

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

BOCH IMPORTS, INC. D/B/A BOCH HONDA;

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
DISTRICT LODGE 15, LOCAL LODGE 447

Case No. 1-CA-83551

**MEMORANDUM IN SUPPORT OF
RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. STATEMENT OF THE CASE

This case comes before the National Labor Relations Board (hereinafter “the Board” or “the NLRB”) pursuant to Exceptions filed by Boch Imports, Inc. d/b/a Boch Honda (“Boch Honda” or “Respondent”) to Administrative Law Judge (“ALJ”) Joel Biblowitz’ Decision issued in the above-referenced case on January 13, 2014. Boch Honda files this Brief pursuant to the Rules and Regulations of the Board, including section 102.46 thereof. The fundamental issue before the Board concerns the right of a non-union employer to operate its business by promulgating employee rules and policies.

In the Amended Complaint, and at the hearing on this matter, the General Counsel alleged that Boch Honda’s Handbook provisions concerning Confidential and Proprietary Information, Discourtesy, Inquiries Concerning Employees, Dress Code and Personal Hygiene, Solicitation and Distribution Policy, and Social Media Policy violated Section 8(a)(1) of the Act. However, the Region issued the Amended Complaint more than a month after Boch Honda revised the allegedly unlawful policies, to the Region’s approval, and issued a new Employee Handbook. Despite Boch Honda’s continued and oft-expressed willingness to work with the Region to remedy alleged violations of the Act, the ALJ found that Boch Honda violated Section 8(a)(1) of the Act.

In reaching his decision, the ALJ committed three distinct errors. First, pursuant to well-settled Board precedent, Boch Honda’s decision to collaborate voluntarily with the Region to remedy alleged 8(a)(1) violations by modifying several sections of its Employee Handbook mooted the allegations contained in Paragraphs 7 and 8 of the Amended Complaint. During the hearing, the ALJ agreed. (ALJ Decision 5:14; Tr. 12-13). Nevertheless, the ALJ found violations stemming from these previously remedied provisions and decided to impose an additional remedy on Boch Honda. In so doing, the ALJ clearly erred.

Second, the ALJ ignored additional well-established Board precedent in concluding that Boch Honda's substantial interest in maintaining its long curated public image did not rise to a special circumstance justifying the prohibition of insignias and message clothing for its public-facing employees contained in its Dress Code and Personal Hygiene Policy. Boch Honda's efforts to cultivate and maintain its public image, including the significant expense of doing so, and the results of those efforts – earning the title of “#1 Honda dealership on the planet” – were undisputed. Consequently, the ALJ erred in failing to find special circumstances supporting Boch Honda's prohibition of insignias and message clothing.

Finally, the ALJ violated Boch Honda's due process rights by extending the remedy to all other dealerships and retail businesses related to Boch Honda, the named Respondent, as well as the due process rights of those non-party entities. The General Counsel did not propose this overbroad remedy until the pre-hearing telephone conference with the ALJ just days before the hearing, and when advocating for this overbroad remedy, could not even identify those entities that it alleged should be included in the remedy. By accepting the General Counsel's ambush remedy, the ALJ essentially deprived the non-party dealerships and other retail businesses related to Boch Honda of their due process rights by precluding them from marshaling and presenting evidence of special circumstances at those various entities and their facilities purportedly included in the remedy. Moreover, the ALJ directed Boch Honda to undertake something that it has no legal right to do – to require non-parties, that are not owned or controlled by Boch Honda, and which operate at different locations, to take certain actions.

II. QUESTIONS PRESENTED

1. Did the Administrative Law Judge err in concluding that Boch Honda violated Section 8(a)(1) of the Act by maintaining in its Employee Handbook from about December 21, 2011 to about May 2013, provisions relating to Confidential and Proprietary Information,

Discourtesy, Inquiries Concerning Employees, Dress Code and Personal Hygiene, Solicitation and Distribution Policy, and Social Media Policy? (See Exception Nos. 1 through 15).

2. Did the ALJ err in concluding that Boch Honda's substantial interest in maintaining its long curated public image did not rise to a special circumstance justifying the prohibition of insignias and message clothing for its public-facing employees contained in its Dress Code and Personal Hygiene Policy? (See Exception Nos. 7 through 15).

3. Did the ALJ err by extending the ordered remedy to all other dealerships and other retail entities related to, but not owned or controlled by, Boch Honda, many of which are distinct legal entities and some of which have no employees, without notice, thereby preventing Boch Honda and those non-parties from presenting evidence of special circumstances at each of their facilities? (See Exception Nos. 13 through 15).

