

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

G4S SECURE SOLUTIONS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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G4S SECURE SOLUTIONS, INC. v. NLRB

No. 16-16698-GG

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**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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|---------------------------------------|---|------------------------|
| G4S SECURE SOLUTIONS, INC. | : | |
| | : | |
| Petitioner/Cross-Respondent | : | No. 16-16698-GG |
| | : | |
| v. | : | |
| | : | |
| NATIONAL LABOR RELATIONS BOARD | : | |
| | : | |
| Respondent/Cross-Petitioner | : | |

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. R. 26.1 and Local Rule 26.1-1, the National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Cantor, Jared D., Board Counsel
2. Doyle, Chris, Supervisory Field Examiner for Region 28 for the Board
3. Dreeben, Linda, Deputy Associate General Counsel for the Board
4. Ferguson, John, Associate General Counsel for the Board
5. Finnerty, Terry P., Counsel for Petitioner
6. Fisher & Phillips, LLC, Former Counsel for Petitioner
7. G4S Secure Solutions (USA), Inc., Petitioner

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8. Griffin, Richard, General Counsel for the Board
9. Hirozawa, Kent, Former Board Member
10. International Union, Security, Police and Fire Professionals of America,
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11. Jason, Meredith, Deputy Assistant General Counsel for the Board
12. Laws, Eleanor, Administrative Law Judge for the Board
13. Lewis Brisbois Bisgaard & Smith, LLP, Counsel for Petitioner
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15. McFerran, Lauren, Board Member
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20. Overstreet, Cornele A., Regional Director of Region 28 for the Board
21. Pearce, Mark G., Board Member
22. Seleman, Fred, Managing Counsel for Petitioner
23. Shinnars, Gary, Executive Secretary for the Board
24. Solomon, Lafe, Former Acting General Counsel for the Board

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Dated at Washington, D.C.
this 19th day of May, 2017

STATEMENT REGARDING ORAL ARGUMENT

Because this case involves the application of well-settled legal principles to established facts, the Board submits that oral argument is not necessary. However, if the Court decides to hear argument, the Board requests to participate.

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Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of G4S Secure Solutions, Inc. (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order

issued against the Company on August 26, 2016, and reported at 364 NLRB No. 92. (D&O 1.)¹

The Board had jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, *et seq.* The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The Board’s Order is final, and the Company transacts business within the Eleventh Circuit. (D&O 23.) The Company’s petition and the Board’s cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its Order finding that the Company committed numerous violations of the Act by discharging and disciplining employees, threatening employees, creating an impression of surveillance, prohibiting employees from discussing the Union, and maintaining overbroad work rules.

¹ “D&O” references are to the Board’s Decision and Order. “Tr.” references are to the hearing transcript. The transcript cited by the Company in its brief (and included in its appendix) contains different pagination than the official transcript filed with the Court as part of the agency record. The Board’s brief cites to the official version, which is reproduced in the Board’s appendix. “GCX” and “RX” references are, respectively, to the exhibits introduced by the General Counsel and the Company. “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by maintaining an overbroad insignia ban.

3. Whether the Board's Order falls within its broad remedial authority.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

After an investigation of charges filed by International Union, Security, Police and Fire Professionals of America ("the Union"), the Board's Acting General Counsel issued a complaint, subsequently amended, alleging that the Company had committed numerous violations of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by maintaining overbroad work rules, threatening employees, creating an impression of surveillance, prohibiting employees from discussing the Union, and disciplining an employee. The complaint further alleged that the Company had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by discharging an employee for engaging in union activity. (D&O 22; GCX 1(a), 1(c), 1(e), 43.) Following a hearing, an administrative law judge found that the Company had committed most of the alleged violations. (D&O 32-42.) On review, the Board affirmed some of the judge's findings, affirmed others with additional reasoning, rejected several findings, and found an additional rule violation. (D&O 1-6.)

II. THE BOARD'S FINDINGS OF FACT

A. Background: the Company's Operations and Work Rules

The Company, a provider of security services throughout the country, provides security for a segment of Metro Light Rail ("Metro"), a mass-transit system running from Mesa to Phoenix, Arizona. (D&O 1, 23; GCX 2, Tr. 23-24, 44.) For its segment, the Company provides approximately 30 officers in 4 categories: patrol officer, fare inspector, kiosk officer, and passenger assistant agent ("PAA"). (D&O 23; GCX 9 pp. 15-20, Tr. 29, 36-39.) Relevant here, PAA officers are assigned to a control room where they remotely monitor security cameras; they do not have contact with passengers or with members of the general public. (D&O 23; Tr. 29, 36-38, 422-23.)

The Company maintains numerous work rules in an employee handbook that applies to its security officers nationwide, including a Professional Image Rule.

That rule provides, in relevant part:

You must be neat and clear while on duty. You must wear only the complete uniform as prescribed by your supervisor.

Due to the public nature of our business and the business necessity that uniformed personnel represent figures of authority, we have established the following rules for personal appearance.

.

- No insignias, emblems, buttons, or items other than those issued by the company may be worn on the uniform without expressed permission.

(D&O 24-25; GCX 15 pp. 26-27.)

Consistent with that rule, officers assigned to Metro wear uniforms, the specifics of which comport with the request for proposal under which the Company won the security-services contract. (D&O 23; RX 1 pp. 10-13, Tr. 92-93.) Uniformed officers wear a white button-down shirt with a nametag and an arm patch that identifies them as security for Metro. They also wear dark pants, black shoes, a hat with a pin depicting Metro's logo, and a duty belt, which holds pepper spray, handcuffs, and radios. (D&O 23; GCX 10-12, Tr. 69-73.) An individual wearing any item not specifically part of the uniform is considered out of uniform and subject to disciplinary action. (D&O 23; RX 1 p. 10.)

Prior to January 2011, the Company's handbook contained a Confidential Material rule that barred officers from discussing "wage and salary information." (D&O 25; GCX 16 p. 17.) After January 2011, the handbook contained a revised rule prohibiting them from "giv[ing] interviews or mak[ing] public statements about the activities or policies of the company" without written permission. (D&O 25; GCX 15 p. 31.)

In addition to its handbook, the Company also maintains nationwide standalone policy statements, including a Social Networking Policy. That policy prohibits employees from "comment[ing] on work-related legal matters without express permission" from the Company. (D&O 25; GCX 13.) It also provides that

“[p]hotographs, images, and videos of G4S employees in uniform (whether yourself or a colleague) or at a G4S place of work, must not be placed on any social networking site” without the Company’s express permission. (D&O 25; GCX 13.)

