

No. 17-60241

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

IN-N-OUT BURGER, 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**

**APPELLEE BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

The National Labor Relations Board submits that this case involves the application of well-established legal principles to findings of fact supported by substantial evidence, and that the case may accordingly be decided without oral argument. However, if the Court believes that oral argument would be of assistance or if it grants In-N-Out Burger, Inc.'s request for oral argument, the Board respectfully requests the opportunity to participate.

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of In-N-Out Burger, 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 March 21, 2017 (ROA.574–86),¹ and reported at 365 NLRB No. 39, 2017 WL 1103798.

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Order is final, and this Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). Venue is proper because the Company transacts business within the Fifth Circuit. (ROA.577.) *See* 29 U.S.C. § 160(e), (f). 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 ISSUE PRESENTED

Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(1) of the Act by (1) maintaining and enforcing a rule that prohibited its employees from wearing any unauthorized pins or stickers; (2) instructing employee Brad Crowder to remove a “Fight for Fifteen” button from his uniform; and (3) telling employee David Nevels that such a button was not part of the uniform.

¹ “ROA” refers to the administrative record on appeal, which the Board filed on May 15, 2017. Record citations preceding a semicolon are to Board findings; those following, to supporting evidence. “Br.” refers to the Company’s opening brief. “RE” refers to the Company’s Record Excerpts.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act are reproduced in an addendum to this brief.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Business

The Company owns and operates more than 300 fast food restaurants bearing the name In-N-Out Burger. (ROA.578, 581, 585; ROA.23, 47.) It strives to keep its restaurants visibly clean and wholesome. (ROA.582; ROA.41, 55, 139–42, 144, 482.) Accordingly, the Company has surrounded its kitchens with glass walls so that “customers can see their food prepared and handled by Associates in a sparkling clean environment.”² (ROA.580–81; ROA.99.)

B. Uniform and Appearance Policy

The Company requires its restaurant employees to wear uniforms with nametags and follow a detailed appearance policy, which is printed in the Company's employee handbook. (ROA.577–79, 585; ROA.8, 47–48, 487–94, RE 5 (ROA.314), RE 6 (ROA.316), RE 7 (ROA.318), RE 9 (ROA.388).) The appearance policy states in relevant part, “Wearing any type of pin or stickers is not permitted.” (ROA.578; ROA.491.) The Company enforces the policy through

² The Company refers to its employees as “Associates.” (ROA.578 n.1; ROA.46.)

daily inspections and issues documented warnings for infractions. (ROA.583; ROA.106–08, 117–19.)

Notwithstanding the foregoing rule, the Company requires employees to wear company-issued buttons at certain times of year. (ROA.581; ROA.147–48.)

In the Christmas season, employees must wear a button that states:

MERRY CHRISTMAS
IN-N-OUT
NO DELAY

(ROA.581; ROA.148–49, RE 11 (ROA.456).) In April, employees must wear buttons seeking donations to the In-N-Out Foundation, which is concerned with preventing child abuse and neglect. (ROA.581; ROA.155–57, 159.) These buttons state:

TEXT
“4KIDS”
TO 20222
TO DONATE
YOUR \$5 WILL HELP
PREVENT CHILD ABUSE

(ROA.581; ROA.158–59, RE 12 (ROA.466).)

C. The Company Prohibits “Fight for Fifteen” Buttons

Around April 18, 2015, Brad Crowder, an employee working at an In-N-Out Burger in Austin, Texas, wore on his uniform a “Fight for Fifteen” button, which supported a movement to increase the minimum wage. (ROA.578, 579 & n.2; ROA.26–27, 173, 242–45, 269–72, 478.) A “Fight for Fifteen” button is the size

of a quarter; the Company's Christmas and In-N-Out Foundation buttons are 2 to 3 times larger in diameter.³ (ROA.581; ROA.244, 272, 313, RE 11 (ROA.456), RE 12 (ROA.466).)

Daniel Moore, a manager, noticed the button and reported it to Store Manager Nick Palmimi, who then called Crowder into his office. (ROA.584; ROA.242, 269–70.) In Moore's presence, Palmimi directed Crowder to remove the button pursuant to the Company's appearance policy. (ROA.584; ROA.242–43, 270–71, 478.) Crowder complied. (ROA.584; ROA.243, 246.)

One day earlier, around April 17, 2015, David Nevels, also an employee at the Austin restaurant, asked Moore if he could wear a "Fight for Fifteen" button. (ROA.574 n.2; ROA.268–69, 478.) Moore answered that it was not part of the uniform. (ROA.574 n.2; ROA.269, 478.)

II. PROCEDURAL HISTORY

Following the investigation of unfair-labor-practice charges filed with the Board (ROA.301–12), the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act by maintaining a blanket

³ Neither the actual button worn by Crowder nor an image thereof is in the record. However, the record contains a black-and-white photocopy of a "Fight for Fifteen" button worn by employee Amanda Healy, a co-worker of Crowder's at the Austin restaurant. (ROA.578; ROA.27–29, 103, 313.) The Company's managers testified that Crowder's button was about the same size as Healy's. (ROA.244, 272.)

prohibition of “[w]earing any type of pin or stickers[,]” and by directing employees to remove “Fight for Fifteen” buttons from their uniforms. (ROA.292–93.) After a hearing, an administrative law judge found that the Company violated Section 8(a)(1) by maintaining its blanket prohibition and by instructing Crowder to remove his “Fight for Fifteen” button. (ROA.577–79, 585).⁴

III. THE BOARD’S CONCLUSIONS AND ORDER

On review, the Board (Acting Chairman Miscimarra;⁵ Members Pearce and McFerran) adopted the judge’s findings that the Company violated Section 8(a)(1) by maintaining its prohibition of all unauthorized pins and stickers and instructing Crowder to remove his “Fight for Fifteen” button. (ROA.574 n.2.) Additionally, the Board (Members Pearce and McFerran; Acting Chairman Miscimarra

⁴ The judge did not consider whether the Company violated the Act when Moore told Nevels that the “Fight For Fifteen” button was not part of the uniform. The parties agreed before the Board that the judge mistakenly read the relevant complaint allegation as referring to a conversation between Moore and Healy, rather than the conversation between Moore and Nevels. (ROA.574 n.2, 578–79.) The Company does not dispute that Moore told Nevels that the button was not part of the uniform.

⁵ Phillip A. Miscimarra was named Chairman in April 2017 after having served as Acting Chairman since January 2017.

dissenting) found that the Company violated Section 8(a)(1) when Moore told Nevels that such a button was not part of the uniform.⁶ (ROA.574 n.2.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act. (ROA.575.) Affirmatively, the Order requires the Company to rescind its unlawful rule, and either (1) furnish its employees nationwide with inserts for its current employee handbook that (a) advise that the unlawful appearance policy has been rescinded, or (b) provide the language of a lawful rule; or (2) publish and distribute to its employees a revised appearance policy that (a) does not contain the unlawful rule, or (b) provides the language of a lawful rule. (ROA.575.) Additionally, the Order requires the Company to remove from its files any reference to the unlawful instructions and/or warnings it gave to Crowder and Nevels, and to notify them in writing of that expungement and that the instructions and/or warnings will not be used against them in any way. (ROA.575.) Finally, the Order requires the Company to post remedial notices at locations nationwide. (ROA.575.)

