Wal-Mart Stores, Inc. *and* the Organization United for Respect at Walmart (Our Walmart). Cases 13–CA–114222 and 32–CA–111715

December 16, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On December 9, 2014 and June 4, 2015, Administrative Law Judge Geoffrey Carter issued the attached decisions.[1] In both cases, the Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs. The Charging Party also filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decisions and the records in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings, and conclusions only to the extent consistent with this Decision and Order.

The issue presented in this case is whether the Respondent violated Section 8(a)(1) by maintaining two dress code policies that limit—but do not prohibit—the wearing of union insignia. One policy is maintained nationwide and the other is maintained only at the Respondent's California stores.[3] The policies are content-neutral and explicitly grant employees the right to wear "small, non-distracting logos or graphics . . . no larger than the size of your [employee] name badge" (the "logos or graphics" policies). Under these policies, employees are allowed to display union insignia, and it is undisputed that employees have displayed "OUR Walmart" insignia that comply with the policies.[4] Specifically, the Respondent has permitted employees to wear logos or graphics that are no larger than employees' name badges (2.25 inches by 3.5 inches) and "non-distracting," including OUR Walmart buttons, pins, and wristbands. Employee supporters of OUR Walmart have also worn a 1.5-inch diameter button displaying the following message: "Colossians 4:1 'Masters, provide your slaves with what is right and fair, because you know that you also have a Master in heaven.'" The Respondent disallowed a 3.5-inch diameter OUR Walmart button because of its size, but it also disallowed the display of a 3-by-5-inch photograph worn in remembrance of an employee who died in an automobile accident. The judge found that the Respondent failed to show special circumstances for requiring logos and graphics to be "small" and "non-distracting," and he concluded that the Respondent violated Section 8(a)(1) by maintaining its logos or graphics policies.

As explained below, we find that the appropriate analytical framework for determining the lawfulness of the Respondent's logos or graphics policies is the Board's test for facially neutral employer policies set forth in *Boeing Co.*, 365 NLRB No. 154 (2017). Applying *Boeing*, we reverse the judge's decision and find the policies lawful insofar as they apply to areas of the Respondent's stores where its employees encounter customers in the course of performing their jobs.[5] As to those areas, the Respondent's legitimate justifications for maintaining the policies—to enhance the customer shopping experience and protect its merchandise from theft or vandalism—outweigh the adverse impact on employees' Section 7 rights. However, no such showing has been made with respect to areas away from the selling floor, where the Respondent's business justifications for its logos or graphics policies are much weaker. Accordingly, we find that the Respondent violated Section 8(a)(1) by maintaining the logos or graphics policies in areas other than the selling floor.

[1] On November 12, 2015, the Board granted the Respondent's motion to sever Case 32–CA–111715 from Case 32–CA–090116, et al., and to consolidate it with Case 13–CA–114222. As explained below, the consolidated cases involve dress code policies that, as relevant here, contain identical language.

[2] The Respondent's argument that the judge improperly rejected its proffered expert testimony and accompanying report is moot in light of our disposition of this case.

[3] The Respondent adopted the nationwide policy in February 2013 and modified it in May 2014 and September 2014. The Respondent excepts on due process grounds to the judge's consideration of the September 2014 policy because the complaint does not specifically reference it. We find that the lawfulness of the September 2014 policy is properly before the Board because the issue is closely related to the allegations of the complaint and was fully and fairly litigated at the hearing. See *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). The complaint language sufficiently notified the Respondent of the specific conduct at issue (maintaining a policy "since at least May 2013" allowing only "small and non-distracting" insignia) and the underlying theory of liability (interference with Sec. 7 rights in violation of Sec. 8(a)(1)). The policy was received into evidence, and the Respondent's counsel acknowledged at the hearing that the complaint "is aimed at a particular phrase in the [Respondent's] dress code," identified that language as "small, non-distracting logos and graphics," and explained that any changes thereafter to the policy would not "impact the particular phraseology." Finally, the Respondent also had the opportunity to present, and did present, evidence at the hearing regarding the September 2014 policy.

[4] "OUR Walmart" is an acronym for Organization United for Respect at Walmart, which is aligned with the United Food and Commercial Workers International Union.

[5] For shorthand purposes, and because the term is a familiar one in Board precedent, we will refer to these areas, including restrooms and hallways leading to areas where sales occur, as "the selling floor."

I.

The Supreme Court long ago affirmed the Section 7 right of employees to wear union buttons and other insignia. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). But this right is not absolute. The Board has evaluated the lawfulness of facially neutral work rules that prohibit the wearing of *all* union buttons and insignia by examining whether the employer has shown special circumstances for the prohibition.[6] In such cases, the infringement on Section 7 rights is incontrovertible, and the employer must therefore prove that special circumstances exist justifying the ban for it to be lawful. This "special circumstances" test 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.[7] Accordingly, determining whether a special circumstance exists justifying a particular insignia ban obviates the need to conduct an open-ended balancing analysis anew in every case.[8] If the prohibition falls within the scope of a recognized special circumstance, it is lawful.[9]

Where, as here, the Employer maintains a facially neutral rule that limits the size and/or appearance of union buttons and insignia that employees can wear but does not prohibit them, a different analysis is required.[10]

[6] See, e.g., *USF Red Star, Inc.*, 339 NLRB 389, 391 (2003) ("[A] *ban* on wearing union insignia violates the Act unless it is justified by special circumstances.") (emphasis added); *United Parcel Service*, 312 NLRB 596, 597 (1993) ("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.") (emphasis added), enf. denied 41 F.3d 1068 (6th Cir. 1994); *The Ohio Masonic Home*, 205 NLRB 357, 357 (1973) ("In the absence of 'special circumstances,' the promulgation of a rule *prohibiting* the wearing of [union] insignia is violative of Section 8(a)(1).") (emphasis added), enfd. 511 F.2d 527 (6th Cir. 1975); *Floridan Hotel of Tampa*, 137 NLRB 1484, 1486 (1962) ("The promulgation of a rule *prohibiting* the wearing of [union insignia] constitutes a violation of Section 8(a)(1) in the absence of evidence of 'special circumstances' . . . .") (emphasis added), enfd. 318 F.2d 545 (5th Cir. 1963).

[7] See, e.g., *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 5 (2016) ("The special circumstances test reflects a balancing of the employer's interests and the employees' Section 7 rights."), enf. denied in relevant part and remanded 701 F.3d 710 (D.C. Cir. 2012); *Albertson's Inc.*, 272 NLRB 865, 866 (1984) ("Under the protection of Section 7 of the Act, employees may wear union buttons or other emblems at work to demonstrate union adherence. This employee right is balanced against an employer's right to operate its business . . . .") (internal footnote omitted), enf. denied mem. 17 F.3d 39 (9th Cir. 1994); see also *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 715 (5th Cir. 2018) ("The Board has explained the 'special circumstances' exception as reflecting a 'balancing' of employees' Section 7 rights and employers' potentially conflicting managerial interests."); *Southern New England Telephone Co. v. NLRB*, 793 F.3d 93, 96 (D.C. Cir. 2015) ("The 'special circumstances' exception to Section 7 is designed '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.'") (quoting *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982)).

[8] Although our colleague contends that this "mischaracterizes" the special circumstances test, this is precisely how the Fifth Circuit described it in *In-N-Out Burger*, 894 F.3d at 715 ("But the Board does not conduct an open-ended balancing analysis anew in every case; rather, it has developed a framework that guides the 'special circumstances' inquiry and reinforces its limited scope.").

[9] The Board has found special circumstances to justify restrictions on union insignia "when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Komatsu America Corp.*, 342 NLRB 649, 650 (2004).

[10] This is particularly true in a facial challenge to a policy that is not a total ban because the Board must analyze it without the benefit of knowing the particular union graphic or insignia in question and the context in which it would be worn. See *W San Diego*, 348 NLRB 372, 373 (2006) (finding special circumstances after examining the size and content of a specific union button and the workplace environment in which employee sought to wear it); *Pathmark Stores, Inc.*, 342 NLRB 378, 379 (2004) (finding special circumstances after examining the content of the union's message on its T-shirts and hats). Where all union buttons and insignia are prohibited, it can be assumed that the restriction bars even the smallest and most innocuous union button or insignia. Such is not the case where the employer explicitly permits employees to wear some union insignia.

It is understandable, then, why the cases our colleague relies on to purportedly support her assertion that the Board applies the special circumstances test to partial bans on union insignia did not involve facial challenges to a size-and-appearance policy—like the sole allegation in this case—but rather as-applied challenges to outright bans of specific union insignia. In *Republic Aviation*, cited by our colleague, the Supreme Court held that the employer unlawfully prohibited employees from wearing a specific UAW–CIO union steward button. 324 U.S. at 795, 803. But neither the Court nor the Board in that case was presented with an allegation challenging the facial lawfulness of a rule permitting the wearing of buttons, including union steward buttons, and only restricting those of a certain size and appearance. This is just as true for the other cases cited by our colleague. See *Holladay Park Hospital*, 262 NLRB 278, 279 (1982) (employer applied its dress code to prohibit the wearing of yellow union ribbons while permitting the wearing of non-union-related red and green ribbons); *Davison Paxon Co.*, 191 NLRB 58, 59, 61 (1971) (employer applied its dress regulations to prohibit employee from wearing a yellow button with black lettering stating, "Vote [Yes] Retail Clerks Union AFL–CIO"), enf. denied 462 F.2d 364 (5th Cir. 1972) (reversing the Board to hold that employer's prohibition against wearing the button on the selling floor of a retail establishment was "clearly reasonable"); *Gray-Syracuse, Inc.*, 170 NLRB 1684, 1687-1689 (1968) (employer applied rule against union campaigning during work hours to prohibit the wearing of a union button stating "JOIN" and "VOTE" in red and "ORGANIZING COMMITTEE" in dark blue); *Fabri-Tek, Inc.*, 148 NLRB 1623, 1624-1625 (1964) (employer applied company rule to prohibit the wearing of a 3-inch diameter metallic button stating "VOTE I.B.E.W." in red and a 2-inch diameter red, white, and blue "vari-vue" button stating "VOTE" or "I.B.E.W." depending on the angle from which it was viewed), enf. denied 352 F.2d 577 (8th Cir. 1965) (reversing the Board to hold that employer's prohibition against wearing "attention-attracting" union buttons during worktime was "entirely reasonable").

Instructively, in the cases cited by our colleague, the Board was able to consider the specific buttons or other insignia that employees were

Necessarily, because the infringement on Section 7 rights is less severe, the employer's legitimate justifications for maintaining the restriction do not need to be as compelling for its policy to pass legal muster, and justifications other than the recognized special circumstances may suffice. In such cases, we will apply the analytical framework in *Boeing*, supra.[11] Under *Boeing*, if a policy, reasonably interpreted, would potentially interfere with Section 7 rights, the Board considers two factors: "(i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the [policy]." 365 NLRB No. 154, slip op. at 3. The Board will find that "the [policy's] maintenance . . . violate[s] Section 8(a)(1) if . . . the justifications are outweighed by the adverse impact on rights protected by Section 7." Id., slip op. at 16.[12] Limitations on the display of union insignia short of outright prohibitions will vary in the extent to which they serve legitimate employer interests and the degree to which they interfere with Section 7 rights.[13] Thus, they will "warrant individualized scrutiny in each case" as *Boeing* Category 2 rules. Id., slip op. at 4.

II.

Applying *Boeing*, we find that the Respondent lawfully maintained its graphics or logos policies on the selling floor of its stores. The policies, when reasonably interpreted, would potentially interfere with employees' Section 7 right to display *some* union insignia. Nonetheless, the adverse effect is relatively minor. Employees are free to wear any union message they want, subject to the policies' size and appearance limitations, and they have done so without interference. Nothing in the Respondent's logos or graphics policies denies employees that right. The only qualifications are that employees' union insignia cannot be larger than their name badges (2.25 by 3.25 inches) or distracting.[14]

On the other side of the balance, the Respondent has offered evidence of its legitimate justifications for its logos or graphics policies: providing its customers with a

barred from wearing and analyze the impact that those specific buttons or insignia would reasonably have in the particular workplaces involved. Here, in a facial challenge to a size-and-appearance policy, we do not have the benefit of knowing that context and must rule on the legality of the Respondent's logos or graphics policies in the abstract. For instance, the Respondent determined that a 3.5–inch diameter OUR Walmart button violated its logos or graphics policies for being too large. However, the General Counsel never alleged that the Respondent unlawfully prohibited employees from wearing that OUR Walmart button. Hence, the type of as-applied challenge that was in the cases cited by our colleague is not before us.

[11] Despite our colleague's assertion, this is not "import[ing] the *Boeing* framework" into a new area of Board law. In *Boeing*, the Board stated that it would apply the standard articulated in that case to determine the lawfulness of all facially neutral policies, rules, and handbook provisions that do not expressly restrict Sec. 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity. 365 NLRB No. 154, slip op. at 1 fn. 4; see also *PAE Applied Technologies, LLC*, 367 NLRB No. 105, slip op. at 2 fn. 6. First, the Respondent's logos or graphics policies are facially neutral; they apply to all logos and graphics, without in any way distinguishing union logos or graphics. Second, by expressly permitting the wearing of logos or graphics of a certain size and appearance, including union insignias, the policies cannot be said to explicitly restrict Sec. 7 activity. Moreover, the General Counsel did not allege that the policies were adopted in response to NLRA-protected activity or applied to restrict NLRA-protected activity. Therefore, *Boeing* is the proper test for determining the lawfulness of the Respondent's logos or graphics policies.

[12] As noted above, the special circumstances test for total bans on union insignia does not involve an explicit balancing in each case. Nevertheless, it reflects a determination that where special circumstances are found to exist, the employer's interests outweigh the interference with the exercise of Sec. 7 rights. Thus, it is consistent with the principles of *Boeing*.

