

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 13**

**WAL-MART STORES, INC.,**

**Respondent,**

**and**

**Case No. 13-CA-114222**

**THE ORGANIZATION UNITED FOR RESPECT  
AT WALMART (OUR Walmart),**

**Charging Party.**

**CHARGING PARTY'S ANSWERING BRIEF  
TO WALMART'S EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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The Board should deny Walmart's exceptions because Administrative Law Judge Geoffrey Carter correctly held that Walmart's logo rule was unlawfully overbroad and that Walmart failed to prove that special circumstances outweighed the unlawfully restrictive rule.

**A. Judge Carter did not rule that the NLRA protected all insignia, but only that Walmart's stated logo rule was unlawfully overbroad.**

Walmart mischaracterizes Judge Carter's holding and Charging Party's argument. See ALJD at 10:37-11:4. Charging Party argued only that Walmart's logo rule that prohibits any insignia larger than 2.25-by-3.5 inches and that permits only "small, non-distracting" logos is unlawfully overbroad. See ALJD at 8:35-37. As Judge Carter found, Walmart "mischaracterizes the positions of" the Charging Party and that the Charging Party does not argue that "anything goes when it comes to union insignia." ALJD at 8 n. 8.

Judge Carter correctly ruled that Walmart's logo rule is facially overbroad because associates have the Section 7 right to wear insignia larger than 2.25-by-3.5 inches and also the right to wear insignia that is not "non-distracting," unless Walmart can prove that special circumstances outweigh workers' rights. Feb. 2013 policy, Jt Exh. 1 at 2.

First as Judge Carter noted, Walmart's prohibition of any insignia larger than 2.25-by-3.5 inches is overbroad because the Board has held that Section 7 protects the right of workers to wear insignia larger than 2.25-by-3.5 inches. ALJD at 9:37-10:13. For example, the Board held that the NLRA protected the right of hospital workers to wear "2-by-4 inch 'United to Fight for our Health Plan' sticker[s]" on their uniforms. *St. Luke's Hosp.*, 314 NLRB 434, 435 (1994). In *Loray Corp.*, the Board affirmed the ALJ decision holding that "[u]nless the size of the union button worn by an employee is related to the impairment of production or discipline, the size of

the button is immaterial and the employer may not curtail the button's use as a union propaganda device.” 184 NLRB 557, 577 (1970).<sup>1</sup>

Second, Walmart’s rule permitting only “non-distracting” insignia is overbroad because workers have the right to wear stickers or buttons displaying protected messages that express anger, are disrespectful, or even offensive to the company or management – all of which Walmart may deem distracting.

Workers are “not required to limit its message to those which are innocuous and respectful to the [company]. Even if the sticker’s message shows that workers are discontent or angry, the button will not be prohibited on that basis.” *Iowa*, 112 LA (BNA) 360, 363 (Jay, Arb.) (1999). *See also U.S. Steel Corp.*, 121 LA (BNA) 1255, 1260 (St. Antoine, Arb.) (2005) (“in the rough-and-tumble of workplace debate,” the “existence of a note of mockery” is not a critical factor in determining whether companies may restrict stickers, and the “company does not have the right to prevent [workers] from complaining about management policies”); *Borman’s Inc.*, 254 NLRB 1023 (1981) (company could not restrict a shirt reading, “I’m tired of bustin’ my ass,” where company officials were not actually offended by the vulgar language), *enf. den.*, 676 F.2d 1138 (6th Cir. 1982). For example, one ALJ held that a company could not lawfully restrict buttons worn during work time displaying the message: “Happiness is Camper’s [supervisor] Picture on a Milk Carton.” *Caterpillar, Inc.*, 1997 WL 33315977 (Div. of Judges, 1997) (settled) (rejecting the company’s argument that the button’s message was a provocative personal attack against the supervisor).

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<sup>1</sup> The Board’s not limiting the size of buttons and stickers makes sense because a workers’ Section 7 right to wear insignia applies to items larger than just buttons or stickers. This right for example “ha[s] always extended to articles of clothing, including prounion T- shirts.” *Stabilus, Inc.*, 355 NLRB 836, 838 (2010) (“There is no basis in precedent for treating clothes displaying union insignia as categorically different from other union insignia, such as buttons.” *Great Plains Coca-Cola Bottling Co.*, 311 NLRB 509, 515 (1993)).