III. FACTS

A. Boch Honda

The material facts in this case are not in dispute. Boch Honda is a Honda dealership located in Norwood, MA. It is the premier Massachusetts Honda dealer and has led all U.S. Honda dealerships in sales at least five times. R Exhs. 3-6. Boch Honda has been the number one Honda Dealership "on the planet" and spends millions of dollars yearly on advertising to maintain that position. Consistent with its position, and the investment in maintaining that position, Boch Honda insists that its employees present themselves professionally in appearance and conduct. (Tr. 76-77).

Boch Honda maintains a Sales Department and a Service Department. In 2011, International Association of Machinists and Aerospace Workers, District Lodge 15, Local Lodge 447 ("IAM") initiated an organizing campaign at Boch Honda, and certain Boch Honda employees elected IAM as their collective bargaining representative. (Tr. 7). The parties began

negotiating a collective bargaining agreement in early 2011, but after Boch Honda's employees filed a decertification petition, Boch Honda lawfully withdrew recognition from IAM in June 2012. (Tr. 8). No union currently represents Boch Honda's employees. (Tr. 57).

As befits a premier new and used car dealership, Boch Honda's Service Department operates seven days a week. (Tr. 40). In its service department, Boch Honda employs a Service Director, Service Managers, and approximately 34 Service Technicians. (Tr. 40-41). Service Technicians perform all facets of repair and maintenance of automobiles brought to the facility. (Tr. 43). In so doing, Service Technicians routinely interact with customers during road tests, if a customer requests to look at the car while the technician is working on it, and occasionally, in the parking lot or at the cashier station. (Tr. 49-51, 55). Moreover, the customer waiting area at the facility has a large glass window that allows the customers to observe the technicians while they are waiting for Service Technicians to service their cars. (Tr. 55-56, 72-74).

In addition to Service Technicians, Boch Honda also employs Service Advisors who meet with customers to ascertain the work to be done, to recommend work depending upon the mileage and condition of the vehicle, and to write up the service orders. These Service Advisors serve as the face of Boch Honda's Service Department. (Tr. 65-67).

Boch Honda requires that all of its Service employees wear a company jacket and hat, which Boch Honda provides at its own expense, and it also provides its Service Technicians with uniforms (shirts and pants). (Tr. 41). America Honda Motor Co. specifically approved these uniforms. (Tr. 41-42). Sales employees have a choice of wearing Boch Honda jerseys or their own shirt and tie, consistent with the larger dress code's requirement of maintaining a professional appearance. (Tr. 82). Employees may wear anything they choose when reporting

to, or leaving from, work, so long as they change when they arrive and look “professional.”¹ (Tr. 86-87).

B. Boch Honda’s Employee Handbook

Since at least July 2010, Boch Honda and other dealerships and retail businesses, separately incorporated, but with a common owner and collectively referred to with the descriptive term, “Boch Enterprises,” have maintained a common Employee Handbook that functions as a “guide and reference” for their various employees. (Tr. 17; GC Exhs. 2 and 3). On or about June 20, 2012, after Boch Honda’s employees filed a petition to decertify the union, IAM filed a charge with Region One of the National Labor Relations Board alleging that certain policies maintained in Boch Honda’s Employee Handbook unlawfully interfered with employees’ Section 7 rights. (Tr. 8; GC Exh. 1). Boch Honda was the only respondent in that charge, which did not challenge the use of the Employee Handbook by other businesses. (*Ibid.*). In or around June 2012, Boch Honda lawfully withdrew recognition of IAM as the collective bargaining representative of its employees. (Tr. 8).

Boch Honda cooperated with the Region’s investigation of IAM’s claims, and repeatedly indicated that its willingness to work with the Region to remedy alleged violations of the Act. Despite that cooperation, on or about December 31, 2012, the Region issued a Complaint alleging that Boch Honda’s Handbook provisions concerning Confidential and Proprietary Information, Discourtesy, Inquiries Concerning Employees, Dress Code and Personal Hygiene, Solicitation and Distribution Policy, and Social Media Policy violated Section 8(a)(1) of the Act. (Tr. 34-35; GC Exh. 1). As with the charge, Boch Honda was the only respondent in the

¹ On one occasion, following the Boston Marathon bombing, Boch Honda conducted a Boston Strong fundraiser and, on that day, the Respondent permitted the employees to wear Boston Bruins, Boston Red Sox, and similar shirts. There is no other evidence that Boch Honda has otherwise deviated from its dress code at any point in its entire history. To the contrary, the evidence established this was a unique and isolated exception.

