

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

**SCHWAN'S HOME SERVICE, INC.,**

Respondent,

and

**PATRICK K. WARDELL,**

Charging Party.

Cases No. 27-CA-066674

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**Respondent's Answering Brief to  
the Acting General Counsel's Exceptions to the  
Administrative Law Judge's Decision and Order**

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## **I. Statement of the Case**

This handbook case is truly unique. Both the context and work environment where the allegedly offending rules exist matter enormously. Respondent Schwan's Home Service, Inc. (Schwan's or the Company) maintains an atypical working environment where wages and working conditions are considered an "open book." (ALJ Op. at 3). The Company "has a 'very open culture' with regard to employee discussions of wages, hours and working conditions." (ALJ Op. at 5). Everyone knows how much money everyone else earns. Schwan's posts daily and weekly sales information on large bulletin boards in each of its facilities and this sparks a near-constant discussion of wages and working conditions. Employees even freely and openly discuss unionization at Schwan's, discussions which the Company welcomes. Schwan's has never disciplined employees for these kinds of discussions or any other Section 7 activity, even when it takes place over the internet on public websites like [www.schwanssucks.com](http://www.schwanssucks.com).

Therefore, given the nature of the work environment, to find that the Company's rules or policies somehow tend to chill the exercise of Section 7 rights, the National Labor Relations Board would have to completely ignore the undisputed evidence that Schwan's employees do in fact constantly exercise their Section 7 rights. But the Board's precedent has made clear that it will not disregard the context in which these rules exist and it will not read them with a searching eye for technical violations—the context matters.

Accordingly, the General Counsel cannot establish a violation of the National Labor Relations Act in this case since Schwan's employees frequently and openly exercise their Section 7 rights, making it impossible to sincerely claim that any of the Company's rules somehow chilled the exercise of their Section 7 rights. The Board should affirm the Administrative Law Judge's (ALJ) recommend decision, order, and notice to employees.

## **II. Issues Presented for Review**

1. The ALJ found that the Company's rules and non-compete agreement did not violate Section 8(a)(1) because no employees could reasonably construe them to prohibit Section 7 activity, particularly when the undisputed evidence amply demonstrated that Schwan's employees engage in a near-constant exercise of their Section 7 rights without reprisal. The General Counsel put on no evidence to the contrary. Should the Board overrule the ALJ's findings of fact and recommended decision without any evidence of a violation?

2. The ALJ's recommended decision made clear that he considered the violations alleged in this case on a maintenance-only theory (as urged by the General Counsel), but the ALJ's statement of the issue included the words "promulgate and maintain." An employer, however, cannot maintain a rule without first promulgating it. Should the Board revise the ALJ's recommended decision when his statement of the issue was technically correct and, in any event, it had no effect on his recommended decision?

3. The ALJ's recommended order and notice to employees correctly advised employees of their rights and the labor law violations found in the case.

The order and notice were simple and easy to understand. Should the Board revise them to include lengthy, jargon-filled statements that add nothing to an ordinary employee's understanding of their rights under the Act or what took place in the case?

### **III. Statement of Facts**

#### **A. Schwan's Business – A Culture Where Wages and Working Conditions are an “Open Book”**

Headquartered in Marshall, Minnesota, Schwan's sells quality frozen food products door-to-door to residential and commercial customers throughout the contiguous 48 states. (ALJ Op. at 2; Tr. 14-15; Jt. Ex. 1 ¶ 3). The Company employs around 7,000 employees and has more than 400 distribution facilities, often referred to as depots. (ALJ Op. at 2; Tr. 15-16, 51). For operational purposes, Schwan's divided the geographic territories it serves into seven regions, which it recently consolidated into six regions because of depot closings. (Tr. 40).

At its depots, the Company employs two types of non-supervisory employees: the drivers, called route sales representatives, who drive Schwan's trucks and deliver and sell the Company's products to customers, (Tr. 50-52); and the material handlers that work exclusively in the depots loading trucks with product and handling inventory. (ALJ Op. at 2; Tr. 50-52).

Schwan's drivers spend the majority of their workdays on their routes making deliveries, except for the periods preceding and following their shifts. (ALJ Op. at 2; Tr. 52). Before their shifts, the drivers arrive in the mornings at the depots to meet with one another and review their routes and orders for the day.

(ALJ Op. at 2; Tr. 52). The drivers then head out with their trucks to make their deliveries and sales. (ALJ Op. at 2-3; Tr. 52). Because of their positions, Schwan's drivers have unique, personal access to customers' homes and businesses and in some cases, they deliver product directly to the customers' freezers when no one is home. (ALJ Op. at 8; Tr. 46-47, 66). The drivers also gain access to a lot of their customers' personal information like credit card numbers, addresses, daily routines, and even the names of children and pets. (ALJ Op. at 8; Tr. 47, 66-67).

The Company has fostered an open and entrepreneurial environment for employees, and it has consistently encouraged employees to discuss their wages. (ALJ Op. at 3; Tr. 55, 58, 76). Until recently, all Schwan's drivers earned the same base salary (\$38,000) per year, however, the compensation model changed in the fall of 2011, with each employee's earnings now tied to daily guarantees and commissions on sales they make and performance incentives. (ALJ Op. at 3; Tr. 54).

To stimulate sales, the Company conspicuously posts each driver's sales goals and the actual day-to-day sales numbers on large bulletin boards in the depots. (ALJ Op. at 3; Tr. 55, 59). This creates a competitive, yet friendly environment for the drivers, and it fuels a near-constant discussion about wages and earnings—particularly with the ease and prevalence of mobile communication technologies to stay constantly connected. (ALJ Op. at 3; Tr. 55, 108-09). The drivers all know precisely how they compare with each other in terms of sales and compensation. (ALJ Op. at 3; Tr. 59). Their wages and working con-

ditions are considered an “open book.” (ALJ Op. at 3; Tr. 55). The Company “has a ‘very open culture’ with regard to employee discussions of wages, hours and working conditions.” (ALJ Op. at 5).

The physical design of Schwan’s depots also works to encourage a frank, open discussion of wages and working conditions. (ALJ Op. at 2-3; Tr. 52). The depots typically have a common area, usually in the middle of the depot, that includes a large table surrounded by chairs or stools. (ALJ Op. at 2; Tr. 52). As a natural congregation point, the drivers meet at these tables for their morning meetings where sales (*i.e.*, wages) are a constant topic of conversation. (ALJ Op. at 2-3; Tr. 52). The Company has encouraged the drivers to discuss terms and conditions of employment with one another and their families, and employees have the freedom to speak both positively and negatively about Schwan’s. (ALJ Op. at 2-3; Tr. 59, 62-63, 106-107).

## **B. The Company’s Handbook**

Like most employers, Schwan’s maintains an employee handbook to formalize its expectations for employees and to provide general information about the Company’s benefit programs. (ALJ Op. at 3; Jt. Ex. 3; Tr. 18-19). Last updated in February 2009, the handbook is 29 pages in length and it covers the predictable topics found in most employee handbooks. (Jt. Ex. 3; Tr. 19). Schwan’s identifies the acceptable standards for employee conduct through a series of 36 enumerated rules under the section of the handbook aptly named “standards of conduct.” (Jt. Ex. 3 at 11-23).

In this case, the General Counsel charged several of the Company's handbook rules as unlawful, but he failed to account for context for these rules. (Tr. 55; GC Ex. 1(m)). The Board has repeatedly said that an employer's rules do not live in a vacuum and cannot be read in isolation—context matters tremendously. Therefore, Schwan's has provided the text of these rules in their entirety, along with the context in which these rules exist.

