

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 01

BOCH IMPORTS, INC. d/b/a BOCH HONDA

and

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

Case 01-CA-083551

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## **INTRODUCTION**

Counsel for the General Counsel's cross-exceptions take issue with a limited number of the Administrative Law Judge's findings of fact, conclusions of law, and recommended Notice to Employees. Counsel for the General Counsel's specific Exceptions are set forth and discussed below.

## **EXCEPTIONS**

**Cross-Exception Number 1 – The Administrative Law Judge erred in stating that only the legality of the rule in Respondent's 2013 Handbook providing that "[e]mployees who have contact with the public may not wear pins, insignia, or other message clothing," set forth in Paragraph 9 of the Amended Complaint, was litigated before him, because the allegations contained in Paragraphs 7 and 8 of the Amended Complaint were also litigated at the hearing.**

In his decision, the Judge correctly noted that the only provision of Respondent's 2013 Handbook that was not satisfactorily revised when Respondent replaced its 2010 Handbook with its 2013 Handbook is a provision which states that "[e]mployees who have contact with the public may not wear pins, insignia, or other message clothing." (ALJD at p.1, par. 1, ll.12-15). However, the Judge erroneously stated that, "[o]nly the legality of this provision was litigated at the hearing." (ALJD at p.1, par 1, ll. 15-16).<sup>1</sup> To the contrary, the 2010 Handbook provisions alleged to violate Section 8(a)(1) of the Act, set forth in Paragraphs 7 and 8 of the Amended Complaint and Notice issued on June 17, 2013, were litigated at the hearing (Tr. 16:4-14; 17:5-18:16; 21:16-23:3; 25:8-26:7).<sup>2</sup> In this regard, the Judge suggested that in order to streamline the hearing, there was no need for Counsel for the General Counsel to elicit testimony about each of the

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<sup>1</sup> References to Judge Biblowitz's decision are cited hereafter as "ALJD" followed by page and line number, where appropriate.

<sup>2</sup> Trial transcript references are cited as "Tr." followed by the page and line number. Counsel for the General Counsel's exhibits will be cited as "GCX (number)" and Respondent's exhibits will be cited as "RX (number)."

challenged provisions in the 2010 Handbook, since it was received in evidence as Counsel for the General Counsel's Exhibit 2 (Tr. 25:8-26:14). However, the substantive allegations of Paragraphs 7 and 8 of the Complaint at all times remained contested issues to be resolved, and in that sense were litigated: clearly, they were not waived.

**Cross-Exception Number 2 – The Administrative Law Judge erred by failing to make a finding of law that the portion of Rule 2 of the Social Media Policy contained in Respondent's 2010 Handbook which required that employees identify themselves when posting comments about Respondent or related to Respondent's business or a policy issue, violated Section 8(a)(1) of the Act.**

The Judge correctly noted that Counsel for the General Counsel alleged that from December 21, 2011 until about May 2013, Respondent maintained a rule in its 2010 Handbook's Social Media Policy that required employees to identify themselves when posting comments about Respondent or related to Respondent's business or a policy issue (ALJD at p. 2, ll. 34-42; ALJD at p. 7, ll. 22-31). However, the Judge's findings of law, enumerating those rules contained in the 2010 Handbook which he found unlawful, do not include a finding that this particular rule in Respondent's 2010 Handbook also violates section 8(a)(1) of the Act (ALJD at p. 8, ll.12-18). Likewise, although the Judge's conclusions of law state that the Social Media Policy set forth in Respondent's 2010 Handbook violates Section 8(a)(1), the Judge's conclusions of law do not indicate that this particular rule contained in Respondent's 2010 Handbook violates section 8(a)(1) of the Act (ALJD at p. 9, ll. 19-25).

That portion of Rule 2 of the Social Media Policy contained in Respondent's 2010 Handbook requiring an employee to "identify himself/herself" when "posting comments about the Company or related to the Company's business or a policy issue" is unlawfully overbroad. In this regard, the Board has recognized that requiring employees to

publicly self-identify in order to participate in collective action would impose a significant burden on Section 7 rights.<sup>3</sup>

Consequently, the Judge erred by failing to make a finding of law that the portion of Rule 2 of the Social Media Policy contained in Respondent's 2010 Handbook requiring employees to identify themselves when posting comments about Respondent or related to Respondent's business or a policy issue violated Section 8(a)(1) of the Act.

