

ORAL ARGUMENT SCHEDULED FOR APRIL 5, 2019
Nos. 18-1125, consolidated with 18-1143

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LONG BEACH MEMORIAL MEDICAL CENTER, D/B/A
MEMORIALCARE LONG BEACH MEDICAL CENTER &
MEMORIALCARE MILLER CHILDREN'S AND WOMEN'S HOSPITAL
LONG BEACH,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

And,

CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED,

Intervenor.

*On Petition for Review and Cross-Application for Enforcement of an Order of the
National Labor Relations Board · NLRB Case No. 21-CA-157007*

PETITIONER'S/CROSS-RESPONDENT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Petitioner/Cross-Respondent in the above-captioned case, Long Beach Memorial Medical Center, Inc. d/b/a MemorialCare Long Beach Medical Center and MemorialCare Miller Children's and Women's Hospital Long Beach (the "Hospital"), hereby replies to the Answering Briefs of the Respondent/Cross-Petitioner, the National Labor Relations Board ("Board"), and the Intervenor California Nurses Association/National Nurses United ("Union"), to the Hospital's Opening Brief in support of its Petition for Review of the Board's Decision and Order in *Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach*, 366 NLRB No. 66 (April 20, 2018), as corrected by the Board on June 20, 2018.

SUMMARY OF THE ARGUMENT

In its Answering Brief, the Board presents an intellectually dishonest portrayal of the actual proceedings before the Board which were fully directed by the Board's 2004 holding in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) ("*Lutheran Heritage*") (holding that an employer violates the Act by maintaining a facially neutral policy that "could" be "reasonably construed" by an employee to prohibit the exercise of rights protected by the National Labor Relations Act). In December 2017 – four (4) months prior to the Board's April 20, 2018 ruling in the instant matter – the Board overruled the holding in *Lutheran Heritage*, explicitly

making the new standard set forth in *The Boeing Co.*, 365 NLRB No. 154, slip op. at 1 (December 14, 2017) (“*Boeing*”) retroactive to all pending cases. In *Boeing*, the Board replaced the *Lutheran Heritage* “reasonably construe” standard with a new balancing test stating that it will not find a violation of the law where the employer rule is facially neutral, does not interfere with the employees’ rights under the Act, and/or the employer’s justification for the rule outweighs any potential harm to employee rights.

The Board’s assertion that the test laid out in *Boeing* does not control this appeal because the Hospital failed to cite the test when the matter was before the Board is disingenuous. A party does not need to motion the Board to apply existing law which overruled a previously controlling precedent. At the time that the parties filed exceptions to the decision of the Administrative Law Judge (“Judge”), the Hospital’s objected-to portion of the determination was general and, though misapplied, fully in accord with then-existing Board precedent. Consequently, it would be futile, if not frivolous, for the Hospital to motion the Board for reconsideration. The Hospital appealed the Board’s failure to apply its own precedent in the instant proper forum.

The Board further fails to provide support for its contention that the Board correctly struck the Hospital policies¹ under review applying precedent unrelated to the Board's *Lutheran Heritage* standard. Guided by *Lutheran Heritage*, the Judge made evidentiary determinations and conclusions based on whether an employee could "reasonably construe" the Hospital's policies at issue to prohibit rights granted by the Act. The record is replete with omissions of evidence based on the *Lutheran Heritage* standard. Despite this, the Board intentionally ignored the current law by applying the standards applicable to cases involving union organizing and employer no solicitation bans, evading both the current law under *Boeing* and the prior test under *Lutheran Heritage*.

Finally, the Board continually mischaracterizes the policies on review before the Board as policies that plainly restrict employee Section 7 activity or policies that serve as "blanket prohibitions" on protected activity. The policies at issue are facially neutral and do not explicitly restrict rights guaranteed by the Act. By classifying the rules in this manner the Board incorrectly attempts to paint them as explicitly unlawful – covering for its failure to apply existing Board precedent. More

¹ The two policies in question are really two discrete rules within the context of larger policies; namely the uniform standard for wearing pins on name badges ("I.D. Rule" or "Pin Rule) contained within the Dress Code and Grooming Standards-Policy #318 and the uniform badge reel requirement ("Memorial-reel Rule" or "Badge Reel Rule") within the Appearance, Grooming and Infection Prevention Standards for Direct Care Providers Policy PC-261.02.

important, the Board seemingly attempts to misdirect the Court away from the undisputed facts establishing the Hospital in fact permitted, and employees in fact routinely wore, various types of union insignia. As the Hospital previously stated, this case is not about a supposed union logo ban, but rather the Hospital's ability to design and determine direct care provider uniforms and to put reasonable limits in discrete areas of the uniform which directly build patient trust and promote consistent brand messaging to Hospital patients.

