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NLRB REAFFIRMS LONG-STANDING BOARD PRECEDENT REGARDING THE RIGHT TO WEAR UNION INSIGNIA IN THE WORKPLACE

On August 29, 2022, the National Labor Relations Board issued its decision in *Tesla, Inc.* 370 NLRB No. 131 (2022). After seeking briefing on the issue and receiving several *Amicus* briefs from union and employee organizations, the Board considered the issue of whether an employer is required to prove special circumstances exist in order to justify a facially neutral uniform policy that implicitly prevents the wearing of Union T-shirts in its facility. In a thoroughly reasoned decision, the Board adhered to long-standing precedent under *Republic Aviation Corp. v. NLRB*, 324 US 793, overruled the Trump Board's recent contrary decision in *Wal-mart*, 368 NLRB No. 146 (2019), and held that the special circumstances test applied to *any* workplace policy that limited employees' right to display union insignia in the workplace, even if those same employees had other opportunities to do so.

In *Republic Aviation*, the Supreme Court analyzed whether a policy which prohibited union members from wearing union steward pins, but not other union insignia, at work was a violation of the union members' Section 7 rights. In holding that it was, the Court established precedent that any rule prohibiting the wearing of union insignia in the workplace was presumptively invalid. An employer could nevertheless justify such a policy with a showing of "special circumstances," such as creating a threat to the safety of the workplace, interfering with providing services to the public, or a threat to the employer's public image. The Board had consistently applied the special circumstances test, using a fact-specific inquiry, for decades, until its decision in *Wal-mart*. In *Wal-mart*, the Trump Board applied the test under *Boeing Co.*, 365 NLRB No. 154 (2017), which applies a two-factor test to determine whether an employer's facially lawful policy interferes with Section 7 rights: (1) the nature and extent of the potential impact on employees' section 7 rights and (2) the "legitimate justifications" the employer has for such a rule. This standard is significantly less strict than the "special circumstances" test, and is in conflict with *Republic Aviation* when it comes to policies about the wearing of union insignia in the workplace.

The Employer's policy analyzed by the Board in *Tesla* requires union members who work in General Assembly to wear an employer-provided uniform of black pants and a black shirt with the Employer's logo. The uniform was specially designed so as not to have any zippers, grommets, or similar accents which may damage or "mutilate" the cars as union members were working. Members are allowed to substitute plain black clothing with permission of their supervisor. Implicitly, this policy prohibited union members from wearing black T-shirts with the Union's logo. The Employer argued that this policy was non-discriminatory and did not interfere with the members' Section 7 rights because they were otherwise allowed to wear union stickers on their Employer-issued clothing. Following recent precedent from *Stabilus, Inc.*, 355 NLRB 836 (2010), the Board found that an employer cannot avoid the special circumstances test simply by requiring a specific uniform. Further, the Board rejected the Employer's and supporting *amici*'s argument that allowing union members an alternative form of displaying union insignia was sufficient to justify its prohibition on union T-shirts. Consistent with *Stabilus* and *Republic Aviation*, the Board firmly stated that "to hold otherwise would effectively treat the display of union

insignia as a privilege to be granted by the employer on the terms it chooses rather than as an essential Section 7 right that the employer is required to accommodate."

The dissent by members Kaplan and Ring argued that, as the Board found in *Wal-mart*, there should be a distinction between policies which completely prohibit the wearing of union insignia and those that only prohibit certain types of union insignia, and would support a rule that applied the *Boeing* standard to the latter and would accordingly require a lesser showing than "special circumstances" for less-restrictive policies. However, the majority squarely rejected this argument, finding that allowing such a rule would undermine Section 7, create uncertainty, and require different standards for different policies. The Board overruled *Wal-mart* to avoid any future confusion.

This decision by the Board reaffirms precedent set by *Republic Aviation* and cemented by *Stabilus* and so many other cases, that employer policies which restrict the display of union insignia are presumptively unlawful and must be justified by special circumstances. In the case of Tesla, the Board held that the Employer had not proven special circumstances existed to prohibit the wearing of Union t-shirts in General Assembly. The Employer's reasons for the dress code – to reduce mutilations to the cars on the line and to allow supervisors to easily identify employees – were not a sufficient justification to prohibit black, cotton, union t-shirts. This decision will ease uncertainty in unionized workplaces over uniform policies which restrict the right to wear union insignia in the workplace, and it will further cement union members' essential Section 7 rights.

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