Butler Medical Transport, LLC *and* Michael Rice *and* William Lewis Norvell. Cases 05–CA–094981, 05–CA–097810, and 05–CA–097854

July 27, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

This case arises from the Respondent's discharge of two employees, William Norvell and Michael Rice, for posts they made on Facebook, based on the Respondent's concededly unlawful social media policy.[1] We affirm the judge's conclusions that the Respondent violated Section 8(a)(1) of the Act by discharging Norvell because his Facebook posts constituted protected concerted activity, and that the Respondent's discharge of Rice was lawful because his Facebook post was unprotected under the Act.[2] We also consider an alternative theory urged by the General Counsel that the judge failed to consider: whether the employees were discharged as a result of the Respondent's unlawfully overbroad social media policy. Applying the analytical framework established by the Board in *Continental Group, Inc.*, 357 NLRB 409 (2011), which addresses discipline imposed pursuant to an unlawfully overbroad rule, we find that the Respondent violated Section 8(a)(1) by discharging Norvell pursuant to its unlawful social media policy because his Facebook posts were protected concerted activity, or alternatively, because they "touch[ed] the concerns animating Section 7." Id. at 412. By contrast, we find that that the Respondent did not violate Section 8(a)(1) by discharging Rice pursuant to its unlawful social media policy. We are not persuaded by our dissenting colleague's view that the discharge of Norvell should be upheld and that *Continental Group* was wrongly decided (an argument the Respondent does not advance).

[1] On September 4, 2013, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief, and an answering brief to the General Counsel's cross-exceptions. The General Counsel filed an answering brief, cross-exceptions, a supporting brief, and a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.

In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order to reflect this remedial change.

In accordance with our recent decision in *King Soopers, Inc.,* 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate William Norvell for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). For the reasons stated in his separate opinion in *King Soopers*, supra, slip op. at 9–16, our dissenting colleague would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

We shall modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997).

Last, we shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB 694 (2014).

The Respondent did not except to the judge's conclusions that its social media policy and its rule on the unauthorized posting and distribution of papers violated Sec. 8(a)(1). As we will explain, the judge did not examine whether the discharges of Norvell and Rice were unlawful insofar as they were predicated on the unlawful social media policy.

[2] The Respondent asserts in its Brief in Support of Its Exceptions to Decision of the Administrative Law Judge that:

> Moreover, the Board could not have properly delegated its authority to issue complaint[s] to the Acting General Counsel [Lafe Solomon], whose appointment is invalid under the Federal Vacancies Reform Act. *Hooks v. Kitsap*, No. C13–5470, 2013 U.S. Dist. LEXIS 114320 (W.D. Wash. Aug. 13, 2013).

The Supreme Court held in *NLRB v. SW General, Inc. d/b/a Southwest Ambulance*, 580 U.S. ___, 2017 WL 1050977 (Mar. 21, 2017), that, under the Federal Vacancies Reform Act of 1998, Solomon's authority to take action as Acting General Counsel ceased on January 5, 2011, after the President nominated him to be General Counsel. Id. at __. However, we find that subsequent events have rendered moot the Respondent's argument that Solomon's lack of authority after his nomination precludes further litigation in this matter. Specifically, on May 25, 2016, General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification in this case that states, in relevant part,

> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.
>
> My action does not reflect an agreement with the appellate court ruling in SW General. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by SW General are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. [*SW General, Inc. v. NLRB*, 796 F.3d 67, 78 (D.C. Cir. 2015)] (citing 5 U.S.C. § 3348(e)(1)).
>
> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

In view of the independent decision of General Counsel Griffin to continue prosecution of this matter, we reject as moot any challenge to the actions taken by Solomon as Acting General Counsel after his nomination on January 5, 2011.

I. THE DISCHARGE OF WILLIAM NORVELL

The Respondent provides ambulance transportation services to hospitals, nursing homes, and other organizations. The Respondent employed Norvell as an EMT and driver from May 2005 until his discharge on October 22, 2012.

Since at least November 2011, the Respondent distributed a sheet of bullet points to newly hired employees. One of the bullet points states, "I will refrain from using social networking sights [*sic*] which could discredit Butler Medical Transport or damages [*sic*] its image." Multiple employees were disciplined or discharged for violations of this social media policy.

On October 10, 2012, former Butler employee Chelsea Zalewski posted on Facebook about her termination. She wrote, "Well no longer a butler employee . . . Gotta love the fact a 'professional' company is going to go off what a dementia pt [patient] says and hangs up on you when you are in the middle of asking a question." Former and current Butler employees commented on her post. One person asked Zalewski what the patient said. Zalewski responded, "Yeah ur telling me! The pt said I told her that they never fix anything on the units . . . Yeah I [know] that pt I'm not dumb enough to tell her let alone any pt how shitty those units are they see it all on their own."

Norvell commented on Zalewski's post. He wrote, "Sorry to hear that but if you want you may think about getting a lawyer and taking them to court." Norvell also suggested, "[Y]ou could contact the labor board too."

An anonymous source left screen shots of parts of this conversation on the desk of Ellen Smith, the Respondent's director of human resources. Smith brought the conversation to the attention of William Rosenberg, Respondent's chief operating officer. Smith and Rosenberg determined that Norvell's suggestion to Zalewski that she get an attorney and sue the Respondent was a violation of the Company's social media policy. They decided to terminate him.

On October 22, 2012, Smith and Rosenberg called Norvell. They explained that he was being terminated because his postings violated the social media policy. Norvell was given no other reason for his termination.

A.

We affirm the judge's conclusion that the Respondent violated Section 8(a)(1) by discharging Norvell because his Facebook posts were protected by Section 7 of the Act.

First, we agree with the judge's finding that Norvell's Facebook posts constituted concerted activity. Norvell engaged in a conversation with fellow employees regarding Zalewski's recent discharge, and Norvell advised Zalewski about potential avenues of redress. In *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014), drawing on well-established precedent, the Board held that an employee's solicitation of her coworkers in connection with her personal complaint of sexual harassment was concerted activity because she sought to enlist the help of other employees. Id. at 3–4. Indeed, "the Board has long held that employee discussions in which advice about future action is sought or offered constitute concerted activity." *UniQue Personnel Consultants*, 364 NLRB No. 112, slip op. at 3 (2016) (citing *Jhirmack Enterprises,* 283 NLRB 609, 614–615 (1987), and *Cadbury Beverages,* 324 NLRB 1213, 1220 (and cited cases) (1997), enfd. 160 F.3d 24 (D.C. Cir. 1998)).[3] In *UniQue*, supra, the Board found that an employee engaged in concerted activity by seeking a coworker's advice about how to deal with perceived unfair discipline. The Board also found that an employee engaged in concerted activity in *Jhimark*, supra, by responding to a coworker's inquiry about complaints concerning his job performance and advising him to take corrective action. And in *Cadbury*, supra, the Board found that an employee's advice to a coworker not to contact a specific union official for support in obtaining an unpaid bonus constituted concerted activity. Similar to the employees in the above-cited cases, Norvell engaged in concerted activity when he offered advice to his former coworker regarding future action.

Our dissenting colleague asserts that Norvell's Facebook posts constituted merely individual activity, citing *Mushroom Transportation Corp. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). We disagree. In *Mushroom*, the court found that an employee did not engage in concerted activity when he advised coworkers regarding their rights because no future group action was contemplated. Similarly, in *Daly Park Nursing Home*, 287 NLRB 710, 710 (1987), the Board found that a conversation following the discharge of an employee in which *other* employees discussed her discharge, with one coworker remarking "that the discharge was 'unfair' and that it was a shame [the employee] could not hire a lawyer to fight it" did not constitute concerted activity. The Board explained that as in *Mushroom*, there was "no evidence that [the coworker] or any of the employees with whom she discussed [the] discharge contemplated doing anything about the discharge." Id. at 711. Further, there was not "even the suggestion that the employees might attempt to

[3] Accord: *Hoodview Vending Co.*, 359 NLRB 355 (2012), reaffirmed and incorporated by reference at 362 NLRB No. 81 (2015) (finding employees' conversation about job security and possibility of discharge to be inherently concerted).

give mutual aid or protection to [the discharged employee] by encouraging her to institute legal action to challenge her termination." Id. This case presents a clear contrast. Here, the Facebook conversation involved both Zalewski, the discharged employee, and Norvell, who encouraged her to seek legal help and to contact the Board. Thus, Norvell's Facebook posts were clearly concerted activity.

Second, we affirm the judge's finding that Norvell's Facebook posts were made for the purpose of mutual aid and protection.[4] Norvell posted his comments as part of an online conversation with fellow employees, triggered by one employee's complaint about what she believed was her unjust discharge—a potential concern for all employees, who have a common interest in job security and protection against such a dismissal. As we observed in *Fresh & Easy*, the "Board has found that an employee who asks for help from coworkers in addressing an issue with management does, indeed, act for the purpose of mutual aid or protection, even where the issue appears to concern only the soliciting employee, the soliciting employee would receive the most immediate benefit from a favorable resolution of the issue, and the soliciting employee does not make explicit the employees' mutuality of interests." 361 NLRB No. 12, slip op. at 5. By complaining, Zalewski was at least implicitly soliciting support from her coworkers, and by advising Zalewski of potential avenues of redress for her discharge, Norvell was making common cause with her and with other employees privy to the conversation. Application of the solidarity principle discussed in *Fresh & Easy*, is especially fitting here because Norvell was fired for helping the fired Zalewski—creating precisely the occasion for reciprocal help that the solidarity principle contemplates—"because next time it could be one of them that is the victim." Id. at 6. Thus, we reject the Respondent's contention that Norvell's conduct was not for the purpose of "mutual aid or protection."[5]

Because we agree with the judge's findings that Norvell's Facebook posts constituted protected concerted activity, the Respondent knew of the concerted nature of the posts, and Norvell's discharge was motivated by the posts, we affirm the judge's conclusion that the Respondent violated Section 8(a)(1).[6]

B.

The General Counsel alternatively contends that Norvell's discharge violated Section 8(a)(1) because it was pursuant to an unlawfully overbroad rule. In *Continental Group,* supra, the Board held that discipline imposed pursuant to an unlawfully overbroad rule may violate Section 8(a)(1) in two situations: if the employee was disciplined for engaging either in protected concerted activity or, for conduct that is not concerted, but "touches the concerns animating Section 7." 357 NLRB at 412. The employer can avoid liability by demonstrating that the employee's conduct actually interfered with the employer's operations and that the interference, rather than the violation of the overbroad rule, was the reason for the discipline. Id. If the employer provided the employee with the reason for the discipline, the employer must also establish that it cited the interference, rather than the violation of the overbroad rule. Id.

Although the judge did not apply *Continental Group*, both the General Counsel and the Respondent urge the Board to apply it here. Contrary to the dissent, we find that *Continental Group* applies to this case and it leads to the same result reached by the judge. We conclude that Norvell's posts were protected concerted activity or, alternatively, that they touched the concerns animating Section 7. The Respondent, in turn, has failed to establish a defense cognizable under *Continental Group*.

It is undisputed that the Respondent discharged Norvell for violating its unlawful social media policy. The social media policy, phrased in terms of a promise required of its employees, stated in relevant part: "I will refrain from using social networking sights [sic] which

[4] The judge based his protected activity determination largely on Zalewski's conduct, rather than Norvell's. The judge found that Norvell's Facebook posts were protected because he was responding to Zalewski's post in which she stated that she was terminated for allegedly telling a patient about the poor condition of the Respondent's units, which the judge found was a matter of mutual concern to the employees. We find it unnecessary to pass on the judge's reasoning in this respect.

[5] In arguing that Norvell's Facebook posts were not for mutual aid or protection, the Respondent relies on a decision overruled in relevant part in *Fresh & Easy*, supra: *Holling Press*, 343 NLRB 301 (2004), where a divided Board had found that an employee was not protected when she sought a colleague's assistance in connection with her sexual harassment claim. In any event, this case is distinguishable from *Holling Press*. There, the Board majority found that the employee's actions—albeit concerted, see id. at 302—were not protected because "[t]he bare possibility that the second employee may one day suffer similar [sexual harassment] treatment, and may herself seek help, is far too speculative a basis on which to rest a finding of mutual aid or protection." Id. at 304. The majority contrasted sexual harassment claims, which it deemed to be relatively uncommon, with discipline in the workplace, and found that it was much more likely that a fellow employee would one day need assistance on a disciplinary issue. Id. Here, Norvell posted his comments to assist a fellow employee with a disciplinary issue, her termination. Therefore, his activity was protected even under the Board majority's rationale in *Holling Press*.

[6] See *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

could discredit Butler Medical Transport or damages [sic] its image."[7]

As explained above, we affirm the judge's finding that Norvell's Facebook posts were protected concerted activity, and thus fall within the first category of protected activity under *Continental Group*. However, even if Norvell's actions were deemed outside the scope of protected concerted activity, they would nevertheless amount to what *Continental Group* described as "conduct that touches the concerns animating Section 7" or "conduct that otherwise implicates the concerns underlying Section 7." Id. In response to Zalewski's complaint that she was fired unfairly, Norvell suggested avenues for redress to address Zalewski's discharge, including pointing her to the Board. This communication clearly implicated concerns underlying Section 7. Indeed, the rights embodied in Section 7 are meaningless without access to the agency that enforces them. "Preserving and protecting access to the Board is a fundamental goal of the Act, as reflected in Section 8(a)(4), which makes it unlawful to discharge or discriminate against employees for coming to the Board." *Solarcity Corp.,* 363 NLRB No. 83, slip op. at 6 (2015).[8] It would be anomalous to hold that an employee could be fired for advising a coworker that she could file unfair labor practice charges—and, indeed, the Board has held that an employer violated Section 8(a)(4) when it discharged employees on the belief that they had supported or assisted a coworker who filed an unfair labor practice charge with the Board. *National Surface Cleaning, Inc.*, 314 NLRB 549, 553 (1994), enfd. 54 F.3d 35 (1st Cir. 1995). Thus, we agree with the General Counsel that even if Norvell's posts did not constitute protected concerted activity, his discharge was still unlawful because his posts "touche[d] the concerns animating Section 7." *Continental Group,* 357 NLRB at 412.

Because Norvell was discharged for violating an unlawfully overbroad rule, and because his underlying conduct amounted either to protected concerted activity or to conduct otherwise implicating the concerns animating Section 7, his discharge was unlawful, unless the Respondent "can establish that [he] actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline." Id. We find that the Respondent failed to establish this affirmative defense. The Respondent did not introduce any evidence that Norvell's posts interfered with its operations. Moreover, the Respondent cited Norvell's violation of the social media policy, rather than any such interference, as the reason for his termination.

We therefore affirm the judge's conclusion that the Respondent violated Section 8(a)(1) by discharging Norvell pursuant to its unlawful rule.

II. THE DISCHARGE OF MICHAEL RICE

The Respondent employed Rice from November 2011 until his discharge on January 14, 2013. On January 5, 2013, Rice posted the following message on Facebook: "Hey everybody!!!!! IM FUCKIN BROKE DOWN IN THE SAME SHIT I WAS BROKE IN LAST WEEK BECAUSE THEY DON'T WANTA BUY NEW SHIT!!!! CHA-CHINNNGGGGGG CHINNNG—at Sheetz Convenience Store." Two people clicked "like" on Rice's post, and two people commented on it. The identity of these people and the content of their comments are unknown.