ARGUMENT

I. THE HOSPITAL APPROPRIATELY PRESERVED ITS CHALLENGE BEFORE THE BOARD.

In hopes of evading a decision on the merits, the Board and Union raise hollow and unpersuasive Section 10(e) arguments that must be rejected.

First, with respect to the Badge Reel Rule, the Judge determined that the policy was lawful and, therefore, the Hospital did not have reason to raise an objection as its position in the underlying proceeding prevailed. Arguing the Hospital needed to file exceptions to a trial Judge's decision *in its favor* and that those exceptions needed to explicitly cite to the yet to be decided *Boeing* decision is beyond nonsensical. Thus, any 10(e) argument related to the Badge Reel Rule is undisputedly without merit.

Second, the Hospital undeniably raised a challenge to the Board regarding the “factual findings, legal conclusions and the legal standard applied and relied upon” in determining that the Pin Rule, was “facially unlawful” and “presumptively invalid.” JA 637. The Board’s misguided argument that the Hospital failed to raise its “*Boeing*-related” challenges is opposite the record. *GC Answering Brief*, at 33. Objections to the Board were clearly adequate to put the Board on notice that there may be an issue with the legal precedent applied to the Pin Rule. JA 637. See also *Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981)(holding that the critical inquiry in determining whether an objection has been presented to the Board is “whether the objections made before the Board were adequate to put the Board on notice that the issue might be pursued on appeal”).

Section 102.46(b)(1) of the Board’s Rules and Regulations requires that each exception to a Judge’s Recommended Decision and Order “shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken” and that “if a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matter shall be set forth only in the brief.” The Hospital’s exceptions clearly set forth the specific ruling made by the Judge to which it excepts, excluding “any argument or citation of authority” as instructed by the Board’s rules. The Board, in a guileful manner, argues that the Hospital failed to specifically raise *Lutheran*

Heritage or *Boeing* by name after it conveniently excluded the Hospital's initial Brief in Support of Exceptions from the record – a document that would clearly show that the Hospital explicitly challenged both the legal standard applied and, even if valid, the Board's failure to apply the *Lutheran Heritage*, pre-*Boeing* standard.²

Even if the Court were to find that the Hospital failed to raise the objection before the Board, this omission would be excused under the Board's Rules and Regulations and existing law.

Section 102.48(d)(1) of the Board's Rules and Regulations only permits a party to move for reconsideration for "extraordinary circumstances." Here there were no extraordinary circumstances. The Board ignored the law, overturned the Judge's ruling regarding the Badge Reel Rule, and applied incorrect legal precedent to both policies at issue. This constitutes grounds for appeal, but does not suggest

² The Hospital renews its July 3, 2018 Motion to Supplement the Record with the Brief(s) in Support of Exceptions filed by the General Counsel, California Nurses Association, and the Hospital. The documents were before the Board and relied upon by the Board when it made the challenged decision. Here, the agency deliberately or negligently excluded documents that may have been adverse to its underlying decision and the argument it currently makes that the Hospital failed to preserve the issue for appeal. See *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002, 382 U.S. App. D.C. 78 (D.C. Cir. 2008). Consequently, inclusion of the requested Briefs falls within an appropriate special circumstance permitted by the Court and nothing in either the Board's or the Union's Answering Briefs justifies excluding these relevant documents from the Record. *Id.*

“extraordinary circumstances” requiring a special motion.³ The Board Rules and Regulations do not require that a party motion for reconsideration as a prerequisite to appeal. See *Universal Security Instruments, Inc. v. NLRB*, 649 F.2d 247, 260 (4th Cir.), *cert. denied*, 454 U.S. 965 (1981) (holding that where the parties have fully litigated the issue and the objecting party cited the contested issue in its exception a failure on the part of the party to move for reconsideration will not preclude it from consideration on appeal).