Complaint, which did not challenge the use of the Employee Handbook by other businesses. (GC Exh. 1).

C. Amendment Of The Employee Handbook

Following the issuance of the Complaint, Boch Honda continued to work with the Region to revise the allegedly unlawful policies, and in or about May 2013, Boch Honda issued a new Employee Handbook that included revised versions of the Confidential and Proprietary Information, Discourtesy, Inquiries Concerning Employees, Solicitation and Distribution, and Social Media Policies that the Region reviewed and approved. (Tr. 34-35; GC Exh. 1).

Nevertheless, on or about June 17, 2013, the Region issued an Amended Complaint targeting the same pre-revision policies. Paragraph 7 of the Amended Complaint alleged:

7. From about December 21, 2011 to about May 2013, Respondent maintained an Employee Handbook containing the following rules and policies:

(a) Confidential and Proprietary Information, which defined confidential information to include all information that has or could have commercial value or other utility in the Company's business; the identity of the Company's customers, suppliers, and/or prospective customers and suppliers; compensation structures and incentive programs; Company policies, procedures, and litigation activity; and prohibited employees during and after their employment from disclosing or authorizing the disclosure or use of any Confidential Information;

(b) Discourtesy, which stated the following:

All employees are expected to be courteous, polite and friendly both to customers and to their fellow employees. The use of profanity or disrespect to a customer or coworker, or engaging in any activity which could harm the image of the Company, is strictly prohibited;

(c) Inquiries Concerning Employees, which stated in relevant part:

All inquiries from outside sources concerning employees should be directed to the Human Resources Department.

An employee shall not provide personal information of any nature concerning another employee (including references) to any outside source unless approved by the Human Resources Department and authorized, in writing by the employee;

(d) Dress Code and Personal Hygiene, which stated in relevant part:

Employees who have contact with the public may not wear pins, insignias, or other message clothing which are not provided to them by the Company; and

(e) Solicitation and Distribution Policy, which restricts persons who are not employed by Respondent from soliciting and distributing literature or other materials at any time on property adjacent to Respondent's premises.

(GC. Exh. 1).

Paragraph 8 targeted Boch Honda's pre-amendment Social Media Policy, alleging:

8. From about December 21, 2011 to about May 2013, Respondent maintained a Social Media Policy in its employee handbook with the following requirements:

(a) prohibited employees from disclosing any information about employees or customers;

(b) required employees to identify themselves when posting comments about Respondent or related to Respondent's business or a policy issue;

(c) prohibited employees from referring to Respondent in postings that would negatively impact the Respondent's reputation or brand;

(d) prohibited employees from engaging in activities that could have a negative effect on Respondent, even if it occurs off Respondent's property or off the clock;

(e) prohibited employees from using Respondent's logos for any reason;

(f) prohibited employees from posting videos or photos that are recorded in the work place;

(g) required employees to contact Respondent's Vice

President of Operations before making a statement to the media;

(h) required employees to provide Respondent access to any commentary posted by employees on social media sites; and

(i) required employees to write and post respectfully.

(Id.).

During the pre-hearing telephone conference, the ALJ “agreed with counsel for the Respondent that it would not effectuate the policies of the Act to spend time on the[] allegations [contained in Paragraphs 7 and 8].” (ALJ Decision 5:14-15). Accordingly, when at the outset of the hearing Respondent’s counsel reiterated the view that time should not be spent on moot issues, the ALJ took action to quickly dispose of those issues, seeking and obtaining from the General Counsel a stipulation that the allegedly unlawful provisions identified in Paragraphs 7 and 8 of the Amended Complaint had been remedied by the May 2013 Handbook. (Tr. 12). The ALJ then confirmed with Respondent’s counsel that a new handbook had been issued, indicating that attention now could focus on the only extant disputed policy, which concerned pins and insignia. (Tr. 12-13).

Indeed, the only provision from the 2010 Employee Handbook that remained in effect when the Region issued the Amended Complaint was Boch Honda’s revised Dress Code and Personal Hygiene Policy. That Policy states in relevant part: “Employees who have contact with the public may not wear pins, insignias, or other message clothing.” See Amended Complaint ¶ 9.

