

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TESLA, INC.

and

MICHAEL SANCHEZ, an Individual

Case No. 32-CA-197020

and

JONATHAN GALESCU, an Individual

Case No. 32-CA-197058

and

RICHARD ORTIZ, an Individual

Case No. 32-CA-197091

and

**INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL WORKERS OF
AMERICA, AFL-CIO**

Case No. 32-CA-197197

Case No. 32-CA-200530

Case No. 32-CA-208614

Case No. 32-CA-210879

**RESPONDENT TESLA, INC.'S BRIEF REPLYING TO THE GENERAL COUNSEL'S
ANSWERING BRIEF TO TESLA, INC.'S EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION AND RESPONDENT'S BRIEF IN SUPPORT OF
EXCEPTIONS**

Mark S. Ross
mross@sheppardmullin.com
Keahn N. Morris
kmorris@sheppardmullin.com
SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP
4 Embarcadero Center, 17th Floor
San Francisco, CA 94111
Telephone: (415) 434-9100

Attorneys for Tesla, Inc.

The GC did not identify any record evidence or cite any authority that contradicted or rebutted Tesla's showing in its opening brief. Tesla's exceptions should be granted.

I. THE JUNE 7 CONVERSATION WAS PROTECTED UNDER 8(c)¹

Tesla accepts the ALJ's factual findings as to what was said and by whom on June 7. The issue is one of law: whether the fact of the conversation and words spoken by Musk and Toledano constitute an unlawful solicitation of grievances and unlawful threats of futility or whether the conversation is privileged speech protected by Section 8(c) and the First Amendment. Whether viewed in isolation or in the context of Tesla's other acts, at worst, these statements constitute the declarant's honestly felt opinions protected by 8(c). *Valley Health System*, 369 No. 16 (2020), slip op. at 5; *Amnesty International of the USA*, 368 NLRB No. 112 (2019), slip op. at 3.

The GC's answering brief ignores the different factual context giving rise to the June 7 conversation (instead citing cases based on dissimilar facts).² The GC does not cite a case where workers spontaneously³ raise an issue with the employer, request a response and, in response, an employer converses with the employee's designated spokesperson. Thus, the conversation had no express or implied promises, but gave Moran and Vega an opportunity to speak about the petition. To conclude otherwise, means that the law prevents an employer from acceding to employee's spontaneous safety complaints and requests for a response during a union organizing drive. This is antithetical to an employer's federal and state workplace safety obligations.

¹ The GC (p. 17) has not rebutted the arguments in Tesla's opening brief that the June 7 allegations are barred by Section 10(b). Moreover, contrary to the GC, Tesla's ability to preserve evidence is directly implicated by the "same or similar" defenses prong.

² The GC's cited cases involve the typical situation of an employer as the initiating party soliciting employee grievances as part of its campaign to blunt union organizing. Here, though the employees were the initiators and it was Moran who diverted the conversation and raised the Union. Musk and Toledano did not impliedly promise anything if the employees rejected the Union, but instead offered their opinions why they believed the Union to be a bad idea and suggested that Moran participate in Tesla's already existing Safety Committee.

³ In all the GC's cited cases, the employer's statements of futility were either explicit threats, indicating that the employer would simply never allow its employees' wish to unionize or, implicit, with the employer essentially telling workers that it would do everything within its power including violating the law to avoid unionization. Nothing in the statements attributed to Musk and Toledano here meets this essential legal criteria.

II. MUSK’S TWEET DID NOT VIOLATE THE ACT: IT WAS NOT A THREAT

The GC and ALJ both misread Musk’s May 20 tweet by reading it in isolation and disregarding the subsequent tweet thread and Tesla’s press release that explain and clarify what is, at worst, an ambiguous statement. Particularly troubling is the GC’s blatant misrepresentation (p. 25) when he states “[t]he record is devoid of any further tweets by Mr. Musk concerning [what] he meant by his . . . May 20 tweet,” when the exhibit to which he cites (GC-69) contains all of the subsequent tweets in the thread that explain what Musk meant and objectively establish it was not an unlawful threat but a permissible statement of belief protected by Section 8(c).⁴