Sometime after January 5, 2013, an anonymous source left a printout of a screen shot of Rice's post underneath Smith's door. Smith showed the post to Rosenberg, who conducted an investigation. Rosenberg reviewed the Company's maintenance records to see whether Rice's vehicle had broken down on the day he wrote the post; he found that it had not. Therefore, Rosenberg determined that Rice's post was false.

On January 14, 2013, Rosenberg and Smith discharged Rice because his post violated the Company's social media policy. Rice's Corrective Action Form reflects that this violation was the reason for his termination.

Thereafter, Rice filed for unemployment benefits. At his unemployment hearing, Rice testified that his post was not about his work vehicle. Rather, Rice claimed that he was referring to his girlfriend's car. At the present hearing, the Respondent called Rice as a witness. Rice refused to testify, citing his Fifth Amendment rights.

We affirm the judge's finding that the Respondent did not violate Section 8(a)(1) by discharging Rice because

[7] The Respondent has effectively admitted that its social media policy was unlawful, by failing to except to the judge's conclusion that the policy violated Sec. 8(a)(1). See Sec. 102.46(b)(2) of the Board's Rules and Regulations. The Board has addressed similar policies. See, e.g., *Novelis Corp.*, 364 NLRB No. 101, slip op. at 1–2, 39–40 (2016) (finding unlawful employer's social media policy providing that "[a]nything that an employee posts online that potentially can tarnish the Company's image ultimately will be the employee's responsibility" and "taking public positions online that are counter to the Company's interest might cause conflict and may be subject to disciplinary action"). See generally Ariana R. Levinson, *Solidarity on Social Media*, 2016 Colum. Bus. L. Rev. 303 (2016).

[8] Sec. 8(a)(4) provides that it is an unfair labor practice for an employer "to discharge or discriminate against an employee because he has filed charges or given testimony under th[e] Act." 29 U.S.C. §158(a)(4).

his Facebook post was not protected under the Act.[9] Because Rice did not testify in this case, we cannot be certain whether his post referred to his girlfriend's car, as he claimed at the unemployment hearing, or to the Respondent's ambulance, as the Respondent reasonably believed. If Rice's post referred to his girlfriend's car, then it was not made for the purpose of mutual aid or protection. The condition of his girlfriend's car was not a matter of mutual concern to his coworkers, at least not regarding their terms and conditions of employment.

On the other hand, if the post referred to the condition of the Respondent's ambulance, we agree with the judge's finding that it was maliciously false. Otherwise protected communications "will lose the protection of the Act if maliciously false, i.e., made with knowledge of their falsity or with reckless disregard for their truth or falsity." *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006), revd. on other grounds sub nom. *Joliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008). Rosenberg testified that he checked the maintenance records and determined that Rice's vehicle did not break down on the day of Rice's post. The General Counsel has not provided any contrary evidence. Therefore, assuming that Rice was referring to the Respondent's ambulance, we find that he made the post with knowledge of its falsity because he was driving the vehicle and knew that it had not broken down.[10]

Applying *Continental Group*, supra, we also find that Rice's discharge was lawful even though it was imposed pursuant to an unlawfully overbroad rule. As explained, Rice's post was not protected under the Act. We find that Rice's post also did not "touch the concerns animating Section 7" because if the post referred to Rice's girlfriend's car, it was not made for the purpose of mutual aid or protection, and if it referred to the Respondent's vehicle, it was maliciously false.

For these reasons, we affirm the judge's conclusion that Respondent did not violate Section 8(a)(1) by terminating Rice.[11]

III. RESPONSE TO THE DISSENT

Our dissenting colleague contends that *Continental Group* is contrary to the Act, insofar as the decision permits the Board to find a violation of Section 8(a)(1) when an employee who has *not* engaged in protected concerted activity is disciplined or discharged for violating an unlawfully overbroad employer rule.[12] We have applied the Board's 2011 decision in *Continental Group* because it is controlling precedent, traceable to a decision more than 40 years old.[13] That no Federal court has rejected Board doctrine in this area—and that two Federal Circuits have upheld it[14]—confirms that we are relying on well-established law. Indeed, the Respondent has argued that the judge erred in *failing* to apply *Continental Group* here (although, of course, the Respondent contends that application of that decision should lead to a different result with respect to Norvell's discharge). The Board, then, is not required to revisit *Continental Group* today. Nevertheless, we address our colleague's principal arguments. All reflect a failure fully to come to terms with the rationale of *Continental Group*: that, in some circumstances—but not all—the discipline or discharge of an employee pursuant to an unlawful rule has a reasonable tendency to chill the exercise of employees' Section 7

[9] The General Counsel contends that by announcing, "Hey everybody," Rice was attempting to initiate discussion regarding the condition of the Respondent's units, and that the discussion had the potential to grow into group action. See *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986) (holding that concerted activity includes those "circumstances where individual employees seek to initiate or induce or to prepare for group action"), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). We find it unnecessary to decide whether this interpretation of Rice's post was correct because, in any event, his post was unprotected.

[10] Compare *Encino Hospital Medical Center*, 360 NLRB 335, 335 (2014) (employee's conduct lost protection under the Act because she engaged in "deception that was neither an integral nor a necessary part of her assistance of her former coworker").

We reject the General Counsel's alternate theory that the Respondent discharged Rice because it believed that Rice engaged in protected concerted activity, even if he did not. See *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 840 (8th Cir. 2003); *Service Industries*, 314 NLRB 30, 31 (1994). Even if the Respondent believed that Rice's post was concerted activity, Rosenberg had every reason to believe that the post referred to the Respondent's vehicle, and therefore that it was maliciously false, which meant that it could not be protected activity.

[11] See *Flex Frac Logistics, LLC*, 360 NLRB 1004 (2014) (finding no violation under *Continental Group*); *Food Services of America, Inc.*, 360 NLRB 1012 (2014) (same).

[12] Our colleague also reiterates his criticism of the Board's well-established approach to evaluating facial challenges to employer rules, as reflected in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Board has rebutted our colleague's arguments at length in *William Beaumont Hospital*, 363 NLRB No. 162 (2016), and we reaffirm the Board's position. There is no need here to reopen the debate, not least because the Respondent concedes that its social media policy was unlawful.

[13] *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. 496 F.2d 484 (6th Cir. 1974).

[14] See *NLRB v. Northeastern Land Services, Ltd.*, 645 F.3d 475, 484 (1st Cir. 2011); *Double Eagle Hotel & Casino*, 414 F.3d 1249, 1258–1259 (10th Cir. 2005), cert. denied 126 S.Ct. 1331 (2006). Contrary to the dissent's assertion, these decisions do indeed demonstrate that the *Double Eagle* rule is well established. In *Double Eagle*, the Tenth Circuit found "that the Board's interpretation [was] reasonable," explaining that "by adopting the rule that all disciplinary actions imposed pursuant to an unlawful rule are unlawful, the Board reduces the chilling effect that results from imposition of overbroad rules." 414 F.3d at 1258. The employer's appellate brief in *Northeastern*, meanwhile, shows that it did challenge the *Double Eagle* rule before the First Circuit. And, as the dissent must concede, no court has rejected the Board's approach as contrary to the Act or otherwise flawed.

rights, in violation of Section 8(a)(1), even when the employee who violated the rule did not himself engage in protected concerted activity.

A.

We briefly summarize the history of Board doctrine in this area, culminating in *Continental Group*, which actually *narrowed* the scope of prior cases. As *Continental Group* explained, the Board had "long adhered to and applied the principle that discipline imposed pursuant to an overbroad rule is unlawful," often stating its rule "in absolute terms," but "never expressly set[ting] forth a rationale for the rule nor a description of its scope."[15] The Board filled this doctrinal gap in *Continental Group*, "set[ting] limits on [the rule's] application."[16] (The *Continental Group* Board referred to the rule as the "*Double Eagle* rule," after a 2004 Board decision enforced by the Tenth Circuit,[17] but traced its origins to *Miller's Discount*, supra, a 1972 decision.)

Continental Group looked to the policies underlying the *Double Eagle* rule, most significantly the need to prevent a potential chilling effect on the exercise of employees' Section 7 rights. This effect, the Board explained, is why an employer's mere maintenance of overbroad rules is held to violate Section 8(a)(1).[18] In turn, actual enforcement of such a rule against employees has a "similar, or perhaps even greater, chilling effect."[19] This is obviously true where the employee had engaged in protected concerted activity, the Board pointed out. The Board then went on to examine two other situations.

First, where the unlawful rule was enforced against conduct "wholly distinct from the activity that falls within the ambit of Section 7," the potential chilling effect is "much less significant."[20] Accordingly, the Board rejected the principle—suggested by earlier decisions—that discipline or discharge pursuant to an overbroad rule is *always* unlawful.

Second, the Board addressed cases where Section 7 was fairly implicated, even if the employee's conduct did not meet the test for protected concerted activity. In those cases, the "much greater risk that employees would be chilled in the exercise of their Section 7 rights"—in comparison to cases involving conduct of no concern to the Act—made it proper to apply the *Double Eagle* rule.[21] The Board did not precisely define the conduct falling into this second category, but suggested that it would include conduct that was *not* concerted, but *was* for mutual aid or protection. It gave as an example "conduct that seeks higher wages," as reflected in an earlier Board decision where an employee who complained to his employer's client about an individual compensation issue was discharged for violating an overbroad confidentiality rule.[22]

Finally, *Continental Group* created a new affirmative defense for employers, permitting them to avoid liability for discipline imposed pursuant to an overbroad rule in specified circumstances, as described earlier.[23] In this respect, too, *Continental Group* represents a careful narrowing of the *Double Eagle* rule, which made no such concession to an employer's legitimate interests.

B.

Our dissenting colleague entirely rejects the clarification set forth in *Continental Group*, despite an acknowledgment that the Board's decision went some way toward addressing what dissenting Board members in earlier cases had viewed as the flaws in the *Double Eagle* rule. In our colleague's view, the Act precludes the Board from ever finding a violation of Section 8(a)(1) when an employee who has *not* engaged in protected concerted activity is disciplined or discharged for violating an unlawfully overbroad employer rule. The dissent argues that the plain language of the Act—first, the text of Section 7 and Section 8(a)(1); second, the text of Section 10(c)—forecloses the approach taken in *Continental Group*. The dissent also contends, as a matter of policy, that the Board's approach creates "too much uncertainty because nobody can reasonably determine whether work rules are unlawfully broad" under the standard established in *Lutheran Heritage Village*, supra. We reject both prongs of our colleague's position. That position, of course, leads him to an untenable result here: that an employer should be free to fire an employee for—in violation of a concededly unlawful rule—informing a coworker that she may file an unfair labor practice charge with the Board to challenge her discharge.

1.

Contrary to our colleague, nothing in the text of the Act precludes the Board from finding—in the circumstances delineated by *Continental Group*—that the disci-

[15] 357 NLRB at 410.

[16] Id.

[17] *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006). In *Double Eagle,* the Board held that "where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." 341 NLRB at 112, fn. 3.

[18] 357 NLRB at 411.

[19] Id.

[20] Id. at 412.

[21] Id.

[22] Id., citing *NLS Group*, 352 NLRB 744 (2008), incorporated by reference in 355 NLRB 1168 (2010), enfd. 645 F.3d 475 (1st Cir. 2011).

[23] Id.

pline or discharge of an employee who has not engaged in protected concerted activity violates Section 8(a)(1).

Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." In our colleague's apparent view, this language can only mean that where employees have not *already* exercised their Section 7 rights, an employer's actions, by definition, can never "interfere with, restrain, or coerce employees" in the "exercise of [those] rights." That very narrow interpretation of Section 8(a)(1) is not compelled by the statutory language—far from it. It is obviously possible for an employer to "restrain . . . employees in the exercise of . . . rights" by creating a *prior restraint* on that exercise. "[T]he Board has often held that an employer violates the Act when it acts to prevent *future* protected activity."[24]

The dissent's position would prevent the Board from finding a violation when an employer has succeeded completely in chilling Section 7 activity by implicitly or explicitly threatening to punish it. This position has no clear support in the case law, whether the Board's decisions or those of the Supreme Court.[25] Indeed, our colleague acknowledges (as the Board has long held) that an employer's mere maintenance of a rule that restricts protected concerted activity can be unlawful—regardless of whether employees have ever exercised their Section 7 right to engage in that activity.[26] At this point, the dissent pivots to an argument that is based not on the statutory text, but simply on a different, and debatable, judgment about the chilling effect of an employer's actions. Our colleague asserts (1) that in the absence of protected concerted activity, the chilling effect caused by discipline or discharge based on an unlawful rule is identical to the effect caused by the mere maintenance of the rule; and (2) that this chilling effect is dispelled by ordering the employer to rescind the rule and related remedies. We disagree, essentially for the reasons suggested by the *Continental Group* Board when it distinguished between cases where employees' underlying conduct had no connection to the Act and cases where the conduct, while not deemed protected concerted activity, nevertheless implicated the concerns of Section 7. When an employee sees a coworker actually disciplined or discharged for conduct that, in somewhat different circumstances, *would be* protected by the Act, the employee (not to mention the coworker himself) is surely more likely to be chilled by the enforcement of an unlawful rule than he would be by the mere maintenance of the rule. The employer has demonstrated that the rule is more than just words; it is a basis for taking action against employees. It is therefore appropriate to find the discipline or discharge unlawful and to remedy it. Certainly nothing in the Act's language or legislative history compels the Board to take a contrary approach. We believe that *Continental Group* reflects not only a reasonable construction of the statute, which the Board is entitled to adopt, but also the construction that best furthers the Act's goals.[27]

2.

The dissent also argues that Section 10(c), which prohibits the Board from ordering reinstatement or backpay to an employee "suspended or discharged for cause,"[28] precludes the *Continental Group* approach. Here, too, our colleague's view is mistaken.

The dissent's premise is that where an employee is disciplined or discharged for violating an unlawful rule, the discipline or discharge is "for cause" within the meaning of Section 10(c) if the employee's underlying conduct was not protected concerted activity. The flaw in this claim is clear. Under *Continental Group*, a discipline or discharge can never be unlawful unless it is predicated on an unlawful rule. That causal nexus between the violation of the unlawful rule and the discipline or discharge establishes that the employer's action was *not* "for cause" in the statutory sense. As the Supreme Court has explained, the legislative history of Section 10(c)

> Indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of *misconduct*. There is no indication, however, that it was designed to curtail the Board's power in fashioning remedies *when the loss of employment stems directly from an unfair labor practice*. . . .

[24] *Parexel International, LLC*, 356 NLRB 516, 519 (2011) (emphasis added; footnote collecting cases omitted). "To be sure," the Board has observed, "an employer may violate Section 8(a)(1) even where an employee has not engaged in protected concerted activity. . . . " *World Color (USA) Corp.*, 360 NLRB 227, 228 (2014) (citing cases), enf. denied in part on other grounds 776 F.3d 717 (D.C. Cir. 2015).

[25] If our colleague were correct, an employer would be free to fire an employee it mistakenly suspected of engaging in Section 7 activity; Board law, not surprisingly, holds otherwise. See, e.g., *Monarch Water Systems, Inc.*, 271 NLRB 558, 558 fn. 3 (1984).

[26] E.g., *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970) ("As the mere maintenance of the rule itself serves to inhibit the employees' engaging in otherwise protected organizational activity, the finding of a violation is not precluded by the absence of specific evidence that the rule was invoked as of any particular date against any particular employee.").