B. The Organizational Campaign

During the summer of 2010, a group of security officers began to discuss unionizing. (D&O 27; Tr. 516-17, 550-51.) On behalf of that group, Officer Donald Wickham contacted the Union in October. (D&O 27; Tr. 364, 381-83, 430, 516-18, 543-44, 550.) The Union provided Wickham with authorization cards, newsletters, and information packets, which he distributed to coworkers. (D&O 27; Tr. 382-84, 518.) Wickham remained in regular contact with the Union and served as a conduit between it and employees. (D&O 27, 29; Tr. 365, 390-91, 517.)

C. The Company Disciplines Officer Sterling

In March 2010, Officer Deborah Sterling believed that her manager was sexually harassing her. (D&O 25; Tr. 496.) She shared her concerns with fellow employees, one of whom also felt harassed. (D&O 25; Tr. 385, 425-27, 496-98.) In June, Sterling complained to the Company’s human-resources manager about the harassment. (D&O 26; Tr. 498-500.) Sterling continued to follow up with the Company about her concerns, including by submitting a written complaint, and one

through the Company's employee hotline. (D&O 26; GCX 32, RX 11, Tr. 502-05.) When those attempts failed to result in satisfactory progress, Sterling filed a charge with the Equal Employment Opportunity Commission ("EEOC") on July 15. (D&O 26; RX 14, Tr. 505-06.) The Company subsequently discharged her manager based on a complaint by another officer. (D&O 26; GCX 55, Tr. 127.)

On November 1, the Company received a copy of Sterling's EEOC right-to-sue letter. (D&O 4; RX 15.) Sterling was scheduled to work overtime on November 9. A few days beforehand, the Company informed her that her overtime had been cancelled and consequently she did not show up for work on November 9. (D&O 26; Tr. 507-09.) On November 10, Sterling received a final warning for missing her shift the prior day, which the Company ultimately reduced to an oral warning after Sterling protested and it conducted an investigation into the circumstances. (D&O 27; GCX 34, Tr. 214-15, 217, 509-12, 514-16.)

D. The Company Prohibits, Warns, and Threatens Employees about, and Creates an Impression It Is Surveilling, Union Activities

The Company routinely allows employees to engage in social discussions during working time. (D&O 3; Tr. 562-63.) In November 2010, a group of officers, including Sterling and Carol Taresh, were discussing the Union when Lieutenant D.J. Clemons, a supervisor, told them that they should not discuss the Union at work. One week later, Clemons warned Officer Taresh to be careful

talking about the Union because it should not be discussed at work. (D&O 27; Tr. 550-52.)

In mid-December, Major Jason Armstrong, also a supervisor, told Officer Sean Nagler that he knew Nagler had been talking to several officers about joining the Union. (D&O 27; Tr. 544-45.) In early February 2011, Armstrong told Officer Wickham that Lieutenant Danny Rice, a supervisor involved in the organization effort, had been suspended for pro-union activities and that Wickham would be terminated if he had any contact with Rice. (D&O 29; Tr. 393-94.) Sometime in March, supervisor Dustin Jiminez told Officer Asucena Banuelos that General Manager Larry Pablo had said that, after the Metro security contract expired, he would not rehire anyone who had supported the Union. (D&O 31; Tr. 432.)

E. The Company Discharges Officer Wickham

On January 31, 2011, General Manager Pablo learned that the Union had filed an election petition seeking to represent the Company's security officers working on Metro. (D&O 40; GCX 33, Tr. 46.) On February 4, Officer Wickham worked overtime as a kiosk officer. (D&O 39; Tr. 397.) During his shift, two supervisors accused Wickham of having been asleep when they arrived at the kiosk, which he denied. (D&O 29-30; Tr. 398-407.)

On February 10, the Company issued Wickham a three-day suspension for sleeping on duty. (D&O 30; GCX 17, Tr. 407-08.) Effective February 14, the

Company discharged Wickham, citing a practice of not authorizing any discipline short of termination for officers caught sleeping on duty. (D&O 30; GCX 18, Tr. 84, 115.) Some other employees caught sleeping, or who engaged in other conduct that was grounds for immediate termination, were not discharged after the first incident. (D&O 30-31; GCX 19-22, 24-28.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Pearce and Member Hirozawa; Member Miscimarra, dissenting in part)² found that the Company had violated Section 8(a)(1) by: prohibiting employees from talking about the Union at work while allowing other non-work-related discussions; threatening employees with unspecified reprisals for talking about the Union at work; threatening employees with job loss for engaging in union or protected concerted activity; creating the impression it was surveilling employees' union or protected concerted activities; instructing employees, under threat of job loss, not to talk with employees or supervisors about disciplinary matters; and disciplining Officer Sterling for engaging in protected concerted activities. The Board further found that the Company had violated Section 8(a)(1) by maintaining the overbroad work rules described above (pp. 4-6). Finally, the Board found that the Company had

² On April 26, 2017, Member Miscimarra was named Chairman.

violated Section 8(a)(3) and (1) by discharging Officer Wickham for engaging in union or protected concerted activities. (D&O 1-6.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. (D&O 6.) Affirmatively, the Order requires the Company to offer reinstatement to Wickham, remove any reference to his unlawful discipline and discharge from its files, notify him in writing of that expungement and that they will not be used against him, and make him whole for any loss of earnings or benefits suffered as a result of the Company discriminating against him. The Company must also remove any reference to Sterling's unlawful discipline from its files and notify her in writing of that expungement and that the discipline will not be used against her. (D&O 7.)

With respect to the unlawful work rules, the Order requires the Company to rescind the rules. In addition, it must: (1) furnish all employees nationwide with inserts for the current employee handbook and Social Networking Policy that (a) advise that the unlawful rules have been rescinded, or (b) provide the language of lawful rules; or (2) furnish all employees nationwide with a revised handbook and Social Networking Policy that (a) do not contain the unlawful rules, or (b) provide the language of lawful rules. (D&O 6.) Finally, the Company must post a

remedial notice (“Appendix A”) at its facilities in Phoenix, Arizona, which addresses all of the violations found, and a separate remedial notice (“Appendix B”) at all of its facilities nationwide, which addresses only the work-rule violations. (D&O 7.)

STANDARD OF REVIEW

This Court affords “considerable deference to the Board’s expertise in applying the . . . Act to the labor controversies that come before it.” *Visiting Nurse Health Sys., Inc. v. NLRB*, 108 F.3d 1358, 1360 (11th Cir. 1997). The Court will sustain the Board’s factual findings if they are supported by “substantial evidence on the record considered as a whole.” *Evans Servs., Inc. v. NLRB*, 810 F.2d 1089, 1092 (11th Cir. 1987) (quoting 29 U.S.C. § 160(e)). The Board’s reasonable inferences from the evidence will not be displaced even if the Court might have reached a different conclusion had the matter been before it *de novo*. *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428-29 (11th Cir. 1985). Finally, the Court will “defer to the Board’s conclusions of law if they are based on a reasonable construction of the Act.” *Evans Servs.*, 810 F.2d at 1092.