[13] Our colleague contends that we ignore decades of Board precedent holding that *any* limitation on the display of union insignia—not just a complete prohibition—is presumptively unlawful in the absence of special circumstances. But the cases she cites in support of that claim involved total bans, not partial restrictions such as the policies at issue in this case. See *Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach*, 366 NLRB No. 66, slip op. at 1-3 (2018) (employer failed to demonstrate special circumstances for total bans on pins, badges, professional certifications, and badge reels not approved by the employer), enfd. mem. 774 Fed.Appx. 1 (D.C. Cir. 2019); *Boch Honda*, 362 NLRB 706, 707 (2015) (employer failed to demonstrate special circumstances for total ban, applicable to employees who have contact with the public, on "wear[ing] pins, insignias, or other message clothing"), enfd. 826 F.3d 558 (1st Cir. 2016); *Albis Plastics*, 335 NLRB 923, 924 (2001) (employer demonstrated special circumstances for total ban on displaying unauthorized stickers, including union stickers, on safety helmets or "bump caps"), enfd. mem. 67 Fed.Appx. 253 (5th Cir. 2003); *Mayrath Co.*, 132 NLRB 1628, 1630 (1961) (employer failed to demonstrate special circumstances to justify ordering employees not to wear union buttons), enfd. in part 319 F.2d 424 (7th Cir. 1963). It is more than reasonable for the Board to analyze a content-neutral policy permitting display of logos or graphics subject to size-and-appearance restrictions under a different standard than a comprehensive prohibition of all union insignia (as in *Long Beach Memorial Medical Center*, *Boch Honda*, and *Mayrath*) or an outright ban on displaying a specific union insignia (as in *Albis Plastics* and the cases cited in fn. 10, above). Under the former, employees may display union insignia, and no specific union insignia is prohibited. The same cannot be said under the latter.

We also observe that, taken to its logical conclusion, our colleague's view that any employer policy restricting the wearing of union insignia is presumptively unlawful would render presumptively unlawful a policy that bars employees, in the presence of customers on a selling floor, from wearing the largest or most distracting union insignia imaginable, such as a pro-union sandwich board or a button 6 inches in diameter encircled with flashing lights. Moreover, it is not self-evident that any currently recognized special circumstance would rebut the presumptive unlawfulness of such an obviously commonsensical size-and-appearance policy. Thus, our colleague's position appears to be not merely that all size-and-appearance policies are presumptively unlawful, but that they are unlawful, period.

Member Emanuel dissented in part in *Long Beach Memorial Medical Center*, supra, but agrees that it is inapplicable here.

[14] As a comparator, the employees' name badges are roughly the same size as a standard credit card, which is 2.125 by 3.375 inches.

satisfactory shopping experience by making store employees readily identifiable to customers and protecting its merchandise from theft and vandalism.[15] The Respondent's director of human resources, LaTonia George, testified that "first and foremost," the reason for requiring logos and graphics to be smaller than an employee's name badge and nondistracting was to "ensure that the name badge or the [Respondent's] logo was the most visible thing to the customer" so that nothing would detract from "customer service." In addition, George also testified that the policies promote "asset protection" by ensuring that store employees are easily identified by the Respondent's asset protection personnel. The Respondent's market asset protection manager, Tina Longfellow, similarly testified that an unobstructed name badge "helps us identify . . . who is an associate, who is not an associate" and that "one of the most identifying factors is the name badge." Longfellow testified that easy identification of employees through the name badge is necessary because of past incidents in which thieves dressed in the Respondent's uniform broke into security cases on the electronic sales floor or acted as if they were assisting customers with carryouts by loading carts with merchandise and walking out the front door with them.

In evaluating the lawfulness of the policies at issue, the Board must be mindful of the considerations underlying the Respondent's adoption of its restrictions on logos and graphics. The 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. As the owner and operator of a chain of retail stores, the Respondent has a compelling interest in providing its customers with a satisfying shopping experience, and measures that facilitate the prompt identification of employees who may be able to assist them serve that interest. Additionally, the Respondent has an interest in ensuring that its security personnel can readily identify who is and who is not an employee to protect against vandalism or theft of its inventory from store shelves. These are fundamental employer interests that serve the primary objective of any retailer, which is to enhance the customer experience and ensure the security of the store's inventory. And we find that these legitimate justifications for maintaining the logos or graphics policies on the selling floor of its stores outweigh the comparatively minor adverse impact of the policies on employees' Section 7 rights. Accordingly, the Respondent's maintenance of its logos or graphics policies does not violate the Act to the extent the policies are limited to the selling floor.

III.

The Respondent asserts that its legitimate business justifications for its logos or graphics policies are just as relevant with respect to those areas of its stores where its employees do not encounter customers in the course of performing their jobs—i.e., areas away from the selling floor. On this point, we disagree.[16] The Respondent's interest in making it easier for customers to identify its employees only applies where customers encounter the Respondent's employees, not in areas away from the selling floor, such as loading docks and other "employees only" areas. And the Respondent's interest in ensuring that its employees are readily identifiable as such by its security personnel applies primarily on the selling floor.[17]

The judge noted that many of the Respondent's concerns carry less weight away from the selling floor because employees can be easily identified by asset protection and other security personnel based on their employee uniforms. The Respondent claims that the uniform is no backstop because thieves dress in Walmart uniforms to pose as employees and steal merchandise. However, the examples given by Longfellow of this happening involved theft of merchandise from the sales floor, not from areas away from the selling floor. And as noted above, in areas away from the selling floor, security personnel can directly confront anyone they do not recognize, regardless of whether the individual is wearing a Walmart uniform. The Respondent also asserts that the logos or graphics policies need to be maintained away from the selling floor to prevent employees from distracting their coworkers, thereby impairing their focus and lessening their productivity. However, the whole point of wearing a large or distracting union or "OUR Walmart" button in an "employees only" area is to catch the attention of coworkers

[15] Needless to say, we reject our colleague's perfunctory assertion that this evidence is somehow "superficial, subjective, and conclusory." To the contrary, we have no reason to doubt that the testimony of the Respondent's witnesses accurately reflects the modern-day concerns of a nationwide retailer.

[16] Contrary to our colleague's claim, there is no requirement that the Board find that a union insignia rule is either lawful or unlawful with respect to its entire establishment, including both public and nonpublic areas. See *W San Diego*, 348 NLRB at 373-374 (union insignia rule found lawful with respect to public areas of an establishment but unlawful with respect to nonpublic areas).

[17] The record does include testimony that nonemployees sometimes enter "employees only" areas, and therefore the Respondent's interest in ensuring that its security personnel can distinguish employees from nonemployees is not strictly limited to the selling floor. However, whereas security personnel must be discreet on the selling floor, they are under no such constraint in "employees only" areas, where nonemployees have no right to be. Thus, if security personnel are unsure whether an individual in an "employees only" area is or is not an employee, that individual can be directly confronted.

in order to communicate a message that is protected by the Act. Thus, the Respondent's justification comes uncomfortably close to an admission of a purpose to interfere with Section 7 activity. But even setting that aside, we find this claim of reduced productivity too speculative to justify a restriction on the insignia employees can wear in areas not accessible to customers.

Lastly, the Respondent argues that the logos or graphics policies lawfully apply away from the selling floor because employees working in those areas may be periodically required to enter the selling floor. However, the Board has recognized that, in such circumstances, an employee could simply remove a button prior to stepping onto the selling floor and that "the mere hypothetical impracticality of detaching a removable union insignia when moving between areas" does not, by itself, warrant applying the same restriction on the wearing of union buttons and insignia in public and nonpublic areas of an establishment. See *W San Diego*, 348 NLRB at 374.[18]

Because the Respondent's logos or graphics policies are not narrowly tailored to serve its legitimate business justifications, we find, as to areas other than the selling floor, that those justifications are outweighed by the infringement on Section 7 rights. We therefore find that the policies are overly broad and violate Section 8(a)(1) to the extent they are not limited to the selling floor.

ORDER

The National Labor Relations Board orders that the Respondent, Wal-Mart Stores, Inc., Bentonville, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the overly broad provisions in its February 2013, May 2014, and September 2014 National Dress Code and its February 2013 California Dress Code that unduly restrict employees' right to display union insignia when and where employees ordinarily will not come in contact with or be observed by customers of the Respondent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind, to the extent applicable in each state and the District of Columbia, the overly broad provisions in its February 2013, May 2014, and September 2014 National Dress Code and its February 2013 California Dress Code that unduly restrict employees' right to display union insignia when and where employees ordinarily will not come in contact with or be observed by customers of the Respondent.

(b) Furnish all current employees in its stores in the United States with an insert for its applicable employee dress code that (1) advises that the unlawful provision regarding logos or graphics has been rescinded or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision, or publish and distribute to employees at its stores in the United States revised copies of its employee dress code that (1) do not contain the unlawful provision or (2) provide a lawfully worded provision.

(c) Within 14 days after service by the Region, post at all its stores in the United States where the unlawful dress code policies are in effect copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Directors for Region 13 and Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed one or more of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current associates and former associates employed by the

[18] We recognize, as the record establishes and as common experience confirms, that many of the Respondent's employees move back and forth between areas where customers are encountered and areas where they are not. Consistent with our decision, the Respondent may mandate that oversized and distracting logos and graphics worn in an area not frequented by customers must be removed before employees enter the selling floor. In addition, in light of the realities of the Respondent's workplace, our decision is limited to logos and graphics that are easily affixed and removed. It simply would not be practical for an employee wearing an oversized or distracting logo or graphic that cannot be easily removed to comply with the Respondent's logos or graphics policies when he or she enters the selling floor. For that reason, the Respondent may categorically prohibit, in all areas, the display of oversized and distracting logos and graphics that cannot be easily affixed or removed, such as shirts that have logos or graphics printed on them. See *Casa San Miguel*, 320 NLRB 534, 540 (1995) (employer lawfully prohibited employees from wearing, in all areas, uniforms with union insignia printed on them).

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent at the closed facilities at any time since February 7, 2013.

(d) Within 21 days after service by the Regions, file with the Regional Directors for Region 13 and Region 32 a sworn certification of a responsible official on a form provided by the Regions attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 16, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

For almost 75 years, the Board has adhered to the principle, expressly endorsed by the Supreme Court in *Republic Aviation Corp. v. NLRB*,[1] that an employer may not limit or ban employees' display of union insignia at work absent a showing by the employer that "special circumstances" exist. As the Supreme Court properly recognized, wearing union insignia—whether as an expression of solidarity, protest, or simply pride of affiliation–is at the core of the activity the National Labor Relations Act is intended to protect. The *Republic Aviation* test is grounded in the presumption that employers' efforts to restrict these rights should be viewed with skepticism, and that employers should bear the burden of justifying such restrictions.

Today, the majority brushes aside *Republic Aviation* and its progeny and applies the less demanding standard from its deeply flawed decision in *Boeing Co.*[2] to find that the Respondent's restriction of its employees' Section 7 right to wear union insignia was lawful. Under the majority's new approach, it seems that employers are now presumptively *permitted* to restrict the wearing of union insignia (so long as they do not ban such activity altogether) based on any "legitimate justification." The burden now rests on the General Counsel to prove that employees' protected interests have been adversely affected, and that the adverse effect on Section 7 rights outweighs the employer's proffered justification. This turns *Republic Aviation* on its head—disregarding the Supreme Court's guidance and ignoring several decades of Board precedent.[3] For those reasons alone, the majority's decision is fundamentally flawed.

Additionally, though, I fear that today's decision signals the majority's intention to import the *Boeing* framework—which is less protective of Section 7 rights—into other well-settled areas of Board law that currently require their own subject-matter specific analyses. That surely would not be a welcome development for workers, and is yet another reason I must respectfully dissent.

I.

Section 7 of the National Labor Relations Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) protects these rights by making it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed" by Section 7. Since the earliest days of the Act, the Board has recognized "the importance of freedom of communication to the free exercise of organization rights."[4] And as the Supreme Court has held, "organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others."[5]

One such critical form of communication has been employees' display of union insignia at work. A survey of Board decisions demonstrates the ways in which workers have displayed union insignia in furtherance of Section 7

[1] 324 U.S. 793 (1945).

[2] 365 NLRB No. 154 (2017).

[3] When an agency reverses its own precedent, the Supreme Court has held, it must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, ___ U.S. ___, 136 S. Ct. 2117, 2125-2126 (2016). Having neglected relevant precedent entirely, the majority has obviously failed to satisfy this requirement.

[4] *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972), citing *Peyton Packing Co.*, 49 NLRB 828 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944). As the Board explained early on:

> It is clear that employees cannot realize the benefits of the right to self-organization guaranteed them by the Act, unless there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization.

LeTourneau Co. of Georgia, 54 NLRB 1253, 1260 (1944).

[5] *Central Hardware*, above, 407 U.S. at 543.

rights, including in support of organizing campaigns,[6] demonstrating solidarity,[7] and advocating for issues during collective bargaining.[8] In *Republic Aviation* itself, the Supreme Court affirmed that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the [employer's] curtailment of that right is clearly violative of the Act."[9]

At the same time, the Board and the courts have recognized that employees' right to display union insignia at work is not absolute. The *Republic Aviation* Court recognized:

> [The Board must adjust] 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.[10]

Republic Aviation established the Board's longstanding approach to balancing these rights—a presumption that any employer limitation on the display of union insignia is invalid, with the burden on the employer to establish special circumstances to justify its action.[11] As Professors Gorman and Finkin have explained, this approach "reflect[s] a substantive judgment that inhibitions on employee activities on behalf of the union inherently do 'interfere' with and 'restrain' the exercise of their section 7 rights and that the burden to justify that inhibition should properly lie with the employer when its needs are not immediately obvious."[12]

It is noteworthy that *Republic Aviation*—like the case at issue today—involved a partial ban, rather than a complete ban on union insignia. Republic discharged three employees for wearing union steward buttons after being directed to remove them, and "sought to justify the prohibition [by] giving assurance that employees were free to wear other types of union buttons."[13] Indeed, Republic argued expressly to the Court that:

> Petitioner freely permitted the wearing of other types of U.A.W. buttons, and there is no showing that the privilege of displaying the steward buttons would have legitimately aided the self-organization of the employees. The Board's failure to perform its required function of balancing the conflicting interests on this issue is underlined by its conclusion that the prohibition was a "curtailment" of the employees' right "to wear union insignia at work."[14]

Both the Board in its underlying decision and, subsequently, the Supreme Court were unpersuaded. The Board concluded that Republic, "by adopting and enforcing the prohibition against the wearing of steward buttons, interfered with, restrained, and coerced its employees, within the meaning of . . . the Act."[15] The Court adopted this conclusion, implicitly rejecting the argument that Republic's toleration of some union insignia – those without the steward label – made its partial ban lawful.

Given the scope of the Court's ruling, the Board's analysis in all subsequent insignia restriction cases – including those, like *Republic Aviation*, involving partial bans[16]—has started from the premise that any limitation is presumptively invalid. The Respondent thus bears the burden

[6] See, e.g., *Malta Construction Co.*, 276 NLRB 1494, 1498 (1985), enfd. 806 F.2d 1009 (11th Cir. 1986); *Mayrath Co.*, 132 NLRB 1628, 1643 (1961), enfd. in relevant part 319 F.2d 424 (7th Cir. 1963).