Thus, on May 22, @ericbrownzzz, asked Musk, “[W]hy would they [a reference to Tesla employees] lose stock options? Are you threatening to take away benefits from unionized workers?, to which Mr. Musk replied, “*No. UAW does that.*” (GC-69, p. 2)(italics added) The next day, in answer to a tweet from @JackallisonLOL who asked about Musk if Tesla employees would lose stock options if they organized, another tweeter, @Altwouss, observed that Musk’s May 20 tweet had been taken out of context and that Musk, had clarified in his May 22 tweet that he believed that the UAW did not allow union workers to own stock. (GC-69, p. 3) Musk replied to this last tweet, saying “Exactly, UAW does not have individual stock ownership as part of the compensation at any other company.” (*Id.*) This is not a threat; it is a protected expression of Musk’s opinion or belief. The GC cannot “disappear” this exonerating evidence; reading the tweet in context demonstrates its lawfulness. *Turtle Bay Resorts*, 353 NLRB 1242, 1278 (2009); *Amnesty International*, *supra*.

Moreover, Tesla had no obligation to present objective facts to substantiate or prove the truth of Musk’s lawful statement because it did not contain a threat of reprisal or promise of a benefit. *Camvac, International*, 288 NLRB 816, 820 (1988); *Southern Bakeries, LLC*, 364 NLRB No. 64, slip op. at 11 fn. 9 (2016). Even if truth were relevant, who better to prove the

⁴ Tweets are abbreviated messages and thus cannot be viewed in isolation. The GC attempts to skirt this argument by faulting Musk for not having multiple tweets, which is exactly what Musk did. The GC cannot have it both ways.

falsity of his protected statements than the Charging Party and the GC. But neither presented any evidence debunking or disproving the accuracy of Musk's statements.

III. TESLA PROPERLY DISCIPLINED MORAN AND DISCHARGED ORTIZ

Tesla did not violate the Act when it discharged Ortiz for lying during an investigation and disciplined Moran with a warning for misappropriating other employees' photographs and personnel information from Tesla's internal Workday database. Simply being involved in an organizing campaign is not a shield that protects them from all consequences of misconduct.

GC failed to establish a *prima facie* case: The GC failed to rebut Tesla's showing that the ALJ improperly substituted her own business judgment and did not properly apply *Wright Line*. The GC attempts the same thing: providing additional, irrelevant suggestions about how the investigation could have been done. *Cellco Partnership v. NLRB*, 892 F.3d 1256, 1262 (D.C. Cir. 2018)(repeatedly held to be improper for ALJ to take on the company's business judgment chair; only relevant question is "whether the company's judgment was reasonably consistent").

GC did not show animus: The GC did not rebut Tesla's showing that there was no animus as required by *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019). Other than a sprawling recitation of union organizing testimony unrelated to the decision makers and including alleged acts involving employees other than Moran and Ortiz (pp. 30-34), the GC's record citation to allegedly support animus is the *entire* section of the ALJ's decision on Ortiz and Moran (p. 31). This is far from the requisite showing. The GC fails to identify any evidence that any decision maker participated in any of the alleged acts or had any anti-union animus.⁵

An investigation's scope is not animus: The GC makes the unsupported implicit suggestion (pp. 36-39) that an investigation's scope must not change and if it does, that equates

⁵ Equally preposterous (p. 44-45, fn. 46) is the suggestion that the termination decision involved Musk or that he provided the rationale for the decision. The GC's suggestion (pp. 32-33) that emails or tweets from Musk *not charged here* are somehow evidence of animus is contrary to law and fact. The only allegation as to Musk's communications – his May 20, 2018 tweet which Tesla contends is a permissible 8(c) opinion statement – occurred *seven months after* the termination decision. And the other tweet relied upon by the GC (not alleged to violate the Act) was sent the same day. Neither the ALJ nor the GC can rely on this as evidence of a purported changed reason for termination unless they possess a time machine.

to animus or unlawful motive. The initial complaint was that Pratt felt harassed and targeted.⁶ (ALJD 55:30-56:3) Gecewich spoke with Pratt and then Kostitch, who raised the fact that the posted photos “were workday on mobile,” that someone took “screenshots of this” and thought it was “100% wrong, and quite disgusting.” (ALJD 56, fn. 84; GC-64, p. 2) Gecewich determined an investigation was appropriate, and should include whether other employee’s Workday profiles had been taken and posted to Facebook. (ALJD 57:25-58:10). The investigation expanded organically as these new facts and misconduct, not originally complained of, were uncovered.