⁶ Acting Chairman Miscimarra found the allegation concerning Nevels to be cumulative and therefore deemed it unnecessary to pass on that allegation. (ROA.574 n.2.)

SUMMARY OF ARGUMENT

Section 7 of the Act confers upon employees the right to wear, while working, adornments that bear union insignia or otherwise concern terms and conditions of their employment. An employer who prohibits employees from exercising this right thereby violates Section 8(a)(1) of the Act, unless the employer proves “special circumstances” that outweigh its employees’ statutory rights and that its prohibition is narrowly tailored to address those circumstances. Here, the Board reasonably found that the Company unlawfully prohibited employees from exercising their Section 7 rights in the following ways: (1) maintaining and enforcing a rule that prohibited its employees from wearing any unauthorized adornments; (2) instructing employee Crowder to remove a “Fight for Fifteen” button from his uniform; and (3) telling employee Nevels that such a button was not part of the uniform.

The Company does not dispute that it engaged in the foregoing conduct, but contends that it did not violate Section 8(a)(1) because its public image and food safety concerns were “special circumstances” justifying the infringements. The Board disagreed, and reasonably so. The Company failed to prove that its blanket prohibition of “any type of pin or stickers” was necessary to maintain a public image of a “sparkling clean” restaurant with immaculately groomed and uniformly dressed employees. The Company offered only conclusory testimony to support

its assertions, which were further undercut by the fact that the Company required employees to wear buttons even more conspicuous than “Fight for Fifteen” buttons. Relatedly, the Company failed to prove that its blanket ban of unauthorized adornments was narrowly tailored to address its asserted public image concerns because the Company failed to show that protected buttons like the “Fight for Fifteen” unreasonably interfered with its concerns and the ban made no exception even for buttons of this sort. Thus, the Company failed to justify, on public image grounds, either its blanket ban or its enforcement of that ban against “Fight for Fifteen” buttons.

The Company also failed to prove that food safety concerns justified its infringements on employees’ Section 7 rights. First, there was no apparent, significant difference in the safety of “Fight for Fifteen” buttons and company-required buttons, which belied the Company’s argument that unauthorized adornments were inherently unsafe. Second, the evidence shows that the Company manager who instructed Crowder to remove a “Fight for Fifteen” button from his uniform was not motivated by food safety concerns, detracting further from the Company’s asserted safety rationale. Finally, the Company’s blanket ban on unauthorized adornments was not narrowly tailored to safety concerns because it was not contingent on any safety-related characteristics of adornments and the Company implicitly conceded that at least some adornments were safe.

In sum, the Board reasonably found that the Company failed to prove “special circumstances” to justify its blanket prohibition of unauthorized pins and stickers. Therefore, its rule violates Section 8(a)(1) of the Act, as does its enforcement of that rule against employees Crowder and Nevels.

STANDARD OF REVIEW

The Court will uphold a Board order “if it is reasonable and supported by substantial evidence on the record considered as a whole.” *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003). “Substantial evidence is ‘such relevant evidence that a reasonable mind would accept to support a conclusion.’” *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). “Recognizing the Board’s expertise in labor law, [the Court] will defer to plausible inferences [the Board] draws from the evidence, even if [the Court] might reach a contrary result were [it] deciding the case de novo.” *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 185 (5th Cir. 1998).

The Court’s “deference to the Board’s expertise extends to its findings of fact and application of law.” *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007). Where, as here, the Board’s application of law entails weighing employee rights against managerial interests, the Supreme Court has made clear that the Board’s decision, “if supported by substantial evidence

. . . , must be enforced.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978).

That is because Congress tasked the Board with striking the balance between conflicting interests to effectuate national labor policy, subject to limited judicial review. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (quoting *NLRB v. Truck Drivers Local Union*, 353 U.S. 87, 96 (1957)). Accordingly, this Court has recognized that the Board’s weighing of interests in other cases arising under the Act is entitled to deference unless “arbitrary or unreasonable[.]” *Mobil Expl. & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 243 (5th Cir. 1999); *U.S. Postal Serv. v. NLRB*, 652 F.2d 409, 412 (5th Cir. 1981).

Finally, this Court will defer to the Board’s conclusions of law “if they have a reasonable basis in the law and are not inconsistent with the Act.” *Valmont Indus.*, 244 F.3d at 464.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(1) BY MAINTAINING AND ENFORCING A RULE PROHIBITING EMPLOYEES FROM EXERCISING THEIR RIGHT TO WEAR PROTECTED ADORNMENTS

Section 7 of the Act 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” 29 U.S.C. § 157. Section 8(a)(1) of the Act 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.]” *Id.* § 158(a)(1).

Among employee activities protected by Section 7 is the wearing of adornments such as pins or buttons that bear union insignia or otherwise concern terms and conditions of employment. An employer who prohibits employees from wearing such adornments violates Section 8(a)(1), unless the employer proves “special circumstances” that outweigh the employees’ right to wear the adornments and that its prohibition is narrowly tailored to address those circumstances. Here, the Company admits that it maintained and enforced a rule that prohibited its employees from wearing “any type of pin or stickers,” which applied to adornments protected by Section 7. The Company contends, however, that its rule did not violate Section 8(a)(1) because “special circumstances” justify the infringement of Section 7 rights. But the Board found, reasonably and consistent with precedent, that the Company failed to make this showing.

A. An Employer May Not Prohibit Employees from Wearing Adornments that Concern Terms and Conditions of Employment, Unless the Employer Proves that “Special Circumstances” Outweigh the Employees’ Section 7 Rights

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*, 437 U.S. at 491. Accordingly, it is well established that

Section 7 confers upon employees the right to wear union-related insignia while at work to communicate about self-organization rights or show support for a union.

See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 801, 802 & n.7, 803 (1945);

NLRB v. Floridan Hotel of Tampa, Inc., 318 F.2d 545, 547 (5th Cir. 1963);

HealthBridge Mgmt., LLC v. NLRB, 798 F.3d 1058, 1067 (D.C. Cir. 2015).

Adornments can also serve employees' Section 7 right to publicize "their concerns and grievances pertaining to the employment relation[.]" *Bell-Atl.-Pa.*, 339 NLRB 1084, 1086 (2003), *enforced sub nom. Communications Workers of America, Local 13000 v. NLRB*, 99 F. App'x 233 (D.C. Cir. 2004); *see Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 545 (D.C. Cir. 2016) ("Section 7 . . . protects employees' rights to discuss organization and the terms and conditions of their employment, to criticize or complain about their employer or their conditions of employment, and to enlist the assistance of others in addressing employment matters."), *petition for reh'g en banc filed*, D.C. Cir. Nos. 14-1231, 14-1265 (filed Sept. 12, 2016).