[27] "The Board . . . is given considerable authority to interpret the provisions of the [National Labor Relations Act]. . . . If the Board adopts a rule that is rational and consistent with the Act, . . . then the rule is entitled to deference from the courts." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987). See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1991).

[28] 29 U.S.C. §160(c).

Fibreboard Paper Products v. NLRB, 379 U.S. 203, 217 (1964) (emphasis added; fn. omitted).[29]

In line with the Supreme Court's *Fibreboard* decision, the Board has held unlawful the discharge of an employee who violated an employer rule established unlawfully in violation of the 8(a)(5) duty to bargain.[30] *Continental Group* is entirely consistent with the Board's approach to rule-based discipline and discharge under Section 8(a)(5). In neither situation is Section 10(c) an obstacle to the Board's approach.

Indeed, and notwithstanding the Supreme Court's decision in *Fibreboard*, insofar as Section 10(c) might be interpreted to require the Board to consider whether discipline or discharge pursuant to an unlawful rule was nevertheless "for cause," the affirmative defense created by *Continental Group* would satisfy such a requirement, by recognizing that an employer's legitimate interests might outweigh the need to protect employees' Section 7 rights in a particular case.[31] Thus, just as the Supreme Court has approved the Board's *Wright Line* framework in 8(a)(3) discrimination cases involving an employer's mixed motives—rejecting a challenge based in part on Section 10(c)—so the *Continental Group* approach is consistent with the Act, even as read by the dissent.[32]

3.

Our dissenting colleague's final challenge to *Continental Group* is based on his disagreement with the Board's established test for addressing facial challenges to employer rules, as articulated 12 years ago in *Lutheran Heritage Village*, supra—and upheld by every federal court of appeals to consider it.[33] Here, our colleague renews arguments that he first articulated in *William Beaumont Hospital*, supra, and that were answered by the Board there. In our colleague's view, "[g]iven the unpredictability inherent in the *Lutheran Heritage* . . . standard, . . . employers, when imposing discipline, have no reasonable way of knowing whether they can or should rely on the work rule that an employee has violated. . . ." But as the Board pointed out in *William Beaumont Hospital*, the challenge posed in determining the legality of employer rules "is not a function of the Board's legal standard," but rather is "inherent in the remarkable number, variety, and detail of employer work rules. . ., drafted with differing degrees of skill and levels of sophistication."[34] Meanwhile, our colleague has proposed an alternative standard for rules challenges "that would be harder to apply" for reasons the Board has explained.[35]

We need not renew this debate here. It is enough to point out that while Board cases involving facial challenges to employer rules are common, cases like this one, involving discipline or discharge based on an allegedly overbroad rule, are relatively rare. Indeed, the number of hypothetical cases marshaled by the dissent to demonstrate the supposedly absurd results that *Continental Group* compels is roughly the same as the number of reported Board decisions applying *Continental Group* itself in the last 6 years—decisions that (like this one)

[29] In *Fibreboard*, supra, the Court upheld a Board's order reinstating employees who had been terminated as the result of employer's unilateral subcontracting of work, in violation of the duty to bargain established by Sec. 8(a)(5) of the Act. Our colleague's view cannot be reconciled with *Fibreboard*. In that case, the terminated employees had not engaged in protected concerted activity and the employer's decision to engage in subcontracting was lawfully motivated: there was no prohibited reason for terminating the employees. Rather, it was the decision to subcontract that was unlawful, because made unilaterally. The dissent would seemingly have to conclude that while the subcontracting might be remedied (like the unlawful rule in this case), the terminations were "for cause" as the dissent interprets it—imposed in the absence of a prohibited reason—and thus Sec. 10(c) prohibited a make-whole remedy.

[30] See, e.g., *Consec Security*, 328 NLRB 1201, 1201–1202 (1999); *Great Western Produce, Inc.*, 299 NLRB 1004 (1990). In *Anheuser-Busch, Inc.*, 351 NLRB 644, 650 (2007), cited by the dissent, a divided Board overruled *Great Western Produce*, but only insofar as it was inconsistent with the decision in that case, which held that Sec. 10(c) precluded the Board from ordering a make-whole remedy for employees whose misconduct (in violation of an existing rule) had been discovered by security cameras installed in violation of the 8(a)(5) duty to bargain. The *Anheuser-Busch* Board, in turn, distinguished *Consec Security* on its facts, because there it was "not clear . . . whether the employees' actions would have constituted 'cause' for discipline . . . if the employer had not committed the unfair labor practices." 351 NLRB at 649. In short, the principle that discipline or discharge predicated on a rule established in violation of Sec. 8(a)(5) is itself unlawful survived *Anheuser-Busch*—as later cases confirm. See *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op. at 15 (2016), citing, inter alia, *Alta Vista Regional Hospital*, 357 NLRB 326 (2011) (incorporating 355NRB 265, 267, 268 (2010)), enfd. 687 F.3d 1181 (D.C. Cir. 2012).

[31] There was no such showing here, as we have explained, nor does Norvell's conduct reflect anything close to the "misconduct" that concerned Congress—yet our dissenting colleague would still hold that Sec. 10(c) precludes finding a violation.

[32] *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1984), approving *Wright Line,* 251 NLRB 1083 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, if the General Counsel establishes that an employee's protected concerted activity was a substantial or motivating factor in the employer's discipline or discharge, the employer may escape liability by establishing, as an affirmative defense, that it would have taken adverse action regardless of the employee's protected conduct. The *Transportation Management* Court observed that in enacting Sec. 10(c), Congress was "not thinking of the mixed motive case," but rather assumed "that discharges were either 'for cause' or punishment for protected activity." 462 U.S. at 401 fn. 6. Like a mixed-motive discharge, a discharge predicated on an unlawful rule does not fit into the neat categories that Congress contemplated.

[33] See *William Beaumont Hospital*, supra, 363 NLRB No. 162, slip op. at 3 & fn. 11 (collecting cases).

[34] 363 NLRB No.162, slip op. at 5 (fn. omitted).

[35] Id., slip op. at 5–6.

include the dismissal of allegations.[36] Notably, both *Continental Group* and *Lutheran Heritage Village* actually *narrowed* the relevant scope of Section 8(a)(1) in their respective contexts.[37] It is telling, then, that in the more than four decades that the *Double Eagle* rule, in some version, has been in effect, the ill effects hypothesized by the dissent have not arisen.

. . .

For all of these reasons, then, we reject our colleague's demand that the Board revisit *Continental Group*. Rather, we carefully apply that decision, as explained, to find one discharge lawful and another, unlawful, reaching results that should strike no one as absurd.

ORDER

The National Labor Relations Board orders that the Respondent, Butler Medical Transport, LLC, Owings Mills, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) Discharging employees based on unlawful rules.

(c) Maintaining the social media policy and posting or distribution of papers rules.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Norvell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make William Norvell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Compensate William Norvell for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify William Norvell in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Rescind the social media policy and posting or distribution of papers rule.

(g) Furnish employees with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

(h) Within 14 days after service by the Region, post at all its facilities copies of the attached notice marked "Appendix."[38] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communi-

[36] See fn. 16, supra (collecting cases). Contrary to the dissent, application of *Continental Group* has not and will not lead to "absurd results." And we simply note that in each of our dissenting colleague's hypothetical cases, he presumes that when discharging an employee for unprotected and disruptive conduct, the employer would only cite the employee's violation of an overbroad rule and thus the employer would not be able to assert an affirmative defense under *Continental Group*. Contrary to the dissent, it is highly unlikely that the employer would not also cite the employee's conduct, Take for example one of the dissent's hypothetical cases: the discharge of an employee who banged on trash can lids and shouted "I want a raise!" at 2 a.m. in a patient-care area of a hospital. It is unlikely that the employer would only cite the employee's violation of its overbroad off-duty access rule. Rather, the employer would likely also cite the employee's interference with its operation of the hospital, and thus, the employer could assert an affirmative defense.

[37] See *William Beaumont Hospital*, supra, 363 NLRB No. 162, slip op. at 5 (explaining that *Lutheran Heritage Village* "gave greater weight than prior decisions to employers' interests," citing dissent there and academic commentary).

[38] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

cates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2010.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 27, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, concurring in part and dissenting in part.

This case involves two sets of established principles involving the National Labor Relations Act (NLRA or Act), and a pair of cases—*Double Eagle Hotel & Casino*[1] and *Continental Group, Inc.*[2]—that combine these principles in a manner that, in my view, impermissibly deviates from the Act's express language.

The first set of principles involves the difference between "protected" and "unprotected" employee activities under Section 7 of the Act.[3] If an employee's activities are protected, then discipline based on those actions violates Section 8(a)(1), which states it is unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[4] If the employee's activities are unprotected, then discipline based on those activities does *not* violate Section 8(a)(1).

The second set of principles relates to whether "facially neutral" employment policies, handbook provisions or work rules (collectively "rules") impose restrictions that are unlawfully broad.[5] In a long line of cases, the Board has found that facially neutral rules—rules that do not expressly prohibit protected activity, have not been applied to restrict protected activity, and were not adopted in response to protected activity—violate Section 8(a)(1) if the Board believes employees would reasonably construe them to prohibit some type of protected activity that employees might wish to undertake in the future.[6]

The pair of decisions at issue here—*Double Eagle* and *Continental Group*—produce incongruous outcomes

[1] 341 NLRB 112 (2004), enfd. as modified 414 F.3d 1249 (10th Cir. 2005).

[2] 357 NLRB 409 (2011), incorporating in part 353 NLRB 348 (2008). The Board's original decision in 2008 was rendered by a two-member Board, which was found to be unconstitutional by the Supreme Court based on the absence of a valid quorum, *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), resulting in a remand to the Board by the D.C. Circuit. See 357 NLRB at 409.

[3] Sec. 7 of the Act states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such a right may be affected by" a union-security agreement. The Board's standards for determining whether conduct is "concerted" are set forth in the *Meyers Industries* cases. See *Meyers Industries*, 268 NLRB 493 (1984) *(Meyers I)*, remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). For a discussion of these standards and additionally the requirement under Sec. 7 that, to be protected, concerted activity must be "for the purpose" of "mutual aid or protection," see *Fresh & Easy Neighborhood Market, Inc*., 361 NLRB No. 12, slip op. at 11–19 (2014) (Member Miscimarra, concurring in part and dissenting in part).

[4] Sec. 8(a)(1).

[5] I use the term "facially neutral" to describe rules that do not expressly restrict Sec. 7 activity, were not adopted in response to Sec. 7 activity, and have not been applied to restrict Sec. 7 activity. Cf. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004) (*Lutheran Heritage*).

[6] See *Lutheran Heritage*, 343 NLRB at 647. For reasons I explained at length in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7–24 (2016) (Member Miscimarra, concurring in part and dissenting in part), I disagree with the "reasonably construe" standard established in *Lutheran Heritage*, supra. Rather, I believe a facially neutral rule should be deemed unlawful only if the Board considers both the potential adverse impact of the rule on protected activity *and* the legitimate justifications associated with the rule and, having done so, if the Board concludes that the justifications are outweighed by the rule's adverse impact on protected activity. Id., slip op. at 9.

Notwithstanding my disagreement with the *Lutheran Heritage* "reasonably construe" standard, I believe *Double Eagle* and *Continental Group* are contrary to the Act and should be overruled *regardless* of whether one applies the "reasonably construe" test adopted in *Lutheran Heritage* or the balancing test I advocated in *William Beaumont Hospital*. In addition, I note that there are no exceptions to the judge's findings that the Respondent's facially neutral work rules—specifically, its social media policy and its rule regarding the unauthorized posting and distribution of papers—were unlawfully broad in violation of Sec. 8(a)(1). By failing to except, the Respondent has waived its right to challenge these findings (see Sec. 102.46(b)(2) of the Board's Rules and Regulations), and I do not reach or pass on the legality of these policies.

where (i) an employee has engaged in *unprotected* activities, which means discipline based on the employee's actions would normally be lawful, and (ii) the employer, when imposing discipline, relies on a facially neutral rule that, according to the Board, is unlawfully broad. Again, in this situation, the disciplined employee's activities are *unprotected* by Section 7, and the facially neutral rule is not deemed unlawful for any reason that pertains to the employee who has been disciplined. Rather, the rule violates the Act because it may be reasonably construed to restrict employees' right to engage in protected activity in the future. When the Board applies *Double Eagle* and *Continental Group* where the employee's conduct is unprotected, three outcomes are produced that I believe are contrary to our statute. First, unprotected conduct is treated like conduct that is protected by Section 7, even though it is not. Second, lawful discipline imposed because of the employee's unprotected conduct is deemed unlawful. Thus, although Section 8(a)(1) only prohibits interference with or restraint or coercion of "employees in the *exercise* of [Section 7] rights,"[7] the Board finds a violation even though the employee did not exercise any Section 7 right. Third, even if the employee was suspended or discharged for "cause," the Board orders backpay and reinstatement, which is contrary to the mandate in Section 10(c) of the Act that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause."[8]

The Board is constrained to apply the statute that Congress enacted. If employee actions are unprotected by Section 7, an employer can lawfully impose discipline based on such unprotected actions. Moreover, if the disciplined conduct is unprotected, it follows that the discipline is for cause, since "[c]ause, in the context of Sec. 10(c), effectively means the absence of a prohibited reason."[9] Accordingly, when an employee is suspended or discharged for unprotected conduct, the suspension or discharge is for "cause," and Section 10(c) prohibits the Board from ordering reinstatement or backpay, regardless of whether the employer invoked an unlawfully broad rule when it suspended or discharged the employee. Moreover, the Board has appropriate remedies to address the unlawful rule, including (i) a cease-and-desist order prohibiting ongoing maintenance of the unlawfully broad rule, (ii) an affirmative order requiring that the rule be rescinded, and (iii) a further affirmative requirement that the employer post a notice informing employees that it will comply with the cease-and-desist and rescission orders. But when an employer dealing with unprotected conduct invokes or applies a facially neutral rule that the Board finds to be unlawfully broad, it exceeds the Board's remedial authority to formulate additional penalties that directly contradict the Act's other provisions.[10] Additionally, I believe the analysis required under *Continental Group* is too complicated to permit employees, employers and unions to reasonably determine when discipline for various infractions is permitted or prohibited.

For all these reasons, I believe *Double Eagle* and *Continental Group* were wrongly decided and should be overruled. In my view, the Board's treatment of employee activities and employer discipline should reflect the straightforward application of the "protected/unprotected" distinction. If the Board determines that an employer has maintained and invoked a rule that is unlawfully broad, the Board should apply the standard remedies for unlawfully broad rules. But it exceeds the

[7] Sec. 8(a)(1) (emphasis added).

[8] In some circumstances, an employee may *lawfully* be subject to discipline even though the discipline is based on activities that are (or were initially) protected under the Act. For example, an employee may be lawfully disciplined for engaging in union-related solicitation during working time in violation of an employer's lawful no-solicitation policy. See *Peyton Packing*, 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944). An employee also may be lawfully disciplined if the employee engages in misconduct in the course of his protected activity that forfeits the Act's protection. See *Atlantic Steel*, 245 NLRB 814 (1979). And discipline is lawful where the employee's protected activity is a motivating factor in the discipline, but the employer demonstrates that it would have imposed the discipline even in the absence of the employee's protected activities. See *Wright Line, Inc*., 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In the first situation, *Double Eagle* and *Continental Group* do not apply because the rule the employer applies is lawful. In the second and third situations, if the employer applies an unlawfully broad rule when imposing discipline, the discipline should nonetheless remain lawful, either because the Act's protection has been lost or the employee would have been disciplined anyway for lawful reasons. Accordingly, for purposes of my discussion, I include the second and third situations in the category of "unprotected" conduct, unless the context clearly indicates otherwise.