The GC’s theory cannot be sustained because it impermissibly prevents workplace investigations that are required by law. *Unique Thrift Store*, 368 NLRB No. 144, slip op. at 4 (2019)(Board reiterating that “[t]here is no dispute that an employer has a legitimate interest in investigating charges of alleged employee misconduct. And because full, fair, prompt, and accurate resolution of such complaints also benefits employees, they, too, possess a substantial interest in having an effective system in place for addressing workplace complaints.”)(internal citations omitted).

Equally specious is the GC’s assertion (p. 43) that the reasons for the termination and discipline “demonstrate the unlawful motive.” The ALJ found “the credited evidence shows that Respondent terminated Ortiz for lying during an investigation.” (ALJD 67:8-9) This is a legitimate business judgment and “not unusual one—that an employee lying during an investigation is a serious threat to management of the enterprise. The Board has no warrant to challenge that decision.” *Cellco*, 892 F.3d at 1262. The termination was also supported by multiple comparators, contrary to the GC’s assertion (p. 40) that there was only one.⁷

Moran’s conduct was not protected: The GC’s assertion (p. 31) that Moran’s use of Workday did not lose the protection of the act because the names and job titles (the GC omits the

⁶ The GC falsely asserts (p. 36) Pratt never complained he felt “targeted.” The ALJ found the investigation began because Pratt complained “the release of his photo and information was inappropriate and made him feel singled out, harassed or cyberbullied.” (ALJD 60:18-20)

⁷ In addition to the case Gecewich discussed, Graminger spoke to his manager who confirmed that there had been similar instances where someone lied during an investigation and was terminated. (ALJD 62:14-25)

employee photographs) were not “private, confidential or otherwise stolen” is contrary to the record. Workday can only be accessed by Tesla employees with a log-in. (ALJD 52:30-32) Moran testified it was an *internal* company system (ALJD 58:29-31) and that Workday data *concerning other employees* could not be shared externally and that “outside sources” should not be provided access to Workday. (Tr. 762:24-763:6, 2278:19-2279:17; GC-67) He admitted when he took “a screenshot of the information” and “passed it on to Ortiz,” he was “not limiting [his] [] use of Workday to internal use.”⁸ (Tr. 763:2-6) Ortiz also described Workday’s function as “like a Facebook for Tesla; *the people inside the building.*” (ALJD 57:11-14)(italics added).

Despite being unable to contradict this evidence, the GC attempts (p. 42) to analogize the facts here to *Gray Flooring*, 212 NLRB No. 107 (1974). *Gray Flooring* is a pre-modern technology 1974 case in which an employee created a list of names and telephone numbers (no employee photographs were involved) by looking at a group of index cards kept by the employer in an office that employees were permitted to enter. The only way *Gray Flooring* could be on point is if the employee there physically took select index cards from the office, moved them off-site and shared them with other people in the new, non-work location – because that is what Moran did here. Moran did not copy down employee information from Workday, he physically took the information by using his phone to take a snapshot that captured all the Workday data for other employees just as it appeared in Workday and then texted each profile to Ortiz who then posted the snapshots externally on the internet using Facebook (ALJD 52:33-34, 53:3-19; Tr. 766:5-7, 16-17; GC-64, p. 2) It was an unlawful taking, as detailed in Tesla’s opening brief.