[7] See, e.g., *Mt. Clemens General Hospital*, 335 NLRB 48, 49 (2001), enfd. 328 F.3d 837 (6th Cir. 2003). See generally John W. Teeter, Jr., *Banning the Buttons: Employer Interference with the Right to Wear Union Insignia in the Workplace*, 80 Ky. L.J. 377, 379 (1992) ("By engaging in this simple act of reaffirmation, the worker assures both herself and others that they belong to an entity devoted to protecting their statutory rights, economic interests, and quest for dignity in their work.").

[8] See, e.g., *Mead Corp.*, 314 NLRB 732, 732 (1994), enfd. 73 F.3d 74 (6th Cir. 1996) (wearing buttons to pressure employer into a favorable successor agreement); *Holladay Park Hospital*, 262 NLRB 278, 278 (1982) (wearing white and blue buttons and yellow ribbons to support the union's bargaining position).

[9] 324 U.S. at 802 fn. 7. See also *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 714 (5th Cir. 2018) ("Since the Act's earliest days, it has been recognized that Section 7 protects the right of employees to wear items—such as buttons, pins, and stickers—relating to terms and conditions of employment (including wages and hours), unionization, and other protected matters."), cert. denied 139 S.Ct. 1259 (mem), enfg. 365 NLRB No. 39 (2017).

[10] 324 U.S. at 797-798.

[11] Id. at 803-804 and fn. 10. See *Peyton Packing Co.*, 49 NLRB 828, 843–844 (finding that, in the context, "a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.").

[12] Robert A. Gorman, Matthew W. Finkin, *Basic Text on Labor Law*, Sec. 8.2 (2d ed. 2004).

[13] *Republic Aviation*, 51 NLRB 1186, 1188 (1943).

[14] Brief for Republic Aviation Corporation, 1944 WL 42256.

[15] 51 NLRB at 1188.

[16] See, e.g., *Holladay Park Hospital*, 262 NLRB 278, 278-279 (applying "special circumstances" where employer permitted wearing small union buttons but prohibited larger ribbons in support of bargaining); *Davison Paxon Co.*, 191 NLRB 58, 61 (1971) (same where employer permitted small union buttons but prohibited larger, gaudier union buttons), enf. denied 462 F.2d 364 (5th Cir. 1972); *Gray-Syracuse, Inc.*, 170 NLRB 1684, 1687-1689 (1968) (same where employer permitted UAW brooch, but prohibited organizing committee button); *Fabri-Tek, Inc.*, 148 NLRB 1623, 1624-1628 (1964) (same where employer permitted smaller union buttons but prohibited larger buttons), enf. denied 352 F.2d 577 (8th Cir. 1965).

of establishing special circumstances, regardless of whether it imposed a complete or partial ban on insignia.[17]

The Board, moreover, has emphasized that the special circumstances exception is narrow.[18] Accordingly, the Board has consistently held that customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia.[19] Nor is the requirement that employees wear a uniform always a special circumstance justifying an insignia prohibition.[20] Further, and regardless of the context, "[u]nless the size of the union button worn by an employee is related to the impairment of production or discipline, the size of the button is immaterial."[21]

Equally important, the Board has consistently held, regardless of the context, that an employer's assertion of special circumstances "must be established by substantial evidence in the record."[22] "[A]n employer who presents only generalized speculation or subjective belief about potential disturbance . . . or disruption of operations fails to establish special circumstances justifying a ban on union insignia."[23] Finally, even where a rule may be based upon special circumstances, the rule must be narrowly drawn to restrict the wearing of union insignia only in areas or under circumstances which justify the rule.[24]

II.

Under those established principles, the present case should be routine. It requires nothing more than the application of the Board's longstanding, Supreme Court-approved "special circumstances" doctrine to a straightforward, familiar fact pattern involving an employer restriction on insignia. Thus, the Respondent—a large national retailer—promulgated dress codes requiring that all insignia be small, non-distracting, and "no larger than the size of your employee name badge," which measured 2.25 inches by 3.5 inches. These dress codes did not distinguish between public and nonpublic areas of the store. In support of its restrictions, the Respondent has asserted several special circumstances, including the need for easy employee identification and the prevention of distractions to customers.[25] The Respondent's argument also rests in large part on its assertion that its burden should be less substantial because it permitted the display of some insignia; namely, that "where the employer allows employees ample opportunity to express their union sentiments through the display of union insignia, the balance shifts in favor of the employer's legitimate business objectives."

The judge, applying the "special circumstances" framework, reached the only permissible conclusion on the facts presented here–that the Respondent's restrictions violated Section 8(a)(1). At the outset, he properly rejected the Respondent's assertion that a different standard should apply, noting that "the Board already recognizes the employer's interests in the existing legal standard that applies to union insignia—that is, the Board recognizes that while employees have a Section 7 right to wear union insignia, employers may restrict that right if the restrictions are justified by special circumstances." From there, the judge carefully evaluated the Respondent's arguments that the display of insignia hindered employee identification and distracted customers, finding that the Respondent failed to present "evidence of a significant or widespread problem" with either. He thus concluded that the Respondent's special circumstances arguments "fall flat."

Finally, the judge found that, even assuming the Respondent's concerns about visibility and customer experience were valid, its policies were "not narrowly tailored to those concerns." Specifically, he observed that the Respondent's restrictions did not differentiate between the sales floor—where employees interact with customers–and nonpublic areas of the store—where most of the Respondent's concerns would be moot. The judge thus properly concluded that the Respondent's dress code language "is overly broad, is not justified by special circumstances, and places unlawful restrictions on associates Section 7 right to wear union insignia."[26]

III.

Adopting the judge's well-reasoned findings here under established law would be simple—and correct. Instead, as stated above, the majority asserts that "a different analysis is required" where an employer maintains a rule that

[17] *Pathmark Stores, Inc.*, 342 NLRB 378, 379 (2004).

[18] *E & L Transport Co.*, 331 NLRB 640, 640 fn. 3 (2000).

[19] *P.S.K. Supermarkets, Inc.*, 349 NLRB 34, 35 (2007) (citing cases).

[20] Id.

[21] *Loray Corp.*, 184 NLRB 557, 577 (1970).

[22] *Washington State Nurses Assn. v. NLRB*, 526 F.3d 577 (2008).

[23] *Danbury HCC*, 360 NLRB 937, 938 (2014), enfd. sub nom. *HealthBridge Management, LLC v. NLRB*, 798 F.3d 1059 (D.C. Cir. 2015). See also *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 4 (2016) ("[T]he Board requires more than conjecture about customers' negative reactions to employees' Section 7 activity to find special circumstances."), enf. denied in relevant part and remanded 701 F.3d 710 (D.C. Cir. 2012).

[24] *Sunland Construction Co.*, 307 NLRB 1036, 1040 (1992).

[25] The Respondent's California dress code similarly required that all logos be "small [and] non-distracting," and did not distinguish between public and nonpublic areas. In addition to asserting the justifications stated above, the Respondent asserted as to its California code that it was necessary to protect its public image.

[26] The judge reached the same conclusions as to the Respondent's California policy, finding that the Respondent did not establish a public image justification under special circumstances and that it "violated Section 8(a)(1) by maintaining its February 2013 dress code, a facially overbroad policy that unduly restricted associates' right to wear union insignia."

places limitations on the display of union insignia but does not prohibit them. In an attempt to rationalize this distinction, the majority contends—with scant explanation and no case support—that "because the infringement on Section 7 rights is less severe, the employer's legitimate justifications for maintaining the restrictions do not need to be as compelling for its policy to pass legal muster, and justifications other than the recognized 'special circumstances' may suffice." To this end, the majority announces that, in cases like this one, the Board will henceforth apply the analytical framework for facially neutral rules in *Boeing Co.*,[27] which requires the Board to consider: (1) the nature and extent of the potential impact on employees' NLRA rights; and (2) employers' legitimate justifications associated with the policy. The Board will then, the majority holds, find that the policy's maintenance violates Section 8(a)(1) only if "the justifications are outweighed by the adverse impact on rights protected by Section 7."

Applying this new framework, the majority finds that the Respondent lawfully restricted the size and appearance of union insignia on the selling floor of its stores. The majority maintains that the "adverse effect [on Section 7 rights] is relatively minor" because "[e]mployees are free to wear any union message they want, subject to the policies' size and appearance limitations, and they have done so without interference." At the same time, it finds that the Respondent "has offered evidence of its legitimate justifications" for its policies. To support this point, the majority cites testimony from the Respondent's managers affirming the importance of customer service and ensuring that store employees are easily identified in order to protect store assets and cautions that "[t]he Board must not second-guess the Respondent's decisions as to how it should run its business." The majority nonetheless freely endorses the Respondent's decisions, based on its judgment that enhancing the customer experience and ensuring the security of the store's inventory "are fundamental employer interests that serve the primary objective of any retailer." In the end, the majority concludes that these legitimate justifications are not outweighed by the "comparatively minor adverse impact of the policies on employees' Section 7 rights" and that the Respondent's maintenance of these policies therefore "does not violate the Act to the extent the policies are limited to the selling floor."

As to areas other than the selling floor, the majority finds that "the Respondent's policies are not narrowly tailored to serve its legitimate business justifications." So, at least as to these nonpublic areas, the majority concludes that the Respondent's insignia policies are "overly broad and violate Section 8(a)(1)," and orders the Respondent to cease and desist from maintaining these policies only as they apply to nonpublic areas.

IV.

The majority's decision, particularly with respect to the selling floor of the Respondent's stores, rests on a series of false premises.[28] The most glaring of these is its apparent belief that the Respondent's partial insignia restriction presents a novel scenario that somehow falls outside the ambit of *Republic Aviation*.[29] But, as explained above, *Republic Aviation* was itself a partial restriction case. Surely there can be no question about the appropriate test to apply here when a nearly identical scenario existed in the Supreme Court case that embraced the "special circumstances" approach in the first place.[30] Instead, the majority essentially adopts as law an argument that the Court *rejected* in *Republic Aviation*: that an employer's willingness to permit the display of some union insignia warrants a more forgiving assessment of its asserted justification for banning other union insignia.

[27] 365 NLRB No. 154, slip. op at 3.

[28] Although I agree with the majority's conclusion that the Respondent's limitation on the display of union insignia in nonpublic areas of its stores was unlawful, I reach that conclusion under the "special circumstances" analysis, not the majority's unsupported extension of the *Boeing* framework to this situation.

[29] In truth, this is hardly a novel scenario in the annals of Board law, and the Board has always applied the "special circumstances" framework. See supra fn. 16.

[30] The majority too suggests that the "special circumstances" test does not apply here because the allegation is a facial challenge to the Respondent's rule rather than an as-applied challenge to an outright ban on union insignia. But the Board has never made such a distinction; it has applied "special circumstances" in both contexts. See, e.g., *Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach*, 366 NLRB No. 66, slip op. at 1-3 (2018), enfd. mem. 774 Fed.Appx. 1 (D.C. Cir. 2019) (analyzing facial challenge to employer's badge restriction under "special circumstances."). And for good reason – in this particular context, facial and as-applied challenges are functionally identical. The guiding principle in both situations is the one set forth in *Republic Aviation* – that any limitation on the display of union insignia is presumptively unlawful. The only difference is that in an as-applied scenario, an employee has actually displayed an insignia that runs afoul of the employer's rule. (In fact, the Respondent here *did*, pursuant to its policy, prohibit an employee from wearing a 3.5-inch diameter union button, but the General Counsel did not allege a violation of the Act on that basis.) Accordingly, the distinction that the majority relies on is meaningless.

Contrary to the majority, it also does not matter that in as-applied cases, unlike here, the Board is "able to consider the specific buttons or other insignia that employees were barred from wearing and analyze the impact that those specific buttons would reasonably have in the particular workplaces involved." Pursuant to *Republic Aviation*, once any limitation on Sec. 7 rights has been established, the only relevant consideration is whether the Respondent can prove special circumstances. The majority's novel assertion that the nature and extent of an employer's prohibition on the display of insignia is somehow relevant to the Board's inquiry itself represents a fundamental departure from this longstanding precedent.

But even putting aside that inconsistency with *Republic Aviation* itself, the majority's approach would still run afoul of longstanding Board principles. It ignores decades of Board precedent holding that *any* limitation on the display of union insignia is presumptively unlawful – regardless of whether an employer permits other related Section 7 activity.[31] It upends the Board's traditional framework by abandoning that presumption and, instead, requiring the General Counsel to first prove that Section 7 rights have been adversely affected. And it all but negates the "special circumstances" standard by holding that an employer need only produce some lesser justification for a partial ban on the display of union insignia. But, as explained above, an employer's willingness to tolerate some union insignia does not give it a freer hand to restrict other protected displays that it views less favorably, nor does it render an employer's interference with protected rights "less severe," as the majority asserts.[32] Taken together, these changes turn the Board's traditional framework on its head and effectively treat the display of union insignia more as a privilege to be granted by the employer on the terms it chooses, rather than as an essential Section 7 right that—pursuant to federal labor law—requires accommodation. The net effect is the marginalization of a critical statutory right—one that "furthers the right [of employees] to communicate [effectively] with one another regarding self-organization at the jobsite."[33]

The majority also mischaracterizes the nature of the Board's traditional test in its assertion that the "special circumstances" framework "obviates the need to conduct an open-ended balancing test anew in every case. If the prohibition falls within the scope of a recognized special circumstance, it is lawful." Certainly, the Board has acknowledged broad categories of cases in which employers have established special circumstances justifying limits on union insignia.[34] But in every case—including in the judge's well-reasoned decision here—the Board engaged in a rigorous, fact-specific inquiry to determine whether the employer had actually established the presence of special circumstances in the context of its workplace.[35] By contrast, the majority's decision today effectively discards a fact-specific analysis for one that plainly tips the balance toward employer interests and makes it exceedingly difficult to prove unlawful interference. Indeed, the majority's apparent willingness to rely on superficial, subjective, and conclusory remarks as "evidence" of an employer justification is indicative of a shift *away* from fact-based scrutiny rather than toward it.

---

[31] See, e.g., *Boch Honda*, 362 NLRB 706, 707 (2015), enfd. 826 F.3d 558 (1st Cir. 2016) ("[A] rule that *curtails* employees' Section 7 right to wear union insignia in the workplace must be narrowly tailored to the special circumstances justifying maintenance of the rule, and the employer bears the burden of proving such special circumstances.") (emphasis added); *Albis Plastics*, 335 NLRB 923, 924 (2001), enfd. mem. 67 Fed.Appx. 253 (5th Cir. 2003) ("The Board has held that, in the absence of 'special circumstances,' an employer's prohibition of *or limitation on* the display of union insignia violates Section 8(a)(1).") (emphasis added); *Mayrath Co.*, 132 NLRB 1628, 1629-1630 ("[R]ules which *interfere* with this right [to wear insignia] . . . are presumptively invalid in the absence of special circumstances.") (emphasis added).

