

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

UNION TANK CAR COMPANY,

Employer
and

Case 12-RC-221465

**INTERNATIONAL ASSOCIATION OF
SHEET METAL, AIR AND RAIL
TRANSPORTATION WORKERS (SMART),**

Petitioner

UNION TANK CAR COMPANY

and

Cases 12-CA-210779, 12-CA-19374,
12-CA-220822, 12-CA-222661

**INTERNATIONAL ASSOCIATION OF
SHEET METAL, AIR AND RAIL
TRANSPORTATION WORKERS (SMART)**

COUNSEL FOR THE GENERAL COUNSEL’S REPLY BRIEF

Pursuant to Section 102.46(h) of the Board’s Rules and Regulations, Counsel for the General Counsel (General Counsel) files this Reply Brief to Respondent’s Answering Brief to the General Counsel’s Exceptions to the Decision of the Administrative Law Judge in the above-captioned cases.

I. INTRODUCTION

In its Answering Brief, Respondent makes assertions about certain arguments contained in Counsel for the General Counsel’s Brief in Support of Exceptions to the Decision of the Administrative Law Judge and urges the Board to depart from its reasonable and long-established precedents acknowledging the “chilling effect” that handbook rules can have on employees

seeking to organize themselves for their mutual aid and protection.¹ Contrary to Respondent's assertions, the facts and arguments set forth in GC's Brief are supported by the record and extant Board case law. The Board should grant the GC's Exceptions for the reasons set forth below and in GC's Brief.

II. ARGUMENT

A. Respondent's Answering Brief relies on inapposite holdings regarding "off duty conduct" rules when more comparable rules exist in the same cases.

Like the ALJ's incorrect analysis of Rule 32, Respondent's Answering Brief directs the Board's attention to analysis in *Albertson's*, 351 NLRB 254 (2007) and *Lafayette Park Hotel*, 326 NLRB 824 (1998) of rules addressing off duty and off of the job conduct and which have no bearing on Rule 32, at issue in this case. Respondent's attempt to equate Rule 32 to those portions of those decisions finding rules prohibiting certain off duty conduct lawful fails in the face of clear analysis in *Lafayette Park Hotel*, **finding unlawful** a rule prohibiting "false, vicious, profane or malicious statements toward or concerning [the employer] or any of its employees." As set forth in detail in GC's Brief in at 14-17, when the rules at issue in *Lafayette Park Hotel* are compared side by side to Respondent's Rule 32, one it is apparent that the rule found unlawful by the Board is most similar to Respondent's Rule 32; the Board's analysis of that rule should be relied on here. Respondent's Rule 32 chills employees' Section 7 rights and is not outweighed by the purported justification of preventing only "maliciously false statements," because the plain text of the rule does not manifest that intent. The connection of the justification to the actual text is too tenuous to merit infringing on employees' rights in this way, especially when the remedy for the Employer

¹ Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge is referenced herein as "GC's Brief [page number]." Respondent's Answering Brief to General Counsel's Exceptions is referenced herein as "Respondent's Answering Brief [page number]." The Administrative Law Judge's Decision is referenced herein as "ALJD [page number:line number]." The Joint Exhibits are referenced herein as "JX [number]." The parties' Joint Stipulations, admitted into the record as Joint Exhibit 2, are referenced herein as "JS [paragraph number]." References to the hearing transcript are noted herein as "Tr. [page number]."

– to add the words “maliciously false” to the beginning of the sentence – is so simple. General Counsel’s Exceptions 1, 2, 12, and 14 should therefore be granted.

B. The Board has specifically declined to adopt Respondent’s desired framework for determining what a “reasonable” reading of an employer handbook rule is.

In *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265 (5th Cir. 2017), the Fifth Circuit Court of Appeals examined rules that had been found unlawfully overbroad by the Board. Those rules:

(1) encouraged employees to “maintain a positive work environment”; (2) prohibited “[a]rguing or fighting,” “failing to treat others with respect,” and “failing to demonstrate appropriate teamwork”; (3) prohibited all photography and audio or video recording in the workplace; and (4) prohibited access to electronic information by non-approved individuals.

Id. at 268. Working under the then-controlling law of *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004), the Fifth Circuit determined that only the third of the above rules violated the Act. In so doing, the Fifth Circuit meditated on the definition of the “reasonable employee” and determined that it is an “employee aware of their legal rights... who also interprets work rules as they apply to the everydayness of his job.” *Id.* at 271.

In *The Boeing Company*, 365 NLRB No. 154 (2017), the Board declined to adopt a definition of the “reasonable employee” – either that set forth by the Fifth Circuit, or any other definition. Rather, the Board rescinded the *Lutheran Heritage* test and established a new one:

when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. We emphasize that the Board will conduct this evaluation, consistent with 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,” focusing on the perspective of employees, which is consistent with Section 8(a)(1).

