Inc.*, No. 16-CA-160901, 2016 WL 7190991 (Dec. 9, 2016) (citing *Copper River*, 360 NLRB at 459).

In *Nat'l Dance Inst. – New Mexico, Inc.*, the Board adopted the ALJ's finding that the employer's rule prohibiting “disrespectful” conduct did not violate the Act. 364 NLRB No. 35 (2016). The ALJ held:

A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee would read the rule as prohibiting Section 7 activity. The question of whether a rule or policy is on its face a violation of the Act requires a balancing between an employer's right to implement certain legitimate rules of conduct in order to maintain a level of productivity and discipline at work, with the right of employees to engage in Section 7 activity.

Id. at 12 (emphasis in original).

Similarly, in *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), the company's policy required employees to “maintain[,] in management's sole judgment, satisfactory attitude . . . and/or relationships with other guests, employees, including supervisors.” *Id.* at 294. The Board

concluded that “an employer in a service industry may require that employees maintain a satisfactory attitude.” *Id.* Schwab operates in a service industry and requires its employees to avoid unprofessional, disrespectful, and rude conduct to co-workers and clients. Again, noticeably absent from Schwab’s rule is any prohibition against acts of disrespect or disparaging comments directed toward or about the Company or employees’ supervisors.

In another recent ALJ decision, which the Board upheld “for the reasons stated by the judge,” the ALJ distinguished between work rules prohibiting disrespect toward customers and co-workers and conduct that could possibly harm an employer’s reputation. *Boch Honda*, 362 NLRB No. 83 (2015). The rule at issue stated:

All employees are expected to be courteous, polite and friendly, both to customers and to their fellow employees. The use of profanity or disrespect to a customer or co-worker, or engaging in any activity which could harm the image or reputation of the Company, is strictly prohibited.

Id. The ALJ and the Board determined the rule violated the NLRA. *Id.* But the ALJ reasoned, and the Board agreed, that the first portion of the rule, related to disrespect to a customer or co-worker, did not violate the Act:

I find that no reasonable reading of the first sentence, as well as the first half of the second sentence (up to coworker) could be construed as limiting or prohibiting Section 7 rights. *Adtranz ABB Daimler-Benz Transp., NA, Inc.*, 331 NLRB 291 [167 LRRM 1196] (2000); *Lutheran Heritage*, supra, at 647. An employer is certainly permitted to maintain order in its workplace and promote harmonious relations between its employees, other employees and its customers. However, the provision prohibiting any activity which could harm the image or reputation of the company is clearly susceptible of being understood to limit employees in their right to engage in a strike, work stoppage or similar forms of concerted activities. The discourtesy policy provision therefore violates Section 8(a)(1) of the Act.

Id. at 10.

As in *Boch Honda*, no reasonable reading of Schwab's rule prohibiting acts of disrespect or disparaging comments to or about co-workers and clients could be construed as limiting or prohibiting Section 7 rights. Board decisions invalidating work rules that prohibit disrespectful conduct and disparaging comments are limited to the context of insubordination and/or conduct and comments to or about management.

Although not binding precedent, the General Counsel also issued guidance related to work rules of this nature. See General Counsel's Memorandum GC 15-04, Subject: "Report of the General Counsel Concerning Employer Rules" (March 18, 2015). The General Counsel's Memorandum highlights a variety of policies that do and do not violate the Act. Specifically, General Counsel stated, "when an employer's handbook simply requires employees to be respectful to customers, competitors, and the like, but does not mention the company or its management, employees reasonably would not believe such a rule prohibits Section 7-protected criticism of the company." GC Memo 15-04, page 8. In its Memorandum, General Counsel gives the following examples of a rule governing employees' interactions with customers that does not violate the Act:

- Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business.

Id. Schwab's work rule falls squarely within the kinds of policies permitted by precedent and recommended by General Counsel.