Further, the Hospital is not required to motion the Board for special consideration because of a change in the law which occurred while the case was before the Board. 29 U.S.C. § 160(e) states that “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 Fifth Circuit addressed the question of “special circumstances” in the face of new precedent in *NLRB v. Robin American Corp.*, 667 F.2d 1170, 1171 (5th Cir. 1982). In *Robin American*, the Board requested enforcement of an order that required Robin American to notify and bargain with its employees' union prior to closing any department of its manufacturing facilities.

³ Certainly, every petition for review argues the Board improperly applied the law, thus there is nothing extraordinary about these circumstances. To find otherwise would be to find that in every case, a party must apply for reconsideration before seeking judicial review of the agency's actions. This is obviously not the case.

Because existing Fifth Circuit precedent "imposed a (general) duty to bargain over [all] partial closing decisions," Robin American did not object to the breadth of the order. *Robin Am. Corp., supra*, at 1171. In *First National Maintenance Corp. v. NLRB*, the Supreme Court overruled the Fifth Circuit, finding that a refusal to bargain over an economically-motivated closing decision would not violate the Act. *Id.*, 452 U.S. 666 (1981). Following the new Supreme Court precedent, Robin American objected for the first time to the breadth of the Board's order in its petition to the Fifth Circuit. The Fifth Circuit held that because the Board's order was fully in accord with the Circuit's own precedent at the time it was issued, any objection to the Board would have been "futile, if not frivolous." *Robin Am. Corp., supra*, at 1171. The futility of objecting to the Board's order based on precedent presented an extraordinary circumstance warranting relief from the statute's procedural bar.

Here, the applicable law to this matter changed during the Board's review of the Judge's decision, just as it did in *Robin Am. Corp., supra*. The Hospital had every right to expect that the Board would apply the correct law in effect at the time it issued its decision. Consequently, there is no basis for the Board to now insist that the Hospital had an obligation to file a motion for reconsideration to preserve its objection. The futility of motioning the Board to apply existing law is an extraordinary circumstance warranting relief from the Section 10(e) procedural bar. See *Robin Am. Corp., supra*.

Thus, the Board's and Union's 10(e) arguments must be rejected.

II. THE BOARD HAS NOT OVERCOME THE HOSPITAL'S CHALLENGE TO THE BOARD'S FAILURE TO APPLY *BOEING CO.* TO THE RECORD.

A. The Board improperly evades *Lutheran Heritage* in the underlying Order.

Intellectual dishonesty rings throughout the Board's Answering Brief and the underlying Board decision.

1. The Order was clearly improperly based on *Lutheran Heritage*.

First, the Board admits in its Answering Brief that it "does not dispute that the parties relied on *Lutheran Heritage* in their pleadings." *GC Answering Brief*, at 37. Despite this, the Board now claims that the Judge was wrong for relying on *Lutheran Heritage*, and tries to claim the Board corrected that error in its decision. The Board's attempted obfuscation is demystified, however, by looking at the actual Board decision which does not even mention *Lutheran Heritage* at all.

It stretches the confines of credulity for the Board to argue here that the Board panel majority purposefully determined that the Judge mistakenly relied on *Lutheran Heritage* where (1) the Board panel majority fails to cite, discuss or even mention the case the Board now alleges the Judge errantly relied on, and (2) the Board's decision expressly stated "[w]e agree with the Judge, for the reasons stated in his decision, that the [Hospital] violated Section 8(a)(1) by maintaining [the Pin Rule]."

JA 786. This clear express statement of reliance in the decision is both proof that the arguments now advanced are disingenuous at best, and that the Board in fact relied on that same standard and “reasons” of the Judge – namely the now overruled *Lutheran Heritage* standard.

2. The Rules are facially neutral and are not facially overbroad.

Confusingly, the Board conflates the terms facially overbroad and facially neutral throughout its Answering Brief. A facially neutral policy is one that does not expressly prohibit protected activity under the Act. A facially overbroad rule is one that contains language which may lack the “linguistic precision” that in reading it one “could reasonably construe” (*Lutheran Heritage*) or would “reasonably interpret” (*Boeing*) it as potentially impacting protected activity. A rule that is facially neutral can be facially overbroad but is not necessarily so. Despite this, the Board’s Answering Brief inappropriately uses these terms interchangeably.