D. Boch Honda Adduced Special Circumstances Warranting The Ban On Pins And Message Clothing

At the hearing in this matter, Boch Honda adduced substantial evidence of special circumstances warranting the prohibition on pins, insignias, and message clothing. David Carlson, Boch Honda’s Service Director, offered uncontroverted testimony concerning the

myriad safety hazards posed by pins and buttons in the service area. (Tr. 45-49). For example, Mr. Carlson testified that if a pin or button got loose and fell into a car's engine while a Service Technician was working, the pin or button could become a dangerous projectile or could damage or ruin the engine. (Tr. 45). Additionally, buttons or pins could cause cosmetic damage to the interior of the car or scratch the car's paint. (Tr. 46). If a pin or button worn by a technician damaged a customer's car, the dealership would bear the cost of that damage. (Tr. 51).

As the ALJ correctly noted:

Pins have never been allowed at the dealership; during a blood drive, Red Cross and American flag pins were not permitted, nor are pins recognizing individuals with intellectual disabilities. In addition to image, safety concerns are also important in prohibiting pins; they could damage a car, as Carlson testified. Even without pins, Respondent pays out about \$250,000 a year to repair customers' vehicles.

(ALJ Decision 4:36-40).

Boch Honda also presented uncontroverted evidence of special circumstances supporting its ban on insignias and message clothing. It is undisputed that Boch Honda became the premier Honda dealership on the planet, by relying on its image as part of its business plan. Boch Honda spends millions of dollars annually to promote that image and maintain that position. Indeed, Mark Doran, Boch Honda's General Manager testified, without contradiction that Boch Honda's image is at the center of "everything we do." (Tr. 76-77, 78).

As part of Boch Honda's business plan, the dealership stresses exemplary customer service by ensuring customer interaction in all facets of the customer's relationship with the dealership. Thus, not only are Service Advisors and Salespersons in direct contact with customers, but Service Technicians also have substantial customer contact. To ensure customer involvement in all aspects of the Boch Honda experience, Technicians go on test drives with customers; Technicians meet repeatedly with customers to discuss the work to be done, the work

being done, or the work which was just done; Technicians pick up and return the cars; Technicians meet customers at the cashier's desk; Technicians pick up keys in the showroom (which is full of existing customers and potential customers); and most importantly, Technicians perform all work in full view of waiting customers. Put simply, Technicians frequently interact with customers, and when they are not, they are working on customer's vehicles in full-view of those customers. (Tr. 55-56, 72-74).

Finally, it is important to note that the Handbook's ban on pins, insignias, and message clothing is far from absolute. Consistent with its business plan, Boch Honda narrowly tailored the prohibition to apply to only those employees who have contact with the public. See Amended Complaint ¶ 9. Moreover, as the ALJ found:

Carlson also testified that employees are permitted to wear message clothing or pins and buttons to and from work and to have stickers or buttons on their car or toolbox. In fact, Respondent moved into evidence a picture of a technician's tool box with stickers encouraging support of the Union, without complaint from the Respondent. In addition, Respondent recognizes technicians for exemplary service with a sticker or magnetic award that he can put on his tool box, rather than with a button or pin.

(ALJ Decision 4:26-31).

The ALJ found that special circumstances existed warranting Boch Honda's prohibition on pins, but found no such special circumstances supporting the ban on insignias and message clothing. (ALJ Decision 8:45-48).

IV. ARGUMENT

The above facts amply demonstrate the ALJ's errors. In finding that Boch Honda's maintenance of certain Employee Handbook policies between 2010 and 2013 violated Section 8(a)(1) of the Act, the ALJ erroneously ignored the record evidence that Boch Honda effectively remedied and repudiated the allegedly unlawful Handbook provisions, and the General Counsel's

own stipulation to that fact. Worse, in concluding that Boch Honda failed to prove special circumstances warranting its prohibition on insignias and message clothing, the ALJ ignored the record evidence and well-established Board precedent. Finally, in extending the ordered remedy to all dealerships and retail businesses related to Boch Honda (but not owned or controlled by Boch Honda), the ALJ deprived these non-party entities of the opportunity to present evidence of special circumstances supporting a narrower remedy and denied them and Boch Honda's basic due process rights; he also purported to require Boch Honda to do something that it has no legal authority to do, *i.e.*, require separate legal entities to take action with respect to their employees (not Boch Honda's employees).² For these reasons, as amplified below, the Board should reverse the ALJ's conclusions, rescind his overbroad remedy, and dismiss the Amended Complaint.