**1. Rule 12 – Security of Company Information**

Rule 12 of the Company's handbook states that:

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

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

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

(ALJ Op. at 3-4; Jt. Ex. 3 at 15).

The purpose of Rule 12 is to safeguard Schwan's trade secrets, intellectual property rights, and proprietary information. (Tr. 64-66). With Rule 12, the Company aims to keep this kind of information confidential from its competitors, both present and future. (Tr. 64-65). Schwan's has a vitally important legal obligation to protect its intellectual property rights or else it may lose them; or at least have to defend them in very expensive intellectual property litigation.

(Tr. 66). The reference to “Schwan’s business” in the final sentence of Rule 12 means commercial business transactions with its vendors. (Tr. 66-70). The Company does not produce all its own frozen foods for delivery and it spends over a billion dollars a year to purchase food from outside vendors. (Tr. 68-69). Therefore, the Company has an enormous financial interest to keep the details of these purchases and agreements with outside vendors limited to the parties associated with the transactions. (Tr. 68).

The Company has never enforced Rule 12 against employees to prevent them from discussing their wages, hours, or other terms and conditions of employment. (ALJ Op. at 3; Tr. 66-67). Nor has the Company ever enforced Rule 12 to prevent employees from complaining about Schwan’s (or its management) or from discussing union organizing. (Tr. 67). In fact, Schwan’s has produced employee information in response to union requests since a union does not qualify as a Schwan’s competitor under Rule 12. (Tr. 69-70). No employees have ever complained that Rule 12 has been enforced or interpreted to prohibit their discussions of wages, hours, or other terms and conditions of employment. (Tr. 67).

## **2. Rule 17 – Use of the Company Name**

Handbook Rule 17 provides that:

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

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

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

(ALJ Op. at 4; Jt. Ex. 3 at 17).

Rule 17 has a two-fold purpose: First, Schwan's only wants authorized individuals to enter into commercial transactions or otherwise bind the Company to a transaction or obligation. (Tr. 71). Second, the Company only wants authorized spokespersons to speak for Schwan's. (Tr. 71). In other words, the rule does not prohibit employees from speaking *about* the Company; it only prohibits unauthorized employees from speaking *for* the Company. (Tr. 71-72).

Schwan's has never enforced Rule 17 to prohibit employee speech about the Company. (Tr. 71-72). Employees often complain about Schwan's and do not need advance permission to do so. (Tr. 71-73). Employees routinely discuss their terms and conditions of employment in the workplace and outside it on such intensely public platforms like social media and other websites. (Tr. 72-73). Schwan's has not disciplined any employees for complaining or speaking negatively about the Company, regardless of the forum. (ALJ Op. at 3; Tr. 72).

### **3. Rule 26 – Conflict of Interest**

Handbook Rule 26 provides that:

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

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

- a. Conflicts of interest or the appearance of such conflicts.

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

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

(ALJ Op. at 4; Jt. Ex. 3 at 20).

The purpose of Rule 26 is to prevent employees from creating a financial conflict of interest with the Company. (Tr. 60-61). Schwan's drivers typically work alone and the Company has unfortunately encountered situations where drivers have sought to capitalize on the access that their employment gives them to Schwan's customers. (Tr. 61). Drivers have tried to sell Avon products or advance similar side ventures, which the Company prohibited as a violation of Rule 26. (Tr. 61). A conflict of interest would also arise under Rule 26 when managers look to hire their friends or relatives to work under them. (Tr. 61).

Rule 26, however, has never been enforced to prohibit employees' discussions of their wages or terms and conditions of employment, or otherwise prevent them from engaging in union activity. (ALJ Op. at 3; Tr. 61-62). In accordance with Rule 26, employees can freely discuss the Company and their working conditions. (Tr. 62). And employees do in fact discuss working conditions at Schwan's both inside and outside the Company, and they have done so while commenting on Company-sponsored websites or while using social me-

dia. (Tr. 62). In particular, one website exists solely dedicated to employee complaints against the Company ([www.schwanssucks.com](http://www.schwanssucks.com)), and employees have voiced complaints on other publicly available websites like:

- [www.facebook.com/schwans](http://www.facebook.com/schwans)
- [www.schwansjobs.com](http://www.schwansjobs.com)
- [www.glassdoor.com](http://www.glassdoor.com)
- [www.retailreality.net](http://www.retailreality.net)
- [www.yammer.com](http://www.yammer.com)

(Tr. 62-64, 109-10). The Company has not disciplined any employees for comments made about or against the Company, online or elsewhere. (Tr. 62-63, 109-10). Similarly, no employees have ever been disciplined for their discussion about wanting to unionize the Company. (Tr. 63).

### **C. Schwan's Employment, Confidentiality, Ownership, and Noncompete Agreements**

In addition to Schwan's handbook rules, the General Counsel challenged certain statements in the Company's Employment, Confidentiality, Ownership, and Noncompete Agreements (ECONA) as unlawful, but again failed to consider the context for the allegedly offending language. Schwan's ECONA is two pages in length and it has five substantive sections. (Jt. Ex. 2). Section 1 of the ECONA outlines the employee's compensation arrangement. (Jt. Ex. 2). Section 2 identifies the obligations of the Company and the employee should the employment relationship end. (Jt. Ex. 2). Section 3 of the ECONA contains the language that the General Counsel charges as unlawful and that section itself has five subparts:

- a. Stipulation.** Employer and Employee agree that during the course of Employee's employment, Employer will have access to Confidential and Proprietary Information as defined below. Such information has been developed by Employer at great expense over many years of substantial effort, and were competitors of Employer to obtain such information, there would result a substantial and irreparable adverse effect upon the business of Employer. Employee agrees that the Employer owns all such Confidential and Proprietary Information.
- b. Definition.** As used in this Agreement, Confidential and Proprietary Information is understood to mean information in whatever form, tangible or intangible, pertaining in any manner to the sales, manufacture, or distribution business of or product or intellectual property development by Employer where such information has been developed by employees, consultants, or agents of Employer or otherwise at Employer's expense, and which is not generally known in the industry in which Employer is involved and gives Employer a competitive wage advantage.
- c. Scope.** Confidential and Proprietary Information shall include any information pertaining in any way but not limited to (i) contract or lease involving Employer and any individual, organization or other entity, (ii) Employer's cost and price for its merchandise, products or services, as well as Employer's pricing and costing procedures, purchasing or accounting systems or techniques, financial performance, or business systems; (iii) Employer's sales techniques, marketing processes, distribution systems and techniques, manufacturing processes and procedures, and technical data; (iv) any engineering, servicing, computer software program, any report of any manual developed and/or modified by or at the expense of Employer; (v) any information, including any document or other media prepared for the internal use of Employer including without limitation financial, product or marketing reports of plans, recipes, formulations and specifications, new business concepts, new product developments, modeling and coding information and supplies, vendor, customer, and broker lists; (vi) any information not publicly available pertaining to the customers or potential customers of Employer including, without limitation, the identity of Employer's customers or potential customers; (vii) any information pertaining to the wages, commission, performance, or identity of employees of Employer; (viii) any information pertaining to product, sales, manufacturing, or distribution development or the development of intellectual property, including but not limited to any invention, or any manufacture, sales, production, or distribution process, and any copyright, trademark, or patent; and (ix) any other information pertaining to the business of Employer, including information not generally known in the industry in which Employer is involved. It is understood that concepts and methodologies which are

generally known in the industry and which may have been applied in the development of procedures and specific data or program shall not be considered Proprietary or Confidential.