Neither Ortiz nor Moran was interrogated: Though the GC asserts (p. 47) that Gecewich questioned both “their activities in Sacramento and their organizing activities on social media,” the record evidence rebuts this: he asked Ortiz whether the Facebook post was his and for the source of the Workday profiles and asked Moran about his use of Workday and why he took the screenshots. (ALJD 57:11-17, 58:23-35, 59:24-25) The GC then proceeds (p. 47) to

⁸ Moran also did not have Pratt or Ives’ permission to take their photos from Workday. (Tr. 763:14-18)

impermissibly stretch each element of *Rossmore House*, 269 NLRB 1176 (1984) to conclude the interviews were “highly coercive.” The basis: they were “one-on-one meetings with a company investigator” which conceivably describes every workplace investigation interview. It also runs counter to the Board’s holding in *Unique Thrift Store*, which reinforced the legitimate business interest in conducting effective, *confidential* workplace investigations. 368 NLRB No. 144, slip op. at 4. No unlawful interrogation occurred.

IV. LIPSON DID NOT INTERROGATE ORTIZ OR GALESCU

The GC fails to acknowledge that Tesla had federal and state law obligations to protect employee privacy and personally identifiable information, and thus had a legitimate basis for the investigation. The GC argues that the employees’ right to share the Cal/OSHA safety logs and summaries with other employees somehow eliminates Tesla’s concern about inadvertent disclosure, but completely ignores Tesla’s legitimate concerns about whether the forms were disclosed to *unauthorized* third parties. The GC also ignores the ALJ’s finding that the Cal/OSHA safety logs (Form 300) contain personally identifiable information, including the names of injured or ill employees. (ALJD 28, fn. 46) *Unique Thrift Store, supra*. Lipson’s questions to Ortiz and Galescu were consistent with the targeted and legitimate investigation regarding the impermissible disclosure of employees’ personal medical information. Whether Lipson explicitly stated the purpose of the meetings, the legitimate purpose would have been clear to a reasonable employee under the circumstances.⁹

Contrary to the GC, the timeline of Tesla’s investigation fully supports a conclusion that it was based on a concern about the disclosure of employees’ personal medical information. The Worksafe report (which names specific employees and specific injuries taken from the Cal/OSHA forms) was published on May 24, 2017, the same day Lipson met with Ortiz and Galescu. (R-3, Exh. D) The leaflets distributed the morning of May 24 contained an internet

⁹ Holcomb’s notes state that Lipson began both meetings by informing Ortiz and Galescu that the purpose of the meeting was to investigate concerns about the disclosure of employees’ health information. (ALJD 29, fn. 50; GC-91)

link to the Worksafe report (www.fairfutureattesla.org/injuryreport). (GC-9) The GC (p. 11) erroneously contends the “report” is dated one day after the alleged interrogation occurred.¹⁰

It is irrelevant that Tesla did not investigate the disclosure of the forms before May 24 because in early May, Tesla sent out an email to employees notifying them that an employee had requested the Cal/OSHA forms with information about safety incidents, including “employee names and the nature of the incident” and that Tesla “wanted to provide advance notice to employees, as we believe this request is intended to ultimately make this information public despite our efforts to protect your privacy.” (R- 2) Thus, when Tesla sent the email, it believed the information might be made public, but had not yet, so an investigation then would have been pointless. As soon as Tesla discovered the information had been disclosed to an unauthorized third party and made public – the morning of May 24 – it immediately began conducting an investigation later that day. There was simply no unlawful interrogation.

V. THE GA TEAM WEAR POLICY IS LAWFUL ON ITS FACE

Wal-Mart Stores, Inc., 368 NLRB No. 146 (December 16, 2019), governs this case and warrants dismissal of the allegation that Tesla’s Team Wear policy applicable to the GA area of the facility is overbroad and facially invalid. Other than requiring GA employees to wear Tesla-issued uniforms (a black, red, or white Team Wear shirt, and black Team Wear pants, all of which are designed to prevent mutilations to freshly painted vehicles and maintain visual management within GA), the Team Wear policy places no restrictions on the wearing of union insignia or messaging in GA.¹¹ The Board issued its decision in *Wal-Mart* shortly after Tesla filed its exceptions and brief in support, which urged the Board to apply the Board’s test for facially neutral employer policies set forth in *Boeing Co.*, 365 NLRB No. 154 (2017), to

¹⁰ Perhaps the GC is referring to the OSHA Complaint (R-3); but Tesla made no such contention.