Accordingly, Section 7's protection extends to adornments that are unrelated to a labor organization, but that nonetheless concern employees' terms and conditions of employment. *See, e.g., AT&T*, 362 NLRB No. 105, slip op. at 21–22, 2015 WL 3492100, at *14 (June 2, 2015) ("No on Prop 32" button that opposed

ballot initiative affecting union payroll deductions);⁷ *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 1, 3 n.4, 2016 WL 4582495, at *1, *4 n.4 (Aug. 27, 2016) (T-shirt bearing slogan, “I don’t need a WOW to do my job[,]” where “WOW” referred to company program concerning employee performance and morale); *Mt. Clemens Gen. Hosp.*, 335 NLRB 48, 49 (2001) (button with line drawn through letters “FOT” to represent silent protest of forced overtime), *enforced*, 328 F.3d 837 (6th Cir. 2003).

At times, employees’ exercise of their Section 7 right to wear protected adornments in the workplace conflicts with their employer’s interest in managing its business. *See Republic Aviation*, 324 U.S. at 797–98; *Floridan Hotel*, 318 F.2d at 547. With court approval, the Board has struck a balance between conflicting employee rights and employer interests by adopting a presumption that protected adornments may be worn at any time. *See, e.g., Boch Honda v. NLRB*, 826 F.3d 558, 570 (1st Cir. 2016); *Guard Publ’g Co. v. NLRB*, 571 F.3d 53, 61 (D.C. Cir. 2009). An employer’s prohibition restricting that right violates Section 8(a)(1) of the Act unless the employer establishes “special circumstances” that outweigh

⁷ For this and other recent Board decisions that have been published only as slip opinions, Westlaw’s proprietary pin cite allocation system does not effectively subdivide administrative law judge decisions appended to Board decisions. Thus, we recommend obtaining relevant slip opinions from the Board’s website (<https://www.nlr.gov/cases-decisions/board-decisions>) for ease of reference.

employees' Section 7 rights. *Boch Honda*, 826 F.3d at 570; *Guard Publ'g Co.*, 571 F.3d at 61. The employer must also show that the prohibition is narrowly tailored to address those circumstances without unduly impeding those rights. *See, e.g., Boch Honda*, 826 F.3d at 571; *AT&T*, 362 NLRB No. 105, slip. op. at 4, 2015 WL 3492100, at *5.

B. The Board Reasonably Found that the Company Violated Section 8(a)(1) by Maintaining and Enforcing a Blanket Prohibition of Unauthorized Pins and Stickers

1. The Company's blanket prohibition infringes upon employees' Section 7 rights

Substantial evidence supports the Board's finding that the Company engaged in conduct that infringes upon its employees' Section 7 rights. The Company admitted that it maintains a rule prohibiting employees from wearing unauthorized pins and stickers. (ROA.577–78; ROA.478, 491.) This blanket prohibition applies to adornments pertaining to wages, hours, and other terms and conditions of employment, union activity, and other activity protected by the Act. (ROA.577.) Thus, the Company's maintenance and enforcement of the rule infringes upon its employees' Section 7 rights. *See, e.g., P.S.K. Supermarkets*, 349 NLRB 34, 34–35 (2007) (blanket ban on non-company buttons was unlawful absent “special circumstances”). The Company asserts that this infringement does not ultimately violate Section 8(a)(1) because the prohibition was justified by “special circumstances.” But the Board reasonably rejected this contention.

2. The Company failed to prove a “special circumstances” defense

The “special circumstances” exception is a narrow one, *Quantum Electric, Inc.*, 341 NLRB 1270, 1280 (2004), and the employer bears the burden of proving that it applies, *Guard Publ’g Co.*, 571 F.3d at 61. The employer must show that allowing employees to wear the protected adornments at issue “adversely affected or would adversely affect its business” and that these deleterious effects outweigh the employees’ statutory rights. *Medco*, 364 NLRB No. 115, slip op. at 5, 2016 WL 4582495, at *7.

The Board has made clear that none of the following, standing alone, constitute “special circumstances”:

- An employer’s status as a retail employer. *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1284 n.1 (2001), *enforced in relevant part and remanded*, 334 F.3d 99 (D.C. Cir. 2003); *Albertson’s, Inc.*, 351 NLRB 254, 257 (2007).
- Customers’ exposure to employees’ adornments. *P.S.K. Supermarkets, Inc.*, 349 NLRB at 35; *Meijer, Inc.*, 318 NLRB 50, 50 (1995), *enforced*, 130 F.3d 1209 (6th Cir. 1997).
- An employer’s requirement that employees wear uniforms. *AT&T*, 362 NLRB No. 105, slip op. at 4, 2015 WL 3492100, at *4; *P.S.K. Supermarkets*, 349 NLRB at 35.

- “[Every] retail enterprise’s business interest in ensuring a minimum of distractions to the buying public when in its facility.” *Nordstrom, Inc.*, 264 NLRB 698, 701 (1982).
- The risk that customers might be offended by union insignia or other adornments containing political or religious messages. *See Casino Pauma*, 362 NLRB No. 52, slip op. at 5, 2015 WL 1457679, at *2 (Mar. 31, 2015); *AT&T*, 362 NLRB No. 105, slip op. at 5, 2015 WL 3492100, at *6.

To meet its burden of proving “special circumstances,” the employer need not show “actual harm” by the adornments at issue. *Medco*, 364 NLRB No. 115, slip op. at 5, 2016 WL 4582495, at *6. However, at a minimum, the employer must provide specific, nonspeculative evidence that the adornments would adversely affect its business if worn by employees. *Id.* An employer’s “speculative, conclusory testimony is not sufficient to meet its burden of demonstrating special circumstances sufficient to outweigh employees’ Section 7 rights.” *AT&T*, 362 NLRB No. 105, slip op. at 5, 2015 WL 3492100, at *6; *Medco*, 364 NLRB No. 115, slip op. at 4, 2016 WL 4582495, at *6 (“[A]n employer who presents only generalized speculation or subjective belief about potential disturbance . . . or disruption of operations fails to establish special

circumstances”) (first two alterations in original) (quoting *Danbury HCC*, 360 NLRB 937, 938 & n.5 (2014), *enforced sub nom. HealthBridge*, 798 F.3d 1059).

In assessing prohibitions of any scope, the Board considers whether the employer permits or requires employees to wear adornments that implicate the employer’s asserted concerns as much as the protected adornments prohibited by the employer. Such permission or requirement undercuts the conclusion that the employer’s concerns outweigh employees’ right to wear the prohibited items. *See, e.g., Mt. Clemens Gen. Hosp.*, 328 F.3d at 848 (fact that hospital allowed nurses to wear buttons similar to prohibited button undercut hospital’s assertion that prohibited button would interfere with patient care); *Meijer*, 318 NLRB at 52, 56 (employer’s permission and encouragement of employees’ wearing authorized pins and badges undercut argument that “uniformity and neatness” required banning unauthorized union pins).