If a rule explicitly targets Section 7 rights then it is not facially neutral. If, however, it does not directly deal with protected rights but rather is focused on a general application then it is facially neutral. There is no doubt both rules at issue here are facially neutral. If a rule is facially neutral, then the Board must determine if a rule is facially overbroad in a manner that unlawfully restricts employees Section

7 rights. This was determined under the now-overruled *Lutheran Heritage* test, but now must be determined under the *Boeing* balancing test.

The Board failed to conduct this analysis. Instead, the Board jumped to the assumption that both policies at issue were facially unlawful because the rule failed to explicitly state that employees could wear union paraphernalia in non-patient care areas.⁴ The panel majority focused on a single line in the Appearance Policy containing the Badge Reel Rule to find that the policy was overbroad, ignoring the direct language of the text, which clarified that the policy only applied to direct care providers. The dissent in the underlying Board order did not skip this important step. As dissenting Member Emanuel stated, “the majority fail[ed] to read the rule in its entirety,” pointing in part to the fact that the Badge Reel Rule was only directed toward “direct care providers.” Member Emanuel pointed out that employees in fact understood that this rule only applied in immediate patient-care areas and even if it did not, the Hospital was justified by “special circumstances” permitting it to restrict the uniform for hygiene and uniform brand messaging. JA 789-791.

⁴ The composition of the Board’s decisional panel at the time of the Board’s April 20, 2018 decision may provide some insight into the rationale for the majority’s failure to mention either *Lutheran Heritage* or to conduct the *Boeing* analysis. The three-member panel consisted of the two Board members who issued a scathing dissent against the holding in *Boeing* and the timing of the decision fell during a period in which the Board had lost full strength (including the deciding vote in *Boeing*) and before now Chairman Ring (a supporter of *Boeing*) was confirmed.

As noted below, had the Board panel majority not conflated the terms, found the policies to be facially neutral, and then evaluated them under *Boeing* to determine whether they were facially overbroad, the Board would have been compelled to properly dismiss the Complaint.

3. The Board falsely claims the Hospital rules ban union insignia.

Terms such as “plain restriction,” “blanket prohibition,” and “ban” are splattered throughout the Board’s Answering Brief in an effort to fit this case into the framework presented by the Board’s incorrect analysis under the wrong line of cases. As detailed below, the Board mischaracterizes the evidence and misleads the Court by making false claims that the Hospital has banned union insignia when the record evidence clearly established not only that the rules at issue did not target union insignia but, more important, the Hospital actually permitted employees to wear union insignia throughout the Hospital.

The evidence shows that employees were free to wear various forms of union insignia and freely wore union insignia throughout the Hospital. For example, Union steward and Pediatric Registered Nurse Brandy Welch testified that she wore both the Hospital issued badge reel on her uniform while in patient care areas and then switch to a Union logo badge reel when in other areas of the Hospital. JA 114. Likewise, the evidence established that while the uniform jacket needed to be worn

in patient care areas, employees can wear any jacket they choose in non-patient areas and often wear union jackets without consequence. JA 195; 287. Additionally, employee clothing was not restricted when at the Hospital for training and when not directly interacting with patients. JA 199. Even in patient care areas, there were many options available for employees to display union insignia, including wearing union jewelry, expressing their support for the union on their nail polish or even having union tattoos displayed. JA 288-289.

The Board and Union both ignore this evidence as it defeats their narrative and discredits any attempt to characterize the Hospital's rules as bans or unlawful.

B. Committing reversible error, the Board improperly treated this case as a matter involving a solicitation ban on union activity.

In response to the Hospital's assertion that the Board committed reversible error by failing to apply *Boeing*, the Board makes a wild claim that the *Lutheran Heritage* and *Boeing* tests are irrelevant because the Board struck down the Pin and Badge Reel Rules under precedent unrelated to the pre-*Boeing* rules test. In so doing, the Board admits that it applied the wrong standard and committed reversible error.