- d. Restrictions.** Employee shall neither directly nor indirectly (i) disclose to any person not in the employ of Employer any Confidential or Proprietary Information, or (ii) use any such information to the Employee's benefit, the benefit of any third party or employer, or to the detriment of Employer, or (iii) use any such information or solicit any employee of Employer to seek employment elsewhere.
- e. Ownership and Assignment of Rights.** Employer shall own and retain sole and exclusive title, right, and interest to, by way of example and not limited to, any copyright, patent, trademark, idea, invention, product, program, recipe, procedure, format, process, equipment technique and other materials (collectively referred to as "work product") of any kind created or developed or worked on by the Employee during Employee's employment with Employer, except where such work product was developed on Employee's own time, without Employer's equipment, supplies, facilities or trade secrets and which does not relate directly to the Employer's business, anticipated research or development, or which did not result from any work by the Employee for the Employer where such work product is disclosed to the Employer during or one year after the cessation of employment for the Employer. Employee hereby transfers and assigns all title and right to work product and shall execute such documents and take other such action as the Employer may request to warrant and confirm the Employer's title, right, and interest in any work product. The Employee's right to any compensation or other amounts under this Agreement will not constitute a lien on any work product under this Agreement.

(Jt. Ex. 2). Section 4 of the ECONA outlines the parameters of the employee's non-compete obligations. (Jt. Ex. 2). Finally, Section 5 provides for a waiver of personal injury claims against Schwan's customers and vendors in recognition of the fact that employees would receive state workers' compensation benefits should an injury occur. (Jt. Ex. 2).

The two main purposes of the ECONA are (1) to protect the Company's intellectual property rights and proprietary information by keeping it confidential from competitors; and (2) to protect Schwan's customer relations. (Tr. 73-75).

The Company has developed its intellectual properties at great expense over many years and with substantial effort. (Tr. 74; Jt. Ex. 2 § 3(a)). The Company also invests significant amounts of resources in employee training and employees have access to highly confidential, propriety information relating not only to Schwan's business, but also its customers as well. (Tr. 47, 54, 102-03). Therefore, another purpose of the ECONA is help Schwan's retain its most valued assets—its employees—and prevent a competitor from profiting from the Company's investment in its employees and the highly confidential, proprietary information they have received through their employment. (Tr. 74, 102-03).

The risk of antitrust liability and the Sherman Act's potentially bankrupting penalties (triple damages) justifies the ECONA's prohibition on sharing employee wage and benefit information with competitors. (Tr. 77). A conspiracy amongst employers to agree on the price of employee wages and benefits would violate antitrust laws. (Tr. 77). And in recent years, several labor unions have added the threat of antitrust lawsuits to their game plan when trying to organize employers or a particular industry. (Tr. 77-78). A policy against sharing wage and benefit information with competitors makes an antitrust conspiracy much less likely and harder to prove, and it therefore helps reduce the Company's risk of such a suit. (Tr. 78, 98).

Schwan's has never understood or enforced the ECONA to prevent employees from discussing their wages or working conditions, or from discussing those topics with a union. (Tr. 75-76). Again, the Company openly encourages frank discussions about wages and working conditions and has created a very

transparent working environment where employees feel free to discuss these topics. (ALJ Op. at 3-5; Tr. 55, 58, 76). Not surprisingly, no employees have ever complained that the ECONA prevents them from discussing wages, working conditions, or the identity of other employees. (Tr. 76).

Although the General Counsel only put in evidence the ECONA that the Charging Party Patrick Wardell signed, the Company has revised the ECONA several times throughout the years. (Tr. 80-81; Jt. Ex. 2). For existing employees, and in order for a revision to the ECONA to become binding, the Company must offer some kind of contractual consideration through either a changed employment relationship or monetary compensation. (Tr. 81). The version of the ECONA in evidence in this case is the 2005 version, but the 2005 version is not the most current, operative version of the Company's ECONA. (Tr. 81; Jt. Ex. 2).

#### **D. The ALJ's Recommended Decision and the GC's Exceptions**

On March 27, 2012, Administrative Law Judge Gerald A. Wacknov heard testimony and received evidence regarding the General Counsel's charge that some of Schwan's handbook rules and other personnel documents were overbroad and violated Section 8(a)(1) of the National Labor Relations Act. (ALJ Op. at 1). Specifically, the General Counsel alleged that seven separate handbook rules and policies were unlawful. The ALJ sustained the General Counsel's position on two of his challenges: Rule 18 – Solicitation of Organizational Work and the Company's standard suspension notices. (ALJ Op. at 5 & 10). The ALJ found lawful the remaining five other handbook rules and policies:

- Rule 12 – Security of Company Information. (ALJ Op. at 6).
- Rule 17 – Use of the Company Name. (*Id.*).
- Rule 26 – Conflict of Interest. (*Id.*).
- The Company’s termination letters. (*Id.* at 9).
- The ECONA. (*Id.* at 7).

The General Counsel has filed exceptions to the ALJ’s recommended decision and order regarding the lawfulness of Rules 12, 17, 26, and the ECONA. (GC’s Exceptions ¶¶ 2-5). The General Counsel did not except to the ALJ’s recommended decision that the Company’s termination letters were lawful, but he does except to the ALJ’s statement of the issue in this case and the recommended order and notice to employees. (*Id.* ¶¶ 1, 6-7).

#### **IV. Argument**

##### **A. The Legal Framework For Handbook Cases**

When examining an employer’s handbook rules or other statements under Section 8(a)(1) of the National Labor Relations Act, the Board’s decision in *Lafayette Park Hotel* focuses the inquiry on whether the rules do *in fact* reasonably tend to chill the exercise of Section 7 rights—not whether the rules *could* do so under a technical or academic interpretation. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Therefore, to determine whether a rule reasonably tends to chill Section 7 rights, the Board requires that the rule receive a reasonable reading and it will not consider particular phrases in isolation or presume an interference with Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (citing *Lafayette Park Hotel*, 326 NLRB at 825, 827).

The analysis first begins by determining whether the rule *explicitly* restricts activities protected by Section 7 and, if it does, the inquiry ends there. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646 (emphasis in original). But if a rule does not explicitly restrict Section 7 activities, then the Board has said it will only find a violation if the General Counsel proves that:

- (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.

*Id.* at 647.

When considering the first category, the context and surrounding circumstances matter enormously to determine if employees would reasonably construe a rule to prohibit Section 7 activity. *See, e.g., The Room Store*, 357 NLRB No. 143, slip op. at 1 fn.3 (2011) (citing *Lutheran Heritage Village-Livonia* to note that the “task is to determine how a reasonable employee would interpret the action or statement of her employer . . . and such a determination appropriately takes account of the surrounding circumstances”); *Lafayette Park Hotel*, 326 NLRB at 827 (“there is no such context and no factual basis for reasonable employees to view the rule as prohibiting Section 7 activity”).

Also relevant to determine if employees would reasonably construe the language to prohibit Section 7 activity is evidence concerning whether the employer ever enforced the rules in question “to prohibit employees from discussing their terms and conditions of employment” or other protected activity. *Super K-Mart*, 330 NLRB 263, 263 (1999); *see also Lutheran Heritage Village-Livonia*,

343 NLRB at 647 (“There is no evidence that the challenged rules have been applied to protected activity or that the Respondent adopted the rules in response to protected activity”); *Mediaone of Greater Fla.*, 340 NLRB 277, 279 (2003) (finding that the employees would not have reasonably believed the rule would infringe on Section 7 activity because, in part, “there is no evidence that Respondent has enforced the rule against employees for engaging in such activity”).