[9] *Anheuser-Busch, Inc.*, 351 NLRB 644, 647 (2007); *Taracorp Industries*, 273 NLRB 221, 222 fn. 8 (1984).

[10] *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940); *Consolidated Edison Co. v. NLRB,* 305 U. S. 197, 235–236 (1938). Although the Board has broad remedial authority, it is well established that the Board is limited to remedies appropriately tailored to the violation at issue, and it is foreclosed from imposing broader punitive remedies. See *Republic Steel Corp. v. NLRB*, 311 U.S. at 12 (the Board is not "free to set up any system of penalties which it would deem adequate" to "have the effect of deterring persons from violating the Act"); *Consolidated Edison Co. v. NLRB,* 305 U. S. at 235–236 (Board's authority to devise remedies "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order"). Cf. *HTH Corp. d/b/a Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 18–19 (2014) (Member Miscimarra, concurring in part and dissenting in part).

Board's remedial authority to declare discipline based on unprotected conduct a violation of Section 8(a)(1), since (i) discipline based on unprotected conduct does not interfere with, restrain, or coerce employees in the exercise of their right to engage in *protected* activities, and (ii) discipline based on unprotected conduct is for "cause," and when that discipline is suspension or discharge, Section 10(c) prohibits the Board from ordering reinstatement and/or backpay.

Accordingly, I respectfully dissent from my colleagues' reliance on *Continental Group*. Regarding the two discharges at issue here involving employees William Norvell and Michael Rice, I would find that both Norvell and Rice were discharged for conduct that was unprotected under Section 7, which warrants a finding that their discharges were lawful. Thus, I concur with my colleagues' finding that Rice's discharge did not violate Section 8(a)(1) of the Act, and I dissent from my colleagues' finding that Norvell's discharge violated Section 8(a)(1).

Facts

The Respondent provides ambulance transportation to patients at hospitals, nursing homes, and other facilities. The Respondent employed William Norvell as an emergency medical technician.

On October 10, 2012, an employee whom the Respondent had recently discharged, Chelsea Zalewski, posted the following message on her Facebook page: "Well no longer a butler employee . . . Gotta love the fact that a 'professional' company is going to go off what a dementia pt says and hangs up on you when you are in the middle of asking a question." Zalewski had been Norvell's work partner.

Several people posted comments in response to Zalewski's post. In response to inquiries about what the patient had reported to the Respondent, Zalewski wrote, "The pt said I told her that they never fix anything on the units . . . Yeah i no that pt I'm not dumb enough to tell her let alone any pt how shitty those units are they see it all on their own."

In response to Zalewski's statements, Norvell posted the following comment: "Sorry to hear that but if you want you may think about getting a lawyer and taking them to court." Another individual commented that Zalewski should seek employment with an ambulance company called Procare. Zalewski stated that she did not have money for a lawyer and asked where Procare was located. Norvell answered that it was located in Towson, Maryland. He then added, "You could contact the labor board too." This concluded their exchange.

An anonymous source left printed screen shots of parts of the Facebook conversation on the desk of the Respondent's human resources director, Ellen Smith. Smith and the Respondent's chief operating officer, William Rosenberg, determined that Norvell's Facebook posts violated the Respondent's social media policy, and they decided to terminate Norvell's employment. On October 22, Norvell admitted to Smith and Rosenberg that he had posted on Zalewski's Facebook page on October 10. Smith told Norvell that he had violated the social media policy.[11] The Respondent did not give Norvell any reason for his termination other than his October 10 Facebook posts.

On January 14, 2013, employee Michael Rice posted the following message on Facebook: "Hey everybody!!!!! I'M FUCKIN BROKE DOWN IN THE SAME SHIT I WAS BROKE IN LAST WEEK BECAUSE THEY DON'T WANNA BUY NEW SHIT!!!! CHA-CHINNNGGGGGG CHINNNG—at Sheetz Convenience Store." Two people clicked "like" on Rice's post, and two people commented on it.

An anonymous source left a printout of a screen shot of Rice's post underneath Smith's door. Smith showed the post to Rosenberg, who conducted an investigation. Rosenberg determined that Rice's vehicle had not broken down on the day he wrote the post, and he concluded that Rice's post was false. The Respondent discharged Rice, citing violation of the social media policy. At a subsequent unemployment benefits hearing, Rice testified that he was referring to his girlfriend's car, not one of the Respondent's vehicles. Although the Respondent subpoenaed Rice to testify as a witness in the instant unfair labor practice case, Rice refused to testify, citing his Fifth Amendment right not to incriminate himself.

Discussion

A. The Decisions in Double Eagle and Continental Group Are Contrary to the Act and Should Be Overruled0

In a line of cases culminating with *Double Eagle Hotel & Casino*,[12] the Board adopted the principle that, regardless of whether an employee's actions are protected or unprotected under Section 7, an employer violates Section 8(a)(1) whenever it imposes discipline pursuant to a facially neutral rule that is unlawfully broad.[13] However, several Board members have expressed disagreement with this principle. In *Double Eagle*, then-Chairman

[11] As stated above, there are no exceptions to the judge's finding that this policy is unlawful.

[12] 341 NLRB 112 (2004), enfd. as modified 414 F.3d 1249 (10th Cir. 2005).

[13] See *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001); *Opryland Hotel*, 323 NLRB 723 (1997); *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436 (1978); *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. 496 F.2d 484 (6th Cir. 1974).

Battista stated: "[W]here the record clearly establishes that the discipline imposed was for conduct that an employer lawfully can proscribe, and the employer makes clear to the employees that their discipline is for this conduct, I would not find that the discipline violates Section 8(a)(3)."[14] In *Saia Motor Freight Line*, then-Member Hurtgen stated: "I do not agree that disciplinary action which is imposed pursuant to an unlawful rule is necessarily unlawful. For example, if an employer has a rule that is unlawfully broad (e.g., solicitation is banned at all times), that rule would not necessarily render unlawful the application of the rule to warn an employee to stop soliciting during worktime."[15] In *Miller's Discount Dept. Stores*, the majority applied the same principle—discipline imposed pursuant to an unlawfully broad rule is unlawful—and then-Chairman Miller criticized the majority's decision for repeating "an error which seems to underlie a number of Board decisions," which he described as "the mechanistic application of the syllogism which runs: (a) the rule is bad; (b) the discipline was pursuant to the rule; (c) therefore, the discipline is bad." Chairman Miller disagreed with the blanket invalidation of all discipline imposed pursuant to an unlawfully broad rule, with the following explanation:

> In reflecting on this area of the law . . . , I have concluded that in assessing the lawfulness or unlawfulness of employer imposed discipline in any case, we must focus upon: (1) whether, on the facts of the case, *the discipline* interfered with the legitimate exercise of Section 7 rights and therefore violated Section 8(a)(1); (2) whether *the discipline* discriminated against an employee so as "to encourage or discourage membership in any labor organization"; and (3) whether, *under Section 10(c) of the Act, we are forbidden to order reinstatement because the individual was "suspended or discharged for cause*."
>
> Thus, if an employee is disciplined for engaging in conduct which an employer may lawfully prohibit—i.e., utilizing worktime for engaging in nonproductive activity, whatever its nature, including the use of such working time for union activity—it would seem that there is no per se interference with employee rights under Section 8(a)(1). Nor would such discipline constitute 8(a)(3) discrimination unless it were shown that the employee who utilized such working time for union activity was treated more harshly than other employees apprehended while engaging in a like, but not union-connected, prohibited use of working time. Further, if there is no such interference or discrimination shown and we order an employee reinstated, I fear we have run afoul of Section 10(c) in that we have ordered reinstated an employee who was discharged for conduct which an employer may lawfully, and did, prohibit.
>
> As to the too easy application of the syllogism underlying some of our decisions, including that of the majority here, its fallacy lies in failing to examine the nature of the conduct for which the discipline was imposed and to limit our investigation only to the rule. The rule, as here, may require modification in order to conform to our statute, and we may so order as a remedy for its unlawful maintenance in its impermissible form. But the conduct may be such as to justify discipline, whether or not the rule itself might in some other instance have been applied so as to have reached protected conduct for which we would not allow discipline to be imposed.[16]

In *Continental Group*, the Board was forced to confront the fundamental problem to which *Double Eagle* gives rise: invalidating *all* discipline imposed pursuant to an unlawfully broad rule—even when the discipline was obviously warranted—produces absurd outcomes. It certainly would have in *Continental Group* itself. There, employee Gonzalez worked as a front desk concierge for a condominium association, he became homeless, and residents reported that he had been sleeping in a common area of the condominium building and living out of his car in the condominium's parking lot.[17] The employer

[14] *Double Eagle Hotel & Casino*, 341 NLRB at 116—117 (Chairman Battista, concurring in part and dissenting in part).

[15] *Saia Motor Freight Line*, 333 NLRB at 785–786 (Member Hurtgen, concurring).

[16] *Miller's Discount Dept. Stores*, 198 NLRB at 283 (Chairman Miller, dissenting) (emphasis added). Notwithstanding the cogent criticisms levied against the *Double Eagle* rule by former Board members, my colleagues characterize that rule as "well-established law," citing in particular *NLRB v. Northeastern Land Services, Ltd*., 645 F.3d 475 (1st Cir. 2011), and *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249 (10th Cir. 2005). These two appellate decisions provide tepid support at best for my colleagues' position. In *Northeastern Land Services*, the court's decision on this issue appeared to be driven by the deferential standard of review the court applied rather than the merits of the *Double Eagle* rule itself, about which the court said nothing. Similarly, in *Double Eagle Hotel & Casino*, the Tenth Circuit stated that it was adopting the majority's position "in large part on the amount of deference we are required to give the Board's interpretation of the NLRA," notwithstanding that Chairman Battista's separate opinion "ma[de] a strong argument" against the *Double Eagle* rule. 414 F.3d at 1258. Moreover, as my colleagues themselves acknowledge, the entire line of cases applying the *Double Eagle* rule—spanning more than 30 years—*rested on no rationale whatsoever*; and when the Board attempted to furnish the missing rationale in *Continental Group*, it concluded that the *Double Eagle* rule could not be justified as previously formulated and had to be substantially revised. Thus, the *Double Eagle* rule may have been of long duration, but it was hardly "well established."

[17] 353 NLRB at 349–350.

issued the employee a written warning for "frequenting the property" and "loitering on the property" in violation of an off-duty access rule. However, the employer's off-duty access rule was unlawfully broad because it failed to satisfy specific requirements applicable to no-access rules for off-duty employees that the Board adopted in *Tri-County Medical Center*.[18] Consequently, the Board in *Continental Group* was presented with two options. One option was to apply *Double Eagle*, even though doing so would produce a ridiculous outcome: if the Board found an unfair labor practice violation, it would effectively be finding that the NLRA gives employees the right to sleep in the workplace and to live out of their cars in their employer's parking lot. Consistent with the criticisms levied by past Board members against the *Double Eagle* principle, the second option presented in *Continental Group* was for the Board to acknowledge that the *Double Eagle* standard was fundamentally flawed.

The Board circumvented both of these and discovered yet a third option, issuing what it called a "clarification" of the *Double Eagle* rule.[19] Under *Continental Group*, the Board would no longer categorically hold that all discipline imposed pursuant to a facially neutral but unlawfully broad rule is unlawful. Rather, some discipline pursuant to unlawfully broad rules would be deemed permissible under the Act, while other discipline pursuant to unlawfully broad rules would violate the Act. The convoluted, multistage "clarification" set forth in *Continental Group* is not necessarily easy to grasp, but it focuses on four considerations.

First, the Board started from the same principles that the Board applies in cases where it invalidates a facially neutral rule that is found to be unlawfully broad: "the existence of an overbroad rule violates the Act based on its potential chilling effect on employees' exercise of their Section 7 rights," and "the mere maintenance of an overbroad rule tends to inhibit employees who are considering engaging in legally protected activities by convincing them to refrain from doing so rather than risk discipline."[20]

Second, the Board asserted that "because the mere maintenance of an overbroad rule creates a potential chilling effect on the exercise of protected rights, it is reasonable to infer that the *enforcement of such a rule* would have a *similar, or perhaps even greater, chilling effect* on the exercise of protected rights, *even if it is enforced against activity that could have been proscribed by a properly drawn rule*."[21]

Third, the Board focused on the protected nature of certain employee activities (for example, union-related solicitation), even though such activities could lawfully be restricted by an employer pursuant to a valid rule (for example, a no-solicitation policy that prohibits all solicitation during working time). The Board stated, however, that "in the absence of a *valid* employer rule prohibiting [protected] employee conduct . . . the conduct maintains its protected status."[22]

Finally, the Board in *Continental Group* articulated its "clarification" of *Double Eagle* by addressing the application of the *Double Eagle* principle in each of three different situations:[23]

> (1) situations where the "conduct for which an employee is disciplined under an overbroad rule *clearly falls within the protection of Section 7*," in which case the *Double Eagle* rule will apply (meaning that discipline pursuant to the unlawfully broad rule will be unlawful), *unless* the employer satisfies a new "affirmative defense" (see explanation of the affirmative defense below);[24]
>
> (2) "situations in which the conduct for which an employee is disciplined *is wholly distinct from activity that falls within the ambit of Section 7* (e.g., sleeping on the Employer's premises when off duty)," in which case the *Double Eagle* rule does not apply (meaning that discipline pursuant to the unlawfully broad rule will be lawful);[25] and (3) "situations in which an employer disciplines an employee pursuant to an overbroad rule for conduct that *touches the concerns animating Section 7* (e.g., conduct that seeks higher wages) *but is not protected by the Act because it is not concerted*," in which case the *Double Eagle* rule will apply (meaning that discipline pursuant to the unlawfully broad rule will be unlawful), *unless* the employer satisfies a new

[18] 222 NLRB 1089 (1976). Under *Tri-County*, a no-access rule for off-duty employees "is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." 222 NLRB at 1089. In *Continental Group*, the off-duty no-access rule failed to comply with the first *Tri-County* requirement. In relevant part, it provided (with certain exceptions) that "[e]mployees are only permitted to be on property while on duty." 357 NLRB at 410. Thus, the rule did not limit access for off-duty employees "solely with respect to the interior of the plant and other working areas." 222 NLRB at 1089.

[19] 357 NLRB at 410.

[20] 357 NLRB at 411 (citations omitted).

[21] Id. (emphasis added).

[22] Id.

[23] The Board's opinion in *Continental Group* did not separately number these categories.

[24] Id. at 411–412 (emphasis added).

[25] Id. at 412 (emphasis added).