Because acts of disrespect toward managers or conduct that could injure Schwab are not prohibited by Schwab's rule, the rule is in stark contrast to the rules discussed by the three decisions the ALJ cited and relied upon. Schwab's "acts of disrespect" prohibition is limited to conduct to or about co-workers and clients. Moreover, as the ALJ recognized, the scope of the

rule is limited, prohibiting “acts of disrespect . . . in [employees’] interactions or business dealings with clients, coworkers, vendors, and the public.” (ALJD p. 8.) Accordingly, the ALJ erred by applying these prior decisions to the work rule at issue in this case and erred by holding that Schwab’s work rule violated the NLRA.

B. Board Decisions Striking Down Employer Rules Prohibiting “Disparaging” Comments Are Limited to Cases in the Context of Disparaging Comments Toward or About Supervisors and/or the Employer.

In support of the Conclusions, the ALJ also stated, “the Board has also repeatedly struck down rules prohibiting disparaging comments.” (ALJD p. 7.) The ALJ’s sweeping assertion fails to account for the text and context of the rules at issue in the three cited decisions: *Verizon Wireless* 365 NLRB No. 38 (2017); *William Beaumont Hospital* 363 NLRB No. 162, slip op. (2016); and *Lily Transportation Corp.* 362 NLRB No. 54 slip op. (2015). Each of the rules in these decisions is easily distinguished from Schwab’s work rule at issue in this case.

1. *Verizon Wireless*

The work rule at issue in *Verizon Wireless* was in the context of “[d]isparaging or misrepresenting the company’s products or services or its employees.” 365 NLRB No. 38, p. 4 (2017). A rule prohibiting disparaging or misrepresenting the company’s products or services is akin to a rule outlawing negative comments about the company. Moreover, the rule’s inclusion of the broad term “employees” could reasonably be read to mean that “employees could not . . . voice criticism of managers.” *Id.* at 19. Juxtaposed with Schwab’s rule, limited to disparaging comments about co-workers and clients, the work rule in *Verizon Wireless* broadly limited employees’ ability to comment about the company or about any employee, including supervisors. The *Verizon Wireless* rule could reasonably be interpreted to prohibit discussions related to

working conditions or supervisors' conduct, while Schwab's rule, on its face and with the limiting Business Conduct Policy language, is expressly limited to disparaging comments about co-workers, clients, vendors or the public. Thus, the ALJ erred by applying *Verizon Wireless* to the facts of this case.

2. *William Beaumont Hospital*

Similarly, the work rule at issue in *William Beaumont Hospital* prohibiting "disparaging comments" was in the context of comments "about the . . . professional capabilities of an employee or physician. . . ." 363 NLRB at 1. The rules the Board found unlawful in *William Beaumont Hospital* included a rule related to working conditions—prohibiting negative comments about "the moral character or professional capabilities of an employee or physician." *Id.* at 2. It is reasonable to posit that a physician would be in a supervisory role over other hospital staff, such as nurses working under the physician's direction. The Board held the rule was "unlawful because it would be reasonably construed to prohibit expressions of concerns over working conditions." *Id.* By contrast, Schwab's rule is limited to prohibiting disparaging comments to or about co-workers and could not reasonably be interpreted to restrict concerted activity under Section 7. Schwab's work rule, expressly limited in scope to employees' peers, is unequivocally different than the rule in *William Beaumont Hospital*. The ALJ failed to take these key distinctions into account.

3. *Lily Transportation Corp.*

The ALJ also relied on *Lily Transportation Corp.* to support the sweeping assertion that the Board strikes down all work rules prohibiting "disparaging" comments. The work rule in *Lily* is also on its face and in context distinguishable from Schwab's work rule. The rule in *Lily*

prohibited “disparaging . . . comments involving [the employer] or [the employer’s] employees and associates on the internet. . . .” 362 NLRB at 8. Indeed, the *Lily* rule prohibited disparaging comments about the company. *Id.* The Board noted that it found “virtually no distinctions” between the rule in *Lily* and rules in other cases, including *Claremont Resorts & Spa*, 344 NLRB 832 (2005) (finding unlawful a rule which prohibited “[n]egative conversations about associates and/or managers.”). The *Claremont* decision focused on the fact that the rule at issue could lead employees to believe they were prohibited from discussing complaints “about their managers that affect working conditions, thereby causing employees to refrain from engag[ing] in protected activities.” *Id.* (quoting *Claremont Resorts*).

