

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 IMPLEMENT
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

**MOTION FOR PERMISSION TO FILE A BRIEF AS *AMICUS CURIAE* and BRIEF OF
AMICUS CURIAE HR POLICY ASSOCIATION IN RESPONSE TO BOARD'S
INVITATION TO FILE**

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HR Policy Association (“HRPA” or “Association”) submits the instant motion and this amicus brief in response to the National Labor Relation Board’s (“NLRB” or “Board”) invitation to file amicus briefs in *Tesla, Inc.*, 32-CA-197020 et al., which presently is pending before the Board.

STATEMENT OF INTEREST

HR Policy is a public policy advocacy organization that represents the chief human resource officers of more than 380 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States – nearly 9 percent of the private sector workforce. Since its founding, one of HRPA’s principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

Association members regularly have matters before the NLRB, and HR Policy has consistently advocated on behalf of its members on issues related to collective bargaining and the National Labor Relations Act (“NLRA” or “Act”). HR Policy therefore has a general interest in ensuring that the standards articulated by the Board are consistent with the language and purposes of the Act, while, at the same time, are sound, practical, and responsive policies meeting the realities of today’s workplace. More specifically, a substantial number of Association members have manufacturing operations and employees working in industrial settings with employee uniform policies similar to that at issue in the present case. The Association thus has a vested interest in the Board’s approach to employers’ uniform policies and accordingly submits this amicus brief representing its views on this area of the law.

I. ANSWERS TO QUESTIONS POSED BY THE NATIONAL LABOR RELATIONS BOARD

In its invitation to file briefs at 370 NLRB No. 88 (2021), the Board posed the following questions:

1. Does *Stabilus* specify the correct standard to apply when an employer maintains and consistently enforces a nondiscriminatory uniform policy that implicitly allows employees to wear union insignia (buttons, pins, stickers, etc.) on their uniforms?
2. If *Stabilus* does not specify the correct standard to apply in those circumstances, what standard should the Board apply?

Amicus HR Policy Association answers the first question posed by the Board in the negative – the Board’s decision in *Stablius, Inc.*, 355 NLRB 836 (2010) does not set forth the correct standard to determine whether an employer violates the Act regarding the establishment and implementation of facially neutral employee uniform policies. With respect to the Board’s second question, Amicus outlines below the analysis and factors that the Board should utilize in reviewing employee uniform cases.

II. SUMMARY OF FACTS AND ARGUMENT

A. Summary of Facts

The present case involves the Employer, Tesla, Inc.’s employee uniform policy. Tesla requires its Productions Associates (“PA’s”) and Team Leads to wear uniforms, referred to as team wear. The business rationale for such a policy is based on a number of legitimate concerns, including protecting the quality of its car chassis. Specifically, the team wear is made of fabric quality that eliminates or reduces the risk of scratches and other vehicle mutilation which would lead to increased production costs and inferior vehicle quality. Further, the Employer’s rationale for the policy is to permit rapid identification of which team members are in the production area to ensure that there are no unauthorized individuals in such area that could interfere with the production process, including having improper contact with vehicle chassis as they proceed through the assembly process. Additionally, the Employer on occasion has permitted PA’s to substitute all black-colored clothing of a fabric quality similar to team wear when team wear was not available from vendors or when a PA did not otherwise have team wear available for use.

Finally, the Employer has implicitly allowed PA's to wear union insignia on team wear or clothing that otherwise has been approved. Tesla has also permitted PA's to wear union stickers on team wear and otherwise approved clothing. Additionally, the Employer has permitted PA's to wear union hats bearing union insignia.¹