Finally, even if the rule or statement does restrict Section 7 activity, the inquiry does not end there—the Board must then consider whether the employer’s need for the rule outweighs the Section 7 infringement. *Caesar’s Palace*, 336 NLRB 271, 272 (2001) (citing *Jeannette Corp v. NLRB*, 532 F.2d 916 (3d Cir. 1976)). If the employer presents a legitimate and substantial business justification for the rule, then the Board will uphold it as a balancing of the employer’s needs against the imposition on the employees’ Section 7 rights. *Caesar’s Palace*, 336 NLRB at 272. Similar to the initial inquiry, the context and “the surrounding circumstances” matter here as well. *Id.* (citing *Pa. Power Co.*, 301 NLRB 1104 (1991); *Mobil Oil Exploration & Producing U.S. Inc.*, 325 NLRB 176 (1997)).

#### **B. The General Counsel Failed to Meet His Burden of Proof**

The General Counsel had the burden to prove that Schwan’s rules and the ECONA reasonably tend to chill the exercise of Section 7 rights. (Tr. 78); *Tradesmen Int’l*, 338 NLRB 460, 460 (2002) (“General Counsel must prove that the rules can reasonably be interpreted in a way that infringes on Section 7 ac-

tivity”). But the General Counsel offered no witnesses and adduced very little substantive testimony at the hearing, and instead chose to rely on the stipulations and documents received in evidence—the handbook, suspension notice, termination letter, and ECONA. (Tr. 27). He offered no evidence regarding the context and surrounding circumstances in which the rules and the ECONA exist; nor did he offer any evidence suggesting union animus or an enforcement strategy that infringed upon employees’ Section 7 rights.

Importantly, the only evidence received in this case—which went unrebutted—established that Schwan’s has a extraordinarily open and transparent working environment when it comes to its employees’ ability to discuss their wages, working conditions, and unionization. Simply put, the Company is an “open book” and “has a ‘very open culture’ with regard to employee discussions of wages, hours and working conditions.” (ALJ Op. at 3, 5).<sup>1</sup> Schwan’s has never enforced any of the allegedly offending rules or the ECONA to infringe upon Section 7 activity.

Therefore, even if the General Counsel were to make a convincing legal argument that the text, by itself, of Schwan’s handbook rules and other statements reasonably tends to chill the exercise of Section 7 rights, the undisputed

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<sup>1</sup> Indeed, the Charging Party, Patrick Wardell, attended the hearing and heard all of this evidence. (Tr. 115). If there were any inaccuracies or anything at all that he could even remotely add about Schwan’s work environment, handbook rules or statements or their enforcement, surely he could have testified about those topics. (Tr. 115-16). But because Wardell did not testify, and the General Counsel offered no explanation for his conspicuous absence, the ALJ properly credited the Company’s evidence as dispositive of its free and open culture regarding employee discussions of wages, working conditions, and unions. *See Roosevelt Mem’l Med. Ctr.*, 348 NLRB 1016, 1022 (2006) (noting that judge may draw adverse inference from failure to call witness who may reasonably be assumed to be favorably disposed to a party and who could reasonably be expected to corroborate events); *Martin Luther King, Sr. Nursing Ctr.*, 231 NLRB 15, 15 fn.1 (1977) (judge properly drew adverse inference in absence of explanation of witness’ absence).

evidence relating to the context and surrounding circumstances in which these rules and statements exists unquestionably proves otherwise. For instance, given the context of Schwan's workplace, it appears impossible to reasonably conclude that handbook Rule 12 reasonably tends to chill discussions of wages or working conditions when it is undisputed that those very discussions occur frequently and openly at the Company. The same holds true for the other allegedly offending rules and the ECONA. Schwan's employees routinely and openly exercise their Section 7 rights and no discipline has ever occurred as a result.

In light of undisputed evidence and the ALJ's findings of fact relating to the prevalence in which employees exercise their Section 7 rights, it is impossible for the Company's rules and statements to reasonably tend to chill Section 7 activity. The ALJ specifically credited the Company's witnesses at times, and at other times implicitly found them credible when relying on their representations that wages at Schwan's are an "open book" and the Company "has a 'very open culture' with regard to employee discussions of wages, hours and working conditions." (ALJ Op. at 3, 5). For this reason alone, the Board should affirm the ALJ's recommended decision and order. *Standard Dry Wall Prods.*, 91 NLRB 544, 545 (1950).

**C. The Company's Handbook Rules and ECONA Do Not Reasonably Tend to Chill Section 7 Activity (Exceptions 2 - 5)**

Even if the General Counsel's inability to meet his burden of proof were overlooked, none of the Company's rules or the ECONA reasonably tends to chill Section 7 activity, particularly when considered in view of Schwan's work-

ing environment and open culture. The General Counsel does not contend that the handbook rules or the ECONA explicitly restrict Section 7 activity; nor does he allege that they were established in response to union activity or have been enforced to restrict Section 7 rights. The General Counsel's sole theory is that these rules and statements violate the Act "on their face" as he believes that employees would reasonably construe the language to prohibit Section 7 activity. (Tr. 8). But only a strained, hyper-technical reading of the Company's rules and the ECONA could possibly give the General Counsel's theory any credence, which does not suffice to meet his burden of proof.

**1. No Employees Could Reasonably Construe Handbook Rule 12 (Security of Company Information) to Prohibit Section 7 Activity**

Rule 12 of Schwan's handbook prohibits employees from revealing the Company's private information to individuals unauthorized to receive it. (ALJ Op. at 3-4; Jt. Ex. 3 at 15). Specifically, the information to which Rule 12 refers involves trade secrets, intellectual properties, and proprietary information like product formulas, recipes, manufacturing costs, or customer lists. (ALJ Op. at 3-4; Jt. Ex. 3 at 15; Tr. 65-66). The entire focus of the rule relates to protecting disclosure of this incredibly valuable and important information from Schwan's competitors. (Tr. 65). Rule 12 makes no reference to wages or employee information and it contains no ambiguity. The reference to "Schwan's business" in the final sentence of Rule 12 means commercial business transactions with vendors since the Company does not produce all its own frozen foods and spends over a billion dollars annually to purchase it. (Tr. 66-69).

The Company therefore has a substantial and legitimate business justifica-

tion to keep this kind of information confidential, which the Board has recognized and upheld in similar policies:

- See *Mediaone of Greater Fla.*, 340 NLRB at 278-79 (rule did not violate Section 8(a)(1), even though it prohibited disclosure of “employee information,” because that language appeared in connection within a larger prohibition of disclosure of “proprietary information, including *information assets* and *intellectual property*” and employees reading the rule as a whole would understand it did not prohibit discussion of wages) (emphasis in original).
- See *Super K-Mart*, 330 NLRB at 263-264 (overruling judge’s finding that confidentiality rule stating “[c]ompany business and documents are confidential” and “disclosure of such information is confidential” violated the Act because “employees would reasonably understand they can share business information with fellow employees and other[s] who have a need to know” and “[r]easonable persons understand that an enterprise can hardly function without such a flow of information”).
- See *Lafayette Park Hotel*, 326 NLRB at 826 (finding lawful rule that prohibited “[d]ivulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information” because the hotel had a legitimate need to keep confidential its “trade secrets, contracts with suppliers, and range of other proprietary information” and no employees would understand the rule “to prohibit the discussion of their wages”).
- *Sears Holdings (Roebucks)*, No. 18-CA-19081, Advice Memo. (Dec. 4, 2009) (social media policy that prevented disclosure of confidential or propriety information found lawful, even when some portions of it arguably infringed on Section 7 rights, when the vast majority of the policy prohibited matters that did not implicate Section 7 activity).