Moreover, as indicated above, an employer’s prohibition must be narrowly tailored to the “special circumstances” it serves. *See Boch Honda*, 826 F.3d at 571. Thus, the further the breadth of a prohibition exceeds the scope of the employer’s proven, legitimate concerns, the smaller the likelihood that “special circumstances” justify the prohibition. *See, e.g., Boch Honda*, 362 NLRB No. 83, slip op. at 2, 11, 2015 WL 1956199, at *1, *8 (Apr. 30, 2015) (employer failed to show that public image concerns justified “blanket prohibition” of “insignias or other message

clothing”), *enforced*, 826 F.3d 558. Over-inclusive bans that apply to protected adornments that do not implicate the employer’s asserted “special circumstances” are generally unlawful. *See, e.g., AT&T*, 362 NLRB No. 105, slip op. at 4, 2015 WL 3492100, at *5 (allegedly offensive content of certain adornments did not justify blanket ban that prohibited even inoffensive adornments).

Here, the Company attempted to prove two types of “special circumstances” defenses to justify its blanket ban on all unauthorized pins and stickers: (1) that allowing employees to wear an unauthorized adornment would unreasonably interfere with its public image of a “sparkling clean” restaurant with immaculately groomed and uniformly dressed employees; and (2) that food safety concerns also justified banning unauthorized adornments. But the Board reasonably found that the Company failed to prove either asserted defense.

a. The Company failed to prove a public image justification

An employer may prohibit employees from wearing an adornment that the employer proves would “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.*, 339 NLRB at 1086. An employer must demonstrate both its deliberate cultivation of a particular image and that its prohibition of protected adornments is tailored to protect that image without overly impeding its employees’ rights. *See Boch Honda*, 826 F.3d at 571; *id.* at 573 (the Board “may

reasonably choose to require employers to show why a dress rule is tailored to stamp out those aspects of employee dress that would ‘*unreasonably* interfere’ with the employer’s public image”).

Here, contrary to the Company’s argument (Br. 42, 52–54), the Board gave due attention to the Company’s assertions that its business plan contemplates presenting the public with a consistent image of a “sparkling clean” restaurant with immaculately groomed and uniformly dressed employees. (ROA.580–81.) Noting the restaurants’ glass walls, the Board also considered that adornments worn by employees would likely be visible to customers. (ROA.581.) Nonetheless, the Board reasonably rejected the Company’s public-image based defense as justifying the blanket ban.

i. The Company failed to prove that all unauthorized adornments would unreasonably interfere with its asserted public image

Before the Board, the Company argued that any unauthorized adornment would unreasonably detract from employees’ well-groomed and clean appearance or the restaurants’ “sparkling environment,” customer service, or “team-oriented atmosphere.” (ROA.581–82.) The Board reasonably rejected this argument. To begin, the Company offered only conclusory testimony to show that an unauthorized adornment would necessarily detract from its employees’ well-groomed and clean look. (ROA.582.) The Company’s vice-president of

operations, Robert Lang, Jr., testified that “our uniform is part of our environment, so . . . [an unauthorized button] would be interfering with that image that we project.” (ROA.582; ROA.40, 197.) Lang also testified that an unauthorized button is not normal for the Company’s uniform and, to him, “take[s] away.” (ROA.582; ROA.191–92.) The Board reasonably found this conclusory testimony insufficient. *See Guard Publ’g*, 571 F.3d at 62 (“The company has offered nothing beyond its conclusory claims to support the proposition that [an employee’s] wearing of a green armband or displaying other insignia of union support could reasonably be expected to have an adverse effect on business.”); *Albertson’s, Inc.*, 351 NLRB at 256 & n.9, 257 (rule prohibiting supermarket employees from wearing unauthorized adornments not justified by employer’s general testimony that it “want[ed] [its] employees to have a clean, uniform business appearance so that they’re easily identified” by customers).

The Company continues to argue, in conclusory fashion, that unauthorized adornments would unreasonably interfere with its public image. (Br. 45.) The argument’s apparent premise—that customers would be jarred by any deviation, however benign, from the Company’s uniform standards—is plainly contrary to Board law that neither customer exposure nor a prescribed uniform, standing alone, justifies banning every adornment regardless of size, color, or message. *See, e.g., P.S.K. Supermarkets*, 349 NLRB at 35. As the Board recently explained, “the

pleasure or displeasure of an employer’s customers does not determine the lawfulness of banning employee display of insignia.” *Medco*, 364 NLRB No. 115, slip op. at 4, 2016 WL 4582495, at *6 (quoting *Inland Counties Legal Servs.*, 317 NLRB 941, 941 (1995)). Indeed, “the Board requires more than conjecture about customers’ negative reactions to employees’ Section 7 activity to find special circumstances.” *Id.*

The “Fight for Fifteen” buttons involved in this case also amply demonstrate that the blanket ban is unnecessary to maintain employees’ well-groomed and clean look. Section 7 protected the wearing of these buttons, which supported a movement to increase the minimum wage, because their message relates to wages—a term or condition of employment. (ROA.579 n.2; ROA.26–27.) *See, e.g., AT&T*, 362 NLRB No. 105, slip op. at 21–22, 2015 WL 3492100, at *14. And, the Board reasonably recognized that these buttons were benign: They were “only the size of a quarter” (ROA 581; ROA.313); “did not imply that the [Company] was dishonest” or “cast aspersions of any sort” (ROA 580; ROA.313); *cf. Pathmark Stores*, 342 NLRB 378, 378–79 (2004) (grocery store operator could prohibit employees from wearing clothing stating, “Don’t Cheat About the Meat!” because customers could reasonably believe that the employer was cheating them in meat sales); and were not obscene or vulgar (ROA 580; ROA.313); *cf. Leiser Construction, LLC*, 349 NLRB 413, 415 (2007) (employer lawfully prohibited

sticker that was “unquestionably vulgar and obscene”). In fact, employee Amanda Healy testified that she wore a “Fight for Fifteen” button for an entire shift on April 16, 2015, during which neither supervisors nor customers commented on the button. (ROA.31.) Nevertheless, these benign buttons, absent any evidence that they would render an employee’s appearance distracting or unkempt, fell victim to the Company’s blanket prohibition. *See Meyer Waste Sys.*, 322 NLRB 244, 244, 247 (1996) (finding it unreasonable to conclude that a “small, inconspicuous pin” would interfere with public image of employer who supplied employees with professional uniforms); *Nordstrom*, 264 NLRB at 701–02 (employer failed to demonstrate that “small, tasteful, and inconspicuous” button unreasonably interfered with professional, fashionable public image); *cf. Meijer*, 318 NLRB at 57 (upholding prohibition of hats and coats bearing union’s name or logo because the logo or name on these items was larger and more obtrusive than “neat and discrete” union pins); *United Parcel Service*, 195 NLRB 441, 443–44, 450 (1972) (employer, who permitted uniformed employees to wear inconspicuous union button, could lawfully maintain limited prohibition of 2-1/2-inch button that concerned employee’s campaign for union office because button was conspicuous and deprivation of employee rights was small).