¹¹ Aside from one isolated supervisor’s statement to non-GA employees in March 2017, the UAW has been free to distribute insignia throughout the Fremont facility. Moreover, despite the GA Expectations, employees in GA have always been permitted to display UAW graphics and logos including the Union’s “Fair Future for Tesla” emblem, by wearing items such as hats, as well as stickers on their clothing, including on their assigned GA Team Wear. (Tr. 204:14-205:2, 209:11-210:6, 260:12-15, 307:22-24, 308:21-23, 333:23-334:3, 759:12-13, 1388:16-1389:10, 1636:5-1637:6, 2408:18-2409:2, 2535:18-2536:7) The GC does not dispute this.

uniform-related policies in this context. In *Wal-Mart*, the Board agreed with Tesla’s position and held that *Boeing* is the appropriate analytical framework for facially neutral rules that limit – but do not prohibit entirely – the wearing of union insignia. This development under *Wal-Mart* is outcome determinative to this case, which the GC fails to understand.

Under *Boeing*, the Team Wear policy is a category 1 rule insofar as it defines the required base uniform for GA employees (specific shirts/pants, with shirt varying in color by classification), but does not impose any restrictions on employees’ right to wear union insignia such as union stickers or hats. The dress code policy in *Wal-Mart* stated employees were allowed to wear “small, non-distracting logos or graphics ... no larger than the size of your [employee] name badge” only. Thus, the Board analyzed the policy as a *Boeing* category 1 rule, as it limited the size and appearance of union buttons and insignia that employees could wear. Here, the Board should find that a uniform policy that places no limits on employees’ right to accessorize with union insignia belongs in category 1.

Even if Tesla’s Team Wear policy is a category 2 rule, it is lawful. To the extent employees have a Section 7 right to replace their employer-issued uniform with their own clothing items, a dubious proposition, Tesla’s limited restriction on uniform replacement is justified by two legitimate business interests – (1) preventing vehicle mutilation, and (2) standardized visual observation and management of employees by classification. *See Wal-Mart*, slip op. at 4 (noting “[t]he Board must not second-guess the Respondent’s decisions as to how it should run its business – provided, of course, that those decisions do not unreasonably interfere with the exercise of Section 7 rights”). Both of these interests have been recognized by the Board as legitimate in past cases, and have been found to justify even limitations that were much more restrictive than those associated with the Team Wear policy. *E.g., Komatsu America Corp.*, 342 NLRB 649, 650 (2004)(restrictions on wearing union insignia justified where “their display may jeopardize employee safety” or “damage machinery or products”); *Albis Plastics*, 335 NLRB 923, 924 (2001)(restrictions on wearing union insignia justified in workplaces that “require[] measures to ensure that visibility was not unnecessarily impeded” where restrictions

would ensure employees visibility or transmit information, and unauthorized insignia would interfere with visibility and thus with safety); *see also Wal-Mart*, slip op. at 4 (dress code policy furthered employer's interest in ensuring employees were readily identifiable).

Attempting to make an end-run around the Board's holding in *Wal-Mart*, the GC claims that Tesla's Team Wear policy is a "total ban" on wearing union t-shirts, and as such it should be analyzed under the *Republic Aviation* framework. The Board should reject this hollow theory because it conflicts with *Wal-Mart* and, in effect, would render it null and void in almost all cases. *See World Color (USA) Corp. v. NLRB*, 776 F.3d 17, 21 (D.C. Cir. 2015)(remanding Board decision finding that policy requiring employees to wear company hats but allowing employees to accessorize the hat with union insignia); *Eastern Omni Constructors v. NLRB*, 170 F.3d 418, 426 (4th Cir. 1999)(rule that prohibited non-company authorized decals on hardhats was "not a total ban on union insignia," but instead "a partial, inconsequential ban on union insignia" where employees were still allowed to wear decals on their clothing). Essentially, the GC is asking the Board to hold that an automobile manufacturer like Tesla cannot maintain a Company uniform, and must allow a labor union to issue a "shadow uniform" it prefers to send messages with (here, the UAW's "black shirt" with admittedly large print), unless it satisfies the *Republic Aviation* special circumstances test. Such a holding is unfounded.

