UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

WORLD COLOR (USA) CORP., A WHOLLY-OWNED SUBSIDIARY OF QUAD-GRAPHICS, INC.

and **Cases 32-CA-062242**
32-CA-063140

GRAPHIC COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 715-C

COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO REMAND

Counsel for the General Counsel respectfully opposes the remand of this case to the administrative law judge (ALJ) because the record is fully developed to enable the Board to decide this case under *The Boeing Company*, 365 NLRB No. 154 (2017).[1] There is also no factual dispute for an ALJ to resolve. This case has been pending with the Board since the D.C. Circuit's 2015 remand.[2] The Court's remand is now moot because *Boeing* overruled *Lutheran Heritage Village-Livonia,* the case the Court had relied on to support its remand. The Board is urged to address the sole remaining legal issue in this case to avoid further delay. The sole legal issue is whether *Boeing* permits the Board to apply the well-established union insignia "special circumstances" test to

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[1] On November 15, 2018, the Board issued a Notice to Show Cause seeking a response by November 29, 2018, why this case should not be remanded to the ALJ for further proceedings consistent with the Board's decision in *Boeing*, including reopening the record if necessary.

[2] *World Color (USA) Corp. v. NLRB*, 776 F.3d 17 (D.C. Cir. 2015)

determine the lawfulness of Respondent's hat rule, which undisputedly prohibits employees from wearing union baseball caps at work.[3] Or, whether under *Boeing*, the Board should strike a new balance between an employee's rights to wear a union baseball cap at work and the employer's interest in maintaining a uniform appearance for purported security and safety reasons.

As will be discussed below, *Boeing* did not overrule the well-established "special circumstances" test applied to rules that infringe on employees' right to wear union insignia at work. Thus, the Board should reaffirm its decision and conclude that Respondent has not shown "special circumstances" to justify its hat rule. However, even if the Board applies the *Boeing* balancing test, Respondent's legitimate business interests do not outweigh the Section 7 right of employees to wear union insignia at work. As the Supreme Court held long ago, "[T]he right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and [an employer's] curtailment of that right is clearly violative of the Act." *Republic Aviation Corp.*, 324 U.S. at 802 (1945) (internal citations omitted)

I. Relevant Procedural History and Background

After review of the ALJ hearing and decision, Board found that Respondent violated Section 8(a)(1) of the Act by maintaining a hat rule that stated, " .baseball caps

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[3] The Court remanded the case because it disagreed with the Board's conclusion that the hat rule undisputedly prohibits employees from "engaging in the protected activity of wearing caps bearing union insignia" *Id.* at 227 fn.1. The Court drew a distinction between the right of employees to wear a *company cap with union insignia on it* versus the right to wear a *union cap*. However, the rule simply states, " .baseball caps are prohibited except for [Company] baseball caps worn with the bill facing forward . . . ." Thus, the rule on its face bans union baseball caps. The legal question now is whether such a ban is unlawful.

are prohibited except for [Company] baseball caps worn with the bill facing forward " 360 NLRB 227 (2015). It concluded that Respondent failed to show "special circumstances" to justify this rule.

On January 16, 2015, after oral arguments, the Court remanded the case to the Board for reconsideration because it disagreed with the Board's finding that it is undisputed that the hat rule on its face prohibits employees from engaging in the protected activity of wearing caps bearing union insignia. *See* footnote 2 above.

Based upon this procedural history, the record contains ample amounts of testimony and evidence from both Respondent and General Counsel's witnesses regarding Respondent's proffered business justification for its hat rule. This includes the ALJ hearing transcripts, the ALJ decision, the parties brief to the Board on Exceptions, their Statement of Positions to the Board after the Circuit Court's remand. In addition, the parties' oral arguments before the Court includes additional evidence of Respondent's business reasons for the hat rule.

II. *ARGUMENT*

A. Boeing Did Not Alter The "Special Circumstances" Test In Union Insignia Cases

Boeing did not alter the well-established standards with respect to certain work rules where the Board has already struck a balance between employee rights and employer business interests. For example, the Board in *Boeing* specifically approved of assessing the legality of no-distribution, no solicitation, and no access rules under existing balancing tests. *See Boeing*, 365 NLRB No. 154 slip op. at 8 (relying on doctrine regarding those types of rules as support in overturning *Lutheran Heritage*). The decision similarly did not alter the "special circumstances" test regarding employer

prohibition on wearing union insignia. *See Long Beach Memorial Center, Inc.* 366 NLRB No. 66, slip op. at 1-2 (April 20, 2018) (found that hospital's restrictions on wearing union pins overbroad and unlawful without reference to *Boeing* test).

Thus, the Board should decide the merits of this case under the test already established in union insignia cases which requires an employer to establish "special circumstances" to justify a ban on union insignia.

