United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 7, 2017

TO: Garey E. Lindsay, Regional Director
Region 9

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Toyota Motor Manufacturing, Kentucky, Inc.
Case 09-CA-186341

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The Region submitted this case for advice on whether the Employer violated Section 8(a)(1) of the Act by denying an employee the right to display union insignia while working in an allegedly dangerous work area. We conclude that the Employer violated the Act because this curtailment of Section 7 rights is not supported by a special circumstance narrowly tailored to legitimate safety concerns.

FACTS

The Employer operates a car manufacturing plant with a regular workforce of approximately 10,000 employees. The Employer divides the bulk of this workforce into three categories: team members, team leaders, and group leaders. Team members are statutory employees who serve various labor functions throughout the plant. Team leaders train new team members on work processes, perform work processes when team members are absent, and respond to safety and quality issues assigned to their respective teams. They lack supervisory authority. Group leaders are first-level supervisors to team members and team leaders. The plant employs several hundred group leaders. In addition to its normal workforce, the Employer hires contractors, who also work throughout the plant.

The Employer maintains a dress code policy ("high-visibility clothing policy") that requires individuals to wear high-visibility clothing while they are in the conveyance or docking areas of the plant. Approximately 800 team members work in these areas. The Employer states that it created this policy in response to an accident in the conveyance area that involved a team member being hit by a forklift. Forklifts and tuggers—automated guided carts or vehicles that transport parts through the facility—are operated in both the conveyance and docking areas.

As written, the high-visibility policy requires all employees, contractors, visitors, and others to wear "a reflective safety vest or other Safety [Department] approved high visibility clothing in lime-yellow or bright-orange." It further dictates that high-visibility clothing cannot be altered in a way that diminishes its high-visibility nature or creates distractions. The rule also states that "any non-reflective markings, names, or logos larger in size than a credit card will not be allowed," but the Employer states that it enforces the policy to forbid *any* marking larger than the size of a credit card. According to the Employer, when an individual wears a noncompliant shirt, the individual is supposed to wear an Employer-supplied high-visibility vest over the shirt.

The Employer has created one exception to its size limit on shirt markings: team leaders are allowed to wear high-visibility shirts that say "TEAM LEADER" in large, reflective text across the upper back.[1] The Employer claims that it permits this exception because of the need to quickly identify team leaders for normal work functions as well as emergency situations. To the latter point, the Employer states that team leaders are "first responders who report to the scene and coordinate with managers and medical personnel to assist the injured." The Employer does not contend or present evidence indicating that team leaders have any special training in first aid or safety procedures.

Applying its interpretation of the high-visibility clothing policy, the Employer found a team member's lime-yellow, high-visibility shirt that has "UAW" written across the left breast to be noncompliant. The writing is larger than the size of a credit card, as each letter is approximately three inches high and two inches wide. The lettering is composed of a silver-colored reflective material. Each time the team member has worn this shirt in the conveyance or dock area, a team leader or group leader has told [redacted] to cover it with a reflective vest. The Employer contends that these restrictions are warranted on safety grounds because the "UAW" lettering is large enough to distract employees, who would try to read it; the lettering is large enough to diminish the high-visibility nature of the shirt; and the lettering would hurt the Employer's ability to respond to emergency situations because it would impair the ability to quickly identify team leaders, whose high-visibility shirts have large lettering.

[1] The Employer claims that the material is reflective, but photographs of the shirts suggest otherwise.

ACTION

We conclude that the Employer violated the Act when it curtailed the team member's Section 7 right to display union insignia because it has not established a special circumstance to justify the restriction.

The Board and courts have long recognized that employees have a Section 7 right to display union insignia at work.[2] This includes the right to wear pro-union clothing.[3] An employer may only restrict wearing union- or labor-related clothing or insignia if "special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety."[4] The burden is on the employer to prove the existence of special circumstances that would justify a restriction on employee statutory rights.[5]

When an employer claims a special circumstance, "the Board examines the conditions in the workplace to determine if there is a showing that the circumstances necessitate the curtailment."[6] Neither a uniform policy nor a dress code, in itself, establishes special circumstances.[7] "Rather, the entire circumstances of a particular

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[2] *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–04 (1945).