The GC's attempts to distinguish *Wal-Mart* similarly fall flat (p. 8), by suggesting that it involved a public selling floor, and that the employer's legitimate business interests underlying the *Wal-Mart* dress code do not apply to Tesla's Team Wear policy. Tesla is not arguing that its Team Wear policy is justified by the same interests as the *Wal-Mart* policy, but the Board did not hold that those were the *only* legitimate business justifications that could support a partial union insignia restriction. *See Wal-Mart*, slip op. at 3 (limitations on the wearing of union insignia short of outright prohibitions will "warrant individualized scrutiny in each case")(citing *Boeing*).

The GC also seeks to undermine Tesla's business justifications because the Union could (or did) print t-shirts of the same color for *some* associates in GA (i.e., production associates but not team leads or quality inspectors). However, the possibility of partial "shadow uniforms"

issued by a union is not sufficient to reject Tesla’s business justifications here, especially in the context of very expensive, freshly painted and uncured vehicles and the need to police each and every non-Tesla issued shirt for hundreds or thousands of employees each day.

Notably, the judge dismissed the Team Wear policy discriminatory enforcement allegation, and the GC did not except (or cross-accept) to the dismissal. The Team Wear policy was in place well before the Union’s organizing campaign, and there is no allegation (let alone a finding) that the Team Wear policy was implemented in response to union and/or protected concerted activities or has been more strictly enforced. Tesla’s consistent, non-discriminatory enforcement further shows that it was justified by Tesla’s legitimate concerns.

VI. THE ALJ’S REMEDY IS PUNITIVE AND CONTRARY TO THE LAW

Contrary to the GC, a notice-reading remedy is not “usual,” it is an “extraordinary remedy,” and requiring that the notice be read by or in the presence of a specific company official is even more extreme and unusual. The GC fails to distinguish or rebut the case law cited in Tesla’s opening brief that either remedy is wholly unwarranted. Requiring that the notice be read by a specific company official is only justified “where a particular corporate official, to the knowledge of employees, was directly responsible for many of the violations that justified the read-aloud requirement.” *Ingredion, Inc.*, 366 NLRB No. 74, slip op. at 1 fn. 2 (2018). As the GC acknowledges (p. 48), various individuals (security guards, and isolated supervisors and managers) allegedly engaged in the sporadic conduct at issue. At most, Musk was involved in *two* incidents (both of which were lawful). Accordingly, the facts that require a notice reading, much less a reading by Tesla’s top executive, are absent here.

Dated: February 27, 2020

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By



MARK S. ROSS
KEAHN N. MORRIS
Attorneys for
TESLA, INC.

CERTIFICATE OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Four Embarcadero Center, 17th Floor, San Francisco, CA 94111-4109.

On February 27, 2020, I served a true copy of the document(s) described as:

**RESPONDENT TESLA, INC.'S BRIEF REPLYING TO THE GENERAL COUNSEL'S
ANSWERING BRIEF TO TESLA, INC.'S EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION AND RESPONDENT'S BRIEF IN SUPPORT OF
EXCEPTIONS**

on the interested parties in this action as follows:

Edris W.I. Rodriguez Ritchie
E-mail: edris.rodriquezritchie@nlrb.gov
Field Attorney, Region 32
National Labor Relations Board
1301 Clay Street, Ste. 300N
Oakland, CA 94612-5224
T: (510) 671-3041

Margo Feinberg
E-mail: margo@ssdslaw.com
Daniel E. Curry
E-mail: dec@ssdslaw.com
Schwartz, Steinsapir, Dohrmann & Sommers, LLP
6300 Wilshire Blvd., Suite 2000
Los Angeles, CA 90048
T: (323) 655-4700

Jeffery Sodko
E-mail: jsodko@uaw.net
United Automobile, Aerospace and Agricultural Workers of America
AFL-CIO
8000 E. Jefferson Avenue
Detroit, MI 48214
T: (313) 926-5000

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 27, 2020, at San Francisco, California.

A handwritten signature in blue ink that reads "Doug Bacon". The signature is written in a cursive style with a large initial "D" and "B".

Doug Bacon