In an attempt to distinguish *Mediaone*, *Super K-Mart*, and *Lafayette Park Hotel*, the General Counsel has charged Rule 12 as ambiguous; however, if the Board found lawful *Mediaone*’s rule about “employee information” and *Super K-Mart*’s rule referencing “company business,” the Board could hardly make a principled distinction about Rule 12’s reference to “information concerning customers, vendors or employees” or “Schwan’s business.” Rather, “any arguable ambiguity” in Rule 12 could “arise[] only through parsing the language of the rule,

viewing the phrase[s] . . . in isolation, and attributing to the [Company] an intent to interfere with employee rights.” *Lafayette Park Hotel*, 326 NLRB at 825. The Board has said it will not engage in this sort of crusade for ambiguity by importing a “strained construction on the language.” *Id.*

Far from ambiguous, Rule 12 has an unmistakable meaning and focus as paragraph two begins by referencing “[t]rade secret information” and goes on to set forth various categories of information Schwan’s considers trade secrets such as information about customers, vendors, or employees. Rule 12 reaffirms employees’ non-compete obligations by keeping this competitive information confidential. The plain and obvious focus of Rule 12 involves safeguarding the Company’s trade secrets, intellectual property, and proprietary information. The rule has nothing to do with Section 7 rights.

Perhaps most telling, employees do in fact, on a daily basis, discuss information relating to their wages and workings conditions and this kind of information has been shared with unions by employees. (ALJ Op. at 3, 5; Tr. 67-69). Employees can and do post any information they choose about the Company on public websites, including negative comments about Schwan’s. (Tr. 109). Significantly, Schwan’s has never disciplined employees for disclosing information related to wages or working conditions. (ALJ Op. at 3; Tr. 66-70, 109-10). As a result, finding Rule 12 unlawful would require “speculat[ion] both that it prohibits conduct not addressed by the rule and that such conduct includes Section 7 activity[.]”—speculation in which the Board has said it will not engage. *Lafayette Park Hotel*, 326 NLRB at 826.

Schwan's Rule 12 has little in common with the rule found unlawful in *Hyundai America Shipping Agency Inc.*, 357 NLRB No. 80, slip op. at 12 (2011). In that case, the employer's rule prevented disclosure of information in employee personnel files, but the employer's handbook had *an entire, stand-alone* rule dedicated to this topic. *Id.* The first portion of the rule described the kind of information found in employee personnel files. The second portion of the rule threatened employees with the termination of their employment if they disclosed information from an employee personnel file. *Id.*

Likewise, the rule in *IRIS USA Inc.* stated that "[e]ach employee's personnel records are considered confidential and will normally be available to only the named employee and senior management." 336 NLRB 1013, 1015 (2001). The rule also admonished that "[a]ny doubts about confidentiality of information should be resolved in favor of confidentiality." *Id.* In the same vein, the rule found unlawful in *Costco Wholesale Corp.* categorically prohibited employees "from sharing 'confidential' information such as employees' names, addresses, telephone numbers, and email addresses." 358 NLRB No. 106, slip op. at 1 (2012).

The handbook rules in *Hyundai America Shipping*, *IRIS USA*, and *Costco Wholesale* specifically and directly in the text of the rules prohibited the disclosure of personnel documents and personnel information, and the rules made very clear that they were designed to prevent employees from sharing information found in employee personnel files or similar information about employees. Here, by contrast, Schwan's Rule 12 relates to trade secrets, intellectual prop-

erty, and proprietary information and it does not directly focus on personnel information like the rules in *Hyundai America Shipping*, *IRIS USA*, and *Costco Wholesale* do.

In *Flex Frac Logistics LLC*, the employer required its employees to sign a one-page at-will employment agreement setting forth a litany of confidential information that employees could not disclose, which ran the entire gambit from information about management, customers, suppliers, distributors, marketing, finances, information technology, personnel, to trademarks. 358 NLRB No. 127, slip op. at 1 (2012). The employer in *Flex Frac Logistics* attempted to prevent the disclosure of all confidential information wherever it might be, and it specifically identified personnel files. Its “confidentiality rule [was] broadly written with sweeping, nonexhaustive categories that *encompass nearly any information related to the Respondent.*” *Id.* at 2 (emphasis added).

In stark contrast to the sweeping language of the rule in *Flex Frac Logistics*, Schwan’s Rule 12 has a specific focus: Trade secrets, intellectual property, and proprietary information. The reference to information about the Company’s customers, vendors, and employees only limits the disclosure of that information to the extent that it would constitute a trade secret, intellectual property, or proprietary information. No reasonable employee could conclude otherwise.

Therefore, because the focus of Rule 12 is all about protecting the Company’s trade secrets, intellectual property, and proprietary information—and has no specific reference to personnel information—cases like *Flex Frac Logistics*, *Hyundai America Shipping*, *IRIS USA*, and *Costco Wholesale* have no appli-

cation here. And because the language of Rule 12 makes no reference to prohibiting the disclosure of wages or employee information, no employees could reasonably understand this rule to prohibit Section 7 activity. The Board should affirm the ALJ's recommended decision and order and dismiss paragraph 7(b) of the complaint.

**2. No Employees Could Reasonably Construe Handbook Rule 17 (Use of the Company Name) to Prohibit Section 7 Activity**

Rule 17 of Schwan's handbook protects the Company from unauthorized purchases or transactions, and it protects the Company from unauthorized statements attributed to have been made by Schwan's. (Tr. 71-72). The very heart of the rule involves the prevention of employees' acting on behalf of Schwan's when they have not been so authorized. (Jt. Ex. 3 at 17). In other words, this is an agency rule designed to protect Schwan's from employees acting as Company-agents when they have not been authorized to do so. (*Id.*). The rule does not prohibit employees from *speaking about* the Company; it only prohibits unauthorized employees from *speaking for* the Company. (Tr. 71-72).

Schwan's has never enforced Rule 17 to prohibit employee speech about the Company. (Tr. 71-72). And, in fact, employees can and often do speak about Schwan's—both in the workplace and very publicly on websites—and they do not need advance permission to do so. (Tr. 71-73). Nothing in Rule 17 prohibits employee disclosures of information related to wages or working conditions.

The Board has never held that employees have a Section 7 right to purchase, obligate, or otherwise *speak for their employer* as an agent. See, e.g., *Paraxel Int'l LLC*, 356 NLRB No. 82, slip op. at 11-12 (Jan. 28, 2011) (rule

found lawful that required referral of inquiries about the employer to authorized spokespersons). While employees certainly have a Section 7 right to *speak about their employer*, Rule 17 does not prohibit that kind of speech and neither Schwan's nor its employees have ever understood the rule that way as employees have openly (and frequently) complained about the Company without any discipline or reprisal.

The Company has no quarrel with the general principle that an employee can use a company logo to engage in union activity on non-working time. *Pepsi Cola Bottling Co. Inc.*, 301 NLRB 1008 (1991). Nor does Schwan's take issue with the unremarkable proposition that an employee can complain about his employer to the media. *Trump Marina Casino Resort*, 355 NLRB No. 107 (2010) (three-member panel adopting two-member panel decision in *Trump Marina Casino Resort*, 354 NLRB No. 123 (2009)); *Valley Hosp. Med. Ctr.*, 351 NLRB 1250 (2007). But the protections of Section 7 do not stretch to such incredible lengths that they would protect an employee's right to speak *for* the Company—rather than merely speaking *about* it—and the General Counsel has cited no Board law or any other authority to the contrary.

Accordingly, since the language of Rule 17 makes no reference to prohibiting the disclosure of wages or employee information, and because the entire focus of the language of the rule relates to the Company's desire to limit purchases and activities to only authorized agents, no employees could reasonably understand this rule to prohibit Section 7 activity. The Board should

therefore affirm the ALJ's recommended decision and order and dismiss paragraph 7(c) of the complaint.