B. Summary of Argument

The starting point in responding to the questions posed by the Board in its invitation for parties to file briefs is a thorough review of the Supreme Court's decision in *Republic Aviation* and the underlying Board decision that it affirms. While the Court's opinion in *Republic Aviation* was largely a response to the challenge by the parties to the Board's procedural decision-making process and whether the Board had provided a sufficient rationale for its decisions, the key part of the decision to focus on is the Court's establishment of a balancing test to determine the legality of employer workplace policies. *Republic Aviation* did not create a "special circumstances" test, and unfortunately a great deal of incorrect jurisprudence has developed in employer workplace policy cases since that decision. What occurred in *Stabilus*, and in the ALJ decision in the present case, and in many other decisions, is the substitution of the "special circumstances" test for the balancing test outlined in *Republic Aviation*. Indeed, *Stabilus* is a perfect example of a Board majority incorrectly giving the impression of an artificially created "special circumstances" test that places an exceedingly high and inappropriate burden of proof on employers. As noted above, the balancing test is the appropriate test to apply, and in most cases is both the starting and ending point with respect to analyzing the legality of employer workplace policies.

As part of that balancing test, the Board and courts should also consider whether an employer has provided employees other avenues to adequately exercise their Section 7 rights. The

¹ Notice and Invitation to File Briefs, Cases 32-CA-197020 et al., (Feb. 12, 2021); *Tesla, Inc.*, Cases 32-CA-197020 et al. (Sept. 27, 2019).

so-called “special circumstances” test is not the correct starting analytical point in these cases. Further, in no event should the *Republic Aviation* balancing test or the “special circumstances” test be applied in a manner that permits employees to wear apparel, buttons, badges, or insignia of their own choosing such that it entirely negates an employer’s otherwise lawful policy.

Finally, Amicus HRPB submits that the Board should reverse the ALJ decision in the present case as it incorrectly utilized the artificially created “special circumstances” test and did not properly apply the *Republic Aviation* balancing test.²

III. THE DICTA IN *STABILUS* SHOULD NOT APPLY IN SITUATIONS WHERE AN EMPLOYER ESTABLISHES A FACIALLY NEUTRAL BUSINESS-RELATED EMPLOYEE UNIFORM POLICY AND ENFORCES SUCH POLICY IN A NONDISCRIMINATORY MANNER

A. The Board and the Courts Have Consistently Found that Employees have Basic Entrepreneurial Rights to Establish Employee Terms and Conditions of Employment to Operate their Business

Employers have a wide range of operational and entrepreneurial rights under the NLRA that both the Board and the courts have consistently recognized since the NLRA’s enactment. Employers are empowered to establish the terms and conditions of employment “free from the constraints of the bargaining process to the extent essential for the running of a profitable business.”³ Indeed, employers “must have some degree of certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice.”⁴ This “need for unencumbered decision-making”⁵ extends to workplace rules and

² The ALJ also improperly failed to apply the Board’s *Boeing* framework. See *Boeing Co.* 365 NLRB No. 154 (2017). Amicus HRPB does not discuss the applicability of the *Boeing* framework in its brief as another amicus will cover that issue.

³ *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 678-79 (1981).

⁴ *Id.* at 679.

⁵ *Id.*

procedures and other types of operational discretions rooted in maintaining production, discipline, employee safety, and similarly critical business considerations that go into running a business.

Additionally, the Board has specifically recognized that employer uniform policies have special significance in industrial and manufacturing settings and that allowing nonadherence can have tangible consequences for employee and product safety, among other negative implications. Such policies have been upheld in numerous areas, including:

- Preventing the wearing of union insignia for the purposes of preventing employee divisiveness on the factory floor;⁶
- Banning union insignia where such insignia could impair employee visibility or otherwise endanger employees;⁷
- Banning union insignia where it could otherwise distract an employee and impair concentration that is much needed on an assembly line;⁸ and
- Precluding the wearing of union insignia in order to avoid damage to machinery or products.⁹
- Recognizing that “industrial or manufacturing operations[‘]...workplace conditions can heighten the need to ensure that employees are readily visible in the workplace...and that extraneous markings or stickers can interfere with visibility and thus safety.”¹⁰

The above precedent, especially in manufacturing and industrial settings, should be included in the Board’s balancing of interests analysis when deciding employee uniform cases.