Id., slip op. at 3, quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967). Member Kaplan noted his preference for the Fifth Circuit’s construction of the “reasonable employee” for

purposes of NLRB analysis, but the Board majority did not join him. *Id.*, slip op. at fn. 14. This is not surprising, considering the complexity of determining what is and is not protected by Section 7 of the Act for trained experts in the field. To expect that there is such a thing as “a reasonable employee” who is “aware of their rights” and can determine for themselves what conduct is or is not permissible under broadly phrased employer rules is untenable in the real world. Thus, *Boeing* asks *the Board* to reasonably interpret the rule in question.

Accordingly, the Board should “focus on the perspective of employees” and evaluate “the nature and extent of the potential impact” of Rule 32 *as written* on hypothetical employees’ Section 7 rights, as set forth in GC’s Brief.² This analysis occurs prior to factoring in Respondent’s justifications. Rule 32 instructs employees not to make “statements[,] either oral or in writing, which are intended to injure the reputation of the Company or its management personnel *with* customers or employees,” on penalty of immediate discharge for a first offense. [JX 1, page 21 (emphasis added)]. Respondent’s non-disparagement rule therefore chills employees’ Section 7 rights by threatening discharge if employees make comments critical of Respondent and its treatment of employees, e.g., complaints about low wages, unsafe working conditions, or its unwillingness to bargain in good faith – statements that might “injure [its] reputation” with customers or employees. Accordingly, General Counsel’s Exceptions 1, 2, 12, and 14 should be granted.

C. Respondent’s Answering Brief fails to demonstrate that ALJ Amchan’s adverse inference as to Respondent’s purported justification for its no cell phones rule should not be equally applied to the non-disparagement rule.

ALJ Amchan reasonably inferred that Respondent’s “justification” for its printed handbook rule on cell phone use was undermined by its purported rescission of the rule in December 2017

² This analysis occurs independent of Respondent’s non-probative evidence of actual employees’ lack of awareness of the rule. See, e.g., *ImageFIRST*, 366 NLRB No. 182, slip op. at 1, fn. 3 (2018).

and further, reasonably inferred based on the timing of the rescission that the directive was issued because of the Union's charge in Case 12-CA-210779. Respondent's contention that it was error for him to make this logical inference is not supported by the actual available evidence. the Union filed the charge in Case 12-CA-210779 on November 30, 2017. Respondent's supervisors and managers were specifically instructed not to enforce the no-cell phone rule and the non-disparagement rule *in the handbook* as of an unspecified date in December 2017. Respondent did not tell managers not to enforce the handbook writ large pending its revision – only those two rules. Employees themselves were told nothing of the purported rescission. The record shows no evidence that any other rules replaced them in the interim until October 2018, when Respondent's new handbook issued. Thus, an inference that the cause of the rescission was the filing of the charge alleging their unlawfulness was entirely appropriate; likewise, the concomitant inference that the rules *as written* were not justified by the purported intent behind them was also entirely appropriate for ALJ Amchan to make. Respondent's supervisors and managers were specifically instructed not to enforce the handbook versions of the no cell phones rule and the non-disparagement rule, as of December 2017. The record shows no evidence that any other rules replaced them in the interim, until October 2018 when Respondent's new handbook issued. 1, 2, 12, and 14 should be granted.

D. As at the hearing, Respondent's Answering Brief mischaracterizes the role of the GC in this proceeding and then seeks – again – to penalize the Union for the GC's failing to fulfill it.

As set forth in detail in GC's Brief at 17-21, it was error for the ALJ to penalize the Union's position with respect to ordering a second representation election in part due to the General Counsel's "misgivings" about the strength of the Union's substantive or procedural arguments in this case. [ALJD 9 at fn. 10]. Respondent's Answering Brief claims that "the ALJ never mentioned the contents of General Counsel's post hearing brief in his Decision dated January 11,

2019.” [Respondent’s Answering Brief at 15, fn. 15.] If the ALJ was not referring in his footnote 10 to the General Counsel’s post-hearing brief, then he was referring to Tr. 12 and Tr. 34, where the General Counsel’s position on the parties’ burdens was clearly stated in the record and, apparently, interpreted by ALJ Amchan as “failure to support the Union’s position with regard to a new election.” It is clear that either way, this misimpression of the parties’ burdens influenced the ALJ’s conclusion that a new election was not appropriate. It was error for him to be so influenced.

At Tr. 34, counsel for Respondent asserted that, in fact, it *was* the General Counsel’s burden to prove that the circumstances warrant a new election. Counsel for the General Counsel is glad Respondent now “agrees” that it is not the General Counsel’s “role to advocate on behalf of the Union in the representation portion of the hearing,” but in the same paragraph, Respondent again characterizes the General Counsel’s lack of a position as a “failure to advocate” for a new election. [Respondent’s Answering Brief at 14.]