"affirmative defense" (see explanation of the affirmative defense below).[26]

The affirmative defense created in *Continental Group*, which relates to discipline based on conduct that falls into categories 1 and 3 above, requires the employer to clearly separate (i) the adverse impact of the employee's actions on "work" or the "employer's operations" (in which case the discipline might be permissible) from (ii) the employee's violation of the unlawfully broad rule. The Board described the affirmative defense as follows:

> [A]n employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. . . . It is the employer's burden, not only to assert this affirmative defense, but also to establish that the employee's interference with production or operations was the actual reason for the discipline. In this regard, an employer's mere citation of the overbroad rule as the basis for discipline will not suffice to meet its burden. Rather, assuming that the employer provides the employee with a reason (either written or oral) for its imposition of discipline, the employer must demonstrate that it cited the employee's interference with production and not simply the violation of the overbroad rule. . . .[27]

This affirmative defense reflects at least some recognition that, even though a work rule may have been poorly drafted or ambiguous, the Board should not always indiscriminately invalidate discipline that may have been imposed for compelling reasons. For example, employee misconduct may constitute unlawful harassment, cause extensive interference with production, or even cause the death of other employees. However, I believe this affirmative defense is beset with several rather obvious problems.

> (i) The distinction drawn by the affirmative defense is difficult to square with common sense. If certain types of misconduct interfere with "work" or the employer's "operations," this explains why the employer adopted a work rule prohibiting the misconduct, which means the misconduct will violate the work rule *and* it will interfere with "work" and/or "operations." Therefore, in nearly all cases it will be impossible for the employer to prove that the "reason for the discipline" was the "interference" with work or operations "*rather than* the violation of the rule."[28]
>
> (ii) If an employee engages in misconduct that violates a work rule in addition to adversely affecting "work" and/or "operations," the Board's own cases *compel* the employer to rely on the work rule violation when imposing discipline because the existence and application of a preexisting work rule is often critical evidence that the employee would have been disciplined for the misconduct even in the absence of the employee's protected activities, which the employer must prove under the Board's *Wright Line* test governing alleged mixed-motive situations. Similarly, arbitration cases decided under a contractual "just cause" standard emphasize the need for an employer to have relied on a preexisting work rule that placed the employee on notice that his or her actions would result in discipline or discharge.[29]
>
> (iii) Nobody can reliably predict in advance what constitutes an unlawfully broad rule under current Board case law.[30] Therefore, at the time that an employer imposes discipline based on employee conduct that violates an existing rule in addition to interfering with "work" or "operations," many employers—even if they parse the Board's many cases dealing with overly broad rules—have no reasonable way to know whether or not the rule violated by the employee is lawful (in which case the *Double Eagle*/*Continental Group* principles would not apply) or is unlawfully broad (in which case, under the *Continental Group* affirmative defense, the employer must *disclaim reliance* on the violated rule and instead emphasize that the employee has adversely affected "work" and/or the employer's "operations").

[26] Id. (emphasis added).

[27] Id. (emphasis added; citations omitted).

[28] Id. at 412 (emphasis added).

[29] See, e.g., Roger I. Abrams and Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, where the authors noted that the "most comprehensive" and oft-cited description of "just cause" requires that the employer have given the employee "forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct," which entails, among other things, inquiry into whether the employer had "typed or printed sheets or books of shop rules and of penalties for violation therefore," with "actual oral or written communication of the rules and penalties to the employee," although "certain offenses . . . are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable." Id. at 599–600 fn. 30 (citing *Grief Bros. Cooperage Corp*., 42 Lab. Arb. (BNS) 555, 557–559 (Arb. Carroll R. Daugherty, 1964)).

[30] This is a substantial reason (but certainly not the only reason) that the Board's current standard for determining whether mere maintenance of a facially neutral work rule violates the Act should be abandoned by the Board, as I advocated in *William Beaumont Hospital*, supra.

For the following reasons, I believe *Double Eagle* and the "clarification" adopted in *Continental Group*[31] are contrary to the Act and should be overruled by the Board or repudiated by the courts.

(1) The Board's decisions in Double Eagle and Continental Group are contrary to Section 7 and Section 8(a)(1) of the Act

If conduct is protected by Section 7—i.e., if it falls within *Continental Group* category 1—then discipline based on such conduct violates the Act based on a straightforward application of Section 7's protected/unprotected distinction, which means there is no need in such cases for the duplicative analysis set forth in *Continental Group*.[32] Likewise, if conduct is unprotected by Section 7 and "is wholly distinct from activity that falls within the ambit of Section 7," 357 NLRB at 412—that is, if the conduct falls within *Continental Group* category 2—then discipline would be lawful based, again, on the straightforward application of Section 7's protected/unprotected distinction. Thus, in *Continental Group* category 1 and 2 cases, there is no need for the separate analysis set forth in *Continental Group*.

However, as noted previously, *Double Eagle* (in category 2 and 3 cases) and *Continental Group* (in category 3 cases) treat unprotected conduct the same as activity protected under Section 7. As described above, in *Continental Group* category 3 cases, the Board finds that discipline violates Section 8(a)(1) when it is based on conduct that "touches the concerns animating Section 7 . . . but is not protected by the Act because it is not concerted."[33] Nothing in the Act permits the Board to find that Section

[31] In the three-part "clarification" of *Double Eagle* that the Board adopted in *Continental Group*, categories 1 and 2 mirror the "protected/unprotected" distinction embodied in Sec. 7. Thus, in category 1 situations, the Board will find it unlawful to impose discipline based on conduct that "clearly falls within the protection of Section 7," *Continental Group*, 357 NLRB at 411—but discipline for such conduct would normally violate the Act regardless whether the employer relied on an unlawfully broad rule. Conversely, in category 2 situations, the Board will find it lawful to impose discipline based on conduct that "is wholly distinct from activity that falls within the ambit of Section 7," id. at 41, but discipline in these circumstances would be lawful based on the straightforward application of Sec. 7.

My criticisms of the "clarification" adopted in *Continental Group* relate specifically to category 3, where the Board would find it unlawful to impose discipline even though the conduct is unprotected, and even though "cause" exists for an employee's suspension or discharge. See *Continental Group*, 357 NLRB at 412 (finding discipline unlawful where the employee's conduct "touches the concerns animating Section 7 . . . but is not protected by the Act because it is not concerted"). In this circumstance, *Double Eagle* and *Continental Group* treat the employee's unprotected conduct as if it were protected, which is contrary to Sec. 7, and if the employee was suspended or discharged, the Board orders backpay and reinstatement, even though Sec. 10(c) of the Act *prohibits* the Board from providing reinstatement or backpay when employees are suspended or discharged for "cause."

[32] There is one exception where conduct that technically falls within *Continental Group* category 1—conduct that is protected under Sec. 7—ends up being treated differently based on *Double Eagle* and *Continental Group*. Certain types of protected activity may nonetheless be lawfully restricted. For example, employees have a protected right to engage in union-related solicitation, but employers may lawfully prohibit solicitation during working time. *Peyton Packing*, 49 NLRB at 843. Thus, although union-related solicitation is protected under Sec. 7, an employer may lawfully prohibit it during working time if the employer has an appropriately worded rule. However, if the employer has an unlawfully broad rule—for example, a rule prohibiting solicitation during "working hours"—see *Our Way, Inc.*, 268 NLRB 394, 394–395 (1983); *Essex International*, 211 NLRB 749, 750 (1974)—*Double Eagle* and *Continental Group* make it unlawful for the employer to apply the unlawfully broad rule, even though the employee disciplined under that rule could have been lawfully disciplined if the employer's no-solicitation rule had been limited to working time.

The Board in *Continental Group* defended this result by equating cases involving an unlawfully broad rule with cases involving *no* rule. In this regard, *Continental Group* relied on *Trico Industries*, 283 NLRB 848 (1987). See 357 NLRB at 411. In *Trico Industries*, the Board held that if the employer has *no* rule barring solicitation, then if employees engage in union-related solicitation on working time, the employer cannot lawfully discipline them unless the evidence shows that "the employer . . . *acted in response* to an *actual* interference with, or disruption of work." 283 NLRB at 852 (emphasis in original). I do not pass on the soundness of *Trico Industries*, but the rationale for this "no rule" holding does not translate to cases involving application of an unlawfully broad rule. In *Trico Industries*, the Board reasoned that when an employer has *no* rule restricting protected conduct that may be lawfully restricted, an inference is warranted that discipline based on such protected conduct stems from a desire to penalize the protected aspect of the employee's activities:

> "A discharge based on work time . . . [activity] . . . in the absence of a valid rule is suggestive that the employer was reacting to the *protected aspect* of the employee's conduct, rather than considerations of plant efficiency." . . . In other words, *when there is no published rule* regulating working time, the assumption is that *the employer tolerates incursions until they reach disruptive levels*.

Id. (quoting *Greentree Electronics Corp.,* 176 NLRB 919 (1969), enfd. 432 F.2d 1011 (9th Cir. 1970)) (alteration in original; emphasis added).

Continental Group inappropriately extended the *Trico* rationale from "no rule" cases to "unlawfully broad rule" cases. When an employer disciplines an employee for engaging in protected activity that may be lawfully restricted, such as union-related solicitation during working time, even assuming one might infer improper employer motivation from the *absence* of any no-solicitation rule (assuming no actual interference with work), it does not follow that one can infer improper motivation from the application of an *unlawfully broad* no-solicitation rule (for example, a poorly worded rule barring solicitation during "working hours" rather than "working time"). Although the absence of a rule may warrant an inference that the employer was indifferent to workplace solicitation until an employee engaged in union solicitation, an overly broad rule does *not* reflect prior indifference regarding solicitation. To the contrary, it demonstrates the opposite. After all, the employer *maintains* a rule that restricts solicitation. Thus, the *Trico* rationale for inferring an improper motivation where an employer has *no* rule—namely, that the employer is indifferent to solicitation "until [it] reach[es] disruptive levels," 283 NLRB at 852—simply does not apply where the employer does have a rule, albeit an unlawfully broad one.

[33] *Continental Group*, 357 NLRB at 412.

8(a)(1) has been violated when employee activities are not "concerted" (which is a prerequisite to Sec. 7 protection), nor may the Board treat activity that is not concerted as though it were protected under Section 7 on the basis that the activity "touches the concerns" that, in the Board's opinion, "animat[e] Section 7."[34] The bottom line, as the Board acknowledged in *Continental Group*, is that if actions are not concerted, they are "not protected by the Act."[35]

Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees *in the exercise of the rights guaranteed in section 7*" (emphasis added). Section 7, in relevant part, protects the right of employees to engage in "*concerted* activities for the purpose of . . . mutual aid or protection" (emphasis added). If an employee is disciplined or discharged for activity that is *not* concerted, the discipline or discharge does not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[36] The disciplined conduct did not involve the exercise of *any* Section 7 right, which precludes a finding that the discipline or discharge violated Section 8(a)(1).

In my view, the fact that the employer may have relied on a facially neutral rule that was unlawfully broad does not permit the Board to rewrite the NLRA. As the Supreme Court stated in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490 (1947), "it is for Congress, not for us, to create exceptions or qualifications as odds with [the Act's] plain terms."

Moreover, the Board *already* has an extensive body of law that separately addresses the legality of facially neutral rules that are unlawfully broad. Regardless of whether or not an employer has applied a facially neutral rule to restrict protected activity, the Board finds that mere maintenance of an unlawfully broad rule violates Section 8(a)(1) based on the rule's potential future application to protected activity,[37] and the Board orders various remedies, including rescission of the offending rule.[38] The reason that the Board invalidates an unlawfully broad rule is the risk that it "'would reasonably tend to chill employees in the exercise of their Section 7 rights.'"[39] However, in *Continental Group*, the Board relies on the same justification—a "chilling effect on the exercise of protected rights"[40]—to invalidate discipline imposed on employees who have *not* engaged in protected activity, and whose misconduct may have been extremely serious, if the employer invokes an unlawfully broad rule and the Board decides that the employee's conduct "touches the concerns animating Section 7." Id. at 412. In such circumstances, the employee's conduct is not protected, and separate from whatever "chilling effect" might arise from the maintenance of the rule itself, I believe there is no separate or greater chilling effect on protected activity caused by reliance on an overbroad rule when disciplining an employee whose actions were *not* protected by the Act. Again, to quote former Chairman Miller, the *Double Eagle*/*Continental Group* line of cases rests on a "fallacy" that stems from "failing to examine the nature of the conduct for which the discipline was imposed" and instead "limiting our investigation only to the rule."[41]

When an employer invokes an unlawfully broad rule, the potential "chilling effect" stems from the rule itself, which the Board dispels by declaring the rule unlawful, requiring its rescission, and ordering the employer to cease and desist from maintaining the unlawful rule and to post a notice informing employees that it will rescind the unlawful rule and not thereafter maintain it.[42] I believe it exceeds the limits of our remedial authority[43] to devise additional remedies for an unlawfully broad rule that effectively rewrite Section 7 by treating unprotected conduct as if it were protected and ordering the rescission of discipline that an employer lawfully imposed on unprotected conduct.

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[34] Id.

[35] Id.

[36] Sec. 8(a)(1).

[37] *Lutheran Heritage Village*, supra; *William Beaumont Hospital*, supra.

[38] See fn. 42, infra and accompanying text.

[39] *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 4 (quoting *Lutheran Heritage*, 343 NLRB at 646, and *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999)). Obviously, I recognize that an employer violates Sec. 8(a)(1) by maintaining a rule that unjustifiably interferes with Sec. 7 rights *that have not yet been exercised*. Just as obviously, my colleagues engage in fiction when they attribute to me a contrary view. They then argue that this view conflicts with cases that involve employers who mistakenly suspect an employee of engaging in Sec. 7 activity. Since I do not espouse this view, I need not respond.

[40] *Continental Group*, 357 NLRB at 411 ("[B]ecause the mere maintenance of an overbroad rule creates a potential chilling effect on the exercise of protected rights, it is reasonable to infer that the enforcement of such a rule would have a similar, or perhaps even greater, chilling effect on the exercise of protected rights, even if it is enforced against activity that could have been proscribed by a properly drawn rule."); id. at 412 (reliance on an unlawfully broad rule when disciplining conduct that is not concerted and therefore not protected but that "touches the concerns animating Section 7" creates "a much greater risk that employees would be chilled in the exercise of their Section 7 rights").

[41] *Miller's Discount Dept. Stores*, 198 NLRB at 283 (Chairman Miller, dissenting).

[42] *Lutheran Heritage*, 343 NLRB at 649, 657–658; *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 6–7.

[43] See fn. 10, supra.

(2) The Board's decisions in Double Eagle and Continental Group are contrary to Section 10(c) of the Act

In addition to treating unprotected employee conduct as though it were protected—contrary to Section 7 of the Act—*Double Eagle* and *Continental Group* invalidate discipline imposed for "cause." Again, "cause" means "the absence of a prohibited reason."[44] Discipline for unprotected conduct is imposed in the absence of a prohibited reason, and thus it is discipline imposed for "cause." And as explained above, under *Double Eagle* (in category 2 and 3 cases) and *Continental Group* (in category 3 cases), the Board finds discipline based on unprotected conduct unlawful. In other words, discipline imposed for *Continental Group* category 3 conduct—activity that "touches the concerns animating Section 7 . . . but is not protected by the Act because it is not concerted," 357 NLRB at 412—is deemed unlawful, even though it is for "cause."

When the Board finds that an employee has been unlawfully suspended, it orders the employer to furnish backpay for the period of the suspension. When the Board finds that an employee has been unlawfully discharged, it orders the employer to offer reinstatement and to furnish backpay. Thus, when an employer suspends or discharges an employee for unprotected category 3 conduct under *Continental Group*, the Board orders backpay (for a suspension) or reinstatement and backpay (for a discharge). My colleagues order the latter remedies in this case.[45] However, Section 10(c) of the Act prohibits the Board from awarding reinstatement or backpay in any case where a suspension or discharge is for "cause." And *all* suspensions and discharges for category 3 conduct are for "cause."