**B. Walmart’s logo rule is unlawfully ambiguous because Associates would reasonably construe Walmart’s logo rule to prohibit Section 7 Activity.**

Even if Walmart’s logo rule does not explicitly restrict protected activities, the term “non-distracting” is unlawfully ambiguous because workers would reasonably construe “non-distracting” to prohibit Section 7 activity. *See Lutheran Heritage Village–Livonia*, 343 NLRB 646, 647 (2004).

Contrary to Walmart’s assertion, workers would reasonably construe the logo rule to restrict Section 7 activity because, for example, Walmart’s definition of “non-distracting” is ambiguous and would encompass Section 7 protected activity. LaTonia George, Walmart’s Director of HR Support for the U.S. division spearheaded drafting the dress code policies and defined “distracting” as “anything that would take away from the importance of . . . the customer trying to get great customer service or anything that caused the focus not to be on sales and merchandise being to the cashier and checked out of the store.” George test., Tr. 94:14-19.; Feb. 2013 policy, Jt Ex. 1.

Walmart’s stated definition is overbroad because as discussed in greater detail below the “Board has consistently held that customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia.” *P.S.K. Supermarkets*, 349 NLRB 34, 34-35 (2007).

Workers would reasonably conclude that insignia with protected messages, such as the aforementioned strongly-worded messages, would distract some customers. Under Walmart’s definition the logo rule would preclude them from wearing insignia with such protected messages. 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.” *The Continental Group, Inc.*, 357 NLRB No. 39, \*3 (2011).

Anecdotal evidence that a handful of Associates wore some OUR Walmart insignia and that a handful of managers permitted such does not establish that a worker would reasonably understand that the “non-distracting” logo rule permitted them to fully exercise their Section 7 rights. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

To the contrary, Walmart did not present evidence that it addressed its ambiguous rule by communicating clear guidance to workers that the logo rule does not prohibit any protected insignia. Company policies violate the NLRA if they are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the policies do not restrict Section 7 rights. *See University Medical Center*, 335 NLRB 1318, 1320-1322 (2001), enforcement denied in pertinent part, 335 F.3d 1079 (D.C. Cir. 2003) (work rule that prohibited “disrespectful conduct towards [others]” unlawful because it included “no limiting language [that] removes [the rule’s] ambiguity and limits its broad scope.”).

**C. Judge Carter correctly held that Walmart failed to prove special circumstances.**

Contrary to Walmart’s assertion, Judge Carter correctly held that Walmart had to prove special circumstances and that Walmart failed to do so. For Walmart’s restrictive logo rule to be lawful, Walmart must present substantial evidence that the logo rule is necessary to address special circumstances that outweigh the workers’ Section 7 rights.

The Board holds that a restriction “is presumably invalid unless special circumstances exist which make the rule *necessary* to maintain production or discipline, or to ensure safety.” *Kolka*, 335 NLRB 844, 864 (2001) (emphasis added). Companies bear the burden of proving real harm to their business, or “special circumstance,” to justify restrictions on stickers or buttons, and that the “special circumstances outweigh the adverse impact on workers’

organizational rights [resulting from the company's] restrictions on" stickers or buttons. *Mack's Supermarkets, Inc.*, 288 NLRB 1082, 1098 (1988) (citing *Alert Medical Transport*, 276 NLRB 773, 776 (1985)). See also *Raley's*, 311 NLRB 1244 (when a retail store attempted to prevent its workers from wearing offensive or provocative stickers or buttons, the retailer had to prove that the stickers or buttons will likely cause indiscipline and that the threat to discipline outweighs the workers' right to wear stickers or buttons).

Walmart must prove more than that they had a business reason to implement the policy, but rather Walmart must prove substantial evidence of such special circumstances. *Eckerd's Market, Inc.*, 183 NLRB 337, 338 (1970) (finding the "vague general evidence" of customer complaints presented by the employer did not constitute substantial evidence of "special circumstances" warranting removal of the union buttons worn by its employees).