[3] *See Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB 170, 171 (2011) (finding unlawful employer's dress code that prohibited t-shirt with slogan criticizing employer's incentive policy), *enforced in part and remanded*, 701 F.3d 710, 714-15 (D.C. Cir. 2012), *on remand*, 364 NLRB No. 115 (Aug. 27, 2016); *Goodyear Tire & Rubber Co.*, 357 NLRB 337, 337 n.1 (2011) (affirming that pro-union t-shirt with the word "scab" on it was protected).

[4] *Kendall Co.*, 267 NLRB 963, 965 (1983) (citing *Mayrath Co.*, 132 NLRB 1628, 1629-30 (1961), *enforced in relevant part*, 319 F.2d 424, 426-27 (7th Cir. 1963); *Andrews Wire Corp.*, 189 NLRB 108, 109 (1971), *aff'd mem. per curiam*, 1971 WL 2996 (4th Cir. 1971)).

[5] *See, e.g.*, *P.S.K. Supermarkets*, 349 NLRB 34, 34 (2007).

[6] *Albis Plastics*, 335 NLRB 923, 923 (2001), *enforced*, 67 F. App'x 253 (5th Cir. 2003).

[7] *E.g.*, *P.S.K. Supermarkets*, 349 NLRB at 35 (finding grocery store that required employees to wear company-provided uniforms unlawfully banned union buttons); *Meijer, Inc.*, 318 NLRB 50, 56-57 (1995), *enforced*, 130 F.3d 1209 (6th Cir. 1997).

situation must be examined to balance the potentially conflicting interests of an employee's right to display union insignia and an employer's right to limit or prohibit such display."[8] The employer must support its argument beyond "[g]eneral, speculative, isolated or conclus[or]y evidence."[9] When evidence sufficiently demonstrates that "curtailing the employees' right to display union insignia is necessary to its safety objectives, the Board will dismiss allegations that the ban is unlawful."[10]

Here, we assume, without deciding, that the Employer's high-visibility shirt policy is based on legitimate safety concerns for individuals in its conveyance and dock areas. These areas involve a lot of movement between individuals and machinery, including forklifts and tuggers. Indeed, the Employer asserts that its high-visibility clothing policy was prompted by an incident in which an employee was hit by a forklift. Additionally, the Union does not contend that the high-visibility policy is facially unlawful or that the Employer has no legitimate safety concerns with respect to the conveyance and dock areas.

The Employer, however, has failed to justify its particular restriction on the team member's high-visibility "UAW" shirt. We reach this conclusion by examining the Employer's disparate enforcement of the high-visibility clothing policy and its speculative, contradictory, and/or unconvincing arguments that (1) the "UAW" lettering is a distraction; (2) the "UAW" lettering diminishes the high-visibility nature of the shirt; (3) the "UAW" lettering impacts the Employer's ability to respond to emergency situations; and (4) the curtailment is justified because it is merely a "partial" restriction, i.e., it only bars union insignia larger than a credit card and only in conveyance or dock areas.

As a preliminary matter, the Employer cannot demonstrate that special circumstances exist based on safety concerns where it has disparately enforced its policy.[11] As stated above, the Employer has cited its high-visibility clothing policy

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[8] *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982).

[9] *Goodyear*, 357 NLRB at 341-42 (internal citations omitted) (finding that employer's ban on employees wearing shirt with the word "scab" on it was unlawful where any disruption was purely speculative).

[10] *Albis Plastics*, 335 NLRB at 924.

[11] *Stabilus, Inc.*, 355 NLRB 836, 838 (2010) (holding that, even if it justified its policy under the special circumstances test, the employer "nonetheless acted unlawfully by

when ordering the team member wearing [redacted] "UAW" shirt to cover it with a high-visibility vest and keep it buttoned. By comparison, however, there are numerous examples in which the Employer has applied its policy less stringently to other workers, including team members, contractors, and team leaders. First, there is evidence that a group of workers in the conveyance and dock areas regularly wear white, non-high-visibility work aprons without any high-visibility covering. Second, there is evidence that on several occasions team leaders have permitted team members to wear high-visibility vests *unbuttoned* over noncompliant shirts, thus allowing a large portion of the noncompliant shirt to remain visible. Third, there is evidence that the Employer has allowed contractors to wear shirts with any sized logo as long as the shirt itself is in a high-visibility color. Fourth, there is evidence that some team leaders have periodically and/or regularly worn high-visibility shirts with noncompliant logos.[12] These team leaders were not required to wear high-visibility vests over the noncompliant shirts. Such disparate enforcement of the Employer's own policy is alone sufficient to undermine the Employer's special circumstances defense.[13]