[32] As pointed out above, the majority's views echo the employer's unavailing argument in *Republican Aviation* that "there is no showing that the privilege of displaying the steward buttons [in addition to generic union buttons] would have legitimately aided the self-organization of the employees." See also *The Southern New England Telephone Co.*, 356 NLRB 883, 883 (2011), enf. denied 793 F.3d 93 (D.C. Cir. 2015) ("that the Respondent did not otherwise extensively interfere with employees' right to support the Union adds nothing to its 'special circumstances' defense."); *Malta Construction Co.*, 276 NLRB at 1494 (finding unlawful employer's prohibition on helmet stickers even where it "allowed its employees to wear union insignia on articles of their personal attire, such as T-shirts."); *Caterpillar Tractor Co. (Joliet, Ill.)*, 113 NLRB 553 (1955) (expressly rejecting "special circumstances" argument based on assertion that employer "permitted its employees to display the other [union] campaign badges."), enf. denied. 230 F.2d 357 (7th Cir. 1956).

And, as explained, under Board law as well "it is irrelevant that the [employer] allowed employees to wear other union insignia that it deemed acceptable." *Caterpillar, Inc.*, 321 NLRB 1178 (1996), vacated pursuant to settlement March 19, 1998, citing *Holladay Park Hospital*, 262 NLRB at 279. As the Board has observed, "It certainly does not lie in the mouth of [the employer] to tell the Union, or [the employer's] employees, how to exercise their rights under the Act." *Monarch Machine Tool Co.*, 102 NLRB 1242, 1249 (1953) (rejecting "special circumstances" argument based on employer's assertion that "employees have adequate means of communication with other employees—the Union meeting hall, newspaper announcements, mailing lists, the bulletin boards provided by the Company."), enfd. 210 F.2d 183 (6th Cir. 1954), cert. denied 347 U.S. 967 (1954). See also *Page Avjet Corp.*, 275 NLRB 773, 777-778 (1985) (rejecting "special circumstances" argument where employer asserted that posting photographs of the stewards on the union bulletin board was an acceptable alternative to wearing steward badges).

If anything, an employer's willingness to tolerate some insignia constitutes a tacit acknowledgement that the display of insignia does *not* actually interfere with its business and would seem to require an even *more* robust explanation of why it must restrict other insignia, not a weaker one.

[33] *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1212 (6th Cir. 1997), quoting *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978), enfg. 318 NLRB 50 (1995).

[34] See, e.g., *P.S.K. Supermarkets, Inc.*, 349 NLRB 34, 35 (Special circumstances might exist where union insignia "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.").

[35] For this reason, I reject the majority's assertion that my position is tantamount to finding that "all size-and-appearance policies are . . . unlawful, period." Consistent with the Board's longstanding jurisprudence, an employer always has the opportunity to rebut the General Counsel's showing of a presumptively unlawful restriction by establishing a specific and objective special circumstance to justify its policy. The fact that there is not a "currently recognized special circumstance" that would encompass a prohibition on a prounion sandwich board or a large button with flashing lights surely would not preclude an employer from presenting a persuasive "special circumstances" argument with regard to either in the appropriate case.

V.

But even if one were to accept the majority's decision to import the *Boeing* framework here, the majority's application of the framework fails on its own terms. First, the majority's finding that the Respondent's insignia restriction is overbroad as to nonpublic areas of its stores should be the end of the inquiry. As the Board stated in *Times Publishing Co.*, 240 NLRB 1158, 1160 (1979), enfd. 605 F.2d 847 (5th Cir. 1979), "once a rule is found to be generally invalid, it is invalid for all purposes and cannot be applied as valid in part to a specific area."[36] The majority should follow this approach here and find the Respondent's overbroad rule unlawful in its entirety.

But this is not the only flawed aspect of the majority's *Boeing* analysis. The majority's balancing of the impact on workers' rights when compared to the employer's asserted interests is predictably skewed. The majority gives short shrift to employees' statutory rights, ignoring decades of caselaw—including Supreme Court precedent—underscoring the strength of employees' right to wear insignia at work and the inherent interference that any limitation on that right entails. At the same time, the majority accepts as persuasive the very same assertions by the Respondent that the judge who tried the case found to "fall flat." To this end, it relies on facile, nonspecific testimony by the Respondent's managers that comes nowhere close to establishing a concrete factual predicate for the Respondent's restrictive policies.[37] And, as pointed out above, the majority relies on its own views regarding the "fundamental interests that serve the primary objective of any retailer." The end result is a decision that so badly misreads Board precedent regarding Section 7 rights and accepts with so little scrutiny the Respondent's justifications for curbing them as to be arbitrary. What the law and the facts presented here actually demonstrate is that the judge correctly found that the Respondent violated Section 8(a)(1) by maintaining its overbroad insignia rules, and I would adopt that finding.

VI.

Today's decision—though arising in one focused, relatively narrow area of the law—carries with it broader implications for the Board's jurisprudence in all employer rules cases. Until now, the Board's approach in cases involving insignia—under *Republic Aviation*—and its approach in general rules cases—formerly under *Lutheran Heritage Village-Livonia*[38]—have existed in entirely separate analytical boxes, and for good reason. The Board's "special circumstances" approach in insignia cases carries with it the imprimatur of the Supreme Court, which years ago affirmed "the right of employees to wear union insignia . . . as a reasonable and legitimate form of union activity."[39] In place of that approach, the majority imposes an alien framework—*Boeing*—that subverts one of the central rights under the Act while introducing unnecessary uncertainty into a long-settled area of the law.

My suspicion is that today's decision foreshadows what will be an ongoing effort to dilute other subject-matter specific rule analyses by smuggling the *Boeing* framework into places where it simply does not belong.[40] The most pressing question is whether the majority now plans to apply *Boeing* in *all* instances where an employer prohibits some—but not all—Section 7 activity, even beyond insignia cases. This prospect is especially troubling in light of the majority's apparent propensity in applying *Boeing* to find that employer rules have a "relatively minor" impact on protected rights.[41]

---

[36] In that case, the Board found that "even if the [employer's] lobby were a working area, the Respondent's no-distribution rule as it applied to the lobby would be invalid because Respondent's no-distribution rule is overly broad and invalid for all purposes." Id. at 1158. In so doing, it specifically reversed the judge's underlying holding that the employer's rule was unlawfully overbroad generally but "valid to the extent that it applies to the lobby area." *Times Publishing Co.*, 231 NLRB 207, 208 (1977), enfd. in part and remanded in part 576 F.2d. 1107 (5th Cir. 1978). See also, e.g., *Boch Honda*, above, 362 NLRB at 709; *G4S Secure Solutions (USA), Inc.*, 364 NLRB No. 92 (2016).

[37] Puzzlingly, the majority also opines that "[t]he Respondent may categorically prohibit, in all areas, the display of oversized and distracting logos and graphics that cannot be removed"– a statement that is both unrelated to any issue raised in this case and expressly contrary to Board law. Under the "special circumstances" standard, the Board has never created any categorical prohibition on any type of insignia; to the contrary, as stated above, "[u]nless the size of the union button worn by an employee is related to the impairment of production or discipline, the size of the button is immaterial." See supra fn. 21. In other words, in every case, the Board assesses whether the employer has met its "special circumstances" burden. Certainly, the majority's assertion is not supported by *Casa San Miguel*, 320 NLRB 534, 540 (1995), which the majority relies on. There, the Board simply adopted the judge's narrow finding that an employer established special circumstances in support of its refusal to permit employees from wearing, in a hospital setting, uniforms printed with prounion messages. The Board did not purport to set forth any categorical rule.

[38] 343 NLRB 646 (2004), overruled in relevant part by *Boeing Co.*, above.

[39] *Republic Aviation Corp. v. NLRB*, above, 324 U.S. at 802 fn. 7.

[40] Contrary to my colleagues, there is truly nothing inevitable about the application of *Boeing* in this case. That case involved the lawfulness of a no-camera rule and not—as here—an insignia restriction that has long been analyzed under the *Republic Aviation* framework. And *Boeing* overruled *Lutheran Heritage*, which has never been applied in this context. (Tellingly, the Board has continued to apply the "special circumstances" test in facial challenges to insignia rules post-*Boeing*. See *Long Beach Memorial Medical Center, Inc*., 366 NLRB No. 66, slip op. at 1-3.) If nothing else, today's decision confirms my characterization of *Boeing* as a "secret rulemaking in the guise of adjudication," as that decision put into place a flawed set of principles that now apply far beyond the factual context of that case. 365 NLRB No. 154, slip op. at 30.

[41] See *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 3-4 (2019).

But even apart from these wider considerations, today's decision cannot stand. It is inconsistent with Supreme Court precedent. It brushes aside decades of Board law applying the "special circumstances" test in all insignia cases without explaining the departure from precedent. And it produces a result that substantially devalues the Section 7 rights of employees. Accordingly, I dissent.

Dated, Washington, D.C. December 16, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain the overly broad provisions in our February 2013, May and September 2014 National Dress Code and our February 2013 California Dress Code that unduly restrict your right to display union insignia when and where you ordinarily will not come in contact with or be observed by our customers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind, to the extent applicable in each state and the District of Columbia, the overly broad provisions in our February 2013, May and September 2014 National Dress Code and our February 2013 California Dress Code that unduly restrict your right to display union insignia when and where you ordinarily will not come in contact with or be observed by our customers.

WE WILL furnish all current employees in our stores with an insert for our applicable employee dress code that (1) advises that the unlawful provision regarding logos or graphics has been rescinded or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision, or WE WILL publish and distribute to all current employees at our stores where the unlawful dress code provisions have been or are in effect revised copies of our employee dress code that (1) do not contain the unlawful provision or (2) provide a lawfully worded provision.

WAL-MART STORES, INC.

The Board's decision can be found at www.nlrb.gov/cases/13-CA-114222 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Vivian Perez Robles, Esq., for the General Counsel.
Lawrence Katz and *Erin Bass, Esqs.,* for the Respondent.
Joey Hipolito, Esq., for the Charging Party.

DECISION

GEOFFREY CARTER, Administrative Law Judge. In this case, the parties contest whether Walmart Stores, Inc. (Walmart or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining dress codes that state, in pertinent part:

> Walmart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, pants, skirts, hats, jackets or coats are also permitted[.]

The General Counsel asserts that the dress code language is unlawfully overly broad because the language that permits logos only if they are "small" and "non-distracting" violates Walmart associates' right to wear union insignia in the workplace. Walmart, meanwhile, asserts that its policy on logos is justified by special circumstancesμ—specifically, Walmart's need to ensure that associates' name tags are visible to customers and other associates, and Walmart's need to avoid distractions that would detract from the customer experience. As set forth more fully below, I find that Walmart's dress code language regarding logos violates Section 8(a)(1) of the Act because it is overly broad, is not justified by special circumstances, and places unlawful restrictions on associates' Section 7 right to wear union insignia.

STATEMENT OF THE CASE

The Organization United for Respect at Walmart (OUR Walmart or Charging Party) filed the charge underlying this case on September 26, 2013, and the General Counsel issued a consolidated complaint on October 20, 2014 (covering this case and Case 13–CA–110452). The General Counsel amended the consolidated complaint on March 17, 2015. Respondent filed timely answers denying the alleged violations in the consolidated complaint.

On April 14, 2015, I accepted a settlement between Walmart and OUR Walmart that resolved the allegation in Case 13–CA–110452 (subject to compliance with the settlement agreement). That same day, I severed this case (Case 13–CA–114222) from the consolidated complaint, and this case proceeded to trial on April 23, 2015, in Chicago, Illinois.

Notably, this is not the first time that the parties have litigated the lawfulness of Walmart's dress code language concerning logos. Indeed, in September 2014, the parties litigated the lawfulness of virtually identical dress code language in Case 32–CA–090116 et al., albeit with a different evidentiary record and concerning a dress code that only applied in California. Although I found the dress code at issue in Case 32–CA–090116 to be facially unlawful (see *Walmart Stores, Inc.*, 32–CA–090116 (December 9, 2014), slip op. at 29–30), I considered the merits of this case independently and based on the evidentiary record that the parties presented at trial on April 23, 2015.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, OUR Walmart and Respondent, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

Respondent, a corporation with an office and place of business in Bentonville, Arkansas, as well as various stores throughout the United States (including Chicago, Illinois), engages in the retail sale and distribution of consumer goods, groceries and related products and services. In the twelve-month period ending December 31, 2013, Respondent derived gross revenues in excess of $500,000. During the same time period, Respondent purchased and received products, goods and materials at its Chicago, Illinois facility that were valued in excess of $5000 and came directly from points outside of the State of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Walmart's Dress Code Language on Logos

In February 2013, Walmart adopted a revised dress code for all hourly associates in its stores in all states (except for seven states that had state-specific policies).[3] Under that dress code, associates who are working (i.e., not on a rest or meal break) must wear a Walmart nametag that is either clipped to the associate's shirt or attached to a break-away lanyard. For the most part, Walmart associates also must wear a dark blue shirt and a pair of brown khaki pants (the shade of each clothing item may vary, and associates are responsible for purchasing these items). (Jt. Exh. 1, pp. 1–2; Tr. 71–72, 79, 91, 161, 182, 211, 231, 241). The dress code sets forth the following guidelines regarding logos on clothing:

> Walmart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, pants, skirts, hats, jackets or coats are also permitted.[4]

(Jt. Exh. 1, p. 2).[5] Although Walmart updated its dress code in May 2014, Walmart kept the same language regarding clothing logos that was in its February 2013 dress code. (See Jt. Exh. 9, p. 2).

In September 2014, Walmart modified its dress code language about clothing logos to state as follows:

> Walmart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, pants, skirts, capris, skorts, dresses, hats, jackets or coats are also permitted if they are no larger than the size of your associate name badge[.]

(Jt. Exh. 10–11, p. 2) Walmart also announced in the September 2014 dress code that all associates would be required to wear a company-issued a sleeveless Walmart blue vest with a Walmart "spark" logo on the back. Walmart resumed using vests (it had last done so in 2007) because it intended for the vests to serve as another means for customers and coworkers to identify Walmart associates. (Jt. Exhs. 10–11, p. 2; Tr. 71, 86–88, 90–91, 106–107, 191–192).

B. Walmart's Rationale and Parameters for its Dress Code

[1] The transcripts in this case generally are accurate, but I hereby make the following correction to the record: p. 33, L. 18: "subject of" should be "subjective."