Schwab’s rule does not prohibit its employees from making disparaging comments about Schwab or about all Schwab employees—including management. Rather, the rule is narrowly tailored to prohibit disparaging comments about employees’ co-workers.

As the D.C. Circuit held in *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. N.L.R.B.*, “America’s working men and women are as capable of discussing labor matters in intelligent and generally acceptable language as those lawyers and government employees who . . . condescend to them.” 253 F.3d 19, 26 (D.C. Cir. 2001). To hold otherwise, reveals a “low opinion of the working people.” *Id.* As the Court described, “it is preposterous that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to” disrespectful language. *Id.* at 26. Arguing that such a prohibition—without any reference to the Company or supervisors—would be interpreted to encompass concerted activity “is implausible.” *Community Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1088-89 (D.C. Cir. 2003).

Schwab's rule at issue does not contain any reference to management or the Company. Employees would not reasonably construe Schwab's rule as prohibiting protected Section 7 activity. Accordingly, as with the application of *Verizon Wireless* and *William Beaumont Hospital*, the ALJ misapplied *Lily* to the facts of this case by failing to account for crucial factual differences.

The ALJ erred by holding that Schwab's prohibition of disparaging comments to or about co-workers violates the NLRA.

II. *Lutheran Heritage* Should Be Overruled by the Board or Repudiated by the Courts.

As articulated by current Chairman Miscimarra in his dissent in *William Beaumont Hosp.*, *Lutheran Heritage* should be overruled by the Board or repudiated by the courts. *Lutheran Heritage* has multiple inherent defects including, but not limited to: (1) the failure to consider legitimate justifications of particular policies, rules, and handbook provisions, in violation of Supreme Court precedent and the Board's own cases; (2) the erroneous invalidation of facially neutral work rules solely because of a potential ambiguity; (3) the reasonably construe standard improperly limits the Board's discretion; (4) the reasonably construe standard fails to differentiate between industries and work settings without consideration of the potential future impact; and (5) the reasonably construe standard has created uncertainty for the Board, the courts, employers, and the unions—which is contrary to the Board's underlying goal of establishing labor peace.

A. The Board Is Not Bound by *Stare Decisis*.

The doctrine of *stare decisis* does not require that Board decisions be unchangeable; rather, the question in each case is whether the policy, standard, or decision is erroneous. *NLRB v. Kostel Corp.*, 440 F.2d 347, 350 (7th Cir. 1971). As the Supreme Court has noted:

The use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board's earlier decisions froze the development ... of the national labor law would misconceive the nature of administrative decisionmaking. "Cumulative experience' begets understanding and insight by which judgments ... are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."

NLRB v. Weingarten, 420 U.S. 251, 266 (1975) (citing *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953)).

In appropriate circumstances, the Board has not hesitated to overturn its precedent on numerous occasions. See, e.g., *Babcock & Wilcox Construction Co.*, 361 NLRB 132 (2014) (finding that existing standard does not adequately balance the protection of employees' rights under the Act and the national policy of encouraging arbitration of disputes arising over the application or interpretation of a collective-bargaining agreement); *Lamons Gasket Company*, 357 NLRB 72 (2011) (holding that the approach taken in prior decisions was flawed and returning to previous rule); *Oakwood Care Center*, 343 NLRB 659 (2004) (concluding that prior Board case was wrongly decided, and returning to previous precedent); *Levitz Furniture Co. of the Pacific*, 333 NLRB 105 (2001) (overruling precedent based on legal and policy reasons).

The Board should follow a similar path here, returning to its pre-*Lutheran Heritage* standards or adopting a standard similar to that articulated by Chairman Miscimarra of balancing facially neutral work rules against any potential impact on NLRA-protected rights.

B. The *Lutheran Heritage* Reasonably Construe Standard Is Contrary to Supreme Court Precedent Because It Does Not Permit Any Consideration of the Legitimate Justifications that Underlie Many Policies, Rules, and Handbook Provisions.