**1. Judge Carter did address Walmart's insufficient justifications for its logo rule.**

Judge Carter appropriately addressed and rejected Walmart's assertion that special circumstances existed because the logo rule ensured that "associates can easily be identified through their nametags by customers, coworkers and loss prevention personnel; and that noncompliant logos do not distract the customer from his or her shopping experience." ALJD at 9:5-9.

Judge Carter appropriately rejected Walmart's arguments after finding that: "Walmart did not present any evidence of a significant or widespread problem with associates wearing union insignia or other logos that actually made it difficult or impossible for others to see their Walmart nametags. Nor did Walmart present evidence of a significant or widespread problem with customers being distracted by logos worn by associates." ALJD at 9:13-18. Moreover, Judge

Carter held that “Walmart’s concerns about nametag visibility and customer experience falls flat” compared to instances where the Board has found special circumstances. ALJD at 9:13-18.

**2. Judge Carter appropriately held that Dwight Hill’s report and testimony on Hill’s subjective personal shopping experiences carried no weight.**

Contrary to Walmart’s assertion, Judge Carter did not ignore Dwight Hill’s report and testimony, but rather understood Hill’s conclusions and found them not “so complex that they require explanation by an expert witness.” ALJD at 6:41. The fact that Mr. Hill’s assertions were not complex enough to warrant expert explanation is unsurprising because he fundamentally based his contentions on his personal experience as a Walmart shopper. In preparing for the report and his testimony, Mr. Hill did not engage in any objective research, did not talk to any Walmart employees, customers, or clients. Hill test., Tr. 132:24-133:7. As well, Mr. Hill did not conduct any studies or review any studies. *Id.* Mr. Hill spent at most 10 days to write his report, completing it a mere four days prior to the complaint hearing. Hill test., Tr. 127:22-128:11; 131:12-14.

Ultimately, Mr. Hill based his conclusions fundamentally on his personal and subjective shopping experiences at Walmart. Mr. Hill explained that in addition to the dress code policy that Walmart provided, Mr. Hill based his analysis solely on his personal experiences shopping at Walmart and his general consulting background, but admitted that he had no consulting experience analyzing dress codes or name tags, let alone Walmart’s policy. Hill test. Tr. 128:1-11, 151-52. Mr. Hill never consulted “on the effect that dress code might have between sales associates and customers,” let alone the effect of a company’s logo rule. Hill test., Tr. 128:1-11. He never conducted any studies that dealing with customer distractions with respect to name tags. Tr. 151:22-152:10. Rather, his consulting was more general “around the comprehensive

shopping experience and what is breaking down that shopping experience.” *Id.* In other words, Walmart’s proposed expert had no expertise on the precise issues that Walmart contended was material.

In his testimony, Mr. Hill did not speak as an objective expert, but rather as a subjective customer himself stating, for example that “without a specific name tag or something to that effect available, I may not be able to identify who is really working at the particular store at that time or I can't locate a particular associate.” Hill test., Tr. 141:3-7.

His report and testimony is significant only for what they did not find. Tr. 117-155. Mr. Hill did not conclude that insignia larger than the Walmart’s nametag does in fact prevent Walmart customers from checking out or identifying the Associates by name. He did not conclude that Walmart’s asset protection would not be able to identify Walmart associates because insignia somehow prevented them from seeing the nametag. He did not conclude that Associates wearing insignia larger than Walmart’s nametag would in fact result in any impact, let alone one that would be sufficient to outweigh the restricting Section 7 rights necessary to establish special circumstances.

Ultimately, Judge Carter correctly concluded that Mr. Hill’s subjective testimony was unnecessary and ultimately cumulative: “Walmart’s managerial witnesses made the same points [as Mr. Hill] effectively in their own testimony.” ALJD at 6:43.

**3. Judge Carter correctly held that Walmart failed to establish special circumstances based on Walmart’s speculation that logos could distract customers from completing sales.**

Judge Carter properly rejected Walmart’s argument that the possibility of customer distraction constituted special circumstances. As a matter of law, the fact that Associates interact

with customers does not by itself create special circumstances justifying Walmart's overbroad logo rule. The Board consistently rejects the argument that an employer can restrict an employee's right to wear buttons simply because the employee frequently comes in contact with customers. *See Burger King*, 265 NLRB 1507, 1507 (1982), *citing Va. Elec. & Power Co.*, 260 NLRB 408 (1982) ("mere contact with customers is not a basis for barring the wearing of buttons"); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 292 (1999) ("It is well settled that absent some special circumstance . . . employees have the protected right to wear union buttons at work."); *Pioneer Hotel, Inc.*, 324 NLRB 918, 923 (1997) ("customer exposure to union insignia alone not a special circumstances allowing an employer to prohibit display of union insignia"); *Nordstrom Inc.*, 264 NLRB 698, 700 (1982) ("mere employee contact with customers does not, standing alone, justify an employer prohibiting the wearing of union buttons.")