Section 10(c) states in relevant part: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause." Regarding Section 10(c)'s legislative history, I explained in *Babcock & Wilcox Construction Co.*[46] that

> [t]he "cause" language in Section 10(c) was added as part of the Labor Management Relations Act (LMRA) amendments to the NLRA that were adopted in 1947. During the Senate debates on the LMRA, Senator Taft—the legislation's principal sponsor in the Senate—commented on the "cause" language set forth in Section 10(c) and stated: "If a man is discharged for cause, he cannot be reinstated. . . ."[47]

Similar to the Board's substantial curtailment of deferral to arbitration in *Babcock*, the Board's decisions in *Double Eagle* and *Continental Group* reflect "an intention to find suspensions and discharges unlawful—even if supported by 'cause'—based on what the majority believes must be more stringent scrutiny of 'statutory' or 'unfair labor practice' issues. This is precisely what Section 10(c) prohibits because it expressly requires the Board to treat 'cause' as the statutory standard."[48]

(3) Double Eagle and Continental Group Create Too Much Uncertainty Because Nobody Can Reasonably Determine Whether Work Rules Are Unlawfully Broad.

Double Eagle and *Continental Group* are inextricably intertwined with the *Lutheran Heritage* "reasonably construe" standard, which governs whether facially neutral rules are unlawfully broad. Putting aside particular areas where more specific standards govern the legality of

[44] *Anheuser-Busch*, 351 NLRB at 647; *Taracorp Industries*, 273 NLRB at 222 fn. 8.

[45] When an employer relied on a rule deemed by the Board to be unlawfully broad, the Board's *Double Eagle* decision permitted no consideration whatsoever of the seriousness of the employee's misconduct. Although *Continental Group* permits the Board to uphold discipline in certain circumstances pursuant to a multiple stage "affirmative defense," I believe the requirements and qualifications associated with the affirmative defense make it illusory and render it unavailable in most situations. See text accompanying fns. 27–30, supra.

[46] 361 NLRB No. 132, slip op. at 14–24 (2014) (Member Miscimarra, concurring in part and dissenting in part).

[47] Id., slip op. at 17 (Member Miscimarra, concurring in part and dissenting in part).

[48] Id., slip op. at 20 (Member Miscimarra, concurring in part and dissenting in part). There is no merit in the majority's assertion that my position regarding Sec. 10(c) is contrary to *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964). *Fibreboard* involved unilateral subcontracting in violation of Sec. 8(a)(5), and the Court, in its discussion of the Board's remedial authority under Sec. 10(c), was not remotely sanctioning the *Double Eagle*/*Continental Group* framework my colleagues reaffirm today. Under that framework, employees discharged for category 3 conduct (defined in the text) are reinstated with backpay, even though (i) category 3 conduct is unprotected, (ii) an employee discharged for category 3 conduct has been discharged for "cause," and (iii) Sec. 10(c) precludes the Board from awarding reinstatement and backpay to employees discharged for "cause." Nothing in the Court's *Fibreboard* decision countenances such an arrangement. I also disagree with my colleagues' suggestion that *Continental Group* is "entirely consistent" with (a)(5) cases involving rule-based discipline. Again, the salient point here is that under *Continental Group*, employees discharged for "cause" are reinstated with backpay, contrary to Sec. 10(c). The 8(a)(5) cases cited by my colleagues do not address—let alone endorse—this clear transgression of the Board's statutorily imposed remedial limits. Finally, my colleagues suggest that the affirmative defense created in *Continental Group* cures any Sec. 10(c) problem created by *Double Eagle*/*Continental Group*. I have two responses. One, as explained above, the *Continental Group* affirmative defense is largely illusory. Two, it would be unnecessary to repair the breach of Sec. 10(c) created by *Double Eagle* and *Continental Group* if those decisions were overruled and there was no breach to repair in the first place.

rules—for example, those governing solicitation,[49] distribution,[50] and off-duty access[51]—the Board evaluates facially neutral rules using the standard set forth in *Lutheran Heritage*. Under *Lutheran Heritage*, a facially neutral rule is unlawful if the Board determines that an employee "would reasonably construe the language to prohibit Section 7 activity." 343 NLRB at 647.

I have criticized the *Lutheran Heritage* standard, in part, because it "has defied all reasonable efforts to make it yield predictable results." *William Beaumont Hospital*, supra, 363 NLRB No. 162, slip op. at 9 (Member Miscimarra, concurring in part and dissenting in part). This means that application of *Double Eagle* and *Continental Group* is inseparable from the "immense uncertainty" that afflicts the *Lutheran Heritage* "reasonably construe" standard. As I explained in *William Beaumont*, it is virtually impossible to square with one another the various results that have been reached applying the "reasonably construe" standard. For example, rules prohibiting "verbal abuse," "abusive or profane language," "harassment," and "abusive or threatening language to anyone on company premises" have been found lawful,[52] while substantially identical rules prohibiting "loud, abusive or foul language" and "false, vicious, profane or malicious statements toward or concerning the . . . [employer] or any of its employees" have been found unlawful.[53] Moreover, in applying the "reasonably construe" standard, the Board in many cases invalidates facially neutral rules solely because they are ambiguous, invoking the principle that ambiguity is construed against the employer as the drafter of the rule—even though, in *Lutheran Heritage* itself, the Board recognized that work rules "are necessarily general in nature."[54]

Given the unpredictability inherent in the *Lutheran Heritage* "reasonably construe" standard, I believe employers, when imposing discipline, have no reasonable way of knowing whether they can or should rely on the work rule that an employee has violated (even though, as noted above, reliance on a rule is frequently important in Board cases applying the *Wright Line* mixed-motive standard and in arbitration cases applying the "just cause" standard), or whether they must *disclaim* reliance on the work rule violation. The uncertainty in this area is bad enough when a dispute is limited to whether or not a particular work rule is unlawfully broad. However, it is considerably worse when, under *Double Eagle* and *Continental Group*, the lawfulness or unlawfulness of the rule is determinative of the legality of discipline, even though the disciplined conduct is unprotected by Section 7 and therefore the discipline does not interfere with, restrain or coerce employees in the exercise of protected rights.[55] In these respects, *Double Eagle* and *Continental Group* fail the test of "certainty beforehand" that the Supreme Court emphasized in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679 (1981), where the Court indicated that employers must have the ability to "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice."[56]

(4) Double Eagle and Continental Group promote absurd outcomes that cannot be reconciled with Section 8(a)(1) and Section 7

As noted previously, the language of Section 8(a)(1) and Section 7 is unambiguous. Section 8(a)(1) makes it unlawful for an employer to interfere with, restrain or coerce employees "in the *exercise* of the *rights guaranteed in section 7*."[57] Section 7, in turn, states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted* activities for the *purpose* of collective bargaining or *other mutual aid or protection*."[58]

The Board's decisions in *Double Eagle* and *Continental Group* create distinctions that have no basis in our statute. Under both decisions, the Board deems unlawful under Section 8(a)(1) employer actions that do *not* constitute interference with, or restraint or coercion of, activities protected under Section 7. *Continental Group* does exempt one category of cases—category 2 cases, where "the conduct for which an employee is disciplined is

[49] See *Peyton Packing*, supra, 49 NLRB at 828; *Essex International*, supra, 211 NLRB at 749; *Our Way*, supra, 268 NLRB at 394.

[50] See *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

[51] See *Tri-County Medical Center*, supra, 222 NLRB at 1089.

[52] *Lutheran Heritage*, supra, 343 NLRB at 647; *Adtranz ABB Daimler-Benz Transportation, Inc. v. NLRB*, 253 F.3d 19, 27 (D.C. Cir. 2001).

[53] *Flamingo Hilton-Laughlin*, 330 NLRB 287, 295 (1999); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998). For further examples of virtually identical rules found lawful in one case and unlawful in another, see *William Beaumont*, 363 NLRB No. 162, slip op. at 15–18 (Member Miscimarra, concurring in part and dissenting in part).

[54] 343 NLRB at 648. The Board went on to promise that it "[would] not require employers to anticipate and catalogue in their work rules every instance in which [prohibited types of speech] might conceivably be protected by (or exempted from the protection of) Section 7." Id.

[55] Sec. 8(a)(1).

[56] The Supreme Court stressed the importance of providing "certainty beforehand" to unions and employers alike—for the employer, so that it can "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and for the union, so that it may discern "the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board." *First National Maintenance*, 452 U.S. at 678–679, 684–686.

[57] Sec. 8(a)(1).

[58] Sec. 7 (emphasis added). See also fn. 3, supra.

wholly distinct from activity that falls within the ambit of Section 7," 357 NLRB at 412—from application of the *Double Eagle* principle that discipline pursuant to an unlawfully broad rule is unlawful. However, using a phrase that appears nowhere in the Act, the Board in *Continental Group* held that *unprotected* employee conduct is given the same treatment afforded to protected conduct if the Board concludes the unprotected conduct "touches the *concerns animating Section 7*."[59] I respectfully disagree with this attempted modification of the Act. The NLRA does not state that particular "concerns" are "animating" Section 7. Rather, Section 7 is a statutory provision we are duty-bound to apply using conventional principles of statutory construction. Section 7 contains prerequisites—i.e., "words of limitation"[60]—that must be satisfied before an employee's action can be deemed protected. If the employee's actions are *unprotected* by Section 7, this precludes a finding that employer discipline based on those actions violates Section 8(a)(1). Thus, I believe Congress intended that an employer, when imposing discipline on an employee, would violate Section 8(a)(1)—which prohibits interference with or restraint or coercion of employees "in the exercise of the rights guaranteed in section 7"[61]—only if the General Counsel proves that the conduct for which the discipline was imposed involved the "exercise of [a] right[] guaranteed in section 7."

The key contradiction underlying *Continental Group* is its holding that conduct *unprotected* under Section 7 is nonetheless *protected* if it "touches the concerns animating Section 7."[62] Thus, unless the employer can establish the affirmative defense the Board outlined in *Continental Group* (and I have explained why that defense is largely illusory), whenever an individual employee is disciplined or discharged based on activity that is *not* concerted (and therefore not protected by Sec. 7), the employee is still protected from discipline or discharge if (i) the employer cites a rule that the Board deems unlawfully broad, and (ii) the employee's activity involves a subject the Board believes *should* concern other employees. In this regard, the protection afforded category 3 conduct under *Continental Group* is reminiscent of the standard the Board applied in *Alleluia Cushion*, 221 NLRB 999 (1975), and its progeny, which were overruled in *Meyers I* and which the Board in *Meyers I* aptly criticized as applying a standard under which "the Board determines what *ought to be* of group concern and then artificially presumes that it *is* of group concern." 268 NLRB at 496.

Moreover, although *Continental Group* disposed of one category of cases where applying the *Double Eagle* principle produces absurd results, similarly absurd results may follow from the protection *Continental Group* affords to an individual employee who engages in "unconcerted" activity that "touches the concerns animating Section 7."[63] For instance, the following examples involve employee conduct unprotected by Section 7 that *Continental Group* would protect:

- *Hospital Employee Trash-Can Banging Protest at 2 a.m.* An off-duty hospital employee enters a patient-care area at 2:00 a.m., banging together two trash can lids and shouting "I want a raise! I want a raise!" The employee's conduct is unprotected, and the hospital discharges him, citing an invalid off-duty access rule. *Result: Hospital is required, under Double Eagle/Continental Group, to rescind the discharge and reinstate the employee with backpay*.[64]
- *Bus Driver "Working Conditions" Speech to Locked-In Passengers.* A bus driver stops his crowded bus in the middle of a busy downtown street, causing a major traffic jam. The driver refuses to open the doors and lectures the passengers for 30 minutes about the transit company's inadequate wages, long hours, and abusive supervisors. The driver's conduct is unprotected, and the employer discharges him, citing a work rule prohibiting any "discourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public." *Result: Employer is required, under Double Eagle/Continental Group, to re-*

[59] *Continental Group*, 357 NLRB at 412 (emphasis added).

[60] Cf. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. at 220 (Stewart. J., concurring).

[61] Sec. 8 (a)(1).

[62] *Continental Group*, 357 NLRB at 412 (emphasis added).

[63] Id. (emphasis added).

[64] The employee's solitary demonstration is not concerted activity. However, the Board would surely find that the "I want a raise" chant "touches the concerns animating Section 7." *Continental Group*, 357 NLRB at 412. And the employer invoked an off-duty access rule that did not "limit[] access solely with respect to the interior of the [facility] and other working areas." *Tri-County Medical Center*, 222 NLRB at 1089. Assuming the employer merely cited the off-duty access rule as the basis for the discharge without specifically referencing the employee's disruption of patient-care areas at 2:00 a.m., the employer could not successfully assert the *Continental Group* affirmative defense—which provides that an employee may be lawfully disciplined pursuant to an unlawfully broad rule if he or she "actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline," 357 NLRB at 412—since "an employer's mere citation of the overbroad rule as the basis for discipline will not suffice" to satisfy the employer's affirmative defense. Id.

scind the discharge and reinstate the employee with backpay.[65]

- *Public Shaming of Restaurant Customer by Waiter*. A restaurant waiter becomes upset after learning that a regular customer, Arnold Rich, earns $500,000 annually. The waiter posts this message on Facebook: "Arnold Rich is cheap. He earns half-a-million dollars a year, and all I ever get from him is a lousy $1.00 tip." The waiter makes the same statement on a website he creates with the domain name, "Arnold_Rich_Is_Cheap." The employee's conduct is unprotected, and the restaurant discharges him, citing a work rule against disclosing "information concerning customers." *Result: Employer is required, under Double Eagle/Continental Group, to rescind the discharge and reinstate the employee with backpay*.[66]
- *Angry Sex-Based Profanity During Working Time Solicitation.* A union organizing campaign is underway at the employer's workplace, and the employer maintains a policy prohibiting solicitation during working time. Two employees are working on a production line. One employee, John, attempts to get a second employee, Mary, to sign a union authorization card. Mary refuses to sign the card, and John shouts that "Mary is a whore" who is "f___ing the boss to get ahead." Mary files a sex harassment complaint with the employer, and the employer discharges John. John's conduct violated the employer's lawful no-solicitation policy. However, the employer fires John in reliance on a different rule that prohibits "loud, abusive, or foul language." *Result: Employer is required, under Double Eagle/Continental Group, to rescind the discharge and reinstate John with backpay*.[67]

(5) Summary: Double Eagle and Continental Group should be overruled by the Board or repudiated by the courts

It is difficult enough for employers merely to do what our statute requires: determine whether or not an employee's conduct is protected or unprotected by Section 7.[68] I believe the Board oversteps its authority when we disregard this fundamental statutory distinction and base unfair labor practice findings on a purported "clarification" of the law[69] that has no basis in the Act. See *American Ship Building Co. v. NLRB,* 380 U.S. 300, 316 (1965) (the Board lacks "general authority to define national labor policy by balancing the competing interests of labor and management"); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940) (the Board is not "free to set up any system of penalties which it would deem adequate" to "have the effect of deterring persons from violating the Act"); *Consolidated Edison Co. v. NLRB,* 305

[65] The single employee's protest regarding his wages and working conditions is unprotected. However, the Board would surely find that it "touches the concerns animating Section 7." *Continental Group*, 357 NLRB at 412. And the rule applied to discharge the employee has been found unlawfully broad. See *First Transit, Inc.*, 360 NLRB 619, 620–621 (2014). As indicated in fn. 64 supra, if the employer merely cited the work rule violated by the employee, it cannot successfully invoke the *Continental Group* affirmative defense, since "an employer's mere citation of the overbroad rule as the basis for discipline will not suffice" to satisfy the affirmative defense. 357 NLRB at 412.