Moreover, the Board reasonably found that the company-issued buttons weakened the Company’s argument that any other adornments would unreasonably

detract from its employees' well-groomed and clean look. (ROA.581.) Substantial evidence supports the inference that the Company's buttons would detract from this look at least as much as a "Fight for Fifteen" button. Lang testified that the Company's uniform is "very clean, very simple, and to add anything to it would be distracting." (ROA.58.) Yet the Company at times augmented the uniform with buttons that were 2 to 3 times larger in diameter than a quarter-sized "Fight for Fifteen" button and therefore "significantly more conspicuous[.]" (ROA.581; ROA.244, 272, 313, RE 11 (ROA.456), RE 12 (ROA.466).)

Additional company testimony further supports the Board's finding of the relative conspicuousness of the Company's buttons. Lang testified that those buttons were intended "to raise awareness to . . . customers that something different is going on" (ROA.148), and that the Company puts information about the In-N-Out Foundation on a button "to make it more visible to . . . customers" (ROA.181). Most telling, however, is Lang's response when asked why the Company's required buttons did not distract from the otherwise clean and simple employee uniform: "Well, the difference is that usually it contains . . . a logo or some message . . . that we want out there." (ROA.182–83.) Lang's answer does not show the Company's buttons to be any more consistent with the well-groomed and clean look of its employees than "Fight for Fifteen" buttons or other benign unauthorized adornments. Rather, it focuses on the fact that the Company has not

endorsed the messages on unauthorized adornments. But an employer has no legitimate interest in suppressing its employees' messages concerning their terms and conditions of employment, *see, e.g., Medco*, 364 NLRB No. 115, slip op. at 5, 2016 WL 4582495, at *7, and the Company does not argue otherwise.

Based on Lang's testimony and the conspicuous company-issued buttons themselves, the Board reasonably found that the company-issued buttons undercut the proposition that a total ban on other pins and stickers was necessary to employees' well-groomed and clean look. *See Meijer*, 318 NLRB at 50, 52, 54, 56 (ban on unauthorized adornments unlawful notwithstanding employer's contention that ban was necessary to make its uniformed employees "uniformly recognizable" and "to meet . . . customers' expectations of neatness and cleanliness[,] in part because company encouraged employees to wear adornments that were "at least as inconsistent" with the employer's claimed justification as prohibited adornments).

Looking beyond the appearance of employees specifically, the Board reasonably rejected the proposition that an unauthorized pin would necessarily detract from the "very clean environment" of the Company's restaurants. (ROA.582.) There was no basis in the record to find that an unauthorized adornment would necessarily be less hygienic than the company-issued buttons or would otherwise dull the restaurants' shine. (ROA.582.) Indeed, when asked how unauthorized buttons would harm the Company's "sparkling environment," Lang

offered only the blanket assertion that such buttons “would be interfering[.]” (ROA.582; ROA.197.) He utterly failed to articulate how a benign adornment like the “Fight for Fifteen” button would unreasonably interfere with the Company’s desired aesthetic. *See Guard Publ’g*, 571 F.3d at 62.

Next, the Board reasonably found that the record fails to establish that an unauthorized adornment would necessarily harm the Company’s customer service. (ROA.581.) Specifically, “[t]he record reveals no reason to believe that wearing a button would slow an employee down or otherwise impair the employee’s ability to serve customers.” (ROA.581.) The Board further noted that the Company “has established no reason why wearing a button would make an employee less friendly or less attentive to a customer’s needs.” (ROA.581.) On this basis, the Board reasonably found that “[t]he [Company]’s focus on customer service . . . has no apparent relevance.”⁸ (ROA.581.) *See Medco*, 364 NLRB No. 115, slip op. at 6, 2016 WL 4582495, at *8 (absent proof that clothing criticizing employer program adversely affected or would adversely affect the employer’s relationship

⁸ The Company misinterprets the Board as asserting that an adornment’s harm to customer service would be irrelevant as a matter of law. (Br. 52.) But the Company’s criticism is misplaced. The Board simply found no evidence that a prohibited button would necessarily harm the Company’s customer service. (ROA.581.)

with customers, infringement on employee's right to wear such clothing was not justified).

Finally, the Company failed to show that its blanket ban was necessary to maintain its "team-oriented atmosphere." (ROA.582–83). The Board reasonably found it not "self-evident how wearing a small button would affect teamwork in any way." (ROA.583.) And the Company failed to meet its burden of proving the contrary. Moreover, as the Board noted, the Company defined "team-oriented atmosphere" as an atmosphere that fosters goal-setting and communications. (ROA.582; ROA.482.) However, the Company offered no evidence to explain how every unauthorized adornment would unreasonably interfere with the team-related goal-setting and communications that the Company values. (ROA.583.) When Lang was asked how an unauthorized button would change the Company's "team-oriented atmosphere," he answered, "Well, if everybody was allowed to wear what they wanted, . . . where would the end be." (ROA.582; ROA.197–98.) The Board reasonably found Lang's testimony insufficient to satisfy the Company's burden of proof. *See Guard Publ'g*, 571 F.3d at 62. In fact, his slippery-slope argument about where "the end" would be is unavailing because the Company could prohibit problematic items without banning every single unauthorized pin and sticker. (ROA.583.)

Before the Court, the Company argues that the Board ignored evidence that allowing employees to choose adornments for their uniform would undermine its team-oriented atmosphere and (presumably thereby) unreasonably interfere with the Company's public image. (Br. 53–54.) But the Company does not identify any evidence the Board ignored. The Company also claims that allowing any employee-chosen button would “place the focus on the individual, rather than on the team.” (Br. 46.) The Company offered no evidence to show that a neat and discreet adornment like a “Fight for Fifteen” button would necessarily detract from its “focus . . . on the team.” More importantly, the Company failed to establish any link between such detracting and any deleterious effect on the Company's business. *See Medco*, 364 NLRB No. 115, slip op. at 5, 2016 WL 4582495, at *7.