A. The ALJ Erred In Concluding That Boch Honda Violated Section 8(a)(1) Of The Act By Maintaining Certain Policies In Employee Handbook From About December 21, 2011 To About May 2013.

Relying on Passavant Memorial Area Hospital, 237 NLRB 138 (1978), the ALJ found that Boch Honda violated Section 8(a)(1) of the Act by maintaining in its Employee Handbook from about December 21, 2011 to about May 2013, provisions relating to Confidential and Proprietary Information, Discourtesy, Inquiries Concerning Employees, Dress Code and Personal Hygiene, Solicitation and Distribution Policy, and Social Media Policy. In so doing, the ALJ placed form over substance, completely ignoring the fact that Boch Honda – with the approval of the Region and the General Counsel – revised the policies at issue to ensure complete compliance with the Act. Indeed, at the hearing, the General Counsel stipulated that

sometime prior to or in May of 2013, the Respondent changed the provisions to the satisfaction of the Board or the region, and that

² Some of the non-party business names are not legal entities but rather are owned by the non-party legal entities and do not themselves have any employees. (Tr. 27-28).

the region is no longer alleging that these provisions in paragraph seven and eight are still in effect.

(Tr. 12).

Under Passavant, supra, an employer's repudiation of an allegedly unlawful policy is effective if it is timely, unambiguous, specific to the coercive conduct, free from other illegal conduct, and provides assurances to employees that there will not be future interference with the exercise of their rights. 237 NLRB at 138-39. Here, the ALJ erroneously concluded that Boch Honda failed to meet the Passavant standard because "the Dress Code provision remains as is in the Handbook, and there has been no assurances that, in the future, it will not interfere with employees' Section 7 rights." (ALJ Decision 5:45-47). For several reasons, the ALJ's conclusion is patently incorrect.

First, the Board does not require strict adherence to all of the Passavant factors. For example, in River's Bend Health & Rehabilitation Service, 350 NLRB 184 (2007), the Board adopted an ALJ's dismissal of an alleged violation repudiated by the employer, even though the ALJ found that the employer's "repudiation does not completely accord with the Passavant criteria with regard to timeliness and lack of ambiguity." Id. at 193. See also, e.g., Claremont Resort, 344 NLRB 832, 832-833 (2005) (noting, "we do not necessarily endorse all the elements of Passavant").

Thus, even if as the ALJ found, Boch Honda failed to provide employees with assurances that it would not violate employee's Section 7 rights in the future, that fact alone is not a sufficient basis for finding that Boch Honda failed to repudiate the policies. This is particularly true here, where despite the existence of the policies targeted by the General Counsel, employees repeatedly engaged in their Section 7 rights, first by organizing and joining a union, by putting union stickers on their tool boxes kept at Boch Honda, and subsequently by seeking to decertify

that union – all before the 2013 Handbook revision. As the General Counsel noted in his Brief to the ALJ, “employees [even] previously engaged in lawful picketing activity on Respondent’s property.” (GC Brief at 20). The General Counsel presented no evidence that any employee refrained from engaging in any Section 7 activity because of the pre-2013 policies, or that Boch Honda ever unlawfully disciplined any employee for violating any of the pre-2013 policies. This is because it did not.

Second, contrary to the ALJ’s findings, Boch Honda has offered myriad assurances that it would not interfere with employees’ section seven rights. Boch Honda’s Company Values and Guiding Principles, Equal Employment Policy, and Policy Prohibiting Harassment and Discrimination, all of which are found in the Employee Handbook, each explicitly assure employees that Boch Honda will not interfere with any rights “protected by law.” GC Exh. 3. The same is true of the Handbook’s Conflict of Interest/Code of Ethics Provision, which “reiterates the Company’s commitment to ethical and legal business practices.” Id. These provisions explicitly renounce all unlawful conduct, which necessarily includes interference with employee’s Section 7 rights.

In finding that the pre-2013 policies violated the Act, the ALJ explained, “there is no evidence that any of the rules herein . . . explicitly restrict Section 7 activity.” (ALJ Decision 6:21-22). Instead, the ALJ found a violation because a “reasonable construction” of the rules could chill employees’ exercise of their Section 7 Rights. (ALJ Decision 6-8). By the same rationale, a reasonable construction of Boch Honda’s Company Values and Guiding Principles, Equal Employment, Policy Prohibiting Harassment and Discrimination, and Conflict of Interest/Code of Ethics Provision, should serve to assure employees that Boch Honda will not interfere with employees’ Section 7 rights.