[2] Although I have included several citations in the findings of fact to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

[3] The following geographic areas had "state-specific" dress code policies and thus were not covered by any of the February 2013 and May 2014 dress codes in the record: Arizona; California; Louisiana; Massachusetts; Mississippi; Missouri; and New Jersey. (Jt. Exhs. 1–9 (p. 1); 13). The District of Columbia was covered by certain versions of the February 2013 and May 2014 dress code, but was not covered by other versions. (Compare Jt. Exhs. 1–3 (District of Columbia covered by dress code) with Jt. Exhs. 4–9 (District of Columbia not covered by dress code because it has its own policy)). The September 2014 dress code (discussed infra), meanwhile, covered all "states" except for the District of Columbia and New York, which had "state-specific" policies. (Jt. Exhs. 10–11 (p. 1)).

[4] The dress code also states that "[t]he logo or graphic must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional messaging." (Jt. Exh. 1 (p. 2)). The General Counsel does not take issue with that portion of the dress code in this case. (Tr. 30–31.)

[5] The record includes multiple versions of the February 2013 dress code that reflect modifications that are not material to the issues in this case. Each of those versions of the dress code contains the same language regarding logos. (See Jt. Exhs. 1–8.)

Language about Logos

In the interest of ensuring that customers, coworkers and loss prevention personnel can easily identify Walmart associates, Walmart requires its associates to wear nametags while on duty, and requires that any non-Walmart logos be "small" and "non-distracting." (Tr. 70, 79–80, 94–95, 104, 161–162, 165–166, 178, 192). Walmart defines "small" logos as any logos that are not larger than the Walmart nametag, which is a 2.25–inch long by 3.5–inch wide plastic card with room for the associate's first name.[6] (R. Exhs. 2, 2(a) (showing a blue and white nametag, as well as a yellow badge backer); Tr. 65–68, 198, 207, 231, 241–242; see also Jt. Exhs. 10–11, p. 2 (September 2014 dress code, stating explicitly that logos must not be larger than the Walmart nametag)).

There is no evidence that Walmart has an established definition for what logos qualify as "non-distracting." Walmart does have general goals of providing great customer service and keeping its customers focused on shopping, but when questions have arisen about whether an associate's appearance or attire is distracting to the customer experience, Walmart managers have handled those questions on an ad-hoc basis (with the assistance of Walmart's labor relations department if requested). (Tr. 51–53, 94, 98–100).

Walmart expects its associates to comply with the nametag and dress code logo requirements at all times when they are on duty, even at times when the associate is not in contact with customers because the associate is working in a non-public area of the store or is working while the store is closed to the public.[7] (Tr. 78, 80, 95, 113–114, 190–191, 221, 237–238, 252; see also Tr. 102–104 (noting that Walmart has approximately 4,500 "supercenters" and "discount stores," and that approximately 2,900 of those stores are open 24 hours); 216, 225, 249 (providing examples of stores that close at or after 10 p.m. and reopen at 6 or 7 a.m.)). Walmart applies its dress code to associates who are assigned to work in non-public areas of the store because those associates periodically may be required to go to the sales floor as part of their job duties, and may interact with customers at those times. (Tr. 167–171, 195–197, 205–208, 214–216, 229–231, 248–249). As for associates who work overnight shifts that span times when the store is closed to the public, Walmart applies its dress code to those associates because they may interact with customers during the portions of their shift when the store is open, and because the dress code and nametag requirement assists managers in identifying associates at all times, including when the store is closed. (Tr. 217–218, 226–227, 249–250).

C. Examples of how Walmart has Interpreted and Applied its Dress Code to Logos

To illustrate how it has interpreted its dress code to permit "small" and "non-distracting" logos and prohibit logos that do not comply with those limitations, Walmart provided examples of how it has applied its dress code to various logos since February 2013.

Examples of logos that Walmart has permitted

- OUR Walmart buttons, pins and wristbands that are smaller than the Walmart nametag (Tr. 75–77, 242, 244–245, 247–248; R. Exh. 1 (pp. 2708–2709, 2879–2880, 2928–2930, 3093–3094, 3161, 3808, 3900, 4021–4022); see also id. (April 16, 2015 transcript, pp. 16–19, 54);
- A 1.5–inch diameter green button with the following wording: "Colossians 4:1 'Masters, provide your slaves with what is right and fair, because you know that you also have a Master in heaven." (R. Exh. 3; Tr. 61–64 (noting that OUR Walmart supporters were wearing the button));
- A 2–inch by 2–inch photograph that associates wore in remembrance of an associate who was killed in an automobile accident (Tr. 198–204, 206–207 (noting that this smaller photograph replaced a larger one that did not comply with the dress code logo size restrictions)); and
- Assorted pins and buttons (e.g., buttons with family photographs, smiley faces or the Easter bunny) that were smaller than the Walmart nametag (Tr. 231–232, 242).
- *Examples of logos that Walmart has determined violate its dress code*
- A 3–inch by 5–inch photograph that associates wore in remembrance of an associate who was killed in an automobile accident (Tr. 198–204, 206–207 (noting that Walmart deemed this photograph of the deceased associate to be too large and thus potentially distracting for customers, and allowed associates to replace it with the smaller 2–inch by 2–inch version

[6] Walmart associates also wear a "badge backer" card that is pinned beneath the nametag and shows the associate's job title. The portion of the badge backer that is visible beneath the nametag is 1.25–inches long and 2.75–inches wide. (R. Exhs. 2, 2(a); Tr. 65–68). There is no evidence that Walmart uses the badge backer, or the portion of the badge backer that is visible when worn under the nametag, to assess whether logos are "small" enough to comply with the dress code. (See Tr. 66 (distinguishing between Walmart nametags and badge backers); Tr. 207, 231, 241–242 (explaining that logos must be smaller than the Walmart nametag)).

[7] Consistent with its requirement that associates comply with the dress code whenever they are on duty, Walmart does not allow its associates to don or doff clothing or other items with logos when moving between public and non-public areas of the store, or when the store opens or closes its doors to the public. Although some of Walmart's witnesses testified that it would not be possible for associates to don or doff items (such as buttons, clothing or other items with union insignia) while on duty because of time constraints (see Tr. 220, 228–229, 250–251), I have given that testimony little weight because the witnesses made no distinction between items that could easily be removed (such as a hat or other item worn on the surface of other clothing), and items that might require more privacy (and thus more time) to remove. See *Casa San Miguel*, 320 NLRB 534, 540 (1995) (distinguishing between union insignia that an employee printed on her uniform, which made it impractical to remove when going between nonpatient and patient care areas of the hospital, and other items that, for example, an employee might attach to his or her uniform and be able to remove).

described above));

- A handwritten message on an associate's knuckles and palms that stated "Stop, don't shoot," where the message was the same width as the Walmart nametag (Tr. 212–214, 222 (noting that Walmart deemed the message to be too distracting for customers));
- A 3–inch by 5–inch piece of paper (the back of a store receipt) on which an associate drew a hammer and sickle and wrote "Comrade [name]. How may the Communist Party help you?" (R. Exh. 7; Tr. 232–237 (noting that Walmart determined that the note violated the dress code because it was both too large and distracting));
- An 8.5–inch by 11–inch piece of paper with a drawing of a cat roasting a marshmallow, worn by an associate underneath his nametag (Tr. 183–185 (noting that Walmart determined this drawing/logo violated the dress code because it was too large); see also R. Exh. 6); and
- A 3.5–inch diameter OUR Walmart button (Tr. 243–244 (noting that Walmart determined that the button violated the dress code because it was too large); R. Exh. 8).

III. ADMISSIBILITY OF WALMART'S PROFFERED EXPERT TESTIMONY

During trial, Walmart called Dwight Hill to testify as an expert witness. Over the General Counsel's objection concerning whether Mr. Hill qualified as an expert witness under Federal Rule of Evidence 702 (FRE 702), I permitted Mr. Hill to testify and accepted his report into the record, but I did so only provisionally, subject to any arguments that the parties might make in their posttrial briefs concerning Mr. Hill's qualifications as an expert and the admissibility of his testimony and report. (Tr. 134–135). Now that the parties have briefed the issue, I return to the question of whether Mr. Hill's testimony and report are admissible under FRE 702.

Under FRE 702, "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. Rule of Evidence 702; see also *Fluor Daniel, Inc.*, 350 NLRB 702, 713 (2007). "Whether to permit expert testimony is a question that is committed to the discretion of the trial judge." *California Gas Transport*, 355 NLRB 465, 465 fn.1 (2010).

Based on Mr. Hill's extensive experience as a retailer and as a consultant to retailers, I find that he is qualified as an expert witness in the areas of retail strategy and the customer experience. (See R. Exh. 5 and Tr. 117–128 (indicating that Mr. Hill has over 25 years of experience with merchandise planning, customer strategy, enterprise cost reduction, workforce management and other areas)). However, I also find that Mr. Hill's testimony and report should be excluded under FRE 702 because the specialized knowledge that he offered does not assist me, as the trier of fact, with understanding the evidence or determining any facts in issue in this case. In essence, Mr. Hill asserted in his testimony and report that retailers seek to minimize customer distractions and keep their customers focused on shopping, and hopefully, buying. In connection with that goal, retailers have their employees follow dress codes and wear name tags to: make the employees easily identifiable to customers who need assistance (as well as to coworkers and loss prevention personnel); and avoid inciting conversations between customers and employees that are not relevant to the customer's shopping activities. (R. Exh. 5; Tr. 135–147.) None of those points are so complex that they require explanation by an expert witness; indeed, Walmart's managerial witnesses made the same points effectively in their own testimony (a fact that also makes Mr. Hill's testimony and report cumulative and therefore inadmissible). (See, e.g. Tr. 70–73, 79–80, 85–96, 160–161, 165–166 (testimony of: senior director of labor relations Jaime Durand; director of human resources support LaTonia George; and market asset protection manager Tina Longfellow); see also Findings of Fact (FOF), Sections II(B)–(C), supra)). Accordingly, I hereby reclassify Mr. Hill's testimony as an offer of proof and reclassify Mr. Hill's report (R. Exh. 4) as a rejected exhibit, and I will disregard both in my substantive analysis.

Discussion and Analysis

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 13–14 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 14. To the extent that I have made them (since most of the facts in this case are undisputed), my credibility findings are set forth above in the findings of fact for this decision.

B. Is Walmart's Dress Code Language Regarding Logos Facially Unlawful?

1. Complaint allegation and applicable legal standard

The General Counsel alleges that since at least May 2013, Walmart has violated Section 8(a)(1) of the Act by maintaining the following rule in its dress code guidelines in all states except those with state-specific policies: "Wal-Mart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, hats, jackets or coats are also permitted, subject to the

following . . .” (GC Exh. 1(e), par. V(a)).

As the Board reiterated in a recent decision, it is well settled that an employer violates Section 8(a)(1) when it prohibits employees from wearing union insignia at the workplace, absent special circumstances. *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015). The Board has found special circumstances justifying proscription of union insignia and apparel when their display may 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. However, a rule that curtails employees’ Section 7 right to wear union insignia in the workplace must be narrowly tailored to the special circumstances justifying maintenance of the rule, and the employer bears the burden of proving such special circumstances. Id.; see also *Stabilus, Inc.*, 355 NLRB 866, 868 (2010); *W San Diego*, 348 NLRB 372, 373 (2006); *Nordstrom, Inc.*, 264 NLRB 698, 701–702 (1982) (noting that customer exposure to union insignia, standing alone, is not a special circumstance that permits an employer to prohibit employees from displaying union insignia).

In its posttrial brief, Walmart argued that I should apply a hybrid legal standard that combines the legal standard that the Board applies when considering work rules (see Lutheran Heritage Village-Livonia, 343 NLRB 646, 646–647 (2004)) with the legal standard that the Board applies when considering restrictions on employees’ Section 7 right to wear union insignia (see *Boch Honda*, supra). See Walmart Posttrial Br. at 4 (relying on the D.C Circuit’s decision in *World Color (U.S.A.) Corp. v. NLRB*, 776 F.3d 17, 20 (D.C. Cir. 2015) as the basis for its proposed hybrid legal standard); *Lutheran Heritage Village-Livonia*, 343 NLRB at 646–647 (explaining that for work rules, the analysis begins with whether the rule is unlawful because it explicitly restricts activities protected by Section 7, and, if necessary then turns to the question of whether the work rule is unlawful because employees would reasonably construe the language to prohibit Section 7 activity, the rule was promulgated in response to union activity, or the rule has been applied to restrict the exercise of Section 7 rights).

There is no support in Board law for Walmart’s proposed hybrid standard. To the extent that the D.C. Circuit applied a hybrid standard when analyzing questions about union insignia in *World Color*, I respectfully submit that the D.C. Circuit did so in error. Compare *World Color (U.S.A.) Corp. v. NLRB*, 776 F.3d at 19–20 (recognizing that employees have a Section 7 right to wear union insignia unless special circumstances are present, but then analyzing the case using the *Lutheran Heritage* legal standard for work rules) with *Guard Publishing Co. v. NLRB*, 571 F.3d 53, 61 (D.C. Cir. 2009) (explaining that “[w]hen [an employer] bans the wearing of union insignia, the employer bears the burden of overcoming the presumption of an unfair labor practice by demonstrating that special circumstances exist”). In any event, since I am bound to follow Board precedent, I will apply the legal standard that the Board reiterated in *Boch Honda* concerning employees’ Section 7 right to wear union insignia.

2. Analysis

As its initial argument, Walmart asserts that the Act should allow employers (and particularly retailers) to set forth some reasonable limits on union insignia to avoid disruption in the work and shopping environment.[8] (See Walmart Posttrial Br. at 4–9). It suffices to observe, in response, that the Board already recognizes the employer’s interests in the existing legal standard that applies to union insignia – that is, the Board recognizes that while employees have a Section 7 right to wear union insignia, employers may restrict that right if the restrictions are justified by special circumstances.

Turning, then, to the question of whether Walmart’s dress codes are unlawful, the evidentiary record establishes that, since February 2013, Walmart has maintained dress code language that prohibits associates from wearing logos, including union insignia, that are “distracting” and/or are larger than Walmart’s 2.25–inch by 3.5–inch nametag. (FOF, Section II(A)–(B); see also FOF, Section II(C) (indicating that Walmart permits “non-distracting” union insignia that are smaller than the Walmart nametag). Since Walmart’s dress code imposes limits on its associates’ Section 7 right to wear union insignia, the dress code is overly broad and is unlawful unless the dress code language concerning logos is justified by special circumstances. See *Boch Honda*, 362 NLRB 706, 707.