SUMMARY OF ARGUMENT

Substantial evidence supports the Board’s findings that the Company committed numerous unfair labor practices contemporaneous with employees’ organizational efforts, and maintained several overbroad work rules. Those

violations are uncontested on appeal and accordingly the Board is entitled to summary enforcement of them.

With respect to the sole contested violation before the Court, the Board reasonably found, based on substantial evidence, that the Professional Image Rule's blanket ban on security officers wearing insignia not approved by the Company was unlawfully overbroad for two independent reasons. First, the ban indisputably restricts employees' right to wear union insignia at work, and it cannot be justified by the Company's asserted interest in maintaining a particular public image because the ban applies to PAA officers, who have no contact with the public. Second, officers reasonably would construe the rule's categorical ban on insignia as applying when they are in uniform but off duty. None of the provisions that the Company relies upon clearly limit the scope of the ban to working time; at most, they create ambiguity as to whether it extends to off duty officers, and such ambiguity is construed against the Company as the rule's promulgator.

Finally, having found that the Professional Image Rule's ban on union insignia was unlawfully overbroad, the Board reasonably ordered its standard, court-approved remedy for rule violations: rescission or revision of the unlawful rule and the posting of a remedial notice, both commensurate with the geographic scope (nationwide) of the offending rule. The Board's imposition of those

remedies nationwide is well within its broad remedial discretion. The Company has not met its burden to show otherwise. The Company maintains the insignia ban in an employee handbook that it distributes to all security officers nationwide. Evidence in the record further establishes that it provides officers who perform control-room monitoring, away from the general public, to other clients in the Phoenix area, as well as nationwide, undermining any public-image-based justification for the ban. Accordingly, the Board's two independent reasons for finding the insignia ban overbroad are coextensive with the rule itself, and applicable beyond Metro.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER FINDING THAT THE COMPANY COMMITTED NUMEROUS VIOLATIONS OF THE ACT

The Board found, based on substantial evidence, that the Company violated Section 8(a)(1) of the Act by:

- prohibiting employees, including Sterling and Taresh, from talking about the Union at work while allowing other non-work-related discussions (D&O 2-3, 27; Tr. 550-52, 562-63);
- threatening Officer Taresh with unspecified reprisals for talking about the Union at work (D&O 2-3, 27; Tr. 550-52);
- threatening Officer Banuelos with job loss for engaging in union or protected concerted activity (D&O 2, 31; Tr. 432);
- creating the impression that Officer Nagler's union or protected concerted activities were under surveillance (D&O 2, 27; Tr. 544-45);
- instructing Officer Wickham, under threat of job loss, not to talk with Lieutenant Rice about disciplinary matters (D&O 2 & n.5, 29; Tr. 393-94);
- disciplining Officer Sterling for engaging protected concerted activities (D&O 2, 3-4, 25; GCX 30, 32, 34, 55, RX 11, 14, 15, Tr. 127, 214-15, 217, 385, 425-27, 496-500, 502-12, 514-16);
- maintaining a confidentiality rule that prohibited employees from discussing "wages and salary information" (D&O 1-2, 25; GCX 16 p. 17);
- maintaining a confidentiality rule prohibiting employees from "giv[ing] interviews or mak[ing] public statements about the activities

or policies of the company” without written permission (D&O 2, 4-5; GCX 15 p. 31);

- maintaining a social networking policy prohibiting employees from “comment[ing] on work-related legal matters without express permission” (D&O 2, 5-6, 25; GCX 13);
- maintaining a social networking policy prohibiting employees from posting on any social networking site “[p]hotographs, images, and videos of G4S employees in uniform (whether yourself or a colleague) or at a G4S place of work” without express permission (D&O 2, 5-6; GCX 13).

The Board also found, based on substantial evidence, that the Company violated Section 8(a)(3) and (1) by discharging Wickham for engaging in union or protected concerted activities.³ (D&O 2 & n.6, 39-43; GCX 17, 19-29, 33, RX 9-10, Tr. 46, 84, 115, 145, 230-42, 397-410.)

In its brief, the Company does not challenge those violations (Br. 11-22), or the corresponding Board-ordered remedies (Br. 22-24). By failing to contest either the violations or the remedies, the Company has waived any challenge to them.

³ An employer violates Section 8(a)(1) if its conduct reasonably tends to coerce employees in the exercise of their statutory right to engage in union activity. *NLRB v. McClain of Ga., Inc.*, 138 F.3d 1418, 1421 (11th Cir. 1998). Threats and warnings about, prohibitions on, and discipline for protected concerted activity are hallmark Section 8(a)(1) violations. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978) (rules limiting union or protected activity); *Rockwell Int’l Corp. v. NLRB*, 814 F.2d 1530, 1535 (11th Cir. 1987) (discipline); *Purolator Armored*, 764 F.2d at 1427 (*inter alia*, threats, impression of surveillance). And an employer violates Section 8(a)(3)’s prohibition on discrimination by discharging an employee for union activity. *See McClain*, 138 F.3d at 1421, 1423. A violation of Section 8(a)(3) produces a “derivative” violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

See United States v. Nealy, 232 F.3d 825, 830-31 (11th Cir. 2000) (arguments not raised in opening brief are waived); *see also* Fed. R. App. P. 28(a)(8)(A) (brief must contain party's contentions with citation to authorities and record); *accord NLRB v. Allied Med. Transp., Inc.*, 805 F.3d 1000, 1009 (11th Cir. 2015) (“Arguments made for the first time in the reply brief . . . are forfeited.”). The Board is therefore entitled to summary enforcement of the uncontested portions of its Order. *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1313 n.2 (11th Cir. 1999); *Purolator Armored*, 764 F.2d at 1427-28.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING, IN ITS PROFESSIONAL IMAGE RULE, AN OVERBROAD INSIGNIA BAN

The Board reasonably found (D&O 1 & n.4, 32-33), based on substantial evidence, that the Professional Image Rule’s ban on non-company insignia was unlawfully overbroad for two independent reasons. First, the rule restricts employees’ right to wear union insignia at work and cannot be justified by the Company’s asserted interest in maintaining a particular public image because the ban applies to PAA officers, who have no contact with customers or the general public. Second, officers reasonably would construe the rule as applying when they are in uniform but off duty.

A. The Insignia Ban Unlawfully Restricts Employees' Right To Wear Union Insignia at Work, and the Company Has Not Demonstrated Special Circumstances Justifying That Restriction

Section 7 of the Act, 29 U.S.C. § 157, guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), in turn, makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].”