The Board does not restrict employee section 7 rights based solely on interference with the customer experience because an employee has the right to engage in protected Section 7 activity on the sales floor absent significant disruptive interference with production. In *Wal-Mart*, an off-duty employee entered the store with a shirt that read "Union Teamster" on the front and on the back "Sign a card. . . Ask me how," and during this visit the off-duty employee socialized with on-duty employees about non-union matters. 340 NLRB 637, 639 (2003), *enf. in relevant part*, 400 F.3d 1093 (2005). Following this incident, while on-duty, the same employee "merely asked" two co-workers to attend a union meeting that evening. 340 NLRB at 639.

The NLRA protected the employee's activity during both events. 340 NLRB at 638. Specifically, the Board held that an employee can lawfully show support for Union organizing even on the retail floor in the form of wearing union insignia or even "talking about the union or a union meeting or whether a union is good or bad" 340 NLRB at 638, *citing W.W. Grainger*,

229 NLRB 161, 166 (1997). The Board distinguished the associate's activity from unprotected activity that could "occupy enough time to be treated as a work interruption" and "present a greater potential for interference with the employer productivity," and found that the employee activity in this case did not "significantly interrupt" the employer's productivity. 340 NLRB at 639. In other words, the Board focused on worker's productivity not the customer's experience.

Here, even if customer interference could establish special circumstance, Walmart presented no evidence of insignia distracting customers such that customers failed to complete their sales, let alone evidence of such significant interference necessary to justify the need for Walmart's overbroad logo rule.

The only customer reaction that Walmart presented was of store manager Rick Risenhoover reporting that in October 2014 customers were "offended" by a cashier's temporary tattoo stating "stop, don't shoot" which Mr. Risenhoover explained was "obviously disturbing to customers." Risenhoover test., Tr. 213:1-214:1-2. Mr. Risenhoover did not state though that customers did not checkout. *Id.*

Walmart's logo rule prohibits not just logos that are offensive or "obviously disturbing to customers," but rather is overbroad in prohibiting any logo that is not "non-distracting." Sep. 2014 policy, Jt Exh. 10 at 2. Walmart itself recognizes that offensive markings are distinct from distractive markings: Walmart's tattoo rule at the time of the incident stated that "Tattoos that may be offensive or distracting are to be covered by clothing or other means within dress code requirements." *Id.* at 1.

4. **Judge Carter correctly held that Walmart failed to establish special circumstances based on Walmart’s speculation that logos could substantially interfere with worker’s focus on customers.**

Judge Carter properly rejected Walmart’s argument that special circumstances existed because logos larger than the name badge or that were otherwise distracting interfere with workers focusing on customers.

As a matter of law, the need to maintain worker productivity by itself is not a special circumstance justifying Walmart’s logo rule restricting Section 7 rights. The Board has never held that potential interference with worker productivity by itself, justifies restricting worker’s rights to wear stickers and buttons. *See, for example, Albertsons*, 300 NLRB 1013, 1016 (1990); *Floridan Hotel of Tampa*, 137 NLRB 1484 (1962).

Rather, courts have held that distraction is a special circumstance if the employees require a “high degree of concentration” to perform their work “and that distractions of any kind might very well lead to inefficiency, work slowdown and costly errors.” *Fabri-Tek, Inc. v. N. L. R. B.*, 352 F.2d 577, 579 (8th Cir. 1965). In *Fabri-tek*, the court held that large, shimmering, 3-D buttons distracted workers and threatened productivity in a plant where close attention was crucial to the manual production of magnetic memory devices that the workers completed by hand. *Id.* In *Fabri-tek*, the company presented evidence that the workers’ “finished product [was] extraordinarily complex and that each item must operate perfectly to enable the ultimate mechanism to function.” *Id.* For example, the failure of a worker to properly solder one of the 7,000 soldered points in one memory device would render the device inoperable. *Id.*

In contrast, Walmart neither argued nor presented evidence proving that employees needed crucial concentration in its retail stores or else risk a complete loss of sales; and that

certain logos prevented such acute concentration. Ultimately, Walmart failed to present any evidence that insignia violating its logo rule actually led to any lost productivity.