Even without evidence of disparate enforcement, we conclude that the Employer has failed to meet its burden to demonstrate special circumstances that justify its actions. The Employer's first argument—that the "UAW" shirt would distract workers from their jobs and thus lead to accidents—fails for several reasons. For one, the Employer's argument is speculative and not supported by any evidence. Additionally, the display of union insignia here is far less conspicuous than union insignia that the Board held created a safety-jeopardizing distraction.[14] Furthermore, the Employer

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disparately enforcing the policy against statutorily protected activity while not enforcing it against other similar activity under similar circumstances"); *see also Titus Electric Contracting, Inc.*, 355 NLRB 1357, 1357 (2010) (finding employer violated Section 8(a)(1) when it sent an employee home to change out of a union shirt because employer did not send home employees that wore shirts with various nonunion, noncompany logos).

[12] According to this evidence, one team leader has periodically worn a high-visibility shirt with a large "Toyota" logo and another team leader has, on a weekly basis, worn a high-visibility shirt with a large logo of that individual's personal company. Notably, this evidence also shows that team leaders do not always wear the Employer's official "Team Leader" shirts.

[13] *Stabilus, Inc.*, 355 NLRB at 838.

[14] *See Fluid Packaging Co.*, 247 NLRB 1469, 1474 (1980) (finding that a ten-inch-by-sixteen-inch "Vote Yes" union sign pasted to an employee's back was a legitimate

contradicts itself by also arguing that the team member's "UAW" logo is so large that it dangerously reduces the visibility of [redacted] high-visibility shirt. A shirt cannot be simultaneously distracting and not visible. For these reasons, the Employer's distraction argument fails.

The Employer's second argument—that the "UAW" insignia compromises the visibility of the shirt—also fails for several reasons. For one, the argument is contradicted by the Employer's argument, above, that the "UAW" lettering is distracting. Second, the Employer has failed to show that the team member's display of union insignia undermines the Employer's "high-visibility" precautionary measures given the fact that the "UAW" logo covers only a small portion of the team member's shirt.[15] Similarly, the Employer's high-visibility vests do not cover the wearer's arms and thus allow the wearer to display a significantly smaller portion of high-visibility material than the team member's "UAW" shirt. Third, the Employer encourages certain employees to wear clothing that compromises visibility even more than the "UAW" shirt.[16] Namely, compared to the "UAW" shirt, the "Team Leader" shirt has a

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safety concern because it might distract other employees working the production line), *enforced mem.*, 649 F.2d 860 (3d. Cir. 1981).

[15] *Compare Malta Construction Co.*, 276 NLRB 1494, 1494-95 (1985) (finding no special circumstance existed at outdoor construction site where employer required employees to wear orange hardhats for visibility purposes and an employee partially covered the identifying color by placing two stickers on the helmet), *enforced*, 806 F.2d 1009 (11th Cir. 1986), *with Andrews Wire Corp.*, 189 NLRB at 108-09 (finding special circumstance existed in smoky factory where employer purchased "bright lustre" helmets for visibility purposes but workers had put union stickers "all over" them).

[16] The Board has rejected employers' "special circumstances" arguments where the display of union insignia undermined an otherwise legitimate safety precaution no more than the display of other insignia that was either mandated or allowed by the employer. *See World Color (USA) Corp.*, 360 NLRB 227, 227 n.1, 234 (2014) (employer barring employees from adding union insignia to hats with employer's logo not justified by special circumstances because union insignia would not impair hats' safety function—securing employees' hair), *enforcement denied*, 776 F.3d 17 (D.C. Cir. 2015); *Northeast Industrial Service Co.*, 320 NLRB 977, 978, 980 (1996) (finding restriction on employees wearing stickers on hardhats not justified by special circumstance because, inter alia, stickers impaired employer's ability employer to inspect hardhats no more than employer-supplied helmet decals bearing employer's name); *see also United Parcel Service*, 312 NLRB 596, 597-98 (1994) (finding employer's "public image" interest did not warrant restriction on union button

larger logo with lettering that is no more reflective. For these reasons, the Employer's second argument fails.