Even if the Board decides to strike its own balance under *Boeing*, as will be more fully discussed below, Respondent's legitimate business interests do not outweigh employees' Section 7 right to wear union insignia at work.

B. Respondent's Rule Bans Union Hats On Its Face

Respondent's rule states that "baseball caps are prohibited except for [company] baseball caps worn with the bill facing forward." By the explicit terms of this rule then, all union baseball caps are banned since an employee cannot wear a cap that is not a company baseball cap. Further, Respondent conceded that the rule prohibits employees from wearing any baseball caps other than Company caps, including union produced caps. (Oral Arg. Tr. at 4:23-10:9)[4] *See also* Respondent's Brief in Support of its Exceptions to the ALJ decision at 4.[5]

The Court noted that this rule does not state that company baseball caps cannot be affixed with union insignia. However, Respondent's other rules, as explained below, prohibits employees from affixing union pins and union buttons on caps.

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[4] "Oral Arg. Tr." refers to the transcripts of the oral arguments before the D.C. Circuit in this matter. A copy of the transcript is attached as Exhibit 1 of Charging Party's Statement of Position on Remand filed with the Board and dated March 17, 2015.

[5] Respondent brief is Exhibit 3 of Charging Party's Statement of Position on Remand filed with the Board and dated March 17, 2015.

C. Respondent has Failed to Show Special Circumstances for its Ban on Union Hats

The Court did not find any error with the Board applying the special circumstances test to this case. The Board reaffirmed the well-established precedent that absent the presence of "special circumstances," such as legitimate safety concerns[6] or other legitimate business concerns,[7] an employer cannot restrict employees from wearing union insignia.[8] It is also well-established that the burden is a heavy one. "General, speculative, isolated or conclusory evidence of potential disruption does not amount to 'special circumstances.'"[9] Instead, in order to restrict an employees' right to wear union insignia an employer must successfully demonstrate a legitimate concern and that the restriction is narrowly tailored to address that concern.[10]

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[6] *See, e.g., Andrews Wire Corporation*, 189 NLRB 108, 108–09 (1971) (finding employer's prohibition on union stickers on employer's hardhats lawful, as the stickers interfered with hardhat visibility and thus overall safety). *Cf. Malta Construction Co.*, 276 NLRB 1494, 1494–95 (1985) (finding that employer had failed to show that stickers on employer's hardhats were unsafe), *enforced*, 806 F.2d 1009 (11th Cir. 1986).

[7] There can be special circumstances where an employee must maintain a certain image in the public eye but mere customer exposure alone does not establish a special circumstance. *See Nordstrom, Inc.*, 264 NLRB 698, 701-702 (1982).

[8] *See, e.g., Andrews Wire Corporation*, 189 NLRB 108, 108–09 (1971) (finding employer's prohibition on union stickers on employer's hardhats lawful, as the stickers interfered with hardhat visibility and thus overall safety). *Cf. Malta Construction Co.*, 276 NLRB 1494, 1494–95 (1985) (finding that employer had failed to show that stickers on employer's hardhats were unsafe), *enforced*, 806 F.2d 1009 (11th Cir. 1986).

[9] *Goodyear Tire & Rubber Co.*, 357 NLRB at 5–6, (citing *Boise Cascade Corp.*, 300 NLRB 80, 82 (1990)) (finding that the employer's ban on employees wearing a shirt with the word "scab" on it was unlawful where any disruption was purely speculative).

[10] *See, e.g., Eastern Omni Constructors, Inc.*, 324 NLRB 652, 652 n.2 (1997) (finding that while employer had legitimate concern about inflammatory decals, promulgation of rule against wearing of all noncompany insignia overbroad), *enforcement denied*, 170 F.3d 418, 424-26 (4th Cir. 1999).

Here, the ALJ and the Board properly concluded that Respondent's speculative assertions of gang violence at the workplace failed to establish special circumstances. 360 NLRB 227, slip op. at 8. Likewise, its safety assertions were insufficient to show special circumstances based on Respondent's witnesses conceding that there were no specific safety features built into the company baseball cap and no other special requirements at all other than the color and company logo. *Id.* Further, Respondent failed to present evidence showing that a union cap would present a safety issue since any baseball cap can secure an employees' hair to their head. *Id.*

In sum, the ALJ has already combed through and analyzed a complete record regarding Respondent's legitimate business assertions for its hat rule. Further, upon examination of the entire record and Respondent's exceptions, the Board properly affirmed the ALJ's conclusion that special circumstances were not established to justify Respondent's total ban on Union hats. This Board also has the benefit of the D.C. Circuit's oral arguments.