The Board incorrectly classifies this as a matter involving a union solicitation ban, relying on *HealthBridge Mgmt., LLC*, 360 NLRB 937, 938 (2014), *enforced*, 798 F.3d 1059 (D.C. Cir. 2015). The underlying facts in *HealthBridge Mgmt* are inapposite. Specially, the union in that matter prepared flyers and stickers indicating

that the Respondent Healthcare institution was “busted” by the Board for committing an unfair labor practice. The Respondent directed facility managers to remove the stickers from union bulletin boards and to prohibit employees from wearing union stickers in “all areas” of the facilities. The Board found that the Respondent’s solicitation ban, implemented in response to protected activity, was unlawful, and that the plain language of the rule was unlawful because it specifically banned employees from wearing union stickers in public, non-patient care areas of the facility. *Id.* at 938. The only relevance of *HealthBridge* to the instant matter is to exhibit the distinction between rules targeting union activity, which are unlawful, from the facially neutral policies at issue here, which are lawful under *Boeing*.

The Board also mistakenly relies on *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945) where the Board specifically looked at a no solicitation and distribution rule intended to restrict union access to the employer’s property. In that case, the Employer discharged employees for violating the rule aimed at prohibiting solicitation by union agents on its property. The Board cites to *Republic Aviation* for the idea that in most work places, the presumption is that union paraphernalia may be worn at any time and prohibitions violate Section 8(a)(1) unless the employer demonstrates special circumstances. See *GC Answering Brief*, at 13. First, the Hospital has established that it does not restrict union paraphernalia in the work place. Employees have a reasonable opportunity to express their Section

7 activity when they are not performing in a direct patient care role in a direct patient care area. Both the Hospital and the employee witnesses expressed this understanding. Second, the Hospital is not “most work places,” and has readily identified special circumstances requiring a uniform appearance to its badge, badge reel, and related badge pins. The Hospital seeks to control variations from its established uniform in two discrete places on the uniform that specifically impact safety, security, quality of patient care and the Hospital’s branded care messages to patients.

The Board similarly misses the mark by citing to *Beth Israel Hospital v. NLRB*, which states that an employer rule prohibiting solicitation (during a union organizing drive) in health care facilities in areas other than immediate patient care areas are presumptively invalid. 437 U.S. 483 (1987). The instant matter does not involve a union campaign or an employer rule against solicitation. And, again, the record testimony irrefutably established that employees were generally free to, and did, engage in union activity, including wearing various forms of union insignia throughout the Hospital.

In total, the cases relied on by both the Union and the Board are not only distinguishable in this instance, but they focus on an entirely different line of cases targeting different circumstances. Had the Board applied the proper law related to

facially neutral rules, i.e. *Boeing*, it would have found the rules lawful and dismissed the Complaint.

C. This is a Handbook Rule Case, Not a Case Involving a Solicitation Ban.

This case has nothing to do with cases related to rules targeting union organizing, and there is no contention the rules here were promulgated in response to or in any way related to union organizing. Here, the Hospital Pin and Badge Reel Rules are in place and have existed since 2014. Moreover, the Union had represented the Hospital's nurses for many years, with the parties maintaining a relatively good collective bargaining relationship. JA 338-345. In fact, the Union was provided notice of and given an opportunity to bargain over the effect of the Hospital implementation of new uniforms, which included the Pin and Badge Reel Rules. JA 95-97, 101; *See* on record stipulation JA 334-335. Thus, unlike virtually all of the cases relied on by the Board, nothing in the plain language of the rules constitutes a ban on union activity, nor was it promulgated in response to union activity.

Further, the Board's reliance on the solicitation ban cases further demonstrates that the Board is improperly conflating the Hospital's establishment of a specific Hospital uniform with a content specific prohibition or ban on union logos. The plain language of both rules pose no ban on union insignia. **They are facially**

neutral. The rules merely establish a uniform standard for the badge, pin and badge reel of the direct care provider uniform. This does not prevent employees from displaying union insignia overall. In fact, the record evidence disproved any such assertion as employees were permitted to wear union insignia in various forms and contexts.

This is why the *Boeing* test, and its earlier versions (*Lafayette Park*⁵ and *Lutheran Heritage*⁶), are so important here as these tests are specifically designed for employer handbook rules that do not directly interfere with Section 7 activity.⁷

⁵ *Lafayette Park*, was the Board's 1998 standard for determining whether the maintenance of facially neutral work rules violated Section 8(a)(1). *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999). The Board stated that the "appropriate inquiry is whether the rules would reasonable tend to chill employees in the exercise of their Section 7 rights." *Id.* at 825.