The Employer's third argument—that the "UAW" logo impedes the Employer's ability to respond to emergencies—also fails. When the Board has found that special circumstances warranted restrictions on union insignia for emergency response purposes, the employer had a demonstrated need to respond to emergencies, the employer had an emergency system in place that relied on the quick identification of emergency personnel, and the evidence showed that unauthorized display of union insignia would impair that system.[17] Here, the Employer has not shown that any system in place required the immediate identification of team leaders, who lack supervisory authority and special training in first aid or plant safety.[18] Furthermore, even if such a system existed, the "UAW" shirt would not jeopardize the system because it is already jeopardized by the Employer's own conduct: inconsistently enforcing its high-visibility clothing policy and not requiring team leaders to wear the "Team Leader" shirts.[19] Even without those facts, the "UAW" shirt would not jeopardize the system because it could not be confused with the team leader shirts, which have larger markings on the *back* of the shirt.

Finally, the Employer's fourth argument—that the restriction is justified because it is merely a partial restriction—fails as well. Although the Board has found that special circumstances existed in cases where employers barred the display of union insignia on a limited portion of employees' apparel,[20] the restriction here is far more

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because union button was no different in this respect than employer-approved lapel buttons), *enforcement denied*, 41 F.3d 1068 (6th Cir. 1994).

[17] *See Albis Plastics*, 335 NLRB at 923, 924; *see also Standard Oil of California*, 168 NLRB 153, 154-56, 161-62 (1967).

[18] *Cf. Albis Plastics*, 335 NLRB at 923, 924 (importance of ability to identify emergency personnel who were either members of plant's safety committee or trained in first aid supported special circumstances finding); *Standard Oil of California*, 168 NLRB at 154-56, 161-62 (importance of ability to identify plant's emergency personnel—safety operators, fire protection personnel, fire fighters, and ambulance drivers—who were part of sophisticated safety program supported special circumstances finding).

[19] *See supra* note 12 and accompanying text.

[20] *See, e.g., Albis Plastics*, 335 NLRB at 924 (employer precluded employees from placing union insignia on hardhats but left them free to display union insignia on

prohibitive, as it only *permits* the display of union insignia on a severely limited portion of the workers' apparel while in certain work areas.[21] Accordingly, the Employer's partial-restriction argument carries little weight.

For the foregoing reasons, the Employer has failed to show special circumstances and thereby violated Section 8(a)(1) of the Act by curtailing the team member's display of union insignia on [redacted] shirt. The Region should issue complaint, absent settlement.

/s/
B.J.K.

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their shirts); *Standard Oil*, 168 NLRB at 161 (employer precluded employees from placing union insignia on hardhats but permitted them to display union insignia elsewhere, including an "8 ½-inch diameter cloth emblem on the back of their shirts or coveralls . . . which can be recognized at a considerable distance"); *Andrews Wire Corp.*, 189 NLRB at 109 ("[T]he [e]mployer told the employees that they could wear union insignia on any item of clothing except the safety hat, and in fact they did so."); *Sam's Club*, 349 NLRB 1007, 1011 (2007) (employees required to wear employer's break-away lanyards, but employees could put union insignia on the lanyards and wear union insignia on their shirts).

[21] We also note that, to the extent the Board has analyzed an employer's restriction on union insignia as only a partial ban, this alone did not result in the Board finding special circumstances. *See Long Beach Mem'l Med. Ctr., Inc.*, 21-CA-157007, JD(SF)-33-16, 2016 WL 4547573 (Aug. 31, 2016) (citing *Albis Plastics*, 335 NLRB at 923; *Standard Oil*, 168 NLRB at 153) ("Although in both [*Standard Oil* and *Albis*] employees were free to display union insignia elsewhere on their clothing, the Board did not rely on this as a basis for upholding the [restriction] in *Albis*, and cited it only as an additional ('furthermore') reason for upholding the similar ban in *Standard Oil*.").