[66] Here as well, the single employee's protest regarding his wages and working conditions is unprotected. But the Board has found unlawfully broad a work rule prohibiting the disclosure of "information concerning customers." See *Boch Honda*, 362 NLRB No. 83, slip op. at 1 fn. 4 (2015); *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 3 fn. 8 (2016). Once again, if the employer only cited the violation of its unlawfully broad rule as the basis for the discharge, it cannot avail itself of the *Continental Group* affirmative defense, since "an employer's mere citation of the overbroad rule as the basis for discipline will not suffice" to satisfy that defense. 357 NLRB at 412.

[67] In this example, the employee, John, is engaged in protected activity—union-related solicitation—although the activity is lawfully prohibited by the employer's rule against solicitation during working time. See, e.g., *Peyton Packing*, 49 NLRB at 843. Although the Board might conclude that the employee's profane, sex-based tirade lost the protection of the Act, the employer invoked its rule against "loud, abusive, or foul language," which the Board has found to be unlawfully broad. See *Flamingo Hilton-Laughlin*, 330 NLRB 287 at 295. Again, the *Continental Group* affirmative defense would be unavailable, since "an employer's mere citation of the overbroad rule as the basis for discipline will not suffice" to satisfy that defense. 357 NLRB at 412.

My colleagues seek to minimize the risk of such results by saying that cases applying *Continental Group* are "relatively rare," and besides, employers would be "unlikely" to cite the overbroad rule only and not also the misconduct, and thus the *Continental Group* affirmative defense would be available. This is like arguing that, even though a life-threatening virus that could be easily eradicated poses the risk of human infection, it should be kept alive because it infects people only rarely, and when people are infected, they might be able to use medicine to combat the disease. No risk of infection is better than a small risk. Likewise, the Board should eliminate the risk of absurd results flowing from *Continental Group*, even if the risk is small. (Here, I also disagree that the risk of absurd results under Continental Group is small, given the ongoing proliferation of cases in which the Board invalidates work rules based on the *Lutheran Heritage* "reasonably construe" standard .) Putting aside the risk of absurd results, the more compelling reason to overrule *Continental Group* and *Double Eagle*, as explained in the text, is the fact that these cases are contrary to our statute.

[68] See, e.g., *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014) (full-Board case where three members found that employee engaged in protected activity, and two members found that the employee's activity was unprotected).

[69] *Continental Group*, 357 NLRB at 410.

U. S. 197, 235–236 (1938) (Board's authority to devise remedies "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose . . . even though the Board be of the opinion that the policies of the Act might be effectuated by such an order").

As illustrated in above examples, *Continental Group* wields a sledge hammer when Congress, in Section 7, mandated that the Board utilize a scalpel. Worse, *Continental Group* requires the reinstatement of employees with backpay when any reasonable fact-finder would conclude that the employee has been discharged "for cause," in which case Section 10(c) of the Act plainly prohibits Board-ordered reinstatement or backpay.

For all of the reasons set forth above, I believe *Double Eagle* and *Continental Group* are contrary to the Act. In cases where an employer maintains or applies an unlawfully broad employment policy, work rule or handbook provision, the Board should find that the offending policy, rule or provision violates Section 8(a)(1) and impose the standard remedies for such a violation, including rescission, the posting of a notice, and a cease and desist order. But whether discipline violates Section 8(a)(1) should be governed by the language of the Act. Did the employer, by imposing discipline, interfere with, restrain or coerce employees in the exercise of any Section 7 right? If so, the discipline is unlawful unless otherwise permitted by a more specific aspect of Board law. But if the employee's activities were not protected under Section 7, then the Board must conclude that the discipline does not violate Section 8(a)(1).

B. Employee Rice Did Not Engage in Protected Activity, and For That Reason, I Agree that Rice's Discharge Did Not Violate Section 8(a)(1)

As to employee Rice, the judge focused—correctly, in my view—on the fact that Rice did not engage in conduct protected by Section 7. Specifically, the judge found that Rice's statement in his Facebook post was maliciously false and therefore unprotected by the Act.[70]

My colleagues agree with the judge's conclusion that Rice's discharge did not violate the Act. However, they substitute a two-stage analysis for the judge's reasoning. They note the judge's finding that the Respondent's social media policy was unlawfully broad,[71] and they apply *Continental Group*. Doing so, my colleagues find that Rice's Facebook post constituted activity that fell within *Continental Group* category 2—i.e., conduct that is "wholly distinct from activity that falls within the ambit of Section 7," meaning it was neither "concerted" nor did it "touch[] the concerns animating Section 7."[72] To reach this finding, my colleagues address two potential interpretations of Rice's Facebook posting. As noted previously, the posting by Rice stated: "Hey everybody!!!!! I'm fuckin broke down in the same shit I was broke in last week because they don't wanna buy new shit!!!! Cha-Chinnnggggggg Chinnng—at Sheetz Convenience Store,"[73] and Rice was discharged after the Respondent determined that his work vehicle did not break down. Subsequently, at his unemployment compensation hearing, Rice claimed that the comment referred to his girlfriend's car. My colleagues reason that if Rice's Facebook comment referred to his girlfriend's car, it was not for the purpose of "mutual aid or protection," which is a prerequisite to Section 7 protection.[74] However, if Rice was referring to his work vehicle, my colleagues reason that the Facebook post was maliciously false and unprotected for that reason.[75]

Either way, under my colleagues' analysis the fact that Rice's actions were unprotected by Section 7 does not immediately warrant a conclusion that Rice's discharge was lawful. Rather, under *Continental Group*, because the Respondent applied an unlawfully broad rule when it discharged Rice, the Board must treat Rice's unprotected actions as if they were protected—making his discharge unlawful—unless, in addition to being unprotected by Section 7, Rice's conduct was "wholly distinct from activity that falls within the ambit of Section 7."[76] Although my colleagues do not spell out their analysis with this level of detail, they effectively find that under either interpretation of Rice's Facebook posting, (i) the posting was "wholly distinct from activity that falls within the ambit of Section 7";[77] (ii) Rice's conduct thereby fell within *Continental Group* category 2; (iii) the *Double Eagle* principle does not apply to *Continental Group* category 2 conduct; and therefore (iv) Rice's discharge was lawful, notwithstanding the Respondent's reliance on an unlawfully broad social media policy.

I concur with my colleagues' conclusion that Rice was lawfully discharged. However, I do not rely on *Double*

[70] See *TNT Logistics North America, Inc*., 347 NLRB 568, 569 (2006) (even assuming statements otherwise constitute protected concerted activity, they lose the Act's protection if they are maliciously false, i.e., made with knowledge of their falsity or with reckless disregard for their truth or falsity), revd. on other grounds sub nom. *Joliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008).

[71] Again, the Respondent did not except to this finding, which means it must be accepted for purposes of our decision.

[72] *Continental Group*, 357 NLRB at 412.

[73] Capitalization modified.

[74] To come within the protection of Sec. 7, activity must satisfy two requirements: it must be "concerted," and the concerted activity must have "mutual aid or protection" as its purpose.

[75] See *TNT Logistics North America*, supra.

[76] *Continental Group*, 357 NLRB at 412.

[77] Id.

Eagle and *Continental Group* because for the reasons stated above, I believe those decisions should be overruled. Rather, the record supports a finding that Rice's Facebook posting referred to his work vehicle, and the uncontroverted testimony of Chief Operating Officer Rosenberg—Rice refused to testify at the unfair labor practice hearing—established that Rice's work vehicle had not broken down on the day he posted the message at issue. Therefore, Rice's Facebook posting was maliciously false—i.e., made with knowledge of its falsity—which means it was unprotected under Section 7, which renders lawful Rice's discharge. See *TNT Logistics North America*, 347 NLRB at 569 (citing *Sprint/United Management Co*., 339 NLRB 1012, 1018 (2003)).[78]

C. Employee Norvell Did Not Engage in Protected Activity, and For That Reason, Norvell's Discharge Did Not Violate Section 8(a)(1)

As to employee Norvell, my colleagues find, in agreement with the judge, that Norvell's Facebook comments—stating to Zalewski "you may think about getting a lawyer and taking them to court" and "[y]ou could contact the labor board too"—were protected concerted activity. Although unnecessary to their analysis—since a discharge based on protected concerted activity violates Section 8(a)(1)—my colleagues apply *Continental Group* (because, again, the Respondent relied on its unlawfully broad social media policy when it discharged Norvell) and conclude that Norvell's discharge violated Section 8(a)(1) because Norvell's Facebook posting came within *Continental Group* category 1: conduct that "clearly falls within the protection of Section 7."[79]

As explained above, I believe the appropriate treatment of Norvell's discharge turns on whether his Facebook postings were protected under Section 7. In other words, did Norvell engage in "concerted" activity, and if so, did he engage in that activity for the "purpose" of "mutual aid or protection"?[80] Although this presents a close question, I believe that Norvell's actions did not constitute "concerted" activity.[81]

To determine whether an activity is "concerted," the Board applies the standards set forth in its decisions in *Meyers Industries*.[82] In *Meyers II*, the Board addressed whether conduct that "'in its inception involves only a speaker and a listener'" is concerted. *Meyers II*, 281 NLRB at 887 (quoting *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951)). Regarding this issue, the Board in *Meyers II* "embrac[ed] the view of concertedness exemplified by the *Mushroom Transportation* line of cases." Id. In *Mushroom Transportation Corp. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), the Third Circuit denied enforcement of a Board order finding a violation where the employer discharged employee Charles Keeler, who had advised other employees of their rights regarding holiday pay, vacations, and the company's practice of assigning trips to drivers of other companies. The court found that Keeler's activities were *not* concerted, explaining as follows:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, *it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action* in the interest of the employees.[83]

The court further explained:

> Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity. . . .[84]

The Third Circuit's reasoning, adopted by the Board in *Meyers II*, is directly applicable to Norvell's Facebook posts. Norvell suggested that Zalewski might "think about getting a lawyer" and take the company "to court," and Norvell further suggested that Zalewski could con-

[78] Alternatively, if Rice was referring to his girlfriend's vehicle as he claimed at his unemployment benefits hearing, his statement still would have been unprotected under Sec. 7. As my colleagues find, even assuming Rice's Facebook post constituted concerted activity, it was not for the purpose of mutual aid or protection: the condition of Rice's girlfriend's vehicle had nothing to do with Rice's and his coworkers' terms and conditions of employment. I also agree with my colleagues that the General Counsel's alternate theory—that the Respondent discharged Rice because it *believed* he engaged in protected concerted activity, even if he did not—is without merit. Rosenberg believed that Rice's Facebook post referred to the Respondent's vehicle, which Rosenberg knew had not broken down. Therefore, Rosenberg believed that Rice had posted a malicious falsehood, which means he did *not* believe Rice had engaged in protected activity.

[79] *Continental Group*, 357 NLRB at 411.

[80] Sec. 7. See also *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 13–17 (Member Miscimarra, concurring in part and dissenting in part).

[81] I do not reach whether Norvell's postings would have been for the purpose of mutual aid or protection *if* they had constituted concerted activity.

[82] *Meyers I*, 268 NLRB at 493; *Meyers II*, 281 NLRB at 882.

[83] 330 F.2d at 685 (emphasis added).

[84] Id. (emphasis added).

tact "the labor board too." Thus, Norvell advised Zalewski "as to what [she] could or should do without involving fellow workers or union representation to protect or improve [her] own status or working position."[85] Even though Norvell's advice was intended to be helpful, it constituted an "an individual, not a concerted, activity."[86] It is not inherently "concerted" for an employee to advise others that they might consult an attorney or go to court or the NLRB, nor does the record suggest that Norvell's advice otherwise "had some relation to group action in the interest of employees."[87] Thus, in my view, the General Counsel has failed to satisfy his burden to prove that Norvell's conduct was "concerted" within the meaning of Section 7. Accordingly, because I believe Norvell's conduct was not "concerted," I would find that Norvell's conduct was not protected under Section 7, and Norvell's discharge cannot appropriately be found violative of Section 8(a)(1), which only prohibits interference with or restraint or coercion of employees "in the exercise of the rights guaranteed in section 7."[88]

Conclusion

For the reasons stated above, I disagree with *Double Eagle* and *Continental Group*, and I believe the Board should overrule these decisions or they should be repudiated by the courts. Regarding the merits, I concur with my colleagues' finding that Rice's discharge did not violate Section 8(a)(1), but this conclusion stems from the fact that Rice did not engage in conduct that was protected under Section 7. Unlike my colleagues, I believe the Board should similarly find that Norvell's discharge did not violate Section 8(a)(1) because, in my view, Norvell's actions were not concerted and therefore not protected under Section 7. Accordingly, I respectfully concur in part with and dissent in part from my colleagues' decision.

Dated, Washington, D.C. July 27, 2017

Philip A. Miscimarra, Chairman

[85] *Mushroom Transportation*, 330 F.2d at 685.

[86] Id.

[87] Id.; *Meyers II*, 281 NLRB at 887.

[88] Sec. 8(a)(1). I agree that former employees, such as Zalewski, are employees under the Act. See, e.g., *Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947). I also agree that job security is frequently a matter of mutual concern to employees. However, to the extent my colleagues find Norvell's conduct *inherently* concerted because of the subject matter of his Facebook posts, I believe such a finding impermissibly deviates from Sec. 7 and relevant Board and court cases interpreting Sec. 7. See *Hoodview Vending Co.*, 362 NLRB No. 81, slip op. at 4–7 (2015) (Member Miscimarra, dissenting); *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 8 (2014) (Member Miscimarra, dissenting in part). Here, there is no escaping the fact that Norvell's conduct is squarely governed by the Third Circuit's holding—adopted by the Board in *Meyers II*, supra—regarding "[a]ctivity which consists of mere talk," which constitutes "concerted" activity for purposes of Sec. 7 only if it "look[s] toward group action." *Mushroom Transportation*, 330 F.2d at 685. There is no evidence that Norvell's advice to Zalewski satisfies this requirement.

To find Norvell's statements concerted, my colleagues rely on *UniQue Personnel Consultants*, 364 NLRB No. 112 (2016), *Cadbury Beverages*, 324 NLRB 1213 (1997), enfd. 160 F.3d 24 (D.C. Cir. 1998), and *Jhirmack Enterprises*, 283 NLRB 609 (1987). To the extent those decisions hold that an employee engages in concerted activity when he or she merely advises another employee "as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position," I believe they are contrary to the just-quoted standard set forth in *Mushroom Transportation*, 330 F.2d at 685, which was adopted by the Board in *Meyers II*. I would follow the latter cases.

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU 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.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT discharge or discipline you because you violate our unlawful rules.

WE WILL NOT maintain the social media policy and posting or distribution of papers rules.

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

WE WILL, within 14 days from the date of this Order, offer William Norvell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make William Norvell whole for any loss of earnings and other benefits resulting from his discharge,

less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate William Norvell for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of William Norvell, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL rescind our unlawful social media policy and posting or distribution of papers rule.

