FOR IMMEDIATE RELEASE **R-2546**
Friday, November 26, 2004 **202/273-1991**
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LABOR BOARD DECLINES TO INFER NLRA SECTION 7 VIOLATIONS FROM FACIALLY NEUTRAL WORK RULES

The National Labor Relations Board, in a 3-2 decision involving Lutheran Heritage Village-Livonia, concluded that the maintenance of work rules prohibiting "abusive and profane language," "verbal, mental and physical abuse," and "harassment…in any way" could not reasonably be understood as interfering with employees' Section 7 rights under the National Labor Relations Act. The majority consisted of Chairman Robert J. Battista and Members Peter C. Schaumber and Ronald Meisburg. Members Wilma B. Liebman and Dennis P. Walsh dissented. *Lutheran-Heritage Village-Livonia*, 343 NLRB No. 75. The decision is posted on the Board's website at www.nlrb.gov.

The decision, dated November 19, 2004, and made public today, adopts the reasoning of the District of Columbia Circuit in *Adtranz, ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001). That court reversed a 2000 decision of the Board (reported at 331 NLRB 291). In *Adtranz*, the District of Columbia Circuit concluded that a rule prohibiting abusive or threatening language was lawful because it was based on the employer's legitimate right to establish a "civil and decent" workplace and to protect itself from liability for workplace harassment by maintaining rules prohibiting conduct that could lead to liability. Adopting the court's view, the Board majority in *Lutheran Heritage Village-Livonia* agreed that a rule prohibiting "abusive and profane language," as well as rules prohibiting "verbal . . . abuse" and "harassment," were lawful.

The majority in *Lutheran Heritage Village-Livonia* recognized that maintenance of a rule that does not expressly prohibit protected activity "can nonetheless be unlawful if employees would reasonably read it to prohibit Section 7 activity." However, the Board said that employees in the *Lutheran Heritage* case would not reasonably read the rule in that way. "That is, reasonable employees would infer that the Respondent's purpose in promulgating the challenged rules was to ensure a 'civil and decent' workplace, not to restrict Section 7 activity." The majority also stated that where, as in this case, the rule does not refer to Section 7 activity, was not adopted in response to organizational activity, and had never been enforced to restrict Section 7 activity, "we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way."

In dissent, Members Liebman and Walsh observed that "the ill-defined scope of the Respondent's 'verbal abuse' and abusive language" rules, as well as its "no harassment" rule, would reasonably tend to cause employees to "steer clear of the prohibited zone" and refrain from voicing disagreement with their terms and conditions of employment or vigorously attempting to organize skeptical workers.

The dissent explained that it relied "not only on the fact that the overbroad rules at issue here could reach activity that is protected, but also on the particular language of the rules, the

Respondent's maintenance of other facially unlawful rules, and the existence of seemingly duplicative rules as providing a context in which employees would reasonably construe the rules as interfering with their Section 7 activity."

The dissenting Members asserted that, "[a]lthough we agree with our colleagues and the District of Columbia Circuit that employers have a legitimate interest in protecting themselves by maintaining rules that discourage conduct that might result in employer liability, . . . that interest is appropriately subject to the requirement that employers articulate those rules with sufficient specificity that they do not impinge on employees' free exercise of Section 7 rights."

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