As the Supreme Court has long recognized, “the right of employees to self-organize and bargain collectively [under Section 7] necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). Accordingly, it is well established that employees generally have a Section 7 right to wear union-related insignia while at work as a form of “other concerted action,” that is, to communicate about self-organization rights, or show support for their union. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803-04 (1945); *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1067 (D.C. Cir. 2015); *NLRB v. Malta Constr. Co.*, 806 F.2d 1009, 1011 (11th Cir. 1986). “The wearing of union insignia

by employees . . . is fairly typical behavior and has been held to be protected under § 7.” *Malta Constr.*, 806 F.2d at 1011 (citing *Republic Aviation*).

1. An employer may justify its maintenance of an otherwise unlawful prohibition on wearing union insignia at work by demonstrating that the rule is tailored to address special circumstances

At times, employees’ exercise of Section 7 rights in the workplace, such as the wearing of union insignia, may come into conflict with their employer’s legitimate interest in controlling its property and operating its business. To balance the conflicting interests in such cases, the Board, with Supreme Court approval, has developed certain legal presumptions. *See Beth Israel*, 437 U.S. at 491-95 & n.10 (explaining the history of the Board’s presumptions). Of particular relevance here, the governing presumption is that union insignia may be worn at any time and that a rule restricting that right violates Section 8(a)(1) of the Act, unless the employer carries its burden of establishing a “special circumstances” defense. *See Republic Aviation*, 324 U.S. 793, 803-04; *see also Beth Israel*, 437 U.S. at 492-93; *Malta Constr.*, 806 F.2d at 1011; *W San Diego*, 348 NLRB 372, 373 (2006).

“The Board has found special circumstances justifying proscription of union insignia and apparel when their display may . . . unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees.” *Bell-Atl.-Pa., Inc.*, 339 NLRB 1084, 1086 (2003), *enforced sub nom., Commc’ns Workers of Am., Local 13000 v. NLRB*, 99

F. App'x. 233 (D.C. Cir. 2004). But “customer exposure to union insignia, standing alone,” is not such a special circumstance, *P.S.K. Supermarkets, Inc.*, 349 NLRB 34, 35 (2007); *Meijer, Inc.*, 318 NLRB 50, 50 (1995), *enforced*, 130 F.3d 1209 (6th Cir. 1997), and neither is a “requirement that employees wear a uniform,” *AT&T*, 362 NLRB No. 105, 2015 WL 3492100, at *4 (June 2, 2015); *see also P.S.K. Supermarkets*, 349 NLRB at 35. To establish a public-image justification for an overbroad rule, an employer must demonstrate both its deliberate cultivation of a particular image as part of its business plan, and that the limitations it has imposed are narrowly tailored to protect that image without overly impeding its employees’ rights. *Bell-Atl.-Pa.*, 339 NLRB at 1086; *Nordstrom, Inc.*, 264 NLRB 698, 701-02 (1982).

2. The Company’s interest in maintaining its public image does not justify its insignia ban, which covers even PAA officers who have no contact with the general public

The Board first found (D&O 1 & nn. 3-4, 32-33), and the Company does not seriously dispute (Br. 18-21), that the Professional Image Rule imposes a blanket prohibition on employees exercising their right to wear union insignia at work. As demonstrated, the rule categorically prohibits all security officers from wearing “insignias, emblems, buttons or items other than those issued by the company” on their uniforms without express permission. (GCX 15 pp. 26-27.) Accordingly, absent demonstrated special circumstances, the Company’s maintenance of the

insignia ban violates Section 8(a)(1). *See, e.g., P.S.K. Supermarkets*, 349 NLRB at 35 (blanket ban on all non-company buttons was unlawful); *Nordstrom*, 264 NLRB at 701-02 (blanket ban on non-company buttons was unlawful, where banned steward button blended in with permitted jewelry).

As its special-circumstances defense, the Company argued—and continues to argue—that the insignia ban is necessary to ensure that security officers command authority with, and present a professional image to, the public. The Board, however, reasonably rejected (D&O1 n.4, 32) that defense, finding that the rule is not tailored to address the Company’s asserted interest because the ban applies to PAA officers. As the Board found (D&O 32), “[a]ny concerns about commanding authority with the public or presenting a certain public image would not apply to” PAA officers because, factually, they “do not have any face-to-face contact with the public.” *See Sunland Constr. Co.*, 307 NLRB 1036, 1040 (1992) (rule restricting Section 7 rights must be narrowly drawn to restrict those rights only under circumstances relevant to employer’s asserted justification for the rule).⁴ That factual finding (D&O 32) is supported by the record. Specifically, the evidence demonstrates that PAA officers are assigned to a central control room

⁴ Consequently, there is no merit to the Company’s claim that the Board failed to “engage in any balancing whatsoever” (Br. 10), as required by the Board’s governing standard, and wholly ignored the Company’s proffered special-circumstances defense (Br. 11).

where they remotely monitor security cameras—they do not have contact with passengers or with members of the general public when performing their duties. (Tr. 29, 36-38, 422-23.)

The Board’s determination that the Company’s asserted special circumstance does not justify an insignia ban applicable to all security officers is consistent with Board and court precedent. For instance, the Board found that a dealership’s blanket ban on wearing pins was overbroad where, although ostensibly aimed at preventing injury to employees engaged in automotive repair and damage to vehicles, the ban also applied to employees who did not typically have contact with vehicles, such as those in administration and finance. *Boch Honda*, 362 NLRB No. 83, 2015 WL 1956199, at *3 (Apr. 30, 2015), *enforced*, 826 F.3d 558 (1st Cir. 2016). Similarly, where a hotel had commissioned distinctive uniforms for public-facing employees to foster a unique “Wonderland” experience for guests, the Board found a blanket ban on adornments justified when employees were in public areas but unlawfully overbroad as it applied to employees in non-public areas. *W San Diego*, 348 NLRB at 372-74. Accordingly, because it applies to PAA officers, the Professional Image Rule’s overbroad insignia ban cannot be justified by a public-image-based rationale.⁵

⁵ The Company cites two General Counsel advice memoranda in support of its arguments, but such memoranda are neither precedential nor binding on the Board. *Midwest Television, Inc.*, 343 NLRB 748, 768 (2004); *see also NLRB v. Gaylord*

Understandably, the Company does not seriously dispute the proposition that its asserted special circumstance cannot justify a ban applicable to employees without regular public contact.⁶ Instead, it contests (Br. 7, 19-20) the Board's factual determination (D&O 32) that PAA officers do not have such contact. As the Board found (D&O 1-2 n.4), however, the Company "provided no evidence that [PAA officers] ever interact with the public." (D&O 2 n.4.) To the contrary, Pablo, the Company's own general manager in charge of the Metro contract, confirmed that PAA officers do not have contact with riders or the general public. (Tr. 29, 36-37.) To the extent the Company argues that there exists "at least the potential for public contact" (Br. 19; *see also* Br. 7, 20) because PAA officers

Chem. Co., 824 F.3d 1318, 1332 n.42 (11th Cir. 2016) (advice memoranda "serve as internal instruction for use by the Office of the General Counsel, and have no precedential value or authoritative weight for administrative law judge") (quoting *United States Postal Serv.*, 345 NLRB 1203, 1214 n.17 (2005)). In any event, as the Board noted (D&O 32) in rejecting the Company's reliance on those memoranda, the General Counsel's analyses in those documents "contemplated that the security guards would interface with the public," unlike the PAA officers here.