⁶ *Lutheran Heritage*, expanded the *Lafayette Park* inquiry to a two part test. *Lutheran Heritage*, 343 NLRB 646 (2004). First the Board would consider whether the rule explicitly restricted Section 7 activity on its face, and if it did it was unlawful. Second, if the rule was facially neutral and did not explicitly restrict Section 7 activity, then a violation would be dependent upon showing one of three prongs: "(1) employees could reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule [had] been applied to restrict the exercise of Section 7 rights." *Id.* at 646 n.1. *Boeing*, specifically changed the first prong of the *Lutheran Heritage* inquiry, replacing the "could reasonably construe" standard with a new balancing test, which weighed an employer's justification for the rule against the potential impact on Section 7 rights.

⁷ It is important to note that at least one of the cases cited by the Board at page 19 of its Answering Brief has been effectively overruled by *Boeing*. See *Boch Honda*, 362 NLRB No. 83 (2015)(relying on *Lutheran Heritage* standard finding reasonable

Under the proper *Boeing* test, the Board must conduct a balancing test that weighs two things: (1) the nature and extent of the potential impact of the rule on rights protected by the Act, and (2) an employer's legitimate business justification for the rule. *Boeing*, 365 NLRB at 1. In *Boeing*, the Board acknowledged that under the Board's previous standard, facially neutral rules that do not carve out every possible impact that an employer's policy may have, may be improperly invalidated just because they lack "linguistic precision." *Id.* at 3 n.2. *Boeing* imposed proper balance and required that weight be given to legitimate business justifications. Consequently, as the rules do not target union activity or ban all solicitation, the facially neutral Pin and Badge Reel Rules must be analyzed under the *Boeing* framework addressing facially neutral rules. The Board erred in not doing so.

D. Under *Boeing*, or any balancing test, which considered the Hospital, justification for the rule, the pin and badge rules are lawful.

As noted, *Boeing* overruled the *Lutheran Heritage* "reasonably construe" test. Under *Boeing* looks the analysis instead looks at how employees actually understood the rule and then weighs it against the employer's justification or need for the rule.

In its Answering Brief, the Board ironically advocates for a *Boeing*-like balancing test (under the solicitation line of cases) assessing whether the business

employee would construe several employer policies to restrict Section 7 rights). The remaining cases address an employer rule banning solicitation.

objectives of the Hospital outweigh any impact the policies at issue may have on protected employee union activity. See *GC Answering Brief*, at 16. As the Board so aptly points out, “the Board has found circumstances justifying proscription of union insignia and apparel when their display may...unreasonably interfere with a public image that the employer has established.” *Id.*, at 16. Citing *Bell-Atl.-Pa., Inc.*, 339 NLRB 1084, 1086 (2003), *enforced sub nom, Commc’n Workers of Am., Local 13000 v. NLRB*, 99 F. App’x 233 (D.C. Cir. 2004). The Board, relying on *Guard Publishing Co. v. NLRB*, 571 F.3d 53, 61 (D.C. Cir. 2009) suggests that the Hospital did not ease its burden of showing that its Pin and Badge Real Rules are permitted by the employer’s public image interest. But in *Guard Publishing*, the company placed a ban on wearing a green armband that promoted the union for an employee who existed in a customer-facing position, asserting that the display of that band did not fit the company’s positive public image. The Board found that the company could not show a special circumstance for its content-specific rule targeting union activity just because the employee interacts with the public. *Id.*

The Hospital’s facially neutral rules are distinguishable from the content-specific ban at issue in *Guard Publishing*. First, as previously stated, the rules do not constitute an all-out ban on union material nor are the rules targeting union activity. Second, the special circumstances are much more akin to the rule the 2nd Circuit considered in *NLRB v. Starbucks Corp.* 679 F.3d 70, 78 (2012), which

limited employee's to wearing only one union pin, if any, on their uniform. The

Court held:

We conclude that the Board has gone too far in invalidating Starbucks's one button limitation. As the Board has previously recognized, '[s]pecial circumstances justify restrictions on union insignia or apparel when their display may . . . unreasonably interfere with a public image that the employer has established.' (Internal citation omitted). Starbucks is clearly entitled to oblige its employees to wear buttons promoting its products, and the information contained on those buttons is just as much a part of Starbucks's public image as any other aspect of its dress code. But the company is also entitled to avoid the distraction from its messages that a number of union buttons would risk. The record reveals that one employee attempted to display eight union pins on her pants, shirts, hat, and apron. Wearing such a large number of union buttons would risk serious dilution of the information contained on Starbucks's buttons, and the company has a 'legitimate, recognized managerial interest' in preventing its employees from doing so. *District Lodge 91*, 814 F.2d at 880.