This lack is symptomatic of the Company's broader failure to prove that unauthorized buttons would necessarily harm its public image. Rather than address this failure, the Company accuses the Board of ignoring alleged ingredients of its public image. Specifically, the Company asserts that the Board failed to pay sufficient regard to various characteristics that set it apart from its competition, such as its avoidance of the franchisor-franchisee business model. (Br. 52–53.) But the Board explained that the Company's lack of franchisees is irrelevant here (ROA.581), and the Company fails to show how its assertions bolster its insufficient showing of unreasonable interference. Considering the lack

of evidence to support the Company’s fundamental argument that any and every unauthorized adornment would unreasonably interfere with its public image, the Board reasonably rejected the argument.

ii. The Company failed to prove that its blanket adornment ban is narrowly tailored to public image concerns so as not to unduly infringe on its employees’ Section 7 rights

The Company’s rule banned every unauthorized adornment, no matter how discreet or benign. (ROA.577–78; ROA.491.) Accordingly, it was only reasonable for the Board to find that the Company’s blanket ban of unauthorized adornments was not “narrowly tailored” to its asserted public-image concerns. (ROA.581–82.) First, the ban was not narrowly tailored to maintaining the well-groomed and clean look of the Company’s employees. As demonstrated above, *supra* at 20–25, the Board reasonably rejected the argument that all unauthorized adornments would unreasonably detract from that look (ROA.580–82), yet the blanket ban made no exception for such adornments. Second, the Company’s rule was not narrowly tailored to maintaining a “very clean environment” because, as discussed above, *supra* at 25–26, the Board reasonably inferred that not all unauthorized adornments posed hygiene concerns, yet the Company did not prohibit only unhygienic adornments or require employees to disinfect

adornments.⁹ (ROA.582.) Similarly, the Company failed to show that an unauthorized adornment would necessarily harm customer service, *see supra* at 26–27, and its blanket ban made no exception for buttons that would not. (ROA.581.) Finally, as discussed above, *supra* at 27–28, the Company failed to show that every unauthorized adornment would interfere with its “team-oriented atmosphere” (ROA.582–83), but its ban was not limited to any adornments that would so interfere.

The Company argues that its blanket ban is as narrowly tailored as it can be because its employees are always visible to customers. (Br. 58–59.) Since customer exposure, without more, is not a “special circumstance,” *P.S.K. Supermarkets, Inc.*, 349 NLRB at 35, the Company is clearly wrong. Additionally, in making the foregoing argument, the Company mistakenly suggests that the Board endorsed a similar blanket ban in *United Parcel Service*, 195 NLRB 441. But the employer in that case maintained no blanket ban. In fact, the employer permitted employees to wear inconspicuous union buttons. *Id.* at 443. In contrast, when the Board has been confronted with blanket bans similar to the Company’s, the Board has deemed them to be unlawful notwithstanding asserted image

⁹ The Board interpreted the Company’s goal of a “sparkling environment” to mean a “very clean environment.” (ROA.582.) But the Board also noted that if the Company meant something different, “presumably it could have narrowly tailored its prohibition to address such a concern.” (ROA.582.) Yet it did not do so.

concerns. *See, e.g., Boch Honda*, 362 NLRB No. 83, slip op. at 2, 11, 2015 WL 1956199, at *2, *8 (prohibition of all “insignias or other message clothing”); *P.S.K. Supermarkets*, 349 NLRB at 34–35 (prohibition of all “pins or buttons other than those issued by [the employer] to promote [its] programs”); *Meijer*, 318 NLRB at 52, 56 (prohibition of all unauthorized items). In sum, the Company’s blanket prohibition was not narrowly tailored to the Company’s asserted public image concerns.

iii. The Board’s findings are consistent with precedent

The Board’s findings that public image concerns did not justify the Company’s blanket ban is consistent with this Court’s and the Board’s precedent. In contrast, the precedent on which the Company relies is distinguishable and fails to support its asserted public image justification.

This Court has enforced a Board order finding unlawful precisely the type of broad ban the Company maintained and enforced here. In *Floridan Hotel*, a hotel operator promulgated a rule “that no badges of any kind will be worn by any employee so that they may be seen by any customer or guest.” 318 F.2d at 546. The hotel enforced this rule to prevent, *inter alia*, public-facing employees in uniform from wearing small union pins. *Id.* This Court agreed with the Board that the rule was unlawful. *Id.* at 547–48. In so holding, the Court noted an absence of evidence that the pins “detracted from the dignity of the business operation or of

the employees wearing them[,]” that customers had complained, that there was “any diminution in the business of the hotel[,]” or that employee friction “might interfere with normal operational and disciplinary procedures[.]” *Id.* at 548. Thus, like the Company here, the hotel failed to prove any legitimate justification for its blanket ban or its enforcement against particular protected adornments.

The Company attempts to distinguish *Floridan Hotel* by suggesting that the Court found the employer’s ban unlawful because the ban applied to non-uniformed in addition to uniformed employees. (Br. 41.) The Company misreads the decision. As just explained, the Court concluded that the ban was unlawful because, in essence, there was no evidence to establish that the button would damage the employer’s business. *See Floridan Hotel*, 318 F.2d at 548. “Thus, whether a dif[f]erent case might be presented as to employees in uniform and those not in uniform [was] not presented.” *Id.* Likewise, here, the Company failed to present evidence justifying its blanket ban or its enforcement against “Fight for Fifteen” buttons even though it maintained a uniform policy.

The Board’s rejection of the Company’s asserted public image defense is firmly grounded in Board precedent as well. A particularly salient example is *Meijer*, 318 NLRB 50. The employer in *Meijer*, like the Company, maintained a detailed appearance policy and prohibited uniformed employees with customer contact from wearing unauthorized adornments. *Id.* at 52–53. Invoking this

policy, it prohibited employees from wearing union pins that the Board found to be “small, neat, and not provocative.” *Id.* at 52–53, 56. The employer argued that its ban was “necessary to make its employees uniformly recognizable as representatives of the [employer] . . . and to meet the customers’ expectations of neatness and cleanliness.” *Id.* at 50 (internal quotation marks omitted). However, the employer permitted or encouraged employees to wear certain other adornments, *id.* at 52, 54, 56, which the Board found to be “at least as inconsistent” with the employer’s claimed justification as the union pins the employer prohibited, *id.* at 56. Just as it did here, the Board reasonably rejected the employer’s conclusory assertions about the necessity of a blanket ban, which its under-inclusive scope belied. *Id.*

The Company erroneously asserts that the Board arbitrarily departed from its decision endorsing an employer’s ban of a particular button in *W San Diego* (“*W*”), 348 NLRB 372 (2006). (Br. 41–42, 46–52.) The Board has repeatedly emphasized that *W* was premised on “narrow factual circumstances.” *Boch Honda*, 362 NLRB No. 83, slip op. at 2 n.6, 2015 WL 1956199, at *2 n.6; *accord Grill Concepts Servs.*, 364 NLRB No. 36, slip op. at 2, 2016 WL 3568238, at *2 (June 30, 2016), *petition for review filed*, D.C. Cir. Nos. 16-1238 & 16-1287 (filed July 11, 2016). In *W*, a hotel-employer proved that it had cultivated an “illusory, otherworld setting and escapist atmosphere” for guests referred to as

“Wonderland,” where “guests can fulfill their ‘fantasies and desires’ and get ‘whatever [they] want whenever [they] want it.’” 348 NLRB at 372, 380. In furtherance of this special atmosphere, the hotel commissioned special all-black uniforms, which employees, who were referred to as “talent” or “cast members,” were to adorn only with a small “W” pin. *Id.* at 372, 378. Under these circumstances, the Board found that the hotel lawfully prohibited employees working in areas with guest contact from wearing a 2-inch square button reading, “JUSTICE NOW! JUSTICE AHORA! H.E.R.E. LOCAL 30” in blue or red letters on yellow background. *Id.* at 373. In the Board’s view, this button, which was “obtrusive in size and color” and distinguishable from smaller adornments with less controversial messages, would have interfered with the hotel’s use of a professionally-designed uniform “to create a special atmosphere for hotel customers.” *Id.* at 373, 380.