Third, as found, in part, by the ALJ and discussed in detail below, special circumstances warrant the Dress Code's ban on pins, insignias, and message clothing. Consequently, the continued existence of the Dress Code provision (which, contrary to the ALJ's findings, was modified by the 2013 revisions; compare GC Exh. 2 with GC Exh. 3) has no bearing on Boch Honda's repudiation of the pre-2013 policies.³ (Indeed, was that policy unlawful (which it is not), it still would not change that Boch repudiated the pre-2013 policies and should not be subject to any remedy.)⁴

At the end of the day, by striking the offending policies, and replacing them with new General Counsel-approved iterations, Boch Honda timely and unambiguously repudiated the pre-2013 policies in a way that was specific to the coercive conduct and free from other illegal conduct. Moreover, throughout the revised Handbook, Boch Honda offered employees several assurances that it would not abridge or interfere with their rights. The ALJ's conclusion to the contrary was, therefore, patently erroneous. Consequently, the Board should sustain Boch Honda's exceptions to the ALJ's Decision.

B. The ALJ Erred By Concluding That Boch Honda's Substantial Interest In Its Public Image Did Not Justify Its Prohibition Of Insignias And Message Clothing For Its Public-Facing Employees.

In evaluating the ban on pins, insignias, and message clothing present in both the pre- and post-2013 versions of Boch Honda's Dress Code and Personal Hygiene Policy, the ALJ concluded that Boch Honda's ban on pins was lawful but that Boch Honda "has not established any special circumstances warranting the prohibition of 'wearing insignias or other message

³ The ALJ also noted that "[a]n additional factor to consider in these situations is whether the unfair labor practice was repudiated before or after the issuance of the Complaint." IBEW, Local 1316, 271 NLRB 338, 341 (1984). While it is unclear whether the ALJ relied on this proposition in finding Boch's repudiation insufficient to cure the violation predicated on pre-2013 policies, the fact is that Boch Honda issued its revised policies in May 2013, more than a month before the General Counsel issued its Amended Complaint, which is the operative complaint in this matter.

clothing.” In this latter conclusion, the ALJ plainly erred.

While employees have a statutorily-protected right to wear union insignia, it is well-established that an employer may lawfully restrict the wearing of union insignia where “special circumstances” justify the restriction. W San Diego, 348 NLRB 372, 373 (2006) (employer’s public image justified the no-button policy while employees were in public areas where they would encounter guests). Special circumstances justify restrictions on union insignia or apparel “when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees.” Komatsu America Corp., 342 NLRB 649, 650 (2004) (special circumstances override the employees’ Section 7 interests and legitimize the regulation of message apparel). Moreover, the Board has held that it will find special circumstances justifying a ban on union insignia where the employer has demonstrated that the display of insignia may unreasonably interfere with the public image that the employer has established, as part of its business plan, through appearance rules for its employees. Nordstrom, Inc., 264 NLRB 698, 700 (1982).

“An employer’s concern about the ‘public image’ presented by the apparel of its employees is . . . a legitimate component of the ‘special circumstances’ standard.” Bell-Atlantic-Pennsylvania, Inc., 339 NLRB 1084, 1086 (2003). In Burger King Corp. v. NLRB, 725 F.2d 1053, 1054 (6th Cir. 1984), the Sixth Circuit held that the restaurant’s ban on the wearing of union buttons by employees who had contact with the public was not an unfair labor practice because: the restaurant chain was attempting to project a clean, professional image to the public; the restaurant consistently enforced its policy in a nondiscriminatory manner; the chain derived

⁴ Moreover, the evidence revealed there was, in fact, no chilling of Section 7 conduct resulting from the promulgation and maintenance of the pre-2013 policies.

much of its recognition from its public image; and, the policy was not created in response to union activities. In W San Diego, 348 NLRB at 374, the Board concluded that a similarly narrow complete prohibition on pins and buttons in public areas was lawful. To wit, the employer's prohibition on employees wearing buttons in public areas was held to be lawful because it interfered with the employer's public image and no other adornments were allowed. Id.