In this case, Walmart asserts that its dress code language about logos meets the special circumstances requirement because Walmart has an interest in ensuring: that its associates can easily be identified through their nametags by customers, coworkers and loss prevention personnel; and that noncompliant logos do not distract the customer from his or her shopping experience. (See Walmart Posttrial Br. at 9; FOF, section II(B)).

Viewing the evidence as a whole, I find that Walmart failed to show that the limitations that it places on logos (including union insignia) are justified by special circumstances. First, Walmart did not show that its concerns about logos impacting nametag visibility and the customer experience constitute special circumstances. Specifically, Walmart did not present any evidence of a significant or widespread problem with associates wearing union insignia or other logos that actually made it difficult or impossible for others to see their Walmart nametags.[9] Nor did Walmart present evidence of a significant or widespread problem with customers being distracted by logos worn by associates. Given the lack of such evidence, much less evidence that would justify the limitations on union insignia based on special circumstances

[8] In connection with its initial argument, Walmart maintains that the Act does not require retailers to tolerate large, distracting and/or absurd union insignia. That argument, however, mischaracterizes the positions of the General Counsel and Charging Party, who merely maintain that Walmart’s February 2013, May 2014 and September 2014 dress code restrictions on logos are unlawfully overly broad. If the General Counsel and Charging Party prevail on that point, such a result does not mean that anything goes when it comes to union insignia. To the contrary, Walmart would remain free to craft a revised dress code that addresses its concerns and complies with the Act.

[9] As an aside on this point, I note that it is not hard to envision a wide variety of union insignia that associates could wear that would be larger than their Walmart nametag, but yet pose little or no risk of obscuring or distracting attention from their Walmart nametags (union insignia on hats, arm bands, leg bands, shirt sleeves, and medium-sized buttons come to mind, among other possibilities).

that the Board has recognized in other cases (e.g., the need to protect employee safety, avoid damage to machinery or products, avoid exacerbating employee dissension, or protect a public image that the employer established as part of its business plan),[10] Walmart's concerns about nametag visibility and the customer experience fall flat. See *Malta Construction Co.*, 276 NLRB 1494, 1495 (1985) (rejecting a special circumstances defense because the employer failed to prove that allowing union insignia on its orange hardhats would make it difficult for the employer to identify its employees), enfd. 806 F.2d 1009 (11th Cir. 1986); *Nordstrom, Inc.*, 264 NLRB at 701–702 (noting that customer exposure to union insignia, standing alone, is not a special circumstance that permits an employer to prohibit employees from displaying union insignia); compare *Albis Plastics*, 335 NLRB 923, 923–925 (2001) (employer's prohibition of union stickers on hardhats was permissible because the employer demonstrated that the limitation was justified by special circumstances in the form of a legitimate strategy to promote plant safety), enfd. 67 Fed.Appx. 253 (5th Cir. 2003).

Second, even if one assumes, arguendo, that Walmart has valid concerns about logos affecting nametag visibility and the customer experience that could constitute special circumstances, Walmart's dress code language regarding logos is not narrowly tailored to those concerns. For example, Walmart requires all union insignia to be smaller than or equal to the size of Walmart's 2.25–inch by 3.5–inch nametag, irrespective of the content or nature of the insignia. By imposing such a strict size limitation on union insignia, Walmart runs afoul of multiple Board cases in which the Board has upheld the right of employees to wear union insignia of a variety of types and sizes, including insignia sizes much larger than Walmart's nametags.[11] See, e.g., *A T & T Connecticut*, 356 NLRB 883, 883 (2011) (finding that the employer violated the Act when, in the absence of special circumstances justifying the limitation, the employer prohibited its technicians from wearing white T-shirts with the words "Inmate #" written on the front in "relatively small print," and with two vertical stripes and the words "Prisoner of A T $ T" on the back); *United Rentals*, 349 NLRB 853, 853 fn. 2, 860–861 (2007) (finding that a dress code was unlawful because it prohibited employees from wearing hats, shirts, sweatshirts and jackets with the union's logo); *Northeast Industrial Service Co.*, 320 NLRB 977, 979–980 (1996) (same, regarding a dress code rule that prohibited union hardhat stickers that were 3 inches in diameter); *Serv-Air, Inc.*, 161 NLRB 382, 401–402, 416–417 (1966) (same, regarding an employer that prohibited various union insignia, including an improvised, crudely printed, paper badge that was 3 inches in diameter, and 14-inch signs that two employees taped to their backs), enfd. 395 F.2d 557 (10th Cir. 1968), cert. denied, 393 U.S. 840 (1968).

In addition, Walmart restricts union insignia not only when associates are on the sales floor and thus in a position to interact with customers, but also when associates are working in nonpublic areas of the store or when the store is closed to the public altogether. (See FOF, Section II(B)). When associates are on duty but not in contact with customers, Walmart's concerns about the customer experience are moot, and Walmart's concerns about the associate being identifiable to coworkers and loss prevention personnel are addressed by the fact that the associate would still be wearing the customary khaki pants, blue shirt and Walmart nametag (as well as a Walmart vest, after September 2014). Further, while Walmart pointed out that all associates may interact with customers during their shifts when their job duties require them to go on the sales floor, Walmart did not show that it would be impractical for those associates to simply remove or cover their union insignia while interacting with the public. See FOF, section II(B), fn.7, supra (discussing the testimony that Walmart presented about the feasibility of donning and doffing union insignia); see also *Target Corp.*, 359 NLRB 953, 974 (2013) (rejecting the employer's argument that its ban on all buttons was justified to preserve its public image and business plan, and noting that the ban was overly broad because it applied to overnight employees who worked when the store was closed to the public); *W San Diego*, 348 NLRB at 374 (finding that the hotel did not demonstrate that its prohibition on wearing union insignia was justified by special circumstances in nonpublic areas of the hotel where employees would not be seen by the public and thus the hotel's public image was not at issue, and noting that a mere hypothetical impracticality with removing union insignia did not justify the hotel's prohibition on union insignia).

In light of these shortcomings in Walmart's proffered special circumstances, I find that Walmart's concerns about logos are outweighed by the associates' Section 7 right to wear union insignia in the workplace. I therefore find that Walmart violated Section 8(a)(1) by maintaining its February 2013, May 2014 and September 2014 dress code language requiring logos to be "small" and "non-distracting." The offending dress code language regarding logos is overly broad, is not justified by special circumstances, and places unlawful restrictions on associates' Section 7 right to wear union insignia.[12]

[10] In its posttrial brief, Walmart explicitly stated that it "does not contend that its rule regarding logos and graphics is justified by 'public image' as defined in Board law." (Walmart Posttrial Br. at 11 fn.4).

[11] The Board has observed in the past that certain union insignia do not interfere with a company's public image because the union insignia are small, neat and inconspicuous. See *Nordstrom, Inc.*, 264 NLRB at 701 (noting that the union pin at issue was "muted in tone, discrete in size and free from provocative slogans or mottos"); see also *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994). It does not follow, however, that union insignia **must** be small, neat or inconspicuous to be protected, particularly where (as here) the employer has not justified such size restrictions with special circumstances.

[12] The General Counsel and Charging Party also argued that Walmart's February 2013, May 2014 and September 2014 dress codes are facially unlawful work rules that reasonably tend to chill associates' exercise of their Section 7 rights. See GC Posttrial Br. at 7–8; CP Posttrial Br. at 6; see also *Lutheran Heritage Village-Livonia*, 343 NLRB at 646–647 (describing the legal standard that applies when challenges to work rules are at issue). Since I have found that Walmart's February 2013, May 2014 and September 2014 dress codes are facially unlawful because they improperly restrict associates' Section 7 right to wear union insignia, I decline to address the parties' arguments concerning the Board's "work rule" legal standard.

CONCLUSIONS OF LAW

1. By, since about February 2013, maintaining February 2013, May 2014 and September 2014 dress codes that unlawfully limit associates' right to wear union insignia, Walmart violated Section 8(a)(1) of the Act.

2. By committing the unfair labor practice stated in conclusion of law 1 above, Walmart has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I will also require Respondent to rescind its unlawful February 2013, May 2014 and September 2014 dress codes. Respondent may comply with this aspect of my order by rescinding the unlawful dress code provision and republishing an associate dress code at its affected stores (i.e., all stores in the United States)[13] without the unlawful provision. Since republishing the dress code for all affected stores could be costly, Respondent may supply the associates at its stores either with an insert to the dress code stating that the unlawful provision has been rescinded, or with a new and lawfully worded provision on adhesive backing that will cover the unlawfully broad provision, until Respondent republishes the dress code either without the unlawful provision or with a lawfully-worded provision in its stead. Any copies of the dress codes that are printed with the unlawful February 2013, May 2014 and/or September 2014 language must include the insert before being distributed to associates at Respondent's affected stores. *Boch Honda*, 362 NLRB No. 83, slip op. at 4; *Guardsmark, LLC*, 344 NLRB 809, 811–812 & fn. 8 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

In addition to the standard remedies that I described above, the General Counsel requested that I also order Respondent to have a representative read a copy of the notice to associates in each of its affected stores during work time. The Board has required that a notice be read aloud to employees where an employer's misconduct has been sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. This remedial action is intended to ensure that employees will fully perceive that the respondent and its managers are bound by the requirements of the Act. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 868.

Applying that standard, I do not find that Respondent's misconduct in this case was sufficiently serious and widespread to warrant an order requiring the notice to be read aloud to employees by one of Respondent's representatives at each of its affected stores. Although I have found that Respondent committed one unfair labor practice that affects all stores in the United States, the unfair labor practice is somewhat technical in nature, and this case does not involve widespread misconduct (beyond the singular violation here) at the affected stores. Accordingly, I find that a standard notice posting remedy will be sufficient to address the dress code violation at issue here and ensure that associates are advised of their Section 7 rights.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

Respondent, Walmart Stores, Inc., Bentonville, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining its February 2013, May 2014 and September 2014 dress code provisions for associates that are overly broad and unlawfully restrict associates' right to wear union insignia.

(b) In any like or related manner interfering with, restraining, or coercing associates in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind, to the extent applicable in each state and the District of Columbia, the overly broad provisions in its February 2013, May 2014 and September 2014 associate dress codes that unduly restrict associates' right to wear union insignia.

(b) Furnish all current associates in its stores in the United States with an insert for its applicable associate dress code that (1) advises that the unlawful provision regarding logos and union insignia has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or (in the alternative) publish and distribute to associates at its stores in the United States revised copies of its associate dress code that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

(c) Within 14 days after service by the Region, post at all stores in the United States copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed one

[13] At least one version of the dress code was applicable in every state and the District of Columbia. (See Jt. Exhs. 1–11 (listing, on the first page of each policy, the jurisdictions that had "state-specific" dress codes when the dress code was issued).

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

or more of the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current associates and former associates employed by Respondent at the closed facilities at any time since February 7, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. June 4, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain our February 2013, May 2014 and September 2014 dress code provisions for associates that are overly broad and unlawfully restrict associates' right to wear union insignia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce associates in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind, to the extent applicable in each state and the District of Columbia, the overly broad provisions in our February 2013, May 2014, and September 2014 associate dress codes that unduly restrict associates' right to wear union insignia.

WE WILL furnish all current associates in our stores with an insert for our applicable associate dress code that (1) advises that the unlawful provision regarding logos and union insignia has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or (in the alternative) WE WILL publish and distribute to associates at our stores revised copies of our associate dress code that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

WAL-MART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-114222 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Catherine Ventola and *David Foley, Esqs.,* for the General Counsel.

Lawrence Katz and *Erin Bass, Esqs.,* for the Respondent.

Deborah Gaydos and *Joey Hipolito, Esqs.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Oakland, California on September 8–11, 2014. The Organization United for Respect Walmart (OUR Walmart) filed the charges at issue here on the following dates:

Case	Charge Filing Date
32–CA–090116	September 26, 2012 (amended on November 19, 2013)
32–CA–092512	November 2, 2012
32–CA–092858	November 8, 2012
32–CA–094004	November 30, 2012
32–CA–094011	November 30, 2012
32–CA–094381	December 6, 2012
32–CA–096506	January 16, 2013
32–CA–111715	August 21, 2013[1]

On February 25, 2014, the General Counsel issued two complaints, one covering cases 32–CA–094004 and 32–CA–094011, and the other covering cases 32–CA–092512, 32–CA–092858 and 32–CA–094381. In an amended consolidated complaint filed on April 15, 2014, the General Counsel combined the two original complaints and added Case 32–CA–090116. Finally, on May 16, 2014, the General Counsel issued a second amended consolidated complaint covering all eight cases listed above.

In the second amended consolidated complaint, the General Counsel alleged that Wal-Mart Stores, Inc. (Respondent or Walmart) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by taking the following actions in 2012, at Walmart store 2418 in Placerville, California and/or at Walmart store 3455 in Richmond, California: enforcing its California dress code policy selectively and disparately against an employee who formed, joined or assisted OUR Walmart and/or the United Food and Commercial Workers union; engaging in surveillance and/or creating the impression of surveillance of employees' protected activities in connection with an OUR Walmart protest; making various statements that had a reasonable tendency to coerce employees in the exercise of their rights

[1] All events in this case occurred in 2012, unless otherwise indicated.

under Section 7 of the Act; and unlawfully disciplining six employees because they engaged in a work stoppage on November 2, 2012, and to discourage employees from engaging in those or other protected concerted activities. The General Counsel also alleged that Walmart violated Section 8(a)(1) of the Act by maintaining two overly broad dress code policies (one that was in effect in 2012, and the other that took effect in 2013) for its California employees.[2] Respondent filed a timely answer denying the violations alleged in the second amended consolidated complaint.

On the entire record, [3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, OUR Walmart and Respondent, I make the following

FINDINGS OF FACT[4]

I. JURISDICTION

Respondent, a corporation with an office and place of business in Bentonville, Arkansas, as well as various stores throughout the United States (including Placerville and Richmond, California), engages in the retail sale and distribution of consumer goods, groceries and related products and services. In the twelve-month period ending December 31, 2012, Respondent derived gross revenues in excess of $500,000. During the same time period, Respondent purchased and received products, goods and materials at its Richmond, California facility that were valued in excess of $5,000 and came directly from points outside of the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since in or about 2010 or 2011, a group of current and former Walmart employees has participated in the Organization United for Respect at Walmart (OUR Walmart) to advocate for various changes in working conditions, benefits and workplace policies at Walmart. (Tr. 44–45, 80–81.) In connection with this effort, OUR Walmart has received extensive advice and support from the United Food and Commercial Workers union (UFCW), even though OUR Walmart is not itself a union and does not "represent" employees for collective-bargaining purposes. UFCW's support for OUR Walmart has included, but is not limited to: assistance with creating OUR Walmart; financial support; staffing support, such as UFCW employees who are assigned to work with OUR Walmart on the "Making Change at Walmart" campaign; advice on strategy; and networking support, including contacting community groups to support or join OUR Walmart members when they engage in strikes, protests or other "actions" as part of the Making Change at Walmart campaign. (Joint (Jt.) Exh. 22; see also Tr. 118.)