**Cross-Exception Number 3 – The Administrative Law Judge erred by failing to make a finding of fact that a portion of Rule 8 of the Social Media Policy contained in Respondent's 2010 Handbook prohibited employees from using Respondent's logo for any reason.**

The Judge correctly noted that Paragraph 8 of the Amended Complaint alleges that Respondent maintained a rule in the 2010 Handbook that prohibited employees from using Respondent's logos for any reason (ALJD at p. 2, ll. 34-36 and l. 51). The Judge, however, appears to inadvertently fail to find as a matter of fact that the 2010 Handbook contained a rule that prohibited employees from using Respondent's logos for any reason. In addition, in his analysis, the Judge omitted this rule from his recitation of the rules in issue that are contained in the 2010 Handbook's Social Media Policy (ALJD at p. 7, l. 22-p.8, l.10). The Judge nevertheless correctly found as a matter of law that Rule 8 of the Social Media Policy contained in Respondent's 2010 Handbook violated Section 8(a)(1) of the Act (ALJD at p. 8, ll. 12-18). In order to conform the Judge's findings of fact to his findings of law, Counsel for the General Counsel requests that the Board modify the Judge's findings of fact to include a finding

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<sup>3</sup> *Special Touch Home Services*, 357 NLRB No. 2, slip op. at 7 (2011) ("The premises of the Act...and our experience with labor-management relations all suggest that permitting an employer to compel employees to provide individual notice of participation in collective action would impose a significant burden on the right[.]").

of fact that a portion of Rule 8 of the Social Media Policy contained in Respondent's 2010 Handbook prohibited employees from using Respondent's logo for any reason.

**Cross-Exception Number 4 – The Administrative Law Judge erred by finding as a matter of law that Respondent established that safety concerns constitute a special circumstance privileging Respondent to prohibit employees from wearing pins in the workplace.**

In finding that Respondent had established special circumstances justifying Respondent's prohibition of pins in the workplace (ALJD at p.8, ll. 20-52), the Judge misapplied and failed to consider settled Board precedent, which requires Respondent to present "*substantial evidence* of special circumstances" sufficiently important to outweigh Section 7's guarantees (emphasis supplied).<sup>4</sup> As set forth below, the record evidence falls well short of satisfying the Board's special circumstances test.

Respondent's Service Director, David Carlson, testified that safety is one reason technicians are prohibited from wearing pins or buttons. In this regard, Carlson testified that a pin or button *could* fall off of an employee's uniform and land in a vehicle's engine compartment while the engine is running and *could* damage the engine, damage a vehicle's leather interior, or scratch a vehicle's paint (Tr. 45-46). Carlson also testified that Respondent shares the same concerns about safety and vehicle damage with respect to service advisors as it does with respect to technicians (Tr. 66). Carlson further testified that he *believes* pins and insignia *could* jeopardize employees' health and welfare and safety if worn in the workplace (Tr. 64). However, Carlson testified that technicians have never worn pins or buttons on their uniforms, and that service advisors

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<sup>4</sup> *Government Employees*, 278 NLRB 378, 385 (1986) (explaining that "[t]he law is clear that substantial evidence of special circumstances...is required before an employer may prohibit wearing of union insignia, and the burden of establishing those circumstances rest[s] on the employer" and holding that an employer's "generalizations and conclusions" were insufficient to establish special circumstances).

cannot wear pins or buttons on their uniforms (Tr. 42-43; Tr. 65-66). Carlson failed to identify any instance where pins or insignia had actually caused damage or injury, and no other persuasive, objective evidence was adduced to support the proposition that pins and insignia posed an actual workplace hazard.

The testimony concerning Respondent's supposed safety concerns vis-à-vis pins and insignia is purely speculative, generalized, and conclusory. Significantly, Carlson failed to offer even a single example to support Respondent's supposed safety claim. The Board considers such self-serving and non-specific evidence insufficient to carry Respondent's heavy special circumstances burden. *Government Employees*, above at n.4.

Moreover, Respondent's rule only forbids employees from wearing pins and insignia that convey a *message*, but does not forbid employees from wearing, e.g., jewelry which does not convey a message, and Respondent permits employees to wear as many as two stud earrings or one stud and one small hoop earring in an ear (GCX 2 at p. 31; GCX 3 at p. 33). If Respondent's supposed safety concerns were legitimate, then wearing jewelry or earrings, which are equally subject to Respondent's hypothetical safety and damage concerns, would also be banned. The discriminatory treatment of pins and insignia bearing a message strongly suggests the articulated safety concern is pretextual. In addition, the rule's express limitation to employees who have contact with the public further undermines Respondent's asserted safety concerns, because the potential safety hazards pins pose bear no relationship to public contact.

In sum, the Judge erred by finding as a matter of law that Respondent established that safety concerns constitute a special circumstance privileging Respondent to prohibit employees from wearing pins in the workplace, and consequently, the Employer's rule should be found to violate Section 8(a)(1).