**3. No Employees Could Reasonably Construe Handbook Rule 26 (Conflicts of Interest) to Prohibit Section 7 Activity**

To prevent employees from creating a financial conflict of interest with the Company, Schwan's established Rule 26. (Tr. 60-61). The rule enumerates several categories of impermissible conflicts of interest and none of them relate to wages, working conditions, or otherwise implicate Section 7 activity. (ALJ Op. at 4; Jt. Ex. 3 at 20). Similarly, Schwan's has never enforced Rule 26 to prohibit employee discussions of their wages and terms and conditions of employment, or prevented them from engaging in Section 7 activity. (Tr. 61-62). The exact opposite occurs at Schwan's. Employees freely discuss the Company and their wages and working conditions, and they openly engage in protected conduct without discipline. (Tr. 62-64, 109-10).

The General Counsel contends that the portion of Rule 26 that requires the avoidance of conduct "which is detrimental to the best interests of the company or its employees" violates the Act, but the Board previously found similar rules were lawful. For example, in *Lafayette Park Hotel*, the hotel established a rule that prohibited "[u]nlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community." 326 NLRB at 826-27. The Board found this rule lawful because it seemed "quite simply, far fetched" that employees fear that the hotel would use the rule to punish them for conduct the hotel considered "improper," particu-

larly when none of the workplace context (like previous enforcement or union animus) suggested employees would view the rule this way. *Id.* at 827; *see also Palms Hotel & Casino*, 344 NLRB 1363, 1367-68 (2005) (finding lawful rule that forbid “any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons” and specifically rejecting the argument that the mere “unrealized potential” that the “rule could reasonably be interpreted as barring lawful union organizing propaganda” because the Board is “simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it”); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288-89 (2000) (finding lawful rule that prohibited “off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel”).

Here, the General Counsel asks the Board to engage in the exact type of “far fetched” “speculation” into an “unrealized potential” about a hypothetical affect on Section 7 activity that the Board specifically rejected in *Lafayette Park Hotel* and *Palms Hotel and Casino*. No employees could reasonably construe Rule 26 to prohibit Section 7 activity. The conflict of interest provisions in Rule 26 recite the typical, garden-variety prohibition against usurpation of corporate opportunities that rightly belong to Schwan’s and the traditional conflict of interest principles that pit the employee’s pecuniary gain against the Company’s. (Jt. Ex. 3 at 20).

To drive this point home, one of the examples of a prohibited conflict of interest given in Rule 26 involves having a financial interest in a supplier or competitor; the other example describes a supervisory relationship over a relative or intimate companion. (Jt. Ex. 3 at 20). From this, to surmise that employees would somehow reasonably believe that Rule 26 prohibits them from contacting a union or otherwise engaging in protected activity would require the kind of over-active imagination and paranoia that Board precedent prohibits. *Lafayette Park Hotel*, 326 NLRB at 827; *Palms Hotel & Casino*, 344 NLRB at 1367. And in the context of Schwan's extraordinarily free and open work environment, particularly when it comes to the topic of unionization, the prospect of this fantasy becoming reality is all the more remote.

The General Counsel's citation to *Costco Wholesale Corp.* does not fit with the facts of this case. 358 NLRB No. 106 (2012). The rule in *Costco Wholesale* dealt specifically and exclusively with employees' electronic communications and prohibited statements that "damage the Company." *Costco Wholesale Corp.*, 358 No. 106, slip op. at 1. In stark contrast to *Costco Wholesale Corp.*, Schwan's conflict of interest rule makes no reference to what employees can or cannot say about the Company (electronically or elsewhere), and the rule merely seeks to prevent the ordinary financial conflicts of interest that have existed in employment and corporate law for decades. The General Counsel also invites the Board to rely on *University Medical Center*, but the District of Columbia Circuit Court of Appeals refused to enforce the Board's order on appeal. 335

NLRB 1318 (2001), *enf. denied in relevant part* 335 F.3d 1079, 1088-89 (D.C. Cir. 2003).

No employees could reasonably understand Rule 26 to prohibit Section 7 activity. Rule 26 makes no reference to prohibiting an employee's involvement with a union; the rule does not restrict employee speech about the Company; and it places no other limits on protected activity. The entire focus of the rule centers on the traditional conflict of interest principles such as financial or conflicted relationships. The Board should affirm the Judge's recommended decision and order and dismiss paragraph 7(d) of the complaint.

**4. No Employees Could Reasonably Construe the ECONA to Prohibit Section 7 Activity**

The Company uses the ECONA to protect its intellectual property rights and to keep confidential its proprietary information from competitors. (Tr. 73-75). The ECONA also protects and safeguards Schwan's customer relations. (Tr. 73-75). Schwan's has gone to great lengths and considerable expense to develop its intellectual properties. (Tr. 74). The Company likewise invests heavily in its employees and they have access to Schwan's confidential, proprietary information such as product formulas and customer lists. (Tr. 65). Thus, Schwan's uses the ECONA to protect and retain its investment in its employees and guard against the disclosure of the Company's confidential, proprietary information to competitors both during and after the employment relationship ends. (Tr. 74, 102-03).

The ECONA also prohibits the discussion of wages and benefit information with Schwan's competitors to avoid the risk of antitrust law's significant liabil-

ity. (Tr. 77-78). Schwan's has never enforced the ECONA to prevent employees from discussing their wages or working conditions with a union and no employees have suggested otherwise. (Tr. 75-76).

The General Counsel contends that the ECONA violates the Act because, when cherry-picking some of the ECONA's language in isolation, a portion of the language supposedly prohibits the disclosure of information related to wages, commissions, performance, or identity of employees. But when considering the ECONA as a whole and in the context of where this language appears, the ECONA paints an entirely different picture.

In Section 3(c) of the ECONA, the agreement specifies a long list of lawful restrictions that in no way infringe upon Section 7 activity, such as preventing the disclosure to competitors of Schwan's:

- Contracts or leases.
- Costs, pricing, and accounting, financial, or business systems.
- Sales techniques, marketing processes, distribution systems and techniques, manufacturing processes and procedures, and technical data.
- Engineering, servicing, computer software programs, reports, and manuals.
- Document or other materials prepared for the internal use such as financial, product or marketing reports of plans, recipes, formulations and specifications, new business concepts, new product developments, modeling and coding information and supplies, vendor, customer, and broker lists.
- Information not publicly available pertaining to the customers or potential customers.
- Information pertaining to product, sales, manufacturing, or distribution development or the development of intellectual property such as inventions, or processes for manufacturing, sales, production, or distribution, and any copyright, trademark, or patent.
- Information relating to the Company's business, particularly information not generally known in the industry.

(Jt. Ex. 2).

The purpose and context of the ECONA cannot be overstated: This is primarily a *noncompete agreement*. It is not a unilaterally imposed rule or condition of employment. Further, the ECONA's limitation on the disclosure of wages, commissions, performance and identity of employees appears amongst a long list of noncompete obligations in which the context makes clear that the ECONA only seeks to limit the disclosure of confidential and proprietary information to Schwan's competitors. The ECONA would not apply to limit the disclosure of information related to wages between employees or to a union since a union does not compete with the Company. (Tr. 70, 75-76).

And, once again, Schwan's employees regularly share information related to their wages, sales, performance, and the identity of other employees not only amongst themselves, but also with their families and on very public forums like social media and other websites. (Tr. 62-63, 107-10). Employees that somehow felt constrained in their exercise of their Section 7 rights surely would not make commentary on websites like [www.schwansucks.com](http://www.schwansucks.com) and others, but that is precisely what occurs at the Company.