Although Walmart has over 4,000 stores, the events in this case generally relate to two stores in northern California: Walmart store 2418, located in Placerville, California; and Walmart store 3455, located in Richmond, California.

B. Placerville, California—June/July 2012

1. The June 1, 2012 protest at store 2418

On June 1, a group of approximately 24–30 OUR Walmart members and community supporters met on the sidewalk in front of Walmart store 2418 in Placerville, California to protest, carry signs, distribute leaflets and advocate for Walmart to provide its associates[5] with better working conditions, wages and healthcare. (Tr. 81–83, 594, 596, 651–652.) While at the protest, associate Lawrence Carpenter observed store manager Tammy Hileman, along with a few assistant managers, exit the store and use their cell phones to text and make telephone calls. (Tr. 87–90, 93–94, 109, 598.) Approximately 45 minutes later, Carpenter observed Hileman return to the sidewalk. Carpenter testified that Hileman appeared to hold a black, shiny item that looked like a cell phone and use it to scan the protesters (as if she were taking a picture). (Tr. 90–91, 93, 109–114.) Carpenter made his observations from the opposite end of the sidewalk from where Hileman was positioned (from a distance of up to 30 feet), and while both he and Hileman stood in front of the protesters who were also present on the sidewalk. (Tr. 97–98, 111; see also Jt. Exh. 1(a) (photograph of the sidewalk in front of the store); GC Exh. 2(a) (same).)

Hileman denied taking any photographs or video recordings of the protest, and also denied stretching her arms in front of her body (as if to scan for a photograph or video) during the protest. Hileman added that, at that time, she carried her cell phone in a pink cover. (Tr. 597–599.) Similarly, assistant manager Lance

[2] The General Counsel withdrew the allegations in paragraphs 6(c)(1)–(2) and 7(a) of the complaint. (Transcript (Tr.) 7, 469–470.) Since the allegations in paragraphs 6(c)(1)–(2) of the complaint are the only allegations in the charge filed in Case 32–CA–096506, the General Counsel moved that I sever Case 32–CA–096506 from this proceeding. (GC Posttrial Br. at 1.) I hereby grant the General Counsel's motion to sever, which was unopposed.

[3] The transcripts in this case generally are accurate, but I hereby make the following corrections to the record: page 149, l. 24: Respondent's attorney Lawrence Katz (Katz) was the speaker; page 150, l. 1: Katz was the speaker; page 204, l. 20: "out" should be "ought"; page 250, l. 18: the Administrative Law Judge was the speaker; page 330, l. 17: should say "Sustained as to form."; page 363, l. 9: "3" should be "30"; page 397, l. 4: "objective" should be "subjective"; page 602, l. 14: should say "it's not something" instead of "it's something"; page 656, l. 23: should say "Sustained as to form."; page 667, l. 20: "sleeping" should be "sweeping"; and page 729, l. 8: "should not" should say "should."

I also note that on October 17, 2014, I issued an order directing the parties to file corrected versions of certain exhibits to redact personal identifiable information and other confidential information. Pursuant to that order, Respondent submitted the following corrected exhibits: Joint (Jt.) Exhs. 24, 28. I have replaced the original copies of those exhibits in my exhibit file with the corrected versions. Since the electronic file still contains both the original and corrected exhibits, I recommend that the Board take appropriate steps to ensure that the original exhibits are handled in a way that will ensure they (and the personal identifiable and/or confidential information they contain) remain confidential.

[4] Although I have included several citations in the findings of fact to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

[5] Walmart calls its employees "associates." I have used the same terminology in this decision.

Snodgrass, who spent most of the day monitoring the protest, did not observe Hileman take any videos or photographs of the protest, and did not see Hileman hold her arms out in front of her with something in her hand at the protest. (Tr. 650, 652, 655, 659–660, 664–665.)

2. Late June 2012—Barbara Collins attends protest in Los Angeles

In late June, Barbara Collins traveled to Los Angeles to participate in a march/rally with OUR Walmart members and community supporters. Collins, who was working as an electronic sales associate in Walmart's store 2418 in Placerville, California, did not tell anyone in management about her plans to attend the rally. (Tr. 44–45, 49.) However, Collins did ask approximately ten other OUR Walmart members at the Placerville store if they would also like to attend the rally, and was generally an open and vocal supporter of OUR Walmart. (Tr. 51–52, 73.) In addition, another OUR Walmart member who was attending the Los Angeles rally told various (unidentified) people in the Placerville store that she and Collins would be attending the rally.[6] (Tr. 66.)

3. Early July 2012—Collins' interactions with supervisor Susan Stafford

At the end of one of Collins' shifts in the second week of July, overnight assistant manager Susan Stafford asked Collins how her trip to Los Angeles was. Collins was surprised by Stafford's question (since she had not told Stafford or anyone else in management that she was going to the Los Angeles rally), but responded that the trip was great. When Collins and Stafford went to the assistant manager's office to turn in Collins' keys to the electronics area, Stafford asked Collins if she was worried that Walmart would close the Placerville store if OUR Walmart became too big. Collins responded that she did not believe Walmart would close the store, since such a store closure had only happened once before at a store in Canada. No one else was present during this conversation, which lasted less than one minute.[7] (Tr. 45–47, 54–55, 57, 410; see also Tr. 412 (noting that if Stafford was the assistant manager on duty when Collins finished her shift, Stafford would be the one to take Collins' keys to the electronics area).)

C. Walmart's Dress Code Policies

1. Overview

Since at least July 19, 2010, Walmart has maintained that the purpose of its dress code "is to provide the parameters for an atmosphere that is professional but at the same time relaxed." (Jt. Exhs. 30, p. 1; 31, p. 1.) Explaining further, Walmart's dress code policies state as follows:

> Dressing for the work environment not only allows us to demonstrate pride in ourselves, but influences how our company is perceived by others, whether they are customers or fellow associates. It has an impact on our performance as well as on the performance of those around us. Our emphasis is that each associate should be neat and clean and take pride in their appearance.
>
> Walmart requires its associates to dress in a manner that is professional, relaxed, and appropriate to the facility[.]

(Id.; see also Jt. Exh. 33, p. 1 (Walmart's workplace standards policy, which states that Walmart strives "to provide a work environment that is clean, safe and allows associates to focus on being productive and providing excellent customer/member satisfaction. All associates are expected to present themselves in a professional manner that promotes respect and trust in the workplace, enhances customer/member loyalty and avoids the appearance of impropriety"); Tr. 537, 632 (noting that Walmart aims to provide excellent customer service and maintain a family friendly environment).)

2. The July 2010 dress code for Walmart's California employees

On July 19, 2010, Walmart issued the following dress code guidelines for hourly associates in its stores located in California:

> Dress Code
>
> Walmart facilities
>
> Any short sleeve or long sleeve solid blue shirt/blouse or solid green shirt/blouse of your choosing, in any shade of blue or green, and in good condition.
>
> - Sleeveless shirts/blouses are not allowed.
> - Examples of acceptable shirt/blouse styles include, but are not limited to, t-shirts, sweaters, sweatshirts, polo-style shirts and button down shirts.
> - You may wear white long sleeve shirts/blouses under short sleeve solid blue or green shirts/blouses
> - You are not required to tuck in your shirt/blouse.
>
> Solid tan, in any shade, and solid brown, in any shade, pants, skirts, or skorts of your choosing in good condition. Skirt or skort length must be no shorter than three (3) inches above the knee.
>
> - Examples of acceptable pants styles and fabrics include, but are not limited to, cargos, capris, denim, and corduroy.

[6] I decline Respondent's request that I take judicial notice of newspaper articles that were published about the Los Angeles protest. (See R. Posttrial Br. at 11 & fn. 3) The newspaper articles are not probative of any material issues that relate to the Los Angeles protest, and the record establishes that many associates at the Placerville store knew about the Los Angeles protest.

[7] Stafford denied making these remarks to Collins, but I did not find the material portions of Stafford's testimony to be credible. For example, when asked if she had ever heard anything about the June 1 OUR Walmart protest, Stafford denied hearing anything about it even though the protest was a significant event at the Placerville store. (Tr. 419.) Further, Stafford gave varied responses when asked whether Collins met with her to turn in keys to the electronics area in July 2012, stating initially that she did not remember any occasions where Collins was leaving and gave Stafford keys, but later stating that if she did meet with Collins in July 2012, their interactions would have been limited to returning keys, asking about electronics, or saying goodnight. (Compare Tr. 412 with Tr. 418–419.) Based on these inconsistencies, I did not find Stafford's memory of the events of July 2012 (including her interactions with Collins) to be reliable.

> If your position requires you to go outside while on the clock, you may wear any hat, jacket or coat of your choosing in good condition; no color or style restrictions apply.
>
> If your position, which includes, but is not limited to Front-End Cashier, People Greeter, Garden Center Cashier, requires you to wear a sweater or jacket inside the building for warmth reasons, you may wear any sweater or jacket of your choosing in good condition; no color or style restrictions apply.
>
> Logos or graphics on shirts/blouses, pants, skirts, hats, jackets or coats are not permitted, except the following, so long as the logo or graphic is not offensive or distracting:
>
> 1. A Walmart logo of any size;
> 2. A clothing manufacturer's company emblem no larger than the size of the associate's name badge; or
> 3. logos allowed under federal or state law.
>
> You are not required to purchase or wear any clothing from Walmart or the online catalog. Clothing can be purchased from any merchant of your choosing. If you feel you are under pressure from management to purchase or wear clothing from Walmart or the online catalog, you are obligated to immediately contact the company's Ethics Hotline, your Market Human Resource Manager, or your Regional Human Resource Director.

(Jt. Exh. 30, pp. 2–3; see also Jt. Exh. 30, p. 6 (setting forth a dress code exception that allowed "Maintenance, Cart Attendant/Courtesy associates, Overnight Receiving, Unloader, In-Stock/ICS Team and Assembler positions" to wear blue denim jeans).)

The July 19, 2010 dress code remained in effect at all material times until February 7, 2013, when Walmart issued an updated dress code. (See Jt. Exh. 31; see also Tr. 12 (Walmart agreed that the July 19, 2010 dress code remained in effect at all material times until at least September 14, 2012).) In practice, Walmart permitted associates to have logos on clothing (including OUR Walmart and UFCW pins and lanyards) as long as the logo was smaller than the Walmart name tag (2 x 3 inches). (Tr. 566–568, 629–630.)

3. August/September 2012 – Raymond Bravo's alleged dress code violations at the Richmond, California Walmart (store 3455)

In 2012, Raymond Bravo was employed as an overnight maintenance associate in Walmart's Richmond, California store. Bravo became an OUR Walmart member on January 23, 2012. (Tr. 333, 335.)

When Bravo began working at Walmart in 2011, he initially complied with the dress code, which he understood required khaki pants and a blue shirt.[8] However, after completing his probationary period and noticing that his coworkers were not complying with the dress code, Bravo began wearing clothes to work that did not comply with the dress code (such as a black thermal shirt, instead of a blue or green shirt as required by the dress code). Generally, Bravo wore noncompliant clothing to work for three out of his four weekly shifts at the store. (Tr. 335–337; Jt. Exh. 30, pp. 2–3.)

At approximately 11 p.m.[9] on August 21, Bravo arrived at work wearing khaki pants, and a green OUR Walmart t-shirt on top of a black thermal shirt. (Tr. 338; Jt. Exh. 27 (August 21, clip 1).) After clocking in, Bravo attended a pre-shift meeting led by assistant manager Peggy Licina. Licina did not comment about Bravo's attire, nor did any other member of Walmart management. (Tr. 340.) Bravo accordingly began his shift and worked for two hours without incident, and then went to the front entrance of the store (at approximately 1:04 a.m. on August 22) because it was time for his break. At approximately 1:07 a.m., Licina arrived at the front entrance and unlocked the door to allow Bravo and other associates to go outside. Licina did not comment about Bravo's attire. (Tr. 339–341, 369, 371; Jt. Exh. 27 (August 22, clip 2).) However, when Bravo reentered the store at approximately 1:11 a.m. to resume working, Licina directed Bravo to take off his OUR Walmart shirt. (Tr. 341–342; Jt. Exh. 27, clip 2.) Bravo complied, and completed his shift wearing his black thermal shirt without further comment from Licina. (Tr. 342; Jt. Exh. 27 (August 22, clip 1).)

On September 14, Bravo arrived at work wearing grey khaki shorts, and a white shirt that had a Mexican flag and the words "UFCW, Un Voice, Un Vision, Un Union" written on the back, and that had an emblem on the left hand side of the front of the shirt. (Tr. 343; Jt. Exh. 27 (September 14, clip 1 (10:51 p.m.) and clip 2 (10:59 p.m.).) While clocking in, Bravo encountered overnight maintenance associate S., who was wearing a black shirt, and overnight maintenance associate D., who was wearing sweatpants. (At trial, Bravo could not recall the color of D.'s shirt.) When Bravo, S. and D. attended a safety meeting led by Licina at the start of their shift, Licina told Bravo to take his white shirt off, or she'd be speaking to him "in a different tone." Licina did not say anything about S.'s or D.'s attire. (Tr. 343–345, 369; Jt. Exh. 27 (September 14, clip 2).) Bravo complied by removing his white UFCW shirt and putting on a blue shirt, and completed his shift with no one in management commenting about the fact that he was wearing shorts while on duty.[10] (Tr. 346; Jt. Exh. 27 (September 15, clip 1 (1:01 a.m.).) Meanwhile, a Walmart official reported as follows to Walmart's Labor Relations department: "[Overnight] maintenance associate wore anti-Walmart t-shirt to work." (Jt. Exh. 56, p. 4.)

4. Dress code violations by other employees

The evidentiary record shows that Walmart was generally

[8] Multiple witnesses agreed that the Richmond store only permitted blue shirts (notwithstanding the July 2010 dress code, which also permitted green shirts). (Tr. 270, 336, 629, 668; compare Jt. Exh. 30, p. 3.)

[9] The times that I reference in this section correspond to the times stated on the surveillance videos that the parties submitted as Joint Exhibit 27.