As well, insignia that distract coworkers only become a special circumstance if the messages were so inflammatory that they would lead to indiscipline or conflicts among workers. *See Albertsons*, 300 NLRB at 1016. For example in *Komatsu America Corp.*, the Board held that the company lawfully restricted a t-shirt that made a provocative, inflammatory and offensive comparison between the [Japanese-owned company's] outsourcing plans and the Japanese "sneak attack" on Pearl Harbor. 342 NLRB 649, 650 (2004). The Board noted that the t-shirt was especially inflammatory because the message clearly appealed to ethnic prejudices. 342 NLRB at 650.

Here, Walmart's logo rule does not prohibit just these inflammatory messages, but any message deemed distracting and therefore the rule is overbroad. Moreover, Walmart itself has not presented any evidence that insignia violating the logo rule resulted in substantial disciplinary problems or refusal to follow directions.

Even if mere customer or worker distraction could constitute special circumstances, Walmart failed to establish such special circumstances. As Judge Carter found, Walmart failed to present any evidence of any person, whether customer or employee, actually being distracted by an employee wearing insignia larger than the name badge.<sup>2</sup> Walmart merely presented testimony of managers enforcing the rule's size limit on logos, but failed to present any evidence proving that the size of the logos itself actually resulted in significant customer or Associate distraction outweighing employees' section 7 rights to wear insignia.

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<sup>2</sup> In the incident where a cashier wrote "stop, don't shoot" on her knuckles and palms, Mr. Risenhoover testified that customers were offended not by the size of the writing, but specifically by the message. Risenhoover test., 213-214. The cashier's written message itself was equal to the width of the name badge. *Id.*

For example, Market Human Resources Manager Jennifer Prough testified that she told a store manager to coach an associate for wearing an 8.5-by-11 inch picture of a “cat roasting a marshmallow” behind the name badge not because the photo distracted anybody, but because the photo violated the logo rule for being larger than the name badge. Prough test., Tr. 183:12-23; 184:19-185:1. Ms. Prough did not testify that the size of the image resulted in any customer or worker distraction. *Id.*

Similarly, Frank Durst, Store Manager of Store 1985 in Laurel Maryland, stated that he asked a cashier to remove a 4-inch circular button with an Organization United for Respect at Walmart logo not because customer or employees reported distractions, but because the button size violated the logo rule’s size requirement. Durst test., Tr. 242-44. Mr. Durst did not testify that any customers or employees complained that the button was distracting. *Id.*

Store manager Teresa King required Associates to reduce the size of a proposed pin depicting a recently deceased Associate merely to comply with the rule prohibiting anything larger than the name badge. The proposed pin was around 3 inches wide by 4 to 5 inches tall and Ms. King ordered Associates to reduce the size to 2-by-2 inches. King test., Tr. 202:12-15; 203:8-10. Ms. King explained that the “issue was not with the picture we had of the [associate], but it was with the size of the picture that was of [the associate] was not following our company associate dress code.” King test., Tr. 202:12-15; 203:8-10.

Lori Bell, co-manager of Store 592 in Derby, Kansas, testified that on November 2014, she told an assistant manager to order an Associate to remove a pin larger than a badge from his shirt. Despite not knowing the pin’s message, she ordered the pin removed because the pin was larger than the name badge and therefore violated the dress code rule. Bell test., Tr. 232-234.

Ms. Bell though did not testify that any customers or employees reported the pin to be distracting. Bell test., Tr. 236:16-18.

In fact, despite removing the pin for violating the policy, Ms. Bell went to the trouble of going to the videotape and fishing through the trash to determine the pin's message because she "wanted to make sure that he hadn't written anything vulgar or distasteful to the customers." Bell test., Tr. 238:16-19.