**CROSS-EXCEPTION Number 5 – The Administrative Law Judge failed to make a finding of fact that the 2010 Handbook treated the identities of Respondent's customers and/or prospective customers and Respondent's policies, procedures, and litigation activity as confidential information, and the Administrative Law Judge failed to make an express finding of law that by including these matters in its definition of confidential information, Respondent violated Section 8(a)(1) of the Act.**

The Judge stated that Respondent's definition of confidential information set forth in the Confidential and Proprietary Information Policy in the 2010 Handbook included customers, suppliers, compensation structures, and incentive programs (ALJD at p. 5, l. 49-p.6, l. 4). However, the Judge failed to make a finding of fact that this definition also treated the identities of Respondent's customers and/or prospective customers and Respondent's policies, procedures, and litigation activity as confidential information (GCX 2 at p. 9).

In addition, although the Judge properly found as a matter of law that Respondent's 2010 Handbook Confidential and Proprietary Information Policy violated Section 8(a)(1) of the Act (ALJD at p. 6, ll. 21-29), his finding in this regard is ambiguous and it is unclear whether he expressly found that Respondent violated Section 8(a)(1) of the Act to the extent Respondent treated the identities of customers and/or prospective customers, and Respondent's policies, procedures, and litigation activity as confidential information. Under settled Board law, it is unlawful to treat these matters as confidential. See *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n.3, 291-292 (1999); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). It is axiomatic that the

rule's prohibition against disclosing company policies, procedures, or other business information would reasonably tend to chill employees in the exercise of their Section 7 rights, since all of these matters plainly encompass employees' terms and conditions of employment and the provision does not contain limiting language or context that would clarify to employees that the rule does not restrict their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999); *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001), *enf. denied in relevant part* 335 F.3d 1079 (D.C. Cir. 2003). Additionally, the rule's prohibition against disclosing litigation activity unlawfully restricts employees' ability to discuss, *inter alia*, National Labor Relations Board proceedings such as the instant case. See *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990) ("parent communication" rule unlawfully interfered with employees' statutory right to communicate workplace complaints to persons and entities other than the employer, "including a union or the Board"). See also *Supply Technologies, LLC*, 359 NLRB No. 38, slip op. at 1-2 (2012) (internal citations omitted) (employer's mandatory grievance arbitration program violated Section 8(a)(1) because employees would reasonably construe its language to prohibit engaging in Section 7 protected activities such as filing Board charges or otherwise accessing the Board's processes; such a right is integral to the Act). These aspects of the Confidential and Proprietary Information Policy set forth in Respondent's 2010 Handbook therefore all clearly violate Section 8(a)(1) of the Act under established Board law.

Accordingly, the Judge erred in failing to make these findings of fact and law and Counsel for the General Counsel requests that the Board modify the Judge's decision to include the above findings of fact and law.

**CROSS-EXCEPTION Number 6 – The Administrative Law Judge's Notice to Employees fails to adequately inform employees about which of Respondent's unlawful 2010 Handbook provisions Respondent appropriately revised in its 2013 Handbook.**

With respect to the unlawful 2010 Handbook provisions which Respondent appropriately revised in its 2013 Handbook, the Judge's Notice to Employees provides as follows:

Although our 2010 Employee Handbook contained some overly restrictive policies that interfered with certain of the rights guaranteed you by Section 7 of the Act, we have rescinded those policies, with the exception of the Dress Code and Personal Hygiene Policy referred to below, and replaced them in our 2013 Handbook. (Appendix to ALJD).<sup>5</sup>

This provision in the Judge's proposed Notice to Employees fails to identify for employees precisely which unlawful rules in Respondent's 2010 Handbook have been properly revised. Accordingly, the Judge's proposed Notice to Employees must be revised to enumerate each of the unlawful rules contained in Respondent's 2010 Handbook which Respondent appropriately revised in its 2013 Handbook. In this regard, Counsel for the General Counsel respectfully submits that an appropriate Notice to Employees include the provisions included in Counsel for the General Counsel's Proposed Notice to Employees, set forth as Appendix A to this brief.

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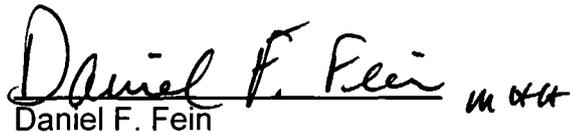
<sup>5</sup> As set forth above in Cross-Exception Number 4, Counsel for the General Counsel maintains that the Judge erred in finding that Respondent lawfully banned employees from wearing pins due to safety concerns. Therefore, Counsel for the General Counsel urges that any revised Notice to Employees also include a provision affirmatively requiring Respondent to rescind or revise its unlawful prohibition against employees wearing pins, consistent with the Judge's proposed affirmative Notice provision concerning the 2013 Handbook's unlawful ban on employees wearing insignia or other message clothing.

## CONCLUSION

Counsel for the General Counsel respectfully requests that the Judge's proposed findings of fact, conclusions of law, and Notice to Employees be corrected as set forth above.

Dated at Boston, Massachusetts this 14th day of April, 2014.

Respectfully submitted,

Handwritten signature of Daniel F. Fein in black ink, with the initials "m 4/14" written to the right of the signature.

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