Here, the Board sufficiently explained why *W* does not apply: The Company did not claim to cultivate a “Wonderland”-type “alternate reality” as its public image, but rather a clean restaurant with well-groomed and uniformly dressed employees. (ROA.580–81, 583.) This difference renders *W* inapposite because the “Wonderland” atmosphere was a necessary predicate for the Board’s evaluation of the lawfulness of banning a particular union button. *See* 348 NLRB at 373. The effect of a union button “obtrusive in size and color” on

“Wonderland,” *id.* at 380, says nothing about the necessity of the Company’s blanket ban to maintaining its distinct image.¹⁰

Notwithstanding the Company’s assertions to the contrary (Br. 54–55), the Board’s assessment of the hotel-issued “W” pins and the Company’s buttons is logically consistent. The Board found that the “W” pin “was consistent with the special atmosphere the [hotel] sought to create.” 348 NLRB at 373. But here, as explained above, *supra* at 23–25, the Board reasonably found that the “significantly more conspicuous” company-issued buttons detracted from the well-groomed and clean appearance of its employees at least as much as small “Fight for Fifteen” buttons. (ROA.581.)

Other precedent on which the Company relies does not further its cause. The Company misplaces its reliance (Br. 40) on this Court’s decision in *Davison-Paxon Co. v. NLRB*, 462 F.2d 364 (5th Cir. 1972). There, the Court held that a

¹⁰ The Company argues that the Board arbitrarily failed to distinguish *W* at all because it disavowed parts of the judge’s discussion of that case. (Br. 50.) In doing so, the Company appears to erroneously rely on the Board’s disavowal of the judge’s discussion of “the scope of what might constitute a legitimate public image justification in circumstances outside the boundaries of this case (business objective of achieving ‘a sparkling clean restaurant,’ as opposed to ‘conjur[ing] an alternate reality,’ not ‘special enough’ justification for an insignia rule in the fast food industry at large).” (ROA.574 n.2.) Opining on matters outside the boundaries of this case, however, is entirely different from assessing the facts of this case against *W* and other precedent, a task that the Board sufficiently performed here.

department store with a concern about its employees' appearance justifiably banned union-distributed buttons that were not "neat, small, and inconspicuous." *Id.* at 368–69, 371. Rather, the buttons were "unfashionable and in poor taste." *Id.* at 368. Additionally, the buttons were shown to "create[] a danger of disruption on the selling floor" because of "animosity between union and antiunion factions at the store" that was "increased to a great extent by the method employed by the [u]nion to distribute the buttons[.]" *Id.* at 369, 371. None of these facts are present here. Also, unlike the Company, the department store maintained no blanket prohibition of unauthorized adornments. In fact, it had previously respected its employees' statutory right to wear a small union button. *See id.* at 365. Thus, rather than supporting the Company's attempted defense, *Davison-Paxon* emphasizes the Company's lack of evidence and the unduly broad scope of its ban.

The Company's reliance (Br. 45–46) on *United Parcel Service v. NLRB* ("UPS"), 41 F.3d 1068 (6th Cir. 1994), is also misguided because that decision is not controlling here. In the underlying Board decision, the Board had found that a "small, neat, inconspicuous" pin "free of any provocative message or language" could not "reasonably be deemed to interfere" with the employer's "neatly uniformed driver" image, in part because the employer permitted employees to wear other adornments of equal or greater size. 312 NLRB 596, 597 (1993). In denying enforcement, the Sixth Circuit invoked its then-extant rule "that where an

employer enforces a policy that its employees may only wear authorized uniforms in a consistent and nondiscriminatory fashion and where those employees have contact with the public, a ‘special circumstance’ exists as a matter of law which justifies the banning of union buttons.” 41 F.3d at 1072–73. The Sixth Circuit subsequently disavowed this rule. *See Meijer*, 130 F.3d at 1215–17.¹¹ In any event, the rule conflicts with this Court’s decision in *Floridan Hotel*. *See* 318 F.2d at 546, 548 (answering negatively, on the facts of the case, the question whether “an employer *with no discriminatory purpose* [may] prohibit the wearing of pins indicating union membership or status by employee members in regular and frequent contact with . . . customers”) (emphasis added). Thus, the Sixth Circuit’s decision in *UPS* is not controlling here.

In sum, the Board’s reasonable rejection of the Company’s asserted “public image” defense is consistent with this Court’s and the Board’s precedent. The Company’s criticism stating otherwise, and its citation (Br. 50–52) to decisions like *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 362–63 (5th Cir. 1981) (en banc) (refusing to read a “brief and ambiguous opinion” as overruling an established principle of labor law), is therefore unfounded.

¹¹ In *Meijer*, the Sixth Circuit also characterized its decision in *UPS* as relying on a collective bargaining agreement in effect between the employer and the relevant union that gave the employer the right to promulgate and enforce appearance standards. 130 F.3d at 1215.

b. The Company failed to prove a food safety justification

Safety concerns may constitute “special circumstances.” *Bell-Atl.-Pa.*, 339 NLRB at 1086. Here, the Company argues that unauthorized buttons would compromise food safety in its restaurants because they could fall off without an employee noticing. (Br. 55–58.) But the Board reasonably found that the Company failed to show that safety concerns justified the Company’s blanket ban. (ROA.582, 584.)

First, the Company’s buttons undermined its argument that all buttons presented food safety concerns. (ROA.582, 584.) While the Company asserts that it can vouch for the quality of its authorized buttons when compared to unauthorized ones (Br. 58), the Board showed that assertion to be meaningless. The judge inspected a “Fight for Fifteen” button and the Company buttons (rather than the photocopies thereof that are in the record (at ROA.313, RE 11 (ROA.456), RE 12 (ROA.466))), and discerned “no apparent, significant difference in safety” between them. (ROA.584.) *See Meyer Waste Sys.*, 322 NLRB at 248 (rejecting safety-based rationale for prohibiting wearing of union button on hats where company allowed company-provided buttons to be worn).