⁶ The Company also argues (Br. 20) that "its business would have suffered" if it did not maintain a uniform consistent with Metro's requirements, but it does so without factual or legal support. It cites, for example, no evidence suggesting that Metro would not have accepted a professional-image rule that allowed PAA officers to wear discreet union buttons. Further, as the judge correctly stated when admitting the exhibit containing the uniform requirement, the Company's contract with Metro cannot "trump the Act," or absolve the Company of its statutory obligations. (Tr. 94-95.) *Cf. Paragon Sys, Inc.*, 362 NLRB No. 182, 2015 WL 5047766, at *6 (Aug. 26, 2015) ("[A]n employer's interest in maintaining a contract is not a legitimate business reason where . . . a contractor requires the employer to discriminate on employees on the basis of their Section 7 activity.").

control access to secure areas that some members of the public could theoretically attempt to access without authorization, “the Board has consistently held that ‘the mere possibility’ that the employees may come into contact with a customer does not outweigh the employees’ [Section 7] right to wear insignia.” (D&O 1 n.4 (citing *Escanaba Paper Co.*, 314 NLRB 732, 733 nn.5, 7 (1994) (employees had “virtually no” contact with public, and little contact with employer’s customers or suppliers), *enforced sub. nom. NLRB v. Mead Corp.*, 73 F.3d 74 (6th Cir. 1996)).)

In addition, although the Company states (Br. 19) that PAA officers “regularly interact” with Metro employees, it cites no evidence detailing the frequency or nature of such interactions. Pablo’s testimony, upon which it relies, merely indicates that PAA officers “interact with the other employees that work there that are non-G4S.” (Tr. 36.) Nor does the Company explain how PAA officers’ contact with other employees would support its special-circumstances defense, which is based on its interest in security officers commanding authority and presenting a professional image with regard to *riders*. Although the Company references (Br. 13) an interest in PAA officers commanding authority over Metro’s employees, it cites no evidence that any company security officers possess, much less ever have occasion to assert, authority over those employees.⁷

⁷ The Company cites page 38 of its version of the transcript, but there is no support for its claim on that page (or any surrounding pages).

B. The Insignia Ban Is Unlawfully Overbroad Because Employees Reasonably Would Construe It as Restricting Section 7 Activity

It is beyond cavil that a workplace rule that explicitly restricts employees' Section 7 rights violates Section 8(a)(1). *Lutheran Heritage Vill.-Livonia*, 343 NLRB 646, 646 (2004). *See also Mercedes-Benz U.S. Int'l, Inc. v. NLRB*, 838 F.3d 1128, 1135 (11th Cir. 2016) (citing *Lutheran Heritage*). Moreover, the Board will find that a workplace rule that does not explicitly restrict Section 7 activity nonetheless violates Section 8(a)(1) when "employees would reasonably construe the [rule's] language to prohibit Section 7 activity." *Lutheran Heritage*, 343 NLRB at 647; *accord Mercedes-Benz*, 838 F.3d at 1135.⁸ Because such a rule is "likely to have a chilling effect on Section 7 rights, the Board may conclude that the [rule's] maintenance is an unfair labor practice, even absent evidence of enforcement." *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). *See Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68 (D.C. Cir. 2007) ("mere maintenance of a rule likely to chill section 7 activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice even absent evidence of enforcement") (internal quotation marks

⁸ A rule that does not explicitly restrict Section 7 rights is also unlawful if it was "promulgated in response to union activity" or it "has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage*, 343 NLRB at 647. Because the Board did not rely on either alternative theory, the Company's argument (Br. 10) that there is "no evidence" of unlawful promulgation or disparate application is inapposite.

omitted); *NLRB v. Saint Vincent's Hosp.*, 729 F.2d 730, 732 (11th Cir. 1984) (“the potential inhibitory effect of [an unlawful] rule, even if not enforced, justifies Board action”); *see also NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 483 (1st Cir. 2011) (affirming that “the Board’s rule is intended to be prophylactic and . . . is subject to deference”).

The Board’s “reasonably construe” standard is objective, not subjective, and is not dependent on any particular employee’s construction. *See Cintas*, 482 F.3d at 467 (no evidence regarding “employees’ actual interpretation of [a work] rule . . . is required to support the Board’s conclusion that the rule is overly broad”). In addition, Board law is settled that ambiguous work rules—ones that reasonably could be read to have a coercive meaning—are construed against the employer as the rule’s promulgator. *Lafayette Park*, 326 NLRB at 828.

1. The Court does not have jurisdiction to consider the Company’s challenge to the established *Lutheran Heritage* “reasonably construe” standard

As demonstrated below, the Board reasonably found that the Professional Image Rule’s insignia ban violates Section 8(a)(1) under the foregoing, well-established principles. The Company requests (Br. 11-18) that the Court reject those principles in favor of a new approach, but failed to raise that argument before the Board, either in its exceptions to the judge’s decision (*see* Respondent’s Exceptions to ALJ’s Decision, pp. 1-14) or through a motion for reconsideration

after the issuance of the Board's decision. Consequently, the Court lacks jurisdiction to reconsider the Board's standard for assessing work rules. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court," absent "extraordinary circumstances"); *NLRB v. Goya Foods of Fla.*, 525 F.3d 1117, 1122 n.2 (11th Cir. 2008) (citing § 160(e)). The Company's statutory obligation to raise its present challenge is not obviated by the Board's passing rejection (D&O 1 n.3) of the dissenting Member's argument that the "reasonably construe" standard should be overruled. *See Spectrum Health–Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349-50 (D.C. Cir. 2011) (objection to *sua sponte* finding preserved through reconsideration motion; that Board itself discussed an issue fails to preserve it under §160(e)); *Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061-62 (D.C. Cir. 2003) (party's obligation to raise issue to Board not satisfied by Board member raising issue in dissent).; *see also Purolator Armored*, 764 F.2d at 1426-27, 1433 (although Board altered judge's finding and remedy, ensuing challenge barred because party failed to raise it following judge's decision or through motion for reconsideration after issuance of Board's decision).