B. The Standard Discussed in *Stabilus* is Unclear

⁶ See, e.g., *United Aircraft Corp.*, 134 NLRB 1632 (1961).

⁷ See, e.g., *Albis Plastics*, 335 NLRB 923 (2001); *Andrews Wire Corp.*, 189 NLRB 108 (1971).

⁸ See, e.g., *Fabri-Tek, Inc. v. NLRB*, 352 F.2d 577 (8th Cir. 1965).

⁹ See, e.g., *Campbell Soup Co.*, 159 NLRB 74, enf. in part, enf. denied in part or on other grounds, 380 F.2d 372 (5th Cir. 1967).

¹⁰ *Albis Plastics*, 335 NLRB 923, 924 (2001).

The *Stabilus* standard is of uncertain origin and appears to be created without any appropriate jurisprudence footing. In *Stabilus*, the Board found that an employer unlawfully prohibited employees from wearing pro-union t-shirts during an election period.¹¹ The employer maintained a uniform policy that required employees to wear shirts bearing the company name “but did not require temporary employees to wear a company uniform of any kind.”¹² The employer also permitted employees to wear company shirts unbuttoned with t-shirts underneath displaying various messages.¹³ However, during an election period, the employer required certain employees to remove pro-union t-shirts, hats, and badges.¹⁴ Thus, the *Stabilus* ruling was limited to the discriminatory enforcement of the employer’s policy that specifically targeted union insignia.

The *Stabilus* language cited by the Board in its present invitation for briefs – “an employer cannot avoid the ‘special circumstances’ test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia” – is in fact merely dicta that had no involvement with the resolution of that case. Such dicta is accompanied by no further justification or explanation, either in the opinion itself or in accompanying citations to previous Board cases from which it may have been derived, nor has it been subsequently elucidated or relied upon in any manner in any future Board adjudication. Thus, the extent to which *Stabilus* stands for the rule that an employer’s uniform policy that may preclude the wearing of clothing with any other insignia is facially unlawful – even where such policy is nondiscriminatory as written and consistently enforced – is unclear, and its dubious source makes the contours of its application subject to question.

¹¹ *Id.* at 837.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

C. *Republic Aviation* Establishes a Test Balancing Employer and Employee Interests and Did Not Create a “Special Circumstances” Test that Places a Heightened Burden on Employers

Initially, it is important to note that the primary issues before the Court in *Republic Aviation* were employer due process challenges to the Board’s decision-making process and challenges to whether the Board had articulated with sufficient particularity rationales for its decisions. For example, the Court stated the following:

The gravamen of the objection of both *Republic* and *Le Tourneau* to the Board’s orders is that they rest on a policy formulated without due administrative procedure. To be more specific it is that the Board cannot substitute its knowledge of industrial relations for substantive evidence. The contention is that there must be evidence before the Board to show that the rules and orders of the employers interfered with and discouraged union organization in the circumstances and situation of each company.¹⁵

The Board has fairly, we think, explicated in these cases the theory which moved it to its conclusions in these cases. The excerpts from its opinions just quoted show this. The reasons why it has decided as it has are sufficiently set forth.¹⁶

The relevant part of *Republic Aviation* with respect to the questions posed by the Board in its invitation to file briefs is the Court’s establishment of a balancing test when employer workplace policies are challenged. Specifically, the Court stated:

These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.¹⁷

This is the test that the Board and courts should apply when legal challenges are made to employer workplace policies, including employee uniform policies. *Republic Aviation* did not

¹⁵ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

¹⁶ *Id.* at 803.

¹⁷ *Id.* at 797-98.

create a heightened burden “special circumstances” test. Indeed, the phrase “special circumstances” as thereafter applied by the Board in subsequent cases, and as referred to in *Stabilus* and applied by the ALJ in the present case, only appears twice in *Republic Aviation* – once in the context of the geographic location of the plants in question and whether they fit in a “company town” situation, and once in a reference to an employer rule prohibiting union solicitation by an employee outside of working hours on company property.¹⁸ Not once does this phrase appear in relation to the employer’s prohibition of union buttons and insignia.