The *Lutheran Heritage* decision held facially neutral policies, work rules, and handbook provisions—which do not expressly restrict Section 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity—*would* be deemed unlawful whenever any employee “would reasonably construe the language to prohibit Section 7 activity.” (emphasis added.)² Under this standard, the Board is failing to consider a variety of factors and the context in which a specific policy is applied. In *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), the Court held:

Resolution of the issue presented by . . . contested rules of conduct involves ‘working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society.’

Id. at 797-798. This reference to a balanced approach has been routinely restated. *See, e.g., NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26,33–34 (1967) (referring to the Board’s “duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy”); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (referring to the “delicate task” of “weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be

² This approach emphasizes the right of the employee and ignores the rights of the employer which is inconsistent with the requirements set forth by the Court. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680–681 (1981) (“[T]he Act is not intended to serve either party’s individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved.”).

served by the employer's conduct.”). The Court requires the Board consider the interests of *both* the employee *and the employer*.

The *Lutheran Heritage* standard deviates from both Supreme Court precedent by focusing exclusively on employees' Section 7 rights while ignoring employers' legitimate justifications for promulgating reasonable workplace rules. *Lutheran Heritage* inappropriately restricts the Board's ability to engage in a balancing of interests. In particular, the reasonably construe standard limits the Board's consideration to whether an employee would reasonably construe a policy to prohibit any activity, regardless of the potential impact on the employer or the likelihood of an actual restriction on the potential protected activity. Clearly this is inconsistent with the balancing approach articulated in *Republic Aviation* and *Great Dane*.³

C. The Board's Application of the *Lutheran Heritage* Reasonably Construe Standard Is Inconsistent with Prior Board Rulings and Is Inconsistently Applied.

The Board, in its pre-*Lutheran Heritage* decisions, acknowledged the appropriateness of the Court's balanced approach and properly weighed the interests of both the employees and the employers. In *Lafayette Park Hotel*, the Board held, “[i]n determining whether the mere maintenance of [disputed] rules violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.” The Board went on to acknowledge, if a rule may reasonably chill a protected right, the rule may still be justified by significant employer interests. 326 NLRB No. 69 at 825 fn. 5 (1998).

The Board reaffirmed the need for a balanced approach in *Desert Palace, Inc. d/b/a Caesar's Palace*, reasoning that a rule prohibiting discussion of an ongoing drug investigation

³ The Board's authority under the NLRA is limited and the Board's constructions of the Act must be rational and consistent with it. See *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 576 (1994) (Board's interpretation was irrational and inconsistent with the NLRA).

was justified by the employer’s “substantial business justification” in protecting confidential information even if it entails “intrusion on its employees’ exercise of Section 7 rights.” 336 NLRB 271, 272 (2001). The Board held the issue should be framed to inquire “whether the interests of the Respondent’s employees in discussing this aspect of their terms and conditions of employment *outweighs* the Respondent’s asserted legitimate and substantial business justifications.” *Id.* (emphasis added).

Moreover, matters resolved before *Lutheran Heritage* would not survive the reasonably construe standard. For instance, the Board has already balanced certain rights: the right to limit solicitation and distribution (*Our Way, Inc.*, 268 NLRB 394 (1983)); the right to limit access to parts of an employer facility (*GTE Lenkurt, Inc.*, 204 NLRB 921, 921–922 (1973)⁴); and the right impose attendance requirements (*Health Management, Inc.*, 326 NLRB 801 (1998)). All of these kinds of rules have the potential to limit protected rights and all of these rules would fail the reasonably construe standard and, yet, the Board has upheld employers’ right to maintain such requirements.⁵ Similarly, in a post-*Lutheran Heritage* environment, the Board has seemingly ignored the reasonably construe standard and applied some form of balancing test. *See, e.g., Flagstaff Medical Center*, 357 NLRB 659, 663 (2011), *petition for review granted in part and denied in part*, 715 F.3d 928 (D.C. Cir. 2013) (upholding a no-photography rule in part because the rule implicated “weighty” interests associated with patient confidentiality.)