D. Even if Boeing's Balancing Test Supplants the Special Circumstances Test, the Hat Rule Infringement on Section 7 Rights Is Not Outweighed by Respondent's Asserted Legitimate Business Interests

Even if the Board rejects the special circumstances test based on the unique facts and procedural posture of this case, and instead decides to weigh Respondent's legitimate business interests under *Boeing*, Respondent's hat rule is still unlawful. Banning employees from wearing union caps outright, as shown below, essentially precludes Respondent's employees from wearing any union insignia on a cap. Such an infringement is not slight nor is it outweighed by Respondent's asserted business

reasons for the rule, especially when Respondent's uniform rule generally precludes employees from wearing all other union apparel as well.

First, Respondent's claims of security due to potential gang activity and safety concerns are speculative, as found by the ALJ and affirmed by the Board. However, even if they are taken as true, those concerns can be met with a narrower rule that does not ban union caps. There is nothing in the record to suggest that Union caps with the same fitting, and the same color as a company cap, would increase purported gang violence or symbolism or safety issues.

Second, the rule's infringement on an employees' Section 7 rule is not slight compared to Respondent's proffered safety and security concerns. The Board should not conclude that the harm of prohibiting union caps is slight based on Respondent's assertion that company hats can be adorned with union insignia because, as a practical matter, an employee cannot based on Respondent's other rules. As the record established, employees are not allowed to wear union insignia in the form of pins or buttons on the pressroom floor because they may get caught in printing equipment. (Tr. At 33:3-7, 123:5-10)[11] Further, company uniforms are mandatory and Respondent stated that patches or other means of permanently affixing union insignia to the company's uniform are prohibited. (Oral Arg. Tr. At 7:6) It nonetheless suggested that employees might be able to sew a union insignia patch to their company baseball caps.

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[11] "Tr." Refers to ALJ hearing transcripts which are attached as Exhibit 2 of Charging Party's Statement of Position on Remand filed with the Board and dated March 17, 2015.

(Oral Arg. Tr. At 7:14-8:10) Stickers would likely pose an even greater safety risk as they easily peel off and fall into machinery. (See, Oral Arg. Tr. at 53:3-5)

Based on these myriad rules and exceptions, employees have no practical means to adorn company hats with union insignia since they cannot affix union pins or buttons on them. Employees would face the unusual burden of sewing a union patch onto their company baseball caps. Depending on their sewing skills, the patch could fall off just as a sticker would. Based on the breadth of Respondent's uniform rules and to maintain the very safety standards Respondent has asserted, the only practical way employees can wear union insignia at work is to wear a union baseball cap, something the rule prohibits on its face.

Given the ambiguity about how employees' can affix union insignia on company caps and the unnecessary burden it places on employees. the Board should, even under *Boeing*, reaffirm this case. The rule on its face prohibits union caps which, in this workplace, infringes on employees' right to wear union insignia at work. Thus, Respondent's business justifications for its hat rule is not outweighed by the right to wear union caps at work, the only meaningful way employees in this workplace may wear union insignia.

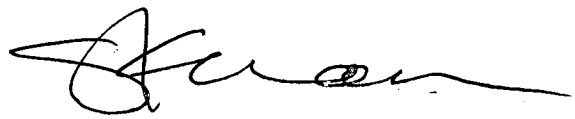
III. CONCLUSION

To avoid unnecessary delay, the Board should decide this case without a remand because there is no factual or evidentiary issue which an ALJ must resolve, and the Board is the adjudicative body that ultimately decides which test to apply. The extensive record allows the Board to either reaffirm the decision based on its well-established union insignia "special circumstances" test or to engage in a separate balancing test

under *Boeing*. Here, given the evidence regarding how ambiguous and difficult it is for employees to attach union insignia on company caps, Respondent's hat rule, which completely bans union caps, should be found unlawful because Respondent has not presented "special circumstances" to justify such a rule. In the alternative, should the Board choose to strike another balance under *Boeing*, it should find that Respondent's legitimate business justifications for its hat rule is not outweighed by the right of employees to wear union caps because it is the only meaningful way employees in this workplace can wear union insignia.

DATED AT Oakland, California this 29th day of November, 2018.

Respectfully submitted,



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AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO REMAND

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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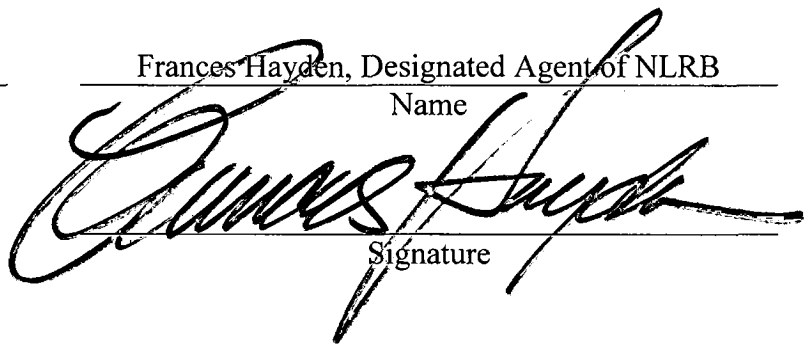

Signature