In any event, the courts of appeals—including this Court, *see Mercedes-Benz*, 838 F.3d at 1135—uniformly have applied the Board's *Lutheran Heritage* framework. *See, e.g., Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 568 (1st Cir.

2016); *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1090-91 (8th Cir. 2016); *Three D, LLC v. NLRB*, 629 F. App'x 33, 38 (2d Cir. 2015); *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208-09, (5th Cir. 2014); *NLRB v. Inter-Disciplinary Advantage, Inc.*, 312 F. App'x 737, 743-45 (6th Cir. 2008); *Cintas*, 482 F.3d at 467 (D.C. Cir. 2007); *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1259-60 (10th Cir. 2005). The Court should therefore reject the Company's invitation to overturn that settled analytical framework.

2. The Professional Image Rule's insignia ban is overbroad because employees reasonably would construe it as applying to them off-duty

The Board reasonably found (D&O 1-2 n.4, 32-33) that the Professional Image Rule's insignia ban separately is overbroad because employees would construe that prohibition on Section 7 activity to apply whether they are on or off duty. The Company does not argue that it could lawfully restrict Section 7 activity outside the workplace consistent with Section 8(a)(1), only that the insignia ban does not apply to off-duty officers, and cannot reasonably be understood as doing so. But the Professional Image Rule categorically prohibits all security officers from wearing "insignias, emblems, buttons or items other than those issued by the company" on their uniforms without express permission. (GCX 15 pp. 26-27.) As the Board found (D&O 32), that prohibition is not expressly limited to officers

who are on duty. The surrounding context, the Board further found (D&O 32), fails to clarify that the ban's reach is limited to on-duty officers.

Specifically, the Professional Image Rule is located in a section of the handbook titled "Duties, Personal Appearance and Conduct," which contains other provisions that plainly encompass off-duty conduct. (GCX 15 pp. 26-27.) For instance, the section contains a prohibition on violating federal, state, or local laws and an accompanying requirement that employees must notify their supervisor if arrested. (GCX 15 p. 26.) In addition, the Professional Image subsection itself contains provisions that "by their nature cannot be confined to duty hours." (D&O 32.) For example, the rule dictates permissible haircuts and provides that facial jewelry "must not be worn during working hours or *anytime when in uniform.*" (GCX 15 p. 27 (emphasis added).)

Employees also would reasonably construe the rule's ban on insignia to apply off duty, the Board found (D&O 1-2 n.4), because there is no evidence that security officers dress onsite. Consequently, their "commutes could include attending to errands or engaging in off-duty protected activity, such as rallies or meetings before their shift, while in uniform." (D&O 2 n.4.) The Company asserts (Br. 21) that officers are allowed to wear uniforms only while "on duty," but it acknowledges that officers also wear uniforms while "reporting for duty." Whether reporting for duty or just finishing a shift, off-duty employees have a right

to engage in protected activities outside working time on or near their place of employment, absent a legitimate justification for restricting such access. *See Republic Aviation*, 324 U.S. at 802 n.8, 803 n.10; *see also Metro-West Ambulance Serv., Inc.*, 360 NLRB No. 124, 2014 WL 2448663, at *59 (May 30, 2014) (under established Board law, employers may not “maintain overbroad no-loitering rules that reasonably tend to chill the exercise of Section 7 rights”); *Lutheran Heritage*, 343 NLRB at 649 n.16, 655 (rule prohibiting “[l]oitering on company property . . . without permission from the Administrator” unlawful because employees reasonably would construe to prevent them from lingering after work to engaged in protected discussions).

Before the Court, nothing the Company points to in the rule makes clear that the insignia prohibition does not apply to off-duty officers. In finding that employees reasonably would construe the ban to apply off duty, the Board rejected (D&O 32) the Company’s claim (Br. 21) that the Professional Image Rule’s opening sentence demonstrates that the subsequent prohibition only applies to on-duty officers. That opening sentence reads “You must be neat and clean while on duty” (GCX 15 p.26), plainly linking the “while on duty” limitation to the requirement that officers be neat and clean. By contrast, the operative language banning insignia contains no similar on/off duty distinction. The Company fails no better when it points (Br. 21) to other allegedly clarifying language in the

Professional Image Rule citing the “public nature” of its business and the need for uniformed officers to “represent figures of authority.” As noted, the on-duty/in uniform and off-duty/out-of-uniform dichotomy that underlies the Company’s argument is not as clear-cut as it asserts.⁹

At best, the language the Company cites as indicating that the insignia ban is limited to on-duty officers may create some ambiguity, when considered in light of the ban’s categorical nature and context, as to whether or not there is such an on-duty limitation. Nevertheless, as the Board found (D&O 32), any such ambiguity is construed against the Company as the promulgator of the rule, consistent with established precedent.¹⁰ *See Lafayette Park*, 326 NLRB at 828. Accordingly, the Board reasonably (D&O 33) found that the Professional Image Rule’s broad prohibition on placing non-company insignia on uniforms violated Section 8(a)(1) because, “[r]ead in context and construed against [the Company], its promulgator, it is not clear[ly] . . . restricted to on-duty security officers.”

⁹ In support of its claim that officers would only construe the insignia ban to apply while on duty, the Company cites (Br. 21) a distinct rule prohibiting officers from conducting “outside business” while onsite or in uniform. That rule, however, is located in a separate section of the handbook and does not define “outside business,” which reasonably read could be directed at preventing officers from operating a for-profit side business while on a jobsite and in uniform, or working for another employer while wearing a G4S uniform.

¹⁰ Because the Board did not find the rule’s ban on insignia unlawful based on a promulgation theory, the Company misses the mark in claiming (Br. 21) that it is “illogical” to assume that the rule was “intended” to apply to off-duty conduct.