Id. The Court found that special circumstances did exist for Starbuck's restriction.

Id. See also *Starwood Hotels and Resorts Worldwide, Inc. d/b/a W San Diego*, 348 NLRB 372 (2006).

Similarly, the Hospital is entitled to avoid distraction from its messaging as a trustworthy care provider by limiting items that may dilute its brand message. This is especially so when, as in *Starbucks*, the Hospital permits employees to wear other forms of union insignia. In an effort to justify the blatant disregard for its own

precedent, the Board misleads the Court by embellishing the record evidence. The Answering Brief asserts that the Hospital policies constitute a “blanket prohibition” on union insignia. This is false. The record evidence shows employees are permitted to and do wear union insignia, and that they are permitted to engage in self-expression in several other places on their uniform beyond the one-restricted badge area.

The Board failed to conduct the *Boeing* balancing or the analysis of the Hospital’s special circumstance justifications. Had the Board done this, the special circumstances test would have certainly been satisfied as the Hospital’s rules are narrow, limited, and justified by legitimate business needs and considerations.

III. THE RECORD EVIDENCE ESTABLISHES THAT THE HOSPITAL’S JUSTIFICATION FOR THE PIN AND BADGE REEL RULES OUTWEIGHS ANY POTENTIAL HARM TO EMPLOYEE RIGHTS.

A. The Record Establishes That the Prohibition Against Employees Wearing Non-Hospital Issued Badge Pins and Badge Reels in Non-Patient Areas is Justified.

The record evidence supports a finding under both the *Boeing* standard and the *Republic Aviation* special circumstances standard that the Pin and Badge Reel Rules are justified by the Hospital’s desire for improved patient care, safety and promoting a consistent public image/branding message. *Republic Aviation* holds that outright bans on union insignia may violate the Act because employees *generally* have a protected right under Section 7 to wear union insignia, including union

buttons, in the workplace. *Republic Aviation, supra*, at 801-803. This right, however, may give way when the employer demonstrates special circumstances sufficient to outweigh employees' Section 7 interests and legitimize the regulation of such insignia. *See Komatsu Am. Corp.*, 342 NLRB 649, 650 (2004). Special circumstances may include, inter alia, "situations where display of union insignia might 'jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees." *P.S.K. Supermarkets*, 349 NLRB at 35 (quoting *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), *enforced*, 99 F. App'x 233 (D.C. Cir. 2004)).

Though *Republic Aviation* is not applicable here as there is no content-specific ban, even if it were, the Hospital has met its burden to show that variations from the Hospital issued pin and badge reel uniform standard would unreasonably interfere with patient care concerns as well as the branded public image the employer established in 2014. Judith Fix, Chief Nursing Officer and drafter of the handbook rule credibly testified that the rules "came about" because "hospital acquired infections [are] a very large concern...and we started to look at our infection control processes and procedures...The second thing we were attempting to do with this policy was to respond to an ongoing request from our patients...and care providers

and physicians to help identify who was providing care to them, who was walking into the room, and what their status at the medical center was...it creates a sense of security...to the patients, through having a standard appearance for our direct care givers.” JA 246. Fix went on to explain that the “presence of a standard uniform creates security, a feeling of security and safety for patients, very similar to how a police officer’s uniform creates safety and security.” JA 247. To enhance the feeling of safety, the Hospital created a work uniform that identified a direct care providers position and rank, access, special certifications, and years of service with the Hospital. Elizabeth Castillo, a Union steward and Registered Nurse in the Diabetes Medical Surgical Unit at the Hospital for eight (8) years, testified that at the time of implementation, the Hospital explained to direct care providers that the rules were in place because “they wanted to keep infection rate down” and “so people like patients and visitors know the difference between who the RNs were.” JA 193. The badge not only created a feeling of security, but in some instances physically insured safety. Each badge identifies the professional discipline of the direct care provider with a color strip. JA 226. In the children’s units, “parents and staff are taught that if there is not a pink badge they do not either give their child to that individual, or that person is not allowed to transport children.” JA 227.