⁴ Overruled on other grounds in *Resistance Technology, Inc.*, 280 NLRB 1004, 1007 fn. 7 (1986), *enfd.* 830 F.2d 1188 (D.C. Cir. 1987)

⁵ *Our Way Inc.*, *supra*, was cited as proper authority by an Administrative Law Judge and affirmed by the Board as recently as January 23, 2017 in *T-Mobile USA, Inc.* 365 NLRB No. 15 (2017). *GTE Lenkurt, Inc.*, *supra*, was cited as proper authority by the Board as recent as August 12, 2016 in *Capital Medical Center*, 364 NLRB No. 69 (2016) (“While the holding in *GTE Lenkurt* was ‘narrowly construed’ in *Tri-County*, *see Nashville Plastic Products*, 313 NLRB 462, 463 [145 LRRM 1049] (1993), the principle that the legality of off-duty no-access rules rests on a balancing of the employer’s property rights and other legitimate interests against the impact of the rule on employee rights protected under the Act remains as valid today as it was then.”)

This inconsistent application results in uncertainty for employers, employees, and unions. See *William Beaumont Hosp.*, 363 NLRB at p. 16 -18(dissent) (Chairman Miscimarra’s summary of inconsistent rulings under the *Lutheran Heritage* standard.) In fact, the ALJ in *William Beaumont Hosp.* seemed to combine a balancing test and the reasonably construe standard. The ALJ held, “[d]etermination of the legality of work rules requires a balancing of competing interests: the right of employees to organize or otherwise engage in protected activity and the right of employers to maintain a level of discipline in the workplace” but then went on to apply a reasonably construe standard. *William Beaumont Hosp.*, 363 NLRB at 31.

This uncertainty and inconsistency flies in the face of one of the Board’s primary responsibilities: promotion of labor relations stability. See, e.g., *Northwestern University*, 362 NLRB No. 167 (2015) (Board declines to exercise jurisdiction in relation to scholarship football student-athletes because doing so would not promote stability in labor relations). See also *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (describing “the Act’s goal of achieving industrial peace by promoting stable collective-bargaining relationships”); *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) (“To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.”); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (“A basic policy of the Act [is] to achieve stability of labor relations.”). The Court emphasized the need to provide “certainty beforehand” for all affected parties so employers can “reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice,” and so a union may discern “the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing

so, it would trigger sanctions from the Board.” *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679, 684–686 (1981).

The *Lutheran Heritage* reasonably construe standard fails to achieve and, in fact, hinders the creation of industrial peace and, therefore, should be overruled by the Board or repudiated by the courts.

III. Under the *Lutheran Heritage* Reasonably Construe Standard or a Balancing Approach, Schwab’s Work Rule Prohibiting Acts of Disrespect and Disparaging Comments To or About Co-Workers Does Not Violate the NLRA.

Regardless of the law applied, Schwab’s work rule prohibiting acts of disrespect or disparaging comments about co-workers does not violate the NLRA. As more fully argued above, under the *Lutheran Heritage* reasonably construe standard, the ALJ’s Conclusions are inconsistent with the facts and applicable Board precedent. See *Copper River*, 360 NLRB at 471 (declining to conclude “that a reasonable employee would read [a] rule to apply to [Section 7] activity simply because the rule *could* be interpreted that way.”) (emphasis in original). Schwab’s work rule prohibiting acts of disrespect or disparaging comments contains limiting language, expressly limiting its application to conduct toward co-workers. Moreover, to avoid any confusion by Schwab’s employees about the scope of the rule, the Business Conduct Policy—containing the rule—also expressly limits the rule’s application to employees’ “interactions or business dealings with clients, co-workers, vendors, and the public.” (ALJD, p. 1.) Unlike the rules at issue in the decisions cited by the ALJ, Schwab’s rule contains no restrictions on conduct or speech toward or about management, the Company, or their working conditions. Accordingly, Schwab’s employees would not reasonably construe Schwab’s work

rule prohibiting its employees from acts of disrespect or from making disparaging comments about employees' co-workers to prohibit Section 7 activity.