A close examination of the Board’s analysis in its underlying decision in *Republic Aviation* also does not support the establishment of an artificial “special circumstances” test placing a heightened burden on employers. The first issue examined in depth by the Board does not even involve employee uniform policies. This issue involved a challenge to an employer policy that prohibited employees from engaging in union solicitation during nonwork lunch periods. The Board correctly held that:

...a rule prohibiting union activity on company property outside of working time constitutes an unreasonable impediment to self-organization, and that discharges for violation thereof are discriminatory.¹⁹

While the Board’s decision does state that the “record discloses no special circumstances” the decision goes on to state that the “Respondent advances no cogent reason, warranting extension of the prohibition to non-working time”²⁰ – a balancing of interests analysis.

The second issue examined by the Board in *Republic Aviation* does touch upon an employer uniform policy – discharge of three employees for wearing union steward pins. Nowhere in this part of the decision, however, does the phrase “special circumstances” appear. The entire

¹⁸ *Id.* at 803-04.

¹⁹ *Republic Aviation*, 51 NLRB 1186, 1187 (1943).

²⁰ *Id.*

analysis on this issue is a balancing test discussion with the Board rejecting the employer's rationale for its policy, and concluding that the wearing of union insignia in the workplace is a protected activity that outweighed any corresponding employer interest in that case.

What term is used to describe the correct balancing test is not important. What is important is that the Board and courts recognize an employer's right to establish and implement facially neutral employee uniform policies, and that a balancing test generally be utilized to determine whether such policies are lawful under the NLRA.

D. The "Special Circumstances Test" Was Improperly Explained in *Stabilus*

To the extent that a "special circumstances" test evolved out of *Republic Aviation*, the test, as applied by the Board over the decades, still:

...inherently involves a balancing of employees' Section 7 rights and the employer's legitimate business interests, as a finding of special circumstances means that the employer's justifications for the policy are sufficiently weighty that the balance must tip in favor of permitting the ban.²¹

It does not give an unqualified right to employees to wear union insignia in the workplace nor similarly render any otherwise lawful uniform policy that prohibits the wearing of such insignia per se unlawful.

Further, such a test is limited in scope "through cases deciding whether employees could add or attach union insignia to a uniform or attire required by their employer's policy."²² Specifically, the question of whether there are "special circumstances" has arisen in cases involving employers with no uniform policies that have prohibited employees from wearing union insignia or attire, or in cases involving employers with a uniform policy that completely banned

²¹ See *Wal-Mart Stores, Inc.* 368 NLRB No. 146 (2019).

²² *Stabilus* 355 NLRB 836, 844 (2010) (Member Schaumber, dissenting).

adding union insignia (such as a button or pin) to the required attire.²³ Thus, the “special circumstances” test, to the extent it properly applies, balances employees’ rights to add or attach insignia to a company uniform against the employer’s right to maintain safety, production, public image, or other employer concern.

Before *Stabilus*, however, the Board had never, in applying the “special circumstances” test, held that where an employer lawfully maintains and consistently enforces a facially neutral policy requiring employees to wear a company uniform, its employees have a right under Section 7 to disregard the policy and wear union attire of their own choosing in place of a required uniform.²⁴ This approach is in direct conflict with established Board precedent recognizing an employer’s right to maintain and enforce a facially neutral nondiscriminatory employee uniform policy.²⁵ Extending an artificially created “special circumstances” test to lawfully maintained and enforced uniform policies as implied by *Stabilus* essentially eliminates an employer’s right to maintain and enforce such policies entirely. If employees have an unqualified right to disregard a company uniform policy and substitute union attire in place of the required uniform then an employer is effectively prevented from maintaining and enforcing any type of uniform policy whatsoever. Indeed,

if employees have the right to wear union attire instead of a company uniform, the employer’s right to promulgate and enforce reasonable, nondiscriminatory apparel rules is negated entirely. Such a result would not strike a balance between employee and employer rights; rather, it would completely submerge the employer’s rights.²⁶

²³ *Id.*

²⁴ *Id.* at 843.