III. THE BOARD'S ORDER FALLS WITHIN ITS BROAD REMEDIAL AUTHORITY AND IS CONSISTENT WITH ESTABLISHED PRECEDENT

A. The Board Possesses Broad Remedial Authority and Regularly Crafts Remedies Equal in Scope to the Violations that They Address

Section 10(c) of the Act directs the Board, upon finding that a party has committed an unfair labor practice, to issue an order requiring the party “to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of [the] Act.” 29 U.S.C. § 160(c). Accordingly, the Board’s remedial order “should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). Consistent with that broad remedial authority, the Board imposes two established remedies where, as here, an employer has maintained an overbroad work rule in violation of Section 8(a)(1) of the Act.¹¹ First, the Board will order the employer to rescind and/or replace the unlawful rule. *See, e.g., 2 Sisters Food Grp.*, 357 NLRB 1816, 1823 & n.32 (2011); *Guardsmark, LLC*, 344 NLRB 809, 811-12 (2005), *enforced in relevant part*, 475 F.3d 369 (D.C. Cir. 2007). Second,

¹¹ As it does in all remedial orders, the Board also imposes a requirement that the employer cease and desist from the unfair labor practices found. (*See* D&O 6.) The Company has not challenged the cease-and-desist portion of the Board’s remedial Order.

the Board will order the employer to post a remedial notice that addresses its maintenance of the unlawful rule. *See 2 Sisters Food Grp.*, 357 NLRB at 1824, 1830-31; *Guardsmark*, 344 NLRB at 812, 814.

To effectuate rescission and/or replacement, an employer must typically furnish all employees subject to the unlawful rule with a revised handbook or standalone policy, as applicable, either advising employees that the unlawful rule has been rescinded or providing the language of a lawful rule. *2 Sisters Food Grp.*, 357 NLRB at 1824; *Guardsmark*, 344 NLRB at 812. Alternatively, the employer may provide affected employees with an insert for an existing handbook or standalone policy, which likewise must advise employees either that the unlawful rule has been rescinded or provide the language of a lawful rule. *2 Sisters Food Grp.*, 357 NLRB at 1824; *Guardsmark*, 344 NLRB at 812. The accompanying remedial notice, which the Board requires as part of the remedy for every unfair labor practice, informs employees of the violation that occurred and of their rights under the Act, and assures them that the unlawful conduct will cease. *See, e.g., Pa. Greyhound Lines, Inc.*, 1 NLRB 1, 52 (1935). As the Board has explained, notice to employees that the employer violated their rights but will refrain from doing so in the future, “is a standard—and venerable—Board remedy” *Boch Honda*, 2015 WL 1956199, at *1 n.3.

The scope of a remedial order may appropriately reflect the scope of the underlying unfair labor practice. Were, as here, an employer maintains an unlawful rule at multiple facilities, the Board's established, court-approved practice is to order a remedy commensurate with the maintenance of the rule—the employer must rescind and/or replace the rule, and post the remedial notice, at all affected locations. *See, e.g., Banner Health Sys. v. NLRB*, 851 F.3d 35, 43 (D.C. Cir. 2017) (“within the Board’s broad discretionary power over remedies” to order employer to post notice “wherever” it used agreement containing unlawful rule) (internal quotation marks omitted); *Fresh & Easy Neighborhood Mkt., Inc. v. NLRB*, 468 F. App’x 1, 3 (D.C. Cir. 2012) (per curiam) (where employer distributed unlawful rule to all employees via handbook and intranet, Board reasonably ordered “corporate-wide remedy . . . to correct this corporate-wide violation”); *United States Postal Serv. v. NLRB*, 969 F.2d 1064, 1072-73 (D.C. Cir. 1992) (same). As the Court of Appeals for the District of Columbia consistently has affirmed, where an employer “distribute[s] its handbook with . . . unlawful rules to all employees nationwide,” then “only a company-wide remedy extending as far as the company-wide violation can remedy the damage.” *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 380-81 (D.C. Cir. 2007).

Finally, the Board’s remedial power under Section 10(c) is “a broad, discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods.*

Corp. v. NLRB, 379 U.S. 203, 216 (1964). This Court “give[s] significant deference to the Board’s chosen remedy: ‘In fashioning its remedies under the broad provisions of § 10(c) of the Act, the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.’” *Goya Foods*, 525 F.3d at 1126 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 n. 32 (1969)) (internal citation omitted).

B. The Board’s Remedial Order Is Reasonable and Consistent with Established Precedent

Having found that the Professional Image Rule’s insignia ban was unlawfully overbroad, the Board reasonably ordered its standard remedy for rule violations, with the same geographic scope as the offending rule. Specifically, it directed (D&O 6, 35) the Company to rescind and/or replace the prohibition on “wearing ‘insignia, emblems, buttons, or items other than those issued by the [C]ompany’ without permission” nationwide. The Board additionally reasonably ordered (D&O 7, 20-22) the Company to post a remedial notice regarding the unlawful insignia ban (and the other unlawful rules) at its facilities in Phoenix, Arizona (Appendix A), and nationwide (Appendix B).

Those remedies comport with, and are supported by, the violations found and record evidence. There is no dispute that the Company maintains the Professional Image Rule in a handbook that it distributes to all of its security officers nationwide when they are hired and every time the handbook is revised.

(GCX 15, 16, Tr. 103, 128, 132-37, 584.) The wording of the rule and handbook suggesting that the insignia ban applies to off-duty officers are thus identical—and unlawful—nationwide. Moreover, just as the Company provides Metro with PAA officers who perform control-room monitoring away from the general public, it provides security officers performing that same type of service for two other large, corporate clients in the Phoenix area and for other clients nationwide. (Tr. 28-33.) Conversely, to remedy violations the Company committed only in the Phoenix area (e.g., threatening employees with job loss, or disciplining them, because of protected activity), the Board ordered notice posting only at its Phoenix-area facilities.¹² For the foregoing reasons, the Board’s chosen remedy is well within its broad remedial discretion and in accordance with established Board and court precedent.

The Company’s challenges (Br. 22-24) to the Board’s remedy are no more availing than its arguments on the merits. Its specific assertion (Br. 22) that the Board’s Order “exceeded its authority” is without merit. Contrary to the Company’s contentions (Br. 23, 24 n.14), the Order neither remedies issues not

¹² As discussed (pp. 15), because the Company is not challenging the Board’s remedial Order as it pertains to the additional unfair labor practices, including its unlawful maintenance of the other overbroad rules, the Board is entitled to summary enforcement of that portion of its Order.

charged in the complaint or litigated at the hearing, nor exceeds the scope of the Board's factual inquiry and findings.

First, as the Board found (D&O 33 n.42), the section of the complaint alleging that the Company had unlawfully maintained the Professional Image Rule is not restricted to the officers working on Metro or to the Phoenix region, notwithstanding the Company's contrary reading (Br. 24 n.13). Rather, the complaint broadly alleges that the Company "has maintained the following overly broad and discriminatory rule [the Professional Image Rule] in its G4S Wackenhut Security Officer Handbook."¹³ (GCX 1(e) p. 4.) Second, evidence adduced at the hearing supports the Board's decision to require that the portions of the remedy relating to the insignia ban be imposed nationwide. As discussed, the identical, overbroad rule was maintained in a handbook distributed nationwide to all security officers, and the Company does not even suggest any variance in language that might affect the analysis of whether the insignia ban applies to off-duty officers. Additionally, the Company provides control-room monitoring akin to the PAA officers' duties nationwide and failed to proffer a special-circumstances defense that would justify application of the insignia ban to officers when performing such

¹³ In light of that allegation, and given the nationwide nature of the rule, the Company cannot credibly claim (Br. 24 n.13) it had no notice that the Board might find the insignia ban unlawful as applied to employees not working on the Metro account.

duties away from the public eye. *See, e.g., W San Diego*, 348 NLRB at 372-74 (insignia ban justified by public-image interest while employees in public areas, but unjustified when employees in non-public areas).