The fact that Ms. Bell, went to the trouble to track down the message of the pin underscores that her primary concern was not the size of the insignia or that the insignia was merely distracting. Rather, Ms. Bell was concerned whether the pin's *message* was "vulgar or distasteful to customers." Bell test., Tr. 238:16-19; copy of pin, R. Exh 7. However, Walmart did not tailor its logo rule to address only "vulgar" messages, but rather the rule is overbroad by prohibiting all insignia larger than a name badge or deemed merely distracting.

**5. Judge Carter correctly held that Walmart failed to establish special circumstances based on Walmart's assertion that logos larger than a name badge would prevent customers and co-workers from seeing name badges.**

Judge Carter correctly held that Walmart failed to establish special circumstances based on Walmart's speculative concern that logos larger than a name badge would so impede people from seeing the name badge, resulting in dire consequences. To establish special circumstances, Walmart must do more than speculate on possibilities, but prove with substantial evidence its concern; prove that the importance of the concern sufficiently outweighs Section 7 guarantees; and prove that the insignia restriction is necessary to address the concern. *Eckerd's Market, Inc.*, 183 NLRB 337, 338 (1970) ("vague general evidence" of customer complaints did not establish "special circumstances").

Walmart failed to present evidence supporting any element of its contention that permitting employees to wear insignia larger than the name badge could distract people from seeing the name badge so much so that customers would not check out and that asset protection could not prevent people from dressing up as Walmart employees and steal merchandise.

This is unsurprising because Walmart's concerns are improbable at best. Walmart failed to present evidence of:

- A customer or co-worker being distracted by an employee wearing insignia larger than the name badge;
- That such distraction was severe enough that this customer or co-worker could not see the employee's name badge;
- That this customer and co-worker could not identify the employee as a Walmart employee, despite the employee working on Walmart's shop floor and wearing otherwise the Walmart dress code, including a blue shirt and khaki pants; and
- That this customer, upon not being able to identify this employee as a Walmart employee, is so despondent such that the customer gives up entirely on checking out instead of, for example, seeking out another employee to answer their question;

Moreover, Walmart failed to present any evidence of its argument that an insignia that happened to be larger than a name badge would render asset protection employees useless to stop theft. Walmart failed to present evidence of:

- a nonemployee entering the Walmart store dress in blue shirt and khaki pants, while also wearing insignia larger than a name badge;

- asset protection employees being so distracted by the insignia larger than the name badge that they fail to recognize that this nonemployee did not have a Walmart name badge;
- because of this failure to recognize the lack of a name badge, asset-protection employees had no other way to determine that the nonemployee was not a Walmart worker; and
- the nonemployee wearing insignia larger than a name badge then proceeded to steal merchandise.

All Walmart presented was speculation. Tina Longfellow, Market Asset Protection Manager at most speculated that insignia larger than a name badge could make it harder to see the name badge on the store surveillance cameras and therefore could make it more difficult to identify employees. Longfellow test., Tr. 165:23-166:2. She cites to no evidence supporting this speculation. This is not surprising because Ms. Longfellow explained on cross exam that these surveillance cameras are scattered through the store, can sometimes zoom and they shoot in color. *Id.* at 174-176. Moreover, the cameras shoot clear enough to identify individual's faces and other unique features because she testified that the Walmart and the government use the footage to identify and prosecute individuals. *Id.* at 174-176. It is improbable that insignia larger than a name tag would render these security cameras ineffective at permitting Walmart to identify employees.

Moreover, even if Walmart had proven that these improbabilities occurred, Walmart has not and cannot show that these mere possibilities sufficiently outweighs workers' section 7 rights to justify Walmart's overbroad restriction. First, as discussed above, the Board has never held that the risk of customer interference was sufficient to establish special circumstances. Second,

Walmart’s concern of nonemployees wearing insignia impersonating retail employees does not reach the threshold where the Board has permitted restrictions on insignia—where the insignia poses significant and immediate threats to workers’ safety in a dangerous industrial workplace.