²⁵ See, e.g., *Noah’s New York Bagels*, 324 NLRB 266, 275 (1997); *Casa San Miguel, Inc.*, 320 NLRB 534, 540 (1995).

²⁶ *Stabilus*, 355 NLRB 836, 843 (2010) (Member Schaumer dissenting).

Thus, the dicta in *Stabilus* inappropriately suggests that the “special circumstances” test could apply to lawful employer uniform policies such that it would inappropriately subordinate employer rights to the rights of their employees.

E. The *Republic Aviation* Balancing Test is the Proper Analysis for Employer Workplace Policies and Not the Artificially Created “Special Circumstances” Test

The artificially created “special circumstances” test as contemplated by *Stabilus* cannot be used to nullify or interfere with the utilization of the *Republic Aviation* balancing test. Indeed, such improper application of the “special circumstances” test in fact improperly elevates employee interests over that of the employer. It places, in most instances, an unachievable burden on employers to establish that “special circumstances” justify implementing an otherwise lawful workplace rule or policy that is grounded in basic operational and entrepreneurial rights. Instead of beginning with a balancing of the legitimate business justifications for an employer’s policy against an employee’s Section 7 rights, such a “special circumstances” test has been utilized in a manner that assumes a workplace rule or policy is unlawful, an assumption that an employer must then rebut to maintain its policy – such an approach, as stated above, places an extremely high and difficult evidentiary burden for employers to meet. Stated alternatively, an overly expansive use of the artificially created “special circumstances” test unlawfully places a nearly unreachable burden on employers to establish their right to implement such policies in the workplace in the first instance.

Such an approach also inappropriately subordinates an employer’s rights to that of its employees in contravention of the goals and purposes of the NLRA and is in direct conflict with the balancing approach derived in *Republic Aviation* from which the artificially created “special circumstances” test purportedly flows. Again, Member Schaumber in his dissent to *Stabilus* properly makes the point:

The elevation of employee rights over the employer's rights simply is not supported by *Republic Aviation* or any case law. Indeed, the core principle of *Republic Aviation*, and subsequent Board cases, is one of balancing and accommodating the equal but competing rights of employees and employers. Inherent in the notion of balancing and accommodating those competing rights is that both employer and employee interests must be fairly considered and weighed.²⁷

Workplace rules and policies should instead be evaluated using the *Republic Aviation* balancing test, in which employee Section 7 rights are properly balanced against employer's rights to maintain productivity and discipline. The right to wear union insignia, for example, as recognized in *Republic Aviation*, is predicated on an employee's right to communicate freely with other employees regarding self-organization at the workplace, and is balanced against an employer's right to implement an employee uniform policy, which is predicated on an employer's right to maintain productivity and discipline. Such an approach gives proper weight to all interests, is in accordance with Board and court precedent, and properly achieves the goals of the NRLA.

CONCLUSION

Substantial precedent provides broad entrepreneurial and operational rights for employers to establish and implement facially neutral employee uniform policies. *Stabilus*, then, does not specify the correct standard to apply when an employer maintains and consistently enforces such policies. The Board should apply a balancing test in deciding employee uniform cases and only apply a heightened burden "special circumstances" test when an employer has no uniform policy or a policy that completely prohibits any type of additional apparel and/or buttons, badges, and insignia to be worn in the workplace.

Respectfully submitted,

²⁷ *Stabilus* 355 NLRB 836, 844 (2010) (Member Schaumber, dissenting).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amicus Brief in Cases 32-CA-197020 et al. was electronically filed via NLRB e-filing system with the National Labor Relations Board and served via email on the following parties or counsel on March 22, 2021.

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