The Company challenges this finding with assertions about the attachment mechanism and weight of a “Fight for Fifteen” button. (Br. 57–58.) But the Company introduced no record evidence to support these assertions. In fact, when

Lang was asked whether there is “anything about [the Company’s] buttons that would make them less likely to become detached from a uniform than . . . an ordinary pin[,]” he provided this unconvincing response: “Well, I -- I’m not an expert on these designs, so I know that this particular design works well for us. I’ve never seen one fall off.” (ROA.180.) The only relevant distinction shown in the record is that “Fight for Fifteen” buttons are smaller than the company-issued buttons. (ROA.581; ROA.313, RE 11 (ROA.456), RE 12 (ROA.466).) On this record, it was reasonable for the Board to infer that unauthorized buttons would not necessarily pose a greater danger than the company-issued buttons, which the Company deemed sufficiently safe.

The Company’s endorsement of the very type of adornment it castigates as unsafe shows why the cases upon which the Company relies (Br. 55–58) are inapposite. In *Consolidated Biscuit Co.*, 346 NLRB 1175 (2006), *enforced*, 301 F. App’x 411 (6th Cir. 2008), the Board found that an employer lawfully told employees who handled packaged food to wash off union slogans they had written on their arms with magic marker. *Id.* at 1176–77. The decision makes no indication that the employer allowed or required employees to write any other magic-marker messages on their skin. Likewise, the hotel in *W* lawfully prohibited employees from wearing union stickers in kitchen areas where the stickers were loosely attached by adhesive to employees’ clothing and “[a]t least one sticker was

already starting to peel off after only a few hours.” 348 NLRB at 375. There was no indication that the hotel allowed or required kitchen employees to wear other stickers. Thus, unlike here, in neither of the Company’s cases did the employer require its employees to wear the very type of adornment that it asserts to be a safety risk.

The Board’s rejection of the Company’s safety-based defense is further supported by the fact that safety concerns were not on Palmini’s mind when he ordered Crowder to remove his “Fight for Fifteen” button. Neither Palmini’s testimony nor Moore’s indicated that either manager made an effort to examine the button before Palmini told Crowder to remove it. (ROA.584; ROA 243–45, 270–72.) Thus, the Board reasonably found that Palmini was not motivated by safety concerns when he made that request. (ROA.584.) The managers’ lack of concern for safety with respect to the “Fight for Fifteen” button supports the Board’s conclusion that the Company failed to demonstrate that an unauthorized adornment would inevitably pose a greater danger than company-issued buttons. *Cf. Boch Honda*, 826 F.3d at 576 (“[T]he Board supportably found that the safety and damage prevention rationales for the sweeping ban on pins were ‘post hoc invention[s].’”) (alteration in original).

Finally, the Board reasonably found that the Company’s rule prohibiting all pins and stickers was not narrowly tailored to safety concerns. (ROA.582, 584.)

Although, as the Board noted, the Company presented testimony that “an [employee-chosen] button *potentially* could affect food safety” (ROA.582; ROA.197), the Board reasonably inferred that “the potential danger would depend on the characteristics and cleanliness of the particular button” (ROA.582). But the Company “has not limited its ban to any particular subset of buttons which might pose a particular danger but instead has prohibited all [employee-chosen] buttons.” (ROA.582.) In other words, the rule bans all pins and stickers “without regard to their safety” and is therefore not narrowly tailored to safety concerns. (ROA.584.)

C. The Company Violated Section 8(a)(1) by Prohibiting Employees Crowder and Nevels from Wearing “Fight for Fifteen” Buttons

Substantial evidence supports the Board’s finding that the Company further interfered with its employees’ Section 7 rights by enforcing its rule against “Fight for Fifteen” buttons. The Company stipulated, and testimony showed, that Store Manager Nick Palmini instructed employee Crowder to remove his “Fight for Fifteen” button from his uniform (ROA.584; ROA.242–43, 270–71, 478) and that manager Daniel Moore told employee Nevels that such a button was not part of the uniform (ROA.574 n.2; ROA.269, 478). And, as the discussion above makes clear, the Company has not demonstrated that “special circumstances” justified prohibiting “Fight for Fifteen” buttons. Thus, the Company violated Section 8(a)(1) when Palmini instructed Crowder to remove such a button from his uniform. *See, e.g., Medco*, 364 NLRB No. 115, slip op. at 1, 2016 WL 4582495, at

*1. It likewise violated Section 8(a)(1) when Moore told Nevels that such a button was not part of the uniform, after Nevels asked Moore if he could wear it, because “an employee would reasonably infer from that statement that he was being told he could not wear the button[.]” (ROA.574 n.2.) *See Comcast Cablevision of Philadelphia, L.P.*, 313 NLRB 220, 220 n.3 (1993) (employer violated Section 8(a)(1) by telling employees that buttons violated employer’s uniform policy and then asking, rhetorically, if they thought they should nevertheless wear them). Thus, the Company’s specific enforcement of its blanket ban against “Fight for Fifteen” buttons were additional violations of Section 8(a)(1).

* * *

Finally, the Company attempts to distract from its lack of evidence to support its asserted “special circumstances” by accusing the Board of improperly rejecting the Company’s business judgments in favor of its own, which the Company criticizes as lacking in comprehension of employer-customer relations. (Br. 36.) This is a flavor of argument that the Supreme Court rejected almost 50 years ago in *Beth Israel*, 437 U.S. 483. There, a hospital-employer criticized the Board’s conclusion that solicitation in the hospital’s cafeteria was unlikely to disrupt patient care as “essentially a medical judgment outside of the Board’s area of expertise,” such that “the Board’s decision is not entitled to deference.” *Id.* at 500. The Court rejected that argument as “fundamentally misconceiv[ing] the

institutional role of the Board.” *Id.* Even though the Board is not expert in any of a host of “varied and specialized business enterprises over which the Act confers jurisdiction[,]” the Board “is expert in federal national labor relations policy,” and it is the Board, not the industries with which it interacts, that are statutorily vested with responsibility to develop that policy. *Id.* at 501. The Court also cautioned that the employer’s “assessment of the need for a particular practice might overcompensate its goals, and give too little weight to employee organizational interests.” *Id.*

Notwithstanding the Company’s suggestions to the contrary, the Board reasonably exercised its “difficult and delicate responsibility” to balance conflicting interests here. *Id.* at 501. As discussed above, the Company has failed to show that every unauthorized adornment would unreasonably interfere with a public image it established through appearance rules for its employees or with food safety. *A fortiori*, the Company has not proven that any deleterious effects of protected adornments outweigh employees’ Section 7 right to wear them.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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August 2017

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

IN-N-OUT BURGER, INC.	:
	:
Petitioner/Cross-Respondent	:
	: Case No. 17-60241
v.	:
	: Board Case No.
NATIONAL LABOR RELATIONS BOARD	: 16-CA-156147
	:
Respondent/Cross-Petitioner	:

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all 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, D.C.
this 18th day August, 2017

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	:
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 9,677 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, D.C.
this 18th day of August, 2017

STATUTORY ADDENDUM
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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have 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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged

before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.