Under an approach that balances Schwab's legitimate business interests, Schwab's work rule prohibiting acts of disrespect or disparaging comments to or about co-workers does not violate the NLRA. As noted in *Republic Aviation* and its progeny, employers have an interest in avoiding disruption of their workplace. 343 U.S. at 798 (employers have a right "to maintain discipline in their establishments."). See also *Caterpillar Tractor Co. v. Nat'l Labor Rel. Bd.*, 230 F.2d 357 (7th Cir. 1956) (the "protective mantle of Section 7 is tempered by the employer's right to exact a day's work for a day's pay and to maintain discipline, and does not reach activities which inherently carry with them a tendency toward, or likelihood of, disturbing efficient operation of the employer's business."). Prohibitions on acts of disrespect and disparaging comments between coworkers are a legitimate business interests and employees have a right to operate and perform their duties without disruption. See *Boch Honda*, 362 NLRB at 10 ("An employer is certainly permitted to maintain order in its workplace and promote harmonious relations between its employees. . . ."). Schwab's employees work closely together. Acts of disrespect or disparaging comments toward co-workers create an atmosphere contrary to the spirit of collaboration. See *Copper River*, 360 NLRB at 471 (upholding work rule prohibiting lack of respect and requiring "cooperation with fellow employees or guests."). The Schwab work rule at issue also does not violate the Act when assessed against a standard that balances its legitimate business interests.

CONCLUSION

Schwab's work rule prohibiting acts of disrespect and disparaging comments to or about co-workers does not violate the NLRA. The work rules contained in the decisions the ALJ cited and relied upon to support the conclusory assertion that all rules relating to disrespectful conduct and disparaging comments are unlawful under Board precedent are factually distinct from Schwab's rule. As with work rules upheld in prior decisions and deemed valid in General Counsel's Memorandum GC 15-04, Schwab's work rule at issue does not extend to conduct or comments to or about the Company or management. Instead, the rule is limited in scope to conduct or comments to or about co-workers and clients. Accordingly, Schwab's rule does not contain any language that could reasonably be interpreted as prohibiting Section 7 activity. The ALJ erred in finding Schwab violated Section 8(a)(1) of the Act by maintaining a rule in its Business Conduct Policy that prohibits employees from engaging in "acts of disrespect . . . including making disparaging comments to or about co-workers."

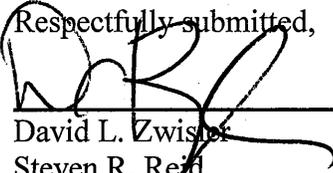
The *Lutheran Heritage* reasonably construe standard contradicts both Supreme Court precedent and the Board's own decisions recognizing the necessity of balancing Section 7 rights with those of employers' legitimate business interests. Accordingly, the Board should overrule the *Lutheran Heritage* reasonably construe standard.

Regardless, under the flawed *Lutheran Heritage* reasonably construe standard or a more appropriate standard balancing the employer's legitimate business interest, Schwab's work rule prohibiting acts of disrespect and disparaging comments to or about co-workers does not violate the NLRA. Schwab's rule does not prohibit acts of disrespect or disparaging comments to or about management or the Company, but rather is limited to such conduct toward co-workers. As

the D.C. Circuit held, “America’s working men and women,” such as Schwab’s employees, are “capable of discussing labor matters” without resort to disrespectful or disparaging language. *Adtranz*, 253 F.3d at 26. The D.C. Circuit also held that a determination that a rule similar to Schwab’s rule—without reference to management or the employer—encompassed concerted activity was “implausible.” *Community Hosps. of Cent. Cal.*, 335 F.3d at 1089.

Schwab’s work rule does not violate the NLRA under either standard because there is no reasonable interpretation of Schwab’s rule that would lead to the conclusion that the rule obstructs Section 7 activity. The Conclusions of the ALJ finding Schwab’s policy violated the Act should be reversed.

Dated August 24, 2017.

Respectfully submitted,


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CERTIFICATE OF SERVICE

The undersigned certifies that on August 24, 2017, a copy of the foregoing **RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** has been filed via electronic filing with:

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