Respondent also misrepresents that the General Counsel “now seek[s] to have the election results set aside.” [Respondent’s Answering Brief at 14-15.] Contrary to Respondent’s assertion, the General Counsel is not seeking to have the election results set aside. Rather, the General Counsel is asking that the merits of the objections be determined without relying on the fact that the General Counsel took no position on whether the election should be set aside. If the ALJ’s determination to rely, in part, on General Counsel’s failure to advocate for a new election is permitted to stand, the General Counsel may be forced to take a position regarding the merits of objections in future election proceedings rather than remaining neutral. It is up to the Board to determine whether the circumstances of this case warrant a new election on the basis of all the available evidence, in light of the ALJ’s errors in this consolidated proceeding. Nothing in this

Reply nor the GC's Brief presumes otherwise. General Counsel's Exceptions 3 through 8 should be granted.

E. Although Respondent's Answering Brief correctly identifies applicable text in *International Baking Co. & Earthgrains*, 348 NLRB 1133, 1135 (2006), the instant case is nonetheless distinguishable from Supervisor Bridges' statement to Wallace regarding the severity of his punishment.

Respondent's Answering Brief correctly directs the Board's attention to section B of the Board's analysis in *International Baking Co. & Earthgrains*, 348 NLRB 1133, 1135 (2006), which is the section apparently being referenced by the ALJD at 10:15-17.³ However, the legal theory relied upon by Respondent from *Earthgrains, Tri-Cast, Inc.*, 274 NLRB 377 (1985), and *Beverly Enterprises*, 322 NLRB 333, 334 (1996) is distinguishable from the instant case because here, supervisor Bridges was not making a statement about hypothetical treatment in the future pursuant to a grievance procedure. Bridges was asserting to Wallace that the reason Wallace had received a 10-week suspension two weeks prior was that the Union wasn't letting Respondent "do its job," and that "it kind of sucks." [Tr. 102-103]. However, the Union and Respondent did not have a collective bargaining agreement in place, and there is no evidence that an interim grievance procedure had been adopted by the parties during bargaining.⁴ In light of these facts, Bridges' statement signaled to Wallace – as it would to any reasonable employee – that Respondent had decided to turn the thumbscrews in order to punish employees for having chosen Union representation, and was taunting Wallace with the notion that, absent the Union's presence in the facility, his punishment might have been far less severe.

³ Counsel for the General Counsel inadvertently overlooked section B of this decision and mistakenly relied on a different section of the decision at GC's Brief 28.

⁴ Although there is no direct evidence in the record regarding whether the parties had a collective bargaining agreement in place, the Employer withdrew recognition one year and three days after the Board certified the results of the first representation election. [JS 3-4]. If there had been an agreement reached after certification, the withdrawal of recognition would have been barred for one year by the execution of that contract. There is likewise no evidence in the record suggesting that the parties reached an agreement in three days, and it is reasonable to infer from the absence of any reference to one in the record that they did not.

The ALJ failed to find that this statement violated Section 8(a)(1) of the Act due to insufficient evidence that it occurred before Respondent's withdrawal of recognition from the Union, i.e., while the disaffection petition was circulating. However, it is not relevant what Respondent's legal obligations to the Union were at the time Bridges made the statement to Wallace, an employee whose employer had just declared – or was preparing to declare – the Union *persona non grata* in the facility. What is relevant is the impact Bridges' statement would have had on the continued support of a reasonable employee for labor organizing generally (i.e., the exercise of his Section 7 right to have a union represent himself and his coworkers in the future) and for this Union in particular. General Counsel's Exceptions 11, 13, and 15 should be granted.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in GC's Brief and Counsel for the General Counsel's Answering Brief to Respondent's Cross-Exceptions, the undersigned respectfully urges the Board to grant Counsel for the General Counsel's Exceptions and modify the ALJ's findings, conclusions of law, and recommended Order to include complete remedies for all of Respondent's violations of Section 8(a)(1) of the Act, as described above.

Dated: March 15, 2019.

Respectfully submitted,

/s/ Caroline Leonard

Caroline Leonard, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, Florida 33602
Telephone No. (813) 228-2662
Email caroline.leonard@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Counsel for the General Counsel's Reply Brief, was served on March 15, 2019 as follows:

By Electronic Filing:

Hon. Roxanne Rothschild
Acting Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

By Electronic Mail:

Hope K. Abramov, Esq.
Tabitha G. Davisson, Esq.
Conor P. Neusel, Esq.
Thompson Coburn LLP
One US Bank Plaza, Ste. 2700
St. Louis, MO 63101
habramov@thompsoncoburn.com
tdavisson@thompsoncoburn.com
cneusel@thompsoncoburn.com

Thomas Fisher
International Union of Sheet Metal, Air &
Rail Transportation Workers (SMART)
8882 Red Creek Drive
Semmes, AL 36575
tfisher@smart-union.org

/s/ Caroline Leonard
Caroline Leonard, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, Florida 33602
Telephone No. (813) 228-2662
Email caroline.leonard@nlrb.gov