Boch Honda satisfied all of the criteria identified by Burger King and W San Diego. As an initial matter, it is undisputed that Boch Honda has worked hard and expended millions of dollars to obtain and maintain its status as the preeminent Honda dealership "on the planet." (ALJ Decision 4:35-36). Mr. Doran, Boch Honda's General Manager, testified without equivocation or contravention that the rationale behind the ban was to maintain that image and project the same sort of clean and professional image found to be a special circumstance in Burger King, 725 F.2d at 1054, and W San Diego, 348 NLRB at 373. Just like the employers in those cases, Boch Honda provides its Service Technicians with specific uniforms that it believes project that desired image, and mandates the clothing that Sales employees must wear for the same reason. (ALJ Decision 3:45-47; 4:41).⁵ The ALJ found no evidence that Boch Honda enforces the policy in a discriminatory manner or that it the promulgated ban on message clothing in response to union activities. (ALJ Decision 4:36-38; 6:10-22). Moreover, the Dress Code's ban on message clothing is narrowly tailored to apply to only those public facing employees, see W San Diego, 348 NLRB at 373 (ban on union insignia valid for employees who

⁵ The ALJ's conclusion that should the ban be lifted, "the display would be a Boston Red Sox or Boston Strong display, rather than an offensive or defamatory display," (ALJ Decision 9:3-5), is both completely speculative and wholly immaterial. Moreover, absent one isolated occasion, a one-time fundraiser following the Marathon bombing, Boch would construe Boston Red Sox or Boston Strong message clothing as undermining its efforts to maintain its public image of preeminence and professionalism. Boch Honda did not even allow Red Sox clothing or insignias when the Red Sox won the World Series last year. (Tr. 93).

interact with public, but invalid for employees who do not), and only while those employees are at work. As the ALJ noted “employees can wear anything when reporting to work, or leaving from work, as long as they change when they arrive and look “professional.” (ALJ Decision 4:42-43).

In rejecting Boch Honda’s asserted special circumstances, the ALJ failed to address any of the factors enumerated in Burger King and W San Diego, and instead relied on Titus Electric Contracting, 355 NLRB 1357 (2010), for the assertion that “[a] blanket prohibition such as [Boch Honda’s prohibition on insignias and message clothing], therefore violates Section 8(a)(1) of the Act.” (ALJ Decision 9:7-9). In so doing, the ALJ misconstrued the Board’s holding in Titus Electric. Nothing in that case stands for the proposition expressed by the ALJ. In Titus Electric, unlike here, the employer did not require its employees to wear uniforms, created the policy banning pins and message clothing in response to union organizing, and discriminatorily applied the ban. Id. at 1357; 1373. Based on these factors – and not on the employer’s blanket policy – the Board found that the employer failed to establish special circumstances warranting its ban on message clothing and pins. Id. None of the Titus Electric factors is present here. Titus Electric is inapposite.

Put simply, for all of the foregoing reasons, the ALJ erred in concluding that Boch Honda failed to establish special circumstances warranting its ban on message clothing, and the Board should sustain Boch Honda’s exceptions to the ALJ’s Decision.

C. The ALJ Erred By Extending The Ordered Remedy To All Other Dealerships And Retail Businesses Related To Boch Honda.

Finally, the ALJ erred in extending the proposed remedy to all dealerships and retail businesses related to Boch Honda. To be clear, these are not divisions or separate locations of Boch Honda; rather, these are separate legal entities, operating separate facilities, with their own

employees. The General Counsel proffered no evidence to the contrary.

The Unfair Labor Practice Charge that initiated this matter, and the General Counsel's initial and amended Complaints, all identified only Boch Honda as the Respondent. GC Exh. 1. During the hearing, the General Counsel sought to amend the Amended Complaint to include all "enterprises where [the subject policies were] in effect." (Tr. 20.). The ALJ denied that request. (Tr. 21). However, in fashioning his order, the ALJ required Boch Honda to "post at each of its dealerships and related retail businesses, copies [of a notice]." (ALJ Decision 11:1-2). Notably, there was no evidence adduced, or finding made, that Boch Honda owned or operated any other dealership or related retail business. Rather, the ALJ relied on evidence that Ernie Boch, the owner of Boch Honda, also owns other dealerships and related retail businesses that had been subject to the policies in the handbook and, from context, apparently is intended to require Boch Honda to post a notice at those non-party dealerships and businesses. (ALJ Decision 10:16-21).

In reaching his conclusion the ALJ relied on Guardsmark, LLC, 344 NLRB 809, 812 (2005), for the proposition that "where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect." (See ALJ Decision 9:49-10:5). But this quotation only highlights the ALJ's error. Boch Honda does not have multiple facilities. Rather, the ALJ is misapplying Guardsmark, LLC to impose a remedy on separate and distinct facilities operated by non-party employers who are separate legal entities apart from Boch Honda. Put simply, Boch Honda's "companywide" policy was only effective at Boch Honda's single facility.