The Board has held that companies could lawfully restrict hardhat stickers that specifically obstructed safety information in dangerous industrial workplaces that were dimly lit, where smoke was present, or that contained a two-level layout because “unauthorized stickers could interfere with the ready visibility of the bump caps and authorized stickers.” *Albis Plastics*, 335 NLRB 923 (2001); *see also Andrews Wire*, 189 NLRB 108 (1971) (company lawfully restricted stickers that totally covered brightly colored hardhats, which were required to be highly visible to compensate for poor lighting in a dangerous workplace); *Standard Oil*, 168 NLRB 153 (at a particularly dangerous work site, company lawfully restricted all hardhat stickers that decreased the wearer’s visibility and obstructed important information). Moreover in both *Andrews Wire* and *Standard Oil*, the Board held that the hardhat stickers restriction lawful in part because the company allowed workers to wear stickers with protected messages elsewhere on their uniforms. 189 NLRB 108; 168 NLRB 153.

Judge Carter correctly noted that in these industrial settings, the Board has held that the company still must prove substantive and specific safety concerns to justify restricting protected insignia. ALJD at 9:16-23. In *Malta Construction*, the Board rejected a construction company’s arguments that special circumstances justified their restriction on stickers on company-issued orange hardhats. The Company argued that the stickers diminished the company’s ability to identify their employees at construction sites and stickers created a safety risk by making it harder for construction operators to identify the hardhats. Despite the employees being on an

active constructive site surrounded by construction equipment, the Board held that the company failed to prove safety concerns sufficient to establish special circumstances.

Here, Walmart does not even raise, let alone establish, a specific concern about worker safety. Rather, the testimony of Walmart's managers highlight that the Walmart is concerned with the safety of its merchandise, which does not by itself establish special circumstances.

For these reasons, Judge Carter correctly held that Walmart failed to establish special circumstances. ALJD at 8:10-31.

**D. Judge Carter appropriately held that the current dress code policy implemented in September 2014 was unlawful because it contained the same provision at issue as the May 2013 policy**

Judge Carter did not err in finding that Walmart's current nationwide dress code policy, implemented in September 2014, was unlawful because Walmart was on notice and well aware that the current dress code contains the logo rule at issue.

First, the complaint itself made clear to Walmart that the General Counsel was contesting Walmart's dress code policy from May 2013 to the present, stating that "[a]t all material times since at least May, 2013, Respondent has maintained the following rule in its 'Dress Code Guidelines' that applies to all states except those with a state specific policy[.]" Comp. para. V(a) (emphasis added).

Wal-Mart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, hats, jackets or coats are also permitted, subject to the following: the logo or graphic must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional messaging.

In its Answer to this allegation, Walmart recognized that the complaint contested Walmart's dress code policy from May 2013 to the present stating that "Walmart's maintained a lawful dress code policy during all material times." Answer at Defense 1 (emphasis added).

Moreover, Walmart itself explained to Judge Carter that the September 2014 dress code policy contained the same language at issue in the May 2013 dress code policy. Walmart argued to Judge Carter in its post-trial brief in this case that the "the testimony made clear that Walmart's rule regarding logos and other adornments has for years been that insignia could not be larger than the name badge." *Wal-Mart Stores Inc.'s Post-Trial Brief* at 9 n. 2. Thus, Walmart explained to Judge Carter that "the Dress Code effective in fall 2014 contains the identical provision at issue" involving logos. (*See* Jt. Exs. 10, 11.)" *Id.*

Moreover, Walmart had an opportunity to present testimony on the September 2014 dress code and did so. For example, Walmart presented three witnesses describing incidents occurring after the September 2014 policy was in effect. Risenhoover test., Tr. 214-215 (describing an October 2014 incident); Lori Bell test., Tr. 234 (describing a November 2014 incident); Jennifer Prough test., Tr. 186 (describing a March 2015 incident).

Judge Carter's ruling on the current dress code policy implemented in September 2014 was not only lawful, but also sensible in addressing the logo rule at issue.

### **CONCLUSION**

For these reasons, the Board should deny Walmart's exceptions.

Dated: July 29, 2015

By: /s/ Joey Hipolito  
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Attorney for Charging Party

## CERTIFICATE OF SERVICE

I certify that I served a copy of the Charging Party's Answering Brief to Walmart's Exceptions to the Decision of the Administrative Law Judge via the Board's electronic filing service on July 29, 2015, to:

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I also certify that I served a copy of the foregoing via e-mail on July 29, 2015, to:

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