The Board has already found that confidentiality rules similar to the ECONA do not violate the Act, even when they technically prohibit the disclosure of information protected by Section 7. *See Mediaone of Greater Fla.*, 340 NLRB at 278-79 (finding lawful "proprietary information" policy that prohibited disclosure of "employee information" because it appeared in context of larger prohibition of "*information assets and intellectual property*").

But in reality, no Board cases can truly serve as an illustrative benchmark here since no decisions involved the undisputed evidence (like in this case) that employees *actually exercise their Section 7 rights* in spite of the allegedly offending language in the ECONA; and employees do this freely, openly, frequently, and notoriously at Schwan's. Therefore, to say that employees could somehow construe the ECONA to prohibit Section 7 activity would not only ignore a common sense reading of the agreement given its context, but more importantly it would also ignore the reality that Section 7 activity abounds unimpeded at Schwan's.

The General Counsel citation to *Phoenix Transit System*, 337 NLRB 510 (2002) or *Caesar's Palace*, 336 NLRB 271 (2001) does nothing to aid the inquiry. In *Phoenix Transit System*, the Board affirmed the ALJ's finding that the employer violated Section 8(a)(1) by maintaining a confidentiality rule prohibiting employees from discussing their sexual harassments complaints amongst themselves. *Phoenix Transit Sys.*, 337 NLRB at 510. Similarly, *Caesar's Palace* dealt with an employer's confidentiality rule prohibiting discussions about an ongoing drug investigation, which the Board ultimately upheld because of the employer's legitimate and substantial need for the rule. *Caesar's Palace*, 336 NLRB at 272. Neither case involved an employer's noncompete agreement and its legitimate need and obligation to keep proprietary and confidential information out of the hands of competitors. Not surprisingly, the General Counsel has not cited one Board decision that invalidated a noncompete agreement's confidentiality provisions. The Board did not consider noncompete agreements

in *Mobil Exploration and Producing U.S., Inc.*, 323 NLRB 1064 (1997), *Danite Sign Co.*, 356 NLRB No. 124 (2011), *Biggs Foods*, 347 NLRB 425 (2006), or *Double Eagle Hotel and Casino*, 341 NLRB 112 (2004).

Of the Board's decisions, Schwan's ECONA has the most common with the rule found lawful in *Mediaone* that prohibited the disclosure of proprietary information and went on to list various properties the employer considered confidential—just like the ECONA does. The fact that employee wages, commissions, performance information, and identity, appears on ECONA's lengthy list of proprietary information does not undermine the application of *Mediaone* because the reference in the ECONA “appears within the larger provision prohibiting disclosure of ‘proprietary information, including information assets and intellectual property’ and is listed as an example of ‘intellectual property.’” *Mediaone of Greater Fla.*, 340 NLRB at 279. Further, since the ECONA is at its core a noncompete agreement, by its express terms it does not prohibit employees from disclosing their wages amongst themselves or with a union because Schwan's does not compete with unions for business. (Jt. Ex. 2 § 3(d); Tr. 70, 75-76).

Accordingly, when reading the ECONA as a whole, the ALJ correctly concluded that no employees could reasonably understand the ECONA to prohibit the discussion of employee wages or other Section 7 activity amongst employees, but rather employees would understand that Schwan's entered into the ECONA with them to protect the Company's intellectual property and proprietary information from competitors. The Company has a legitimate and sub-

stantial need for the ECONA to keep this information confidential from the Company's competitors. Further, employees actually exercise their Section 7 rights unimpeded at Schwan's. It would take a heavy dose of conjecture and speculation to conclude that employees could reasonably construe the ECONA to prohibit Section 7 activity. The Board should affirm the Judge's recommended decision and order and dismiss paragraph 6 of the complaint.

**5. The Company's Legitimate and Substantial Business Needs Outweigh any Potential Infringement Upon Section 7 Rights**

Even if the General Counsel could somehow prove that the Company's handbook rules and other statements do in fact reasonably tend to chill the exercise of Section 7 rights, Schwan's has legitimate, substantial, and compelling business justifications for each of its rules and the ECONA. Contrary to the General Counsel's surprising contention that "the record here is devoid of any evidence of an established legitimate and substantial business justification," the Company specifically and deliberately presented evidence establishing the need for each of its challenged rules and the ECONA.

The Company established handbook Rule 12 (Security of Company Information) to safeguard its intellectual property, trade secrets, and other proprietary information. (Tr. 64-66). Schwan's must take these steps to protect its intellectual properties or it could forever lose the rights to them. (Tr. 66). Similarly, if the Company did not keep its trade secrets confidential, they could not later take steps to prevent a competitor or former employee from usurping them. (Tr. 64-66). Additionally, Schwan's spends over a billion dollars a year on food purchases from outside vendors. (Tr. 68-69). The need to keep the details of such

enormously important transactions limited to the persons involved, as well as the need to protect intellectual property rights and trade secrets, without question, constitutes legitimate and substantial business justifications.

As for handbook Rule 17 (Use of Company Name), Schwan's uses this rule to prevent unauthorized persons from purchasing items or entering into obligations purportedly on behalf of the Company. (Tr. 71). Schwan's also uses the rule to prevent unauthorized communications purportedly made on behalf of Schwan's. (Tr. 71). Like other large employers, Schwan's employs public relations professionals to speak for the Company to avoid inconsistent messages to the public and to avoid legal liability. For example, if an employee unauthorized to speak on behalf of the Company were to make any defamatory statements attributed to Schwan's, the Company could easily defend such a claim by pointing to the fact that the Company did not authorize that employee to speak for Schwan's and made this understanding clear with Rule 17. Schwan's reasons for wanting only authorized personnel to speak for it are manifest, and they certainly represent legitimate and substantial business justifications.

Handbook Rule 26 (Conflict of Interest) prevents employees from having to choose between their own wallets and the Company's interests. (Tr. 60-61). It also seeks to head off the inevitable conflicts and problems that would result when supervisors manage their friends and relatives. (Tr. 61). These kinds of concerns have existed (and been prohibited) in the workplace for decades and

they unquestionably amount to legitimate and substantial business justifications.

Like its other rules, Schwan's ECONA seeks to protect the Company's intellectual property rights, trade secrets, and proprietary information. (Tr. 73-75). The Company also does not want its former employees to lure away customers or employees to competitors. (Tr. 74, 102-03). Further, the risk of antitrust litigation and its potentially crippling award of triple damages require confidentiality to prevent sharing wages and benefit information with competitors. (Tr. 77). The need to keep this kind of information confidential from competitors and to avoid antitrust litigation certainly represents a legitimate and substantial business justification.

When considering the Company's needs for its handbook rules and the ECONA in comparison to the impact on employees' Section 7 rights, the balance tips decidedly in favor of upholding them because the undisputed evidence proves that *there has been no impact on Section 7 rights whatsoever*. The point is not hypothetical or academic; Section 7 activity flourishes at Schwan's. Employees freely, openly, and notoriously exercise their Section 7 rights at Schwan's. They talk about their wages amongst themselves every single work day. They openly discuss unionization. They complain about the Company to one another and very publicly on social media and other websites. Simply put, the comparison here is really no comparison at all since the *imposition on Section 7 rights does not exist*. The Board should therefore affirm the ALJ's recommended decision and order and dismiss the complaint in its entirety.