In Guardsmark, unlike the instant case, a single party-employer maintained unlawful policies at multiple facilities. By contrast, here, multiple employers/companies maintain the

subject policies yet only one of those employers/companies was ever alleged to be a party to the case. Boch Honda's General Counsel's testimony that other non-party companies maintained the same Employee Handbooks does not transmute those non-parties into the only employer/company that was present in this case – Boch Honda. Put another way, the fact that other separate and distinct legal entities maintained the same policies, without substantially more, does not transform Boch Honda into the employer of those entities' employees, nor did it change their facilities into Boch Honda's facilities. For this reason alone, Guardsmark is irrelevant and does not support the order.

Moreover, even if there were only one company and employer at issue, as in Guardsmark, the ALJ compounded his error by failing to note Guardsmark's holding that “an employer may avoid imposition of a company-wide remedy by showing that ‘special circumstances’ justify a narrower remedy.” Guardsmark, LLC, 344 NLRB at 812 n.9 (citing Raley's, Inc., 311 NLRB 1244 fn. 2 (1993)). Here, these non-party employers – by virtue of being non-parties – had no opportunity to marshal and present evidence showing that “special circumstances” would justify a narrower remedy in those facilities. This is significant. A necessary implication of the Guardsmark holding was that the employer/company there did have an opportunity to present evidence of special circumstances at its various facilities; after all, they were its facilities. That is not the case here. Rather, the subject facilities (*e.g.*, Ferrari of New England, Boch Toyota, etc.) are not Boch Honda's facilities and the subject employees working at those facilities are not Boch Honda's employees. These facilities are separate legal entities or owned by separate legal entities, (*e.g.*, Ferrari of New England, Boch Toyota, Boch Collision Center owned by Boch New To You, Boch New To You, etc.), and their employees are hired and supervised by those facilities, not Boch Honda. (Tr. 27-28).

Here, Boch Honda presented evidence, including among other things that it strove to be the “number 1 Honda dealer on the planet.” One might expect that Mr. Boch’s other companies – which include luxury Italian sports car dealerships (Ferrari, Maserati), a collision center, and a used car dealership, among other things (Tr. 27-28) – would present different and additional evidence of special circumstances had they properly been included as parties in the case and given the opportunity to do so. They were not.

By waiting until the hearing to attempt to expand the scope of the Amended Complaint to include all of dealerships and other retail businesses related to Boch Honda, the General Counsel effectively deprived Boch Honda and these non-parties of notice of the need to gather and produce evidence of special circumstances justifying the narrower remedy.⁶ Moreover, by accepting the General Counsel’s request for a broad remedy based solely on legal arguments, the ALJ similarly deprived Boch Honda and these non-parties of their due process right to present evidence of special circumstances in support of the narrower remedy. The ALJ’s violation of due process rights is a clear error. Because Boch Honda and these non-parties were essentially precluded from gathering and presenting evidence of special circumstances as they may apply to the facilities and employees of these non-parties, the ALJ’s remedy and order should be modified to apply to only Boch Honda.

V. CONCLUSION

Boch Honda worked with the Region to amend its personnel policies voluntarily to

⁶ Additionally, in ordering this broad remedy, the ALJ effectively added multiple new parties to the proceeding that were not named in the Complaint or Amended Complaint, were not part of the underlying investigation, and were not the subject of the unfair labor practice charge that initiated this matter. Throughout this proceeding, the Respondent has been Boch Honda, however, in issuing his broad remedy the ALJ is ordering all dealerships and other retail businesses related to Boch Honda to post a notice. These other companies and employers are distinct entities, which before the hearing were never alleged to be parties to this matter, despite the fact that the Employee Handbook, which has been in the General Counsel’s possession since at least 2012, is identified as applying to all employees of any business covered by the descriptive term, “Boch Enterprises.”

ensure those policies did not violate the Act. The ALJ's decision to impose additional remedies on Boch Honda was erroneous and does not further effectuate the underlying policies of the Act, his failure to find special circumstances justifying Boch Honda's prohibition on insignias and message clothing, and his decision to abridge Boch Honda's and multiple non-parties' due process rights by ordering a remedy for facilities that were not parties to this proceeding, were all plain error. Therefore, based upon the foregoing statement of facts, arguments, and authorities, the Boch Honda respectfully requests that the Board sustain its exceptions to the ALJ's Decision and dismiss the Complaint in full.

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