The evidence further establishes that the Pin Rule promotes the Hospital’s branding and healthcare objectives by promoting the accomplishments of its

specialized nursing staff and reflecting the expertise of its direct care providers along with the employee's identification badge. The Hospital and affiliated professional organizations issued pins designating any special knowledge and expertise a nurse achieved. JA 235. The patient can read the badge and specialty pin and readily understand that the provider is a qualified health professional and will take excellent care of the individual or their loved ones. Accordingly, contrary to the Board's generalized assertions in both the decision and its Answering Brief, the record evidence establishes the Hospital had a legitimate business interest in promoting this objective. The Hospital's justification satisfies the *Boeing's* balancing test or even any special circumstances analysis.

B. The Hospital was Precluded from Admitting Evidence that Addressed its Business Justification for the Rule(s).

The Board further erred by failing to address the Judge's preclusion of evidence that directly spoke to the Hospital's special circumstance or business justification defense. *See* Exception Number 3, JA 637. The Hospital attempted to put in evidence that the rules were necessary to avoid disrupting healthcare operations or disturbing patients, but the Judge discouraged direct questions to witnesses that solicited this information (JA 220-222) and precluded key exhibits that spoke to the rules' justification. The Hospital explained that it wanted a clean image on the face of its uniforms and that it relied on evidence-based research to

show that the type of uniform that the Hospital implemented – with consistent and uniform hospital branding – improves patient care. The Judge specifically excluded the Society for Health Care Epidemiology of America article, which the Hospital relied upon in creating its new uniform policy and related Pin and Badge Reel Rules. JA 255-258, ER EXH. 9 (rejected). The Judge’s rationale for these exclusion was that business justifications were not relevant under the *Lutheran Heritage* “reasonably construe” standard, which focuses solely on an employee’s potential reading of the language.

It is disingenuous for the Board to now claim that there is insufficient evidence of specific circumstances when the Judge limited testimony and other admitted evidence on this element because the Judge was focused on the now overruled “reasonably construe” standard of *Lutheran Heritage*.

C. The Record Establishes that the Limitation on Employees Wearing Non-Hospital Issued Badge Reels in Non-Patient Areas is Narrow.

The Board erroneously asserts that when direct patient care providers are in public, non-patient care areas of the Hospital, the rules require that staff wear Hospital-branded badge reels and that they cannot substitute a non-hospital issued reel. See *GC Answering Brief*, at 7-8. The Board again attempts to invert the plain language of the rule. While the rule designates that only Hospital-branded badge reels may be worn while engaged in direct patient care, nothing prevents employees

from swapping out their badge reels in non-patient care areas, and the language of the rules does not prevent employees from making this switch. Moreover, the record evidence establishes the opposite, namely, consistent with the Judge's finding, the rule applied to direct patient care providers in patient care areas, and outside of those areas, employees could and did wear union insignia, with at least one witness testifying that she in fact routinely swapped out her uniform badge reel with a union one when not in patient care areas. JA 114. If anything, this rule is similar to another Hospital policy regarding jackets, under which employees can wear any type of jacket or sweater they wish (and some employees often wear union jackets) in non-patient areas, but while in patient areas they may only cover their uniform with Hospital-branded coats. JA 194-195.

The Hospital has clearly shown that the badge reel restriction is narrow and does not unlawfully limit employees from taking part in Section 7 expression when in non-patient care areas, especially when balanced against its legitimate business justifications.

In short, the record established that had the Board properly evaluated the rules under the standard pronounced in *Boeing*, the Board would have necessarily found them lawful and dismissed the Complaint in its entirety.

CONCLUSION

For the foregoing reasons, the Hospital respectfully requests that this Court (i) grant its petition for review; (ii) deny the Board's cross-application for enforcement; (iii) vacate the Board's decision; and (iv) remand the matter to the Board with instructions to dismiss the Complaint.

Dated: March 11, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), Long Beach Memorial Medical Center, Inc. d/b/a MemorialCare Long Beach Medical Center and MemorialCare certifies that this reply brief contains 6,392 words of proportionally-spaced, 14-point type; the word processing system used was Microsoft Word.

Dated: March 11, 2019.

/s/ Adam C. Abrahms
Adam C. Abrahms

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, the foregoing document is being electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, thereby serving it on all parties of record.

/s/ Adam C. Abrahms

Adam C. Abrahms