**D. The ALJ's Statement of the Issue Was Meaningless (Exception 1)**

The General Counsel correctly pointed out that the ALJ indentified the issue in this case as whether the Company “promulgated and maintained rules and policies in various documents that restrict employee Section 7 rights in violation of Section 8(a)(1) of the Act.” (ALJ Op. at 2). The General Counsel’s theory of the case only charged that the maintenance of the challenged rules and policies was unlawful. But as the General Counsel can surely recognize, an employer can hardly maintain a rule or policy without first promulgating it; otherwise, it would have nothing to maintain.

In any event, the ALJ did not base any of his rulings on a finding that Schwan’s did or did not establish its rules or the ECONA in response to union activity. All of the ALJ’s rulings were based on whether an employee would reasonably construe the challenged language to prohibit Section 7 activity—the first factor under *Lutheran Heritage* when an alleged overbroad rule does not expressly prohibit protected activity. 343 NLRB at 647. Considering whether an employee would reasonably construe the challenged language to prohibit Section 7 activity contemplates a maintenance theory of the violation—not a promulgation theory.

Albeit insightful of the General Counsel’s demand for absolute precision in draftsmanship and his hyper-technical reading of the ALJ’s recommended decision (not to mention Schwan’s rules and the ECONA), the ALJ’s statement of the issue in this case had zero impact on his recommended decision and order. His statement of the issue technically was not even incorrect given the logical

need to first promulgate a rule before an employer can ever hope to maintain it. Therefore, the Board should overrule General Counsel's exceptions to the ALJ's statement of the issue.

**E. The ALJ Ordered the Appropriate Relief (Exceptions 6 - 7)**

The General Counsel contends that the ALJ erred by failing to include language in the recommend notice to employees that Schwan's will not engage in the two unfair labor practices that he found. The notice, however, specifically advised employees that:

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

\* \* \*

[The notice previously specified that the rights listed above to include the right to]

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

(ALJ Op. at 13). Accordingly, the ALJ's recommended notice to employees identified the specific actions that the Company would not take. The fact that this language required the reader's eyes to glance two inches above to connect the specific rights with the statement that the Company would not abridge those rights does invalidate the notice, and the General Counsel has cited no Board authority to the contrary.

The General Counsel has not cited any decisions where the Board revised a notice because it contained the supposed defects about which the General Counsel complains. And nothing in the Board's Rules and Regulations, Case-

handling Manual, or Bench Book for the Division of Judges required that the ALJ's notice take a particular form. Rather, at least as it relates to settlement, the Casehandling Manual advises that "there is considerable latitude in language to be used in the notice" as long as the substance tracks Board orders in comparable cases. NLRB CASEHANDLING MANUAL (Part One) § 10132.3 (Jan. 2011). Substance takes precedence over form. Accordingly, the ALJ's recommended notice to employees contains no error by identifying the conduct in which the Company would not engage.

Further, and contrary to the General Counsel's contention, the ALJ did not err when his recommended order required Schwan's to modify (but not rescind) the rule in its handbook regarding employee solicitations and the Company's standard suspension notice. (ALJ Op. at 5, 10-11). Again, the General Counsel has failed to cite any authority that requires the ALJ to include specific language in his recommended order. Nothing in the Board's Rules and Regulations, Casehandling Manual, or Bench Book for the Division of Judges required that the ALJ's order must include specific language.

In his brief, but not in the complaint, the General Counsel requested language in the ALJ's recommended order that would require the Company to cease and desist from "[m]aintaining and announcing an overly broad nosolicitation rule prohibiting employees from engaging in protected solicitation during non-worktime in work areas." *UPS Supply Chain*, 357 NLRB No. 106, slip op. at 4 (2011). He also requests language that requires Schwan's to cease and desist from "[p]romulgating, maintaining, or enforcing an oral rule prohibiting em-

employees from discussing with other persons any matters under investigation by its human resources department.” *Hyundai Am. Shipping Agency*, 357 NLRB No. 80, slip op. at 3 (2011).

The General Counsel believes that the language from *UPS Supply Chain* and *Hyundai America Shipping Agency* is more specific and better serves the purposes of the Act by explaining the basis for the labor law violations found. But the suggested language would not accomplish that goal. The proposed language is lengthy and densely larded with jargon and specific labor law terms such that the average employee would be unlikely to better understand it any more than the ALJ’s recommended order. All the Company’s employees would understand is that a handbook rule and the suspension notice violated the labor laws and that the Company revised them. The ALJ’s simple, common-sense, plain language order already accomplishes this. Therefore, the Board should overrule General Counsel’s exceptions to the ALJ’s recommended order and notice to employees.

## **V. Conclusion**

Respondent Schwan’s Home Service, Inc., respectfully requests that the Board affirm the ALJ’s recommended decision, order, and notice to employees because:

- None of the Company’s handbook rules challenged by the General Counsel nor the ECONA could reasonably tend to chill Section 7 rights.
- And even if they did, Schwan’s has a legitimate and substantial business justification for these rules and statements that far outweighs the impact on the exercise of Section 7 rights—an impact which, importantly, is

non-existent because employees freely and openly exercise their Section 7 rights despite the alleged infringement.

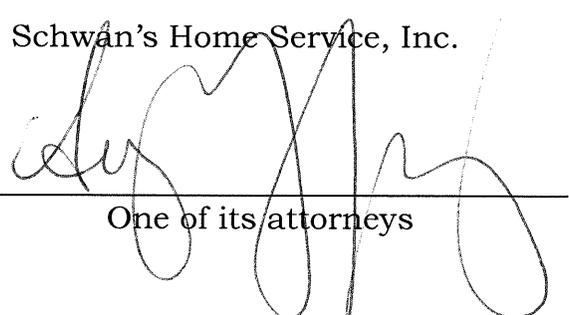
- The ALJ correctly stated the issue in this case and even if his language did not conform to the General Counsel's exacting demand for precision, the statement of the issue had no affect on the proceedings whatsoever.
- The ALJ's recommend order and notice to employees correctly advised employees of their rights and the violations found, and the General Counsel's hyper-technical complaints otherwise have no merit.

Simply put, to sustain the General Counsel's exceptions, the Board would have to ignore the undisputed evidence that Schwan's employees freely and openly exercise their Section 7 rights on a daily basis. The Board would also have to disregard its own long-held precedent that this kind of evidence is vitally important, if not dispositive. The Company urges the Board to remain faithful to its precedent and overrule all of the General Counsel's exceptions and affirm the ALJ's recommended decision, order, and notice to employees. This is simply not the case where a reasonable employee would believe than any of the Company's rules or policies prohibited the exercise of Section 7 activity.

Respectfully submitted,

Schwan's Home Service, Inc.

By:

  
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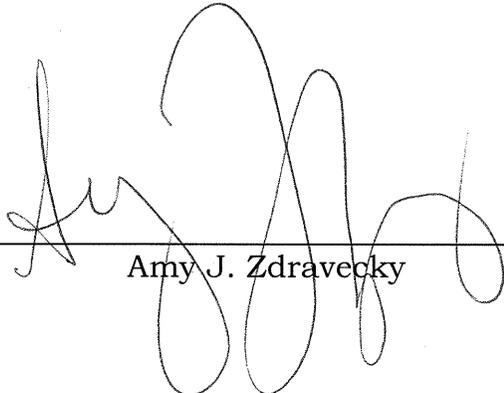
Dated: November 9, 2012

## Certificate of Service

I certify that on November 9, 2012, I electronically filed Respondent Schwan's Home Service Inc.'s *Answering Brief to the General Counsel's Exceptions* with the National Labor Relations Board using the Board's e-filing system. I further certify that on November 9, 2012, I served Respondent Schwan's Home Service Inc.'s *Answering Brief to the General Counsel's Exceptions* upon the individuals identified below by overnight delivery and electronic mail:

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