The Company complains (Br. 23) that there is “absolutely no evidence in the record as to whether special circumstances might exist to justify” the rule at other locations, but it bore the burden of establishing that affirmative defense to the Board’s finding that the insignia ban unlawfully restricts employees’ rights. *See* pp. 18-19. The Company’s citation (Br. 24) to the judge’s observation (D&O 33 n.42) that special circumstances *may* justify the rule at other locations does not advance its cause. As the judge made clear, she could not refine her analysis of the rule or the Company’s defense based on speculation and in the absence of any evidence. As the Board made equally clear (D&O 2 n.4), its Order allows for the Company to maintain an insignia ban that does not unlawfully interfere with Section 7 rights.

In addition, the Board’s Order is, contrary to the Company’s suggestion (Br. 24), consistent with this Court’s decision in *Mercedes-Benz U.S. International, Inc. v. NLRB*, which denied enforcement of a Board order directing an employer to post notices at multiple facilities based on a violation at one facility.¹⁴ 838 F.3d at

¹⁴ The Board had found that the employer had unlawfully prohibited an employee at one facility from distributing union literature in a “team center” area during his nonworking time. 838 F.3d at 1139-48.

1139-48. As an initial matter, the Court's discussion of the Board's remedy in that case is *dicta*, or at most law of the case without precedential value, because it had remanded the underlying violation to the Board for further consideration. *See id.* at 1148. Moreover, the Court based its disapproval of the multi-facility order in *Mercedes-Benz* on its determination that the Board had expressly limited the unfair-labor-practice finding to one facility, and had refused to consider the employer's proffered evidence of special circumstances justifying the allegedly unlawful restriction at other facilities covered by the order. *See id.* As described, the complaint, the record, and the Board's findings all support a nationwide remedy to address the Company's unlawful, nationwide insignia ban.

There is no merit to the Company's related assertion (Br. 23) that even the posting of Appendix A, the notice limited to the Phoenix area, is overbroad because it is not limited just to officers "assigned to the Metro account" but instead requires it "to inform 'all employees'" that it will no longer maintain the insignia ban. The Company provides no authority for the proposition that non-officer employees in the Phoenix area not directly subject to the ban should be shielded from exposure to the remedial notice. As described, notice posting at the affected facility, or facilities, is a standard Board remedy for every unfair labor practice. It does not require that the violation being remedied have directly curtailed the rights of every employee at the facility or facilities who may see the notice. *See, e.g.,*

Malta Constr., 806 F.2d at 1010 (enforcing *Malta Const. Co.*, 276 NLRB 1494, 1496-97 (1985) (requiring employer to post notice at all of its I-695-project offices as remedy for unlawful discharge of two employees working on that project)); *Tex. Gulf Sulphur Co. v. NLRB*, 463 F.2d 778, 778 (5th Cir. 1972) (per curiam) (although discharges occurred at one plant, within Board's broad remedial discretion to order posting of notices at all facilities in geographical region in order to eliminate coercive impact on other plants).¹⁵ Seemingly unremedied violations create a chill that affects the entire workforce by telegraphing the employer's defiance of its statutory obligations; the remedial notice serves to acknowledge the employer's wrongdoing and provide its employees with assurances that it will respect their statutory rights going forward. *See J. Picini Flooring*, 356 NLRB 11, 12 (2010) (notices help to counteract effect of unfair labor practices on employees by: informing them of their rights under the Act, Board's role in protecting the

¹⁵ To the extent the Company asserts that the wording of the Order requires it to provide handbook revisions to non-officer employees who never received a handbook in the first place, the Board's established practice is to litigate liability first and tailor its remedies, if necessary, in compliance proceedings subsequent to enforcement. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 901-02 (1984) (approving Board's policy); *Allied Med. Transp.*, 805 F.3d at 1006 (citing *Sure-Tan*); *NLRB v. Ohmite Mfg. Co.*, 557 F.2d 577, 579 n.5 (7th Cir. 1977) (compliance issues properly considered only after Board order has been enforced); *see also* 29 C.F.R. § 102.54 (procedures governing compliance proceedings). Issues concerning where exactly the Company must post the notices, and to which employees it must send any revisions to the Professional Image Rule, are of the type commonly resolved in compliance.

free exercise of those rights, and steps employer must take to remedy its violations; providing assurances that future violations will not occur; and deterring future violations); *see also NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940) (notices inform employees about their rights and employer's obligation not to interfere with those rights).

More significantly, the Phoenix area notice that the Company challenges simply publicizes the Board's Order on this point, namely, that the Company must rescind or replace the unlawful ban on insignia. Although the Company also asserts (Br. 22) in passing that the Board "exceeded its authority" not only by ordering the remedial posting but also by ordering it to furnish all employees with either revised handbooks or inserts, it has waived that additional, distinct challenge by failing to provide any supporting analysis. *See Sapuppo v. Allstate Floridian Ins.*, 739 F.3d 678, 681 (11th Cir. 2014). In any event, as demonstrated above (p. 32), that remedy is a standard one for the type of rule violation found. To the extent the Company is suggesting that the Order is overbroad because the insignia ban is lawful—and thus need not be rescinded or revised—as applied to on-duty, non-PAA officers, it misstates the Board's finding. The Board found the ban unlawful because it was not so limited, *see pp.* 19-23, but its remedy allows the Company to revise the rule to comply with the Order.

In sum, the Board is entitled to enforcement of its remedial Order, which imposes remedies tailored to the violations found. The Company has not met its burden of showing that the Board abused its remedial discretion. It has not established that “the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Va. Elec.*, 319 U.S. at 540.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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May 2017

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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| G4S SECURE SOLUTIONS, INC. |) | |
| |) | |
| Petitioner/Cross-Respondent |) | |
| |) | No. 16-16698-GG |
| v. |) | |
| |) | Board Case No. |
| NATIONAL LABOR RELATIONS BOARD |) | 28-CA-023380 |
| |) | |
| Respondent/Cross-Petitioner |) | |

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 9,607 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 19th day of May, 2017

**UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 19th day of May, 2017