WE WILL furnish you with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or WE WILL publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

BUTLER MEDICAL TRANSPORT, LLC

The Board's decision can be found at www.nlrb.gov/case/05–CA–094981 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half St., S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Matthew J. Turner and *Andrew Andela, Esqs.,* for the General Counsel.

Gil Abramson and *Louis J. Cannon, Esqs. (Jackson Lewis, LLP),* of Baltimore, Maryland, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Baltimore, Maryland, on July 2, 2013. William Norvell filed charges on December 14, 2012, and February 6, 2013. Michael Rice filed a charge on February 6, 2013. The General Counsel issued a consolidated complaint on March 20, 2013. The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act in discharging Norvell on about October 22, 2012, and in discharging Rice on about January 14, 2013. He also alleges that Respondent has violated Section 8(a)(1) in maintaining rules requiring employees to refrain from discrediting it on social networking sites and prohibiting the unauthorized posting or distribution of papers.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, provides ambulance transport to patients at hospitals, nursing homes, etc. It has an office in Owings Mills, Maryland, and other locations in Maryland, the District of Columbia and York, Pennsylvania. It derives gross revenues in excess of $500,000 from its operations and receives materials valued in excess of $5000 from points outside of Maryland. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Discharge of William Norvell

William Norvell worked as an emergency medical technician for Respondent starting in 2005. He last worked on July 21, 2012, and has been on workers compensation since that date.

On October 10, 2012, Norvell accessed the Facebook page of Chelsea Zalewski on his personal computer at his home. Zalewski, who had been Norvell's partner at work, posted a note on this page indicating that Respondent had terminated her employment. Zalewski's post was as follows:

> Well no longer a butler employee . . . Gotta love the fact a "professional" company is going to go off what a dementia pt says and hangs up on you when you are in the middle of asking a question.

[GC Exh. 13.]

Several people, including another employee, Jake Hiepler, posted comments in response to Zalewski's post.

Zalewski responded to inquiries about what the patient reported to Respondent in the following post:

> Yeah ur telling me! The pt said I told her that they never fix anything on the units…Yeah i no that pt I'm not dumb enough to tell her let alone any pt how shitty those units are they see it all on their own

Then Norvell posted the following comment:

> Sorry to hear that but if you want you may think about getting a lawyer and taking them to court.

Another person posted a suggestion that Zalewski seek employment with Procare, another ambulance company.

Zalewski asked where Procare was located. Norvell responded that Procare was in Towson, Maryland. Then he added, "You could contact the labor board too."

[GC Exh. 13.]

A printed version of these Facebook posts was delivered to Ellen Smith, Respondent's human resource director. Smith consulted with Respondent's chief operating officer, William Rosenberg. They decided to terminate Norvell's employment.

On October 22, 2012, Smith, with Rosenberg on a speaker phone, called Norvell. Smith asked Norvell whether he made the October 10 posts on Zalewski's Facebook page. Norvell responded that he had made those posts. Smith told Norvell that he violated the prohibition in General Counsel's Exhibit 4, a bullet point list of Respondent's rules, which includes a promise to refrain from using social networking sights which could discredit Butler Medical Transport or damages it image (Tr. 82–83). Smith then informed Norvell that Respondent was terminating his employment. Neither Smith nor Rosenberg gave Norvell any reason for his termination other than his October 10 Facebook posts.

I discredit the testimony of Rosenberg and Smith that Respondent had not decided to terminate Norvell when they called him on October 22. One of my reasons for this finding is that on January 10, 2013, Smith gave an affidavit to the Board stating that she and Rosenberg decided to terminate Norvell and then called him. I also discredit Rosenberg's testimony that Respondent terminated Norvell for spewing profanity during his conversation with Rosenberg and Smith. I also discredit his testimony that Norvell spewed profanity after he was told that he was being terminated. Norvell concedes that he was very upset and that his conversation with Rosenberg and Smith continued after he was informed of his termination. However, this record in no way supports a finding that Norvell's termination was justified by anything he said after Respondent told him he was fired.[1]

One reason I discredit this testimony is that there is no mention of Norvell's profanity in either of the affidavits Smith gave to the Board, GeneralCounsel Exhibits 12 and 13. In an affidavit given to the Board on March 4, 2013, Smith discussed Michael Rice's use of profanity at length, but did not raise this issue with regard to Norvell, although she discussed the reasons for his termination in that second affidavit.

Analysis with regard to William Norvell's termination

The only issue with regard to William Norvell's termination is whether or not his Facebook posts of October 10 constitute protected concerted activity within the meaning of the Act. There is no question that he would not have been terminated but for these Facebook posts. If these posts were protected, his discharge violates Section 8(a)(1), *Phoenix Transit System,* 337 NLRB 510 (2002).[2]

Norvell's Facebook posts must be considered in the context in which they were made. He was advising Zalewski, a fellow employee, to obtain an attorney/and or contact the Labor Board.[2] What I find particularly important is that Norvell was responding to a post in which Zalewski stated she had been terminated for commenting to a patient about the condition of Respondent's vehicles.[3] The condition of Respondent's vehicles was a matter of mutual concern to Respondent's employees. Indeed, Zalewski had been disciplined previously for commenting on the Facebook page of Leah Fornier, another employee, about the condition of Butler ambulances (GC Exhs. 6 and. 12, p. 3).[4]

By advising Zalewski to obtain legal counsel or contact the Labor Board, I find that Norvell was making common cause with Zalewski regarding a matter of concern to more than one employee. Thus, I find his post to be protected.[5]

It is not a defense to the unfair labor practice allegation that Norvell's posts were accessible to customers or others outside of Butler Medical Transport. In this regard, The relevant legal

[1] Since I conclude that Norvell's Facebook posts constituted protected concerted activity, as discussed below, I further conclude that Respondent's termination of Norvell cannot be justified under the test enunciated in *Atlantic Steel Co.,* 245 NLRB 814 (1979). First of all, the record does not adequately describe the nature of Norvell's outburst; secondly, the place, time and nature of the discussion, plus the provocation for any outburst leads me to conclude that Respondent had not established that Norvell lost the protections of the Act.

I note further that an employer seeking to be excused from its obligation to reinstate or pay backpay to a discriminatee for misconduct which was not a factor in the discriminatory action, has a heavier burden than when it is merely seeking to justify the original determination. Such an employer must prove the misconduct was "so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant," *Hawaii Tribune –Herald,* 356 NLRB 661 (2011) [sometimes cited as *Stephens Media, LLC*].

[2] An analysis under the *Wright Line* (251 NLRB 1083 (1980)), doctrine is inappropriate in this case. If the Facebook posts were protected there is no issue as to whether Respondent had a nondiscriminatory reason for discharging Norvell which must be analyzed under *Wright Line*.

I do not credit Rosenberg and Smith that they had no idea that Norvell was referring to the NLRB. I also conclude it does not matter whether they thought he was talking about another State or Federal agency. As discussed herein, I find Norvell was making common cause with Zalewski, who was fired because Respondent believed she had made comments about a matter of mutual concern to employees, i.e., the condition of Respondent's vehicles.

[3] Respondent argues that Norvell's post was not protected in part because he did not know why Zalewski had been terminated (R. Br. at p. 10. However, Zalewski's posts, made prior to Norvell's posts, make clear what Zalewski was told was the reason for her discharge, i.e., Respondent's belief that Zalewski had complained to a patient about the condition of her ambulance.

[4] The fact the Zalewski had already been terminated when Norvell made his posts is irrelevant. She was still an employee entitled to the protection of the Act, *Little Rock Crate & Basket Co.,* 227 NLRB 1406 (1977). Thus, Norvell was making common cause with Zalewski by encouraging her to seek vindication of what he thought might be her Section 7 rights.

[5] Zalewski denied making the comment which led to her termination. However, I conclude this is irrelevant since Respondent believed she had commented to a patient about the condition of its vehicles, a matter about which at least she and Fournier were concerned. An employer violates the Act when retaliating against an employee for protected activity in which it mistakenly believed the employee was engaged, *NLRB v. Link-Belt Co.,* 311 U.S. 584, 589–590 (1941); *San Juan Lumber,* 144 NLRB 108 (1963); *JCR Hotel, Inc. v. NLRB,* 342 F.3d 837 (8th Cir. 2003).

framework for analyzing this case was set forth in great detail in *Valley Hospital Medical Center,* 351 NLRB 1250, 1252 (2007):

> Section 7 of the Act provides, in pertinent part, that"[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." The protection afforded by Section 7 extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Thus, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. See, e.g., *Allied Aviation Service Co. of New Jersey, Inc*., 248 NLRB 229, 231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980).
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> . . .
>
> But finding that employees' communications are related to a labor dispute or terms and conditions of employment does not end the inquiry. Otherwise protected communications with third parties may be "so disloyal, reckless, or maliciously untrue [as] to lose the Act's protection." *Emarco, Inc.*, 284 NLRB 832, 833 (1987); accord: *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000). Statements have been found to be unprotected as disloyal where they are made "at a critical time in the initiation of the company's" business and where they constitute "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953); accord: *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006), denying enforcement of 345 NLRB 448 (2005). The Board is careful, however, "to distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues." *Professional Porter & Window Cleaning Co.*, supra at 139. To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence "a malicious motive." *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979).
>
> Statements are also unprotected if they are maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. See, e.g., *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006). The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue.

The Board most recently addressed this issue in *Mastec Advanced Technologies,* 357 NLRB 103 (2011). Numerous Board cases establish that virtually any form of protected activity can be subjectively considered disloyal, including forming, joining or assisting a labor organization, e.g., *RTP Co.,* 334 NLRB 466, 467, 476 (2001), enfd. 315 F. 3d 951 (8th Cir. 2003). Moreover, protected activity will often adversely impact an employer's reputation and revenue. Indeed, Justice Frankfurter in his *Jefferson Standard* dissent observed that "Many of the legally recognized tactics and weapons of labor would readily be condemned for "disloyalty" were they employed between man and man in friendly personal relations," 346 U.S 464 at 479–480.

There is no question that if employees posted or handed out flyers asking the public not to patronize their employer because their equipment was substandard such conduct would be protected, *Kitty Clover, Inc.,* 103 NLRB 1665, 1687–1688 (1953); *Arlington Electric,* 332 NLRB 845, 846 (2000). Appeals to customers that may adversely affect the employer's revenue have been found to be protected by Section 7 in many cases. For example, in *Allied Aviation Service of New Jersey, Inc.,* 248 NLRB 229 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980), the Board found that the letters of a union steward to his employer's customers were protected. The steward in that case claimed that his employer's practices relating to the servicing and maintenance of ground vehicles created a safety hazard to customers and resulted in inferior service.

Pursuant to longstanding Board precedent, I conclude that the fact that Norvell's Facebook posts may have adversely affected Respondent's business is not a valid defense to the complaint allegations. I thus conclude that his conduct in making these posts was protected and that Respondent violated the Act in terminating him for making these posts.

Allegations with Regard to the Termination of Michael Rice

Respondent terminated Michael Rice on January 14, 2013 for making the following Facebook posting: "Hey everybody!!!!! Im fuckin broke down in the same shit I was broke in last week because they don't wantna buy new shit!!!! Cha-Chinnnggggggg chinnng-at Sheetz Convenience Store," (GC Exh. 10).

Respondent's chief operating officer, William Rosenberg, testified without contradiction that he reviewed Respondent's maintenance records and determined that Rice's vehicle had not broken down when he made this post (Tr. 46). He further testified that the assertion made in Rice's post was false.

At an unemployment insurance hearing, Rice contended that his post referred to a private vehicle, not one of Respondent's ambulances. At the instant hearing, Rice was not called as a witness by the General Counsel. He was subpoenaed by Respondent and then refused to testify citing his rights under the Fifth Amendment of the United States Constitution. As a result I conclude on the basis of Respondent's uncontradicted testimony that the allegations made in his Facebook post were maliciously untrue and made with the knowledge that they were false. Thus I dismiss the complaint allegation regarding Rice's termination, *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006).

Complaint paragraphs 4 and 5; illegal rules

Since at least October 1, 2010, Respondent's employee handbook has prohibited "unauthorized posting or distribution of papers" (GC Exh. 3). Since at least November 17, 2011, Respondent has also distributed to all newly hired employees and discussed with them, a sheet of bullet points. Among the bullet points is the following promise by the employee, "I will refrain from using social networking sights which could dis-

credit Butler Medical Transport or damages its image" (GC Exhs. 4 and 5). The General Counsel alleges that these rules violate Section 8(a)((1) of the Act.

Respondent argues at pages 34 and 35 of its brief that the list of a bullet points is not a "policy." This is a distinction without a difference. The bullet point regarding social networking sites was relied upon by Ellen Smith in terminating William Norvell. New employees were required to acknowledge receipt of these bullet points (see, e.g., GC Exh. 5), and would reasonably understand they were subject to discipline up to and including termination if their conduct did not conform to the bullet points.

Both the handbook provision and bullet point policies cited above violate Section 8(a)(1). They are unlawful because employees would reasonably construe their language to prohibit Section 7 activity. The rule on its face is broad enough to prohibit posting and distribution of papers regarding wages, hours, and other working conditions. It can reasonably be read to apply to nonwork time and nonwork areas. There is no evidence that Respondent effectively communicated a narrowed interpretation of its rules that would have clarified its scope and limited its application to non-protected distribution or posting of literature. Moreover, any rule that requires employees to secure permission from their employer before engaging in protected concerted or union activity at an appropriate time and place is unlawful, *Tele Tech Holdings, Inc.,* 333 NLRB 402, 403 (2001).

The bullet point regarding social networking sights is also illegal because it has been applied to restrict the Section 7 rights of Norvell and Zalewski, *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004); *Mastec Advanced Technologies,* 357 NLRB 103, 103 fn. 1, 115–116 (2011).

SUMMARY OF CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act in discharging William Norvell.

2. Respondent did not violate the Act in discharging Michael Rice.

3. Respondent is violating Section 8(a)(1) in maintaining a provision in its employee handbook that prohibits "unauthorized posting or distribution of papers."

4. Respondent is violating Section 8(a)(1) in maintaining a policy that prohibits use of social networking sites which could discredit Butler Medical Transport or damages its image.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged William Norvell, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Butler Medical Transport, LLC, Owings Mills, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected, concerted activity, including the posting or distribution of papers and the use of social networking sites.

(b) Maintaining rules, policies, and/or provisions that prohibit the "unauthorized posting or distribution of papers" and/or which require employees to promise to refrain from using social networking sites which could discredit Butler Medical Transport or damages its image.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer William Norvell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make William Norvell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify William Norvell in writing that this has been done and that the discharge will not be used against him anyway.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at all its facilities copies of the attached notice marked "Appendix."[7]

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 4, 2013.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU 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.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in protected concerted activity, including the posting or distribution of papers and the use of social networking cites which pertain to wages, hours or other terms or conditions of employment.

WE WILL NOT maintain rules, policies and/or provisions that prohibit "the "unauthorized posting or distribution of papers" and/or which require employees to promise to refrain from using social networking sites which could discredit Butler Medical Transport or damages its image.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer William Norvell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make William Norvell whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of William Norvell, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate William Norvell for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

BUTLER MEDICAL TRANSPORT, LLC

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ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."