

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

TESLA, INC.,	)	
	)	
Respondent,	)	Case No.: 32-CA-197020
	)	32-CA-197058
	)	32-CA-197091
AND	)	32-CA-197197
	)	32-CA-200530
MICHAEL SANCHEZ,	)	32-CA-208614
JONATHAN GALESCU, RICHARD ORTIZ,	)	32-CA-210879
INTERNATIONAL UNION, UNITED	)	32-CA-220777
AUTOMOBILE, AEROSPACE AND	)	
AGRICULTURAL IMPLEMENT WORKERS	)	
OF AMERICA, AFL-CIO,	)	
	)	
Charging Parties.	)	
	)	

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**BRIEF OF *AMICUS CURIAE* LOCAL UNION 304 OF  
THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS**

**INTEREST OF THE AMICUS**

The International Brotherhood of Electrical Workers, Local Union 304, is located in Topeka, Kansas and represents approximately 2,100 members across eighteen contracts. This local also represents approximately 400 non-dues paying covered employees. The more than 2,500 employees that the Amicus represents across Kansas work in the utility industry in power plants, rural electric cooperatives, municipalities, government services, and line construction.

The Amicus has, at various times, debated and negotiated the rights of its represented employees to wear union supporting T-shirts, to affix union stickers to

hard hats and other equipment, and to display pro union signage in and around their work areas.

## **INTRODUCTION**

On February 12, 2021, the Board solicited the parties of the above-referenced case and interested parties to submit briefs addressing 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?

The long-standing precedent established in *Republic Aviation Corp.* in 1945, followed repeatedly by the Board since then, and as relied upon in *Stabilus* and countless other decisions, should be retained. The Board should not modify, overrule, or weaken these fair, clear standards.

## **SUMMARY OF ARGUMENT**

In 1945, the Supreme Court affirmed the Board's decision in *Republic Aviation*. *Republic Aviation v. NLRB*, 324 U.S. 793 (1945). The case centered around the company's no solicitation rule, which was the basis for a "no union insignia" policy. An employee was discharged for violating this rule by passing out

application cards on his own time during lunch periods. Three more employees were terminated for wearing UAW-CIO “union steward” buttons. During this time, the union was active in seeking to organize the workers at the plant. The company stated that since the union was not at that time recognized as the duly designated representative, the wearing of the buttons might send the message that management had recognized the union and that the “stewards” might have some authority to represent the employees in dealing with the company, impinging on the company’s policy of strict neutrality in union matters and that it could possibly interfere with the existing grievance system.

The Board found that the promulgation and enforcement of the ‘no solicitation’ rule violated Section 8(1) of the National Labor Relations Act as it interfered with, restrained and coerced employees in their rights under Section 7 and discriminated against the discharged employee under Section 8(3). It also determined that the discharge of the stewards violated Section 8(1) and 8(3). The Board entered a cease-and-desist order and also ordered the reinstatement of the terminated employees with back pay. The Board also ordered the rescission of “the rule against solicitation in so far as it prohibits union activity and solicitation on company property during the employees’ own time.” 51 NLRB 1186, 1189. The U.S. Court of Appeals for the Second Circuit affirmed, 142 F.2d 193.

In *Stabilus, Inc.*, 355 NLRB 836,838 (2010), the Board found that the respondent violated Section 8(a)(1) in part, by prohibiting employees from wearing tee-shirts that supported the union. This was done in a selective and overbroad manner, targeting union supporters.

As the Supreme Court ruled, employees have the Section 7 right to wear union insignia on an employer's premises, which may not be infringed, absent a showing of "special circumstances." *Id.*, quoting *Republic Aviation v. NLRB*, 324 U.S. 793, 801-803 (1945). These protections have always extended to articles of clothing, including "prounion T-shirts." *Wal-Mart Stores*, 340 NLRB 637, 638-639 (2003).

The Amicus understands the "special circumstances" test quite well. Many of our covered employees work in line construction, power generation, and gas distribution, where protective equipment, such as FR (fire retardant) clothing is a must. In those situations, it is understandable that a union jacket or T-shirt is not acceptable, as it would not offer the employee the protection needed if an accident were to occur.

However, the employer cannot simply require the employee to wear company branded clothing or uniforms to avoid the test of "special circumstance." This would go against the spirit and letter of the long-standing precedent confirmed in *Stabilus* and the Act itself. Lowering the standards articulated in *Stabilus* would result in a cynical application of the law in an attempt to avoid its main purpose altogether,

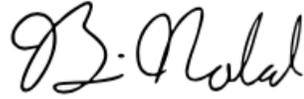
which is to prohibit employers from interference with, restraint of, or coercion of employees in the exercise of their Section 7 rights, except in “special circumstances.” “In the absence of ‘special circumstances,’ the prohibition by an employer against the wearing of union insignia violates Section 8(a)(1) of the Act.” *United Parcel Service*, 312 NLRB 596, 597 (1993). Likewise, the current standards already apply a broad, fair balancing test to determine whether “special circumstances” exist, and do not need to be weakened. To determine whether “special circumstances” justify prohibiting employees from wearing union insignia, “the entire circumstance of a particular situation must be examined to balance the potentially conflicting interests of an employee’s right to display union insignia and an employer’s right to limit or prohibit such display.” *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982).

The long-standing precedent established in *Republic Aviation Corp.* in 1945, followed repeatedly by the Board since then, and as relied upon in *Stabilus* and countless other decisions, should be retained. The Board should not modify, overrule, or weaken these fair, clear standards.

Dated: March 22, 2021

Respectfully Submitted,

WICKHAM & WOOD, LLC



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**ATTORNEYS FOR  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing was e-filed with the NLRB's Executive Secretary and served via electronic mail on the following parties or counsel on March 22, 2021:

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