[10] Walmart allowed certain employees to wear shorts during the summer months, but overnight maintenance associates were not included in the list of employees covered by this exception. (Jt. Exh. 30, p. 6 (noting that the store manager may authorize the following employees to wear shorts in the summer months: "Cart Attendant/Courtesy associates, Garden Center associates, Receiving associates who unload trucks, ICS Team members who do not work on the sales floor, Overnight Stockers in a non-24 hour facility, [Tire, Lube and Express (TLE)] Service Writers and TLE associates who work in the shop area").)

inconsistent with enforcing its dress code policy at the Richmond, California store. On occasion, Walmart managers did: speak to individual employees about wearing the wrong color shirt; or ask certain employees to turn their shirts inside-out to obscure logos that did not comply with the dress code. (Tr. 323, 668–669.) On the other hand, there were occasions where employees wore shirts or other items that did not comply with the dress code, and did so without objection or comment by managers who observed the noncompliant clothing.[11] (Tr. 346 (Bravo's khaki shorts), 702 (Victor Mendoza's blue and white checkerboard flannel shirt); GC Exh. 6.) And, on at least one occasion, two assistant managers at the Richmond Walmart were observed wearing clothing that did not comply with the dress code. (Jt. Exh. 50, p. 1; see also Tr. 570–572.)

Mendoza habitually violated the dress code on his Tuesday night to Wednesday morning shift, because for that shift he always wore a blue shirt with the words "Free Hugs" written on the front in large letters. A manager did ask Mendoza about the Free Hugs shirt when Mendoza first began his practice of wearing that shirt, but thereafter Mendoza continued to wear his shirt on a weekly basis without further inquiry or comment. (Tr. 701–703, 719–720; GC Exh. 6.) Similarly, Mendoza frequently violated the dress code on his Thursday night to Friday morning shift, as he often wore a blue and white checkerboard-patterned flannel shirt to work for that shift. Although a manager (Momlesh "Atlas" Chandra) once told Mendoza to remove the flannel shirt because of the checkerboard pattern, Mendoza resumed wearing the shirt on future days without comment from any supervisors (including Chandra). (Tr. 702, 714; GC Exh. 6; see also Tr. 703 (noting that Mendoza also wore a San Francisco 49ers shirt at work a few times).)

5. The February 2013 dress code for Walmart's California employees

On February 7, 2013, Walmart issued the following updated dress code guidelines for hourly employees in its stores located in California:

> Dress Code
>
> Walmart facilities
>
> Any short sleeve or long sleeve solid blue shirt/blouse or solid white shirt/blouse of your choosing, in any shade of blue or white, and in good condition. This blouse/shirt should be the outermost customer facing garment.
>
> - Sleeveless shirts/blouses are not allowed.
> - Examples of acceptable shirt/blouse styles include, but are not limited to, t-shirts, sweaters, sweatshirts, polo-style shirts and button-down shirts.
> - You may wear white long sleeve shirts/blouses under short sleeve solid blue or white shirts/blouses
> - You are not required to tuck in your shirt/blouse.
>
> Solid tan, in any shade, solid brown, in any shade, and solid black pants, skirts, or skorts of your choosing in good condition. Skirt or skort length must be no shorter than knee length.
>
> - Examples of acceptable pants styles and fabrics include, but are not limited to, cargos, capris and corduroy.
> - Examples of unacceptable pant styles and fabrics include, but are not limited to, jeans, sweatpants, denim and fleece.
>
> While working outside the building (the building includes the garden center), you may wear any hat, jacket or coat of your choice in good condition; no color or style restrictions apply.
>
> If you work in a position such as Front-End Cashier, People Greeter, Garden Center Cashier, you may wear a sweater or jacket inside the building for warmth reasons. Your sweater or jacket must be in good condition and, if it is your outermost garment, it must be solid blue or solid white. You may also wear a sweater or jacket in good condition of any color if you wear it underneath a solid blue or solid white garment otherwise permitted by this dress code (blouse/shirt/sweater/jacket). Your outermost garment must always be solid blue or solid white in any shade.
>
> Walmart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts/blouses, pants, skirts, hats, jackets or coats are also permitted, subject to the following:
>
> - Except for a clothing manufacturer's company emblem no larger than the size of your company name badge, the logo or graphic must not represent
> - Any business engaged in the commercial sale of products or services to the public, including but not limited to a competitor or supplier; or
> - Any product or service offered for commercial sale to the public, whether in Walmart or elsewhere
>
> You are not required to purchase or wear any clothing from Walmart or the online catalog. Clothing can be purchased from any merchant of your choosing. If you feel you are under pressure from management to purchase or wear clothing from Walmart or the online catalog, you are obligated to immediately contact the company's Ethics Hotline, your Market Human Resource Manager, or your Regional Human Resource Director.

(Jt. Exh. 31, p. 2; see also Jt. Exh. 60 (summarizing the 2013 update to Walmart's California dress code, and noting that exceptions to the dress code may be considered for medical or religious reasons).) The February 7, 2013 dress code has been in effect at all material times since at least February 21, 2013. (Tr. 13.) As with the July 2010 dress code, Walmart permitted associates to have logos on clothing (including OUR Walmart and UFCW pins and lanyards) as long as the logo was smaller than the Walmart name tag (2 x 3 inches). (Tr. 566–568, 629–630.)

[11] The evidentiary record establishes that at around 11 p.m, Walmart dims the lights at its Richmond, California store. (Tr. 368, 670.) There is no evidence that assistant manager Peggy Licina (who did not testify), or any other manager, had difficulty seeing what color or type of clothing that employees were wearing during times when the lights were dimmed.

D. Overview of the Summer/Fall 2012 Richmond, CA Store Remodeling Project

In August 2012, Walmart began a remodeling project at its Richmond, California store to give the store an upgrade (e.g., installing new floor tiling, rearranging counters, cleaning). Following its customary framework for such projects, Walmart assigned a field project manager (Malcolm Hutchins) to oversee the remodeling work, and also assigned a team of five field project supervisors (including Art Van Riper) to supervise (and also participate in) the remodeling at the store on a daily basis. (Tr. 230, 351, 472–477, 482; see also R. Exhs. 6–7; Jt. Exh. 24.)

In practice, Hutchins created the remodeling schedule (i.e., the schedule for when remodeling work would be done in the various store departments), prepared and communicated daily work plans to the field project supervisors, and visited the Richmond store periodically to ensure that the project ran smoothly, stayed on schedule and stayed within budget. (Tr. 474–475, 478–479, 481–485; R. Exhs. 6–7.) Field project supervisors such as Van Riper were responsible for working with remodeling team associates to systematically complete the tasks on the daily work plans that Hutchins prepared. Accordingly, field project supervisors: led daily meetings to tell associates about the work that was scheduled; trained associates on how to do certain tasks; decided which remodeling associates to assign to each task; and patrolled the store to supervise associates and ensure that the remodeling team was working effectively.[12] Periodically, field project supervisors also worked alongside associates to carry out the assigned work.[13] (Tr. 231–232, 280–282, 328–331, 485–490, 503, 509–510, 620–621; Jt. Exh. 37.)

Although the remodeling team managers had an active role in planning and completing the remodeling project, the Richmond store managers were responsible for handling personnel matters that related to remodeling associates. Accordingly, Richmond store management hired associates to work on the remodeling project (based on the pre-established remodeling project budget), with all of the remodeling associates having temporary status.[14] In addition, Richmond store management handled all matters relating to employee orientation, compensation and discipline (with input from field project supervisors and/or the field project manager as appropriate), and store managers also had the authority to assign non-remodeling work to remodeling associates if those associates completed their remodeling assignments before the end of their shift. (Tr. 282, 474–481, 488, 491–494, 614–619, 677–678; Jt. Exh. 24.)

Hutchins and Richmond store management worked together to set the schedules for remodeling associates. Remodeling associates worked on two shifts: one during the day (from 7 or 8 a.m. to 4 or 5 p.m.); and one overnight (from 10 p.m. to 7 a.m.). (Tr. 480–483.) Van Riper worked the overnight shift. (Tr. 497.)

E. September/October 2012 – Remodeling Associate Conflicts with Field Project Supervisor Van Riper

1. Initial conflicts

Early in the Richmond store remodeling project, remodeling associates became unhappy with how they were being treated by field project supervisor Van Riper. Specifically, associates noted that Van Riper yelled at them, called them "lazy," and told them that they were the worst remodeling crew that he had ever worked with. (Tr. 233–234, 330; Jt. Exh. 57(c), pp. 8–9, 11–12 (assistant manager heard Van Riper yell at the remodeling crew and state that the crew was lazy and the worst he had ever worked with); Jt. Exh. 57(e), pp. 10–11 (field project supervisor heard Van Riper yell at the remodeling crew, and also heard him tell the remodeling crew that they were a bunch of "lazy ass workers"); Jt. Exh. 57(g), pp. 7–8.) In addition, some associates were offended when Van Riper stated "if it was up to me, I would put that rope around your neck" when associate Markeith Washington put a rope around his (Washington's) waist to assist with moving a heavy counter.[15] Washington laughed Van Riper's comment off, but also told Van Riper that what he (Van Riper) said was not right. (Tr. 234–235, 285; Jt. Exh. 57(a), p. 9; Jt. Exh. 57(b), p. 12.)

2. October 11–12, 2012—Van Riper's remarks when associates returned from strike

On October 9–10, remodeling associates Demario Hammond, Misty Tanner and Markeith Washington joined other Richmond store associates (including Raymond Bravo) in an OUR Walmart sponsored strike "to protest Walmart's attempts to silence Associates who have spoken out against things like Walmart's low take home pay, unpredictable work schedules, unaffordable health benefits and Walmart's retaliation against those Associates who have spoken out." (Jt. Exh. 14; see also Tr. 156–157, 348, 382; Jt. Exh. 40.)

At approximately 10 p.m. on October 11, Bravo, Hammond, Tanner and Washington returned to the Richmond Walmart to read and deliver a "return to work letter" that communicated their "unconditional offers to return to our positions with Walmart for our next scheduled shifts." (Jt. Exh. 15; see also Tr. 118–119, 156–157, 186–187, 197, 201, 349; Jt. Exh. 61.) The returning associates were accompanied by a delegation of

[12] I decline Walmart's request that I draw an adverse inference against the General Counsel for not calling an associate who worked directly with Van Riper to testify about Van Riper's job responsibilities. (See R. Posttrial Br. at 20.) The parties presented ample evidence about that issue through other witnesses, including Hutchins, who was Van Riper's supervisor, and Semetra Lee, who worked on the remodeling team and was familiar with the work that field project supervisors performed at the Richmond store.

[13] When not assigned to a field project, field project supervisors return to their "home store" where they supervise associates as instructed by the store manager. (Tr. 495–496; see also Jt. Exh. 38, pp. 1, 3, 11.)

[14] Temporary associates on remodeling projects typically end their employment with Walmart at the conclusion of the remodeling project. Store managers retain the option, however, to offer store-based jobs to remodeling associates, and may consider the opinions of field project supervisors in making those hiring decisions. (Tr. 493–494.)

[15] Van Riper denied making this statement when he was interviewed by market human resources manager Janet Lilly. (Tr. 554–555; Jt. Exh. 57(f), p. 13.) I have given little weight to Van Riper's denial because multiple employees corroborated Washington's report about the incident, and because Walmart did not call Van Riper to testify at trial, despite Van Riper still being one of Walmart's employees. In this connection, I note that I take no position on whether Van Riper's statement was racist in nature (as some associates maintained), since I need not resolve that issue to address the National Labor Relations Act violations that are alleged in the complaint in this case.

approximately seven UFCW employees (including Mabel Tsang and Ellouise Patton) and community supporters. Initially, the associates handed their letter to assistant manager Atlas Chandra. Presumably because many of the associates were part of the remodeling crew, Chandra called Van Riper over to speak to the associates. (Tr. 11–12, 119, 158–159, 349, 393; Jt. Exh. 61.) When Van Riper became agitated, UFCW employee Mabel Tsang recorded the following exchange with her cell phone:

> Van Riper (VR):I don't want to hear it. It concerns union activities. I'm sorry, I'm out of it. You go talk to the store manager or public information.
>
> Unknown (UK):It's really about the law and not unions. It's about the law—California law.
>
> VR: I don't really want to hear about it.
> UK: You don't want to hear about California law?
> VR: I don't want to hear about unions.
> Misty Tanner: Here Atlas. Here's our return to work [letter]. [Chandra subsequently handed the letter to Van Riper.]
> UK: It's not about unions.
> VR: I know what California law is. I know it probably better than you do sir.
>
> Ellouise Patton (EP): Right. Finish reading the letter to him so he can start work on time.
> M. Tanner: [Reading from a script.] I'm ready to return to my position on my next scheduled shift. If Walmart does not allow me to return to work on my next scheduled shift or retaliates against me for walking off my job its [an] unfair labor practice and I will be filing a charge with the National Labor Relations Board.
>
> . . .
>
> The Board will require Walmart to reinstate me with full pay . . . and benefits from today, the day I offered to return to work until the day Walmart reinstates me . . .
> VR:I don't really . . . I don't even want to hear it. You've been told to come back to work so get out of here – leave me alone.
> M. Tanner:[Continuing to read from script.] I struck in response to Walmart's unlawful attempts to silence and retaliate against associates who spoke up against Walmart's low wages, unpredictable schedules and unaffordable benefits. Therefore I'm entitled to reinstate my position beginning . . .
>
> . . .
>
> VR:I have a job to do.
>
> UK:Yes sir. I appreciate that. We understand. You've got a job to do.
>
> M. Tanner:I'll be back to work tonight. . . . Thank you.
>
> EP:[Sarcastically] Thank you sir, you have been most gracious.
>
> (Jt. Exhs. 7(a)–(b); see also Tr. 119–122, 159–161, 166, 179; Jt. Exh. 61.)[16]

At this point, Tsang stopped her cell phone recording because she believed that the return to work delegation had concluded. However, Van Riper was not finished, and responded to Patton's remark by saying "Don't thank me. If it were up to me, I'd shoot the union."[17] (Tr. 123, 190–192, 350; Jt. Exh. 57(b), p. 13.) Tsang resumed recording the events and recorded the following remarks:

> EP: Really? Okay, did everyone hear that? Okay, so let's let these people go to work.
>
> . . .
>
> VR:If I had my way the union would be . . . I used to work for a union.
>
> Mabel Tsang:I was recording and I stopped it right at . . .

(Jt. Exh. 8(b); see also Tr. 177–178 (noting that at some point, Patton asked Van Riper if his remark about unions was a threat, and that Van Riper responded "no"), 187–188, 190–193.) Notwithstanding this confrontation, the four returning strikers returned to work on their next scheduled shifts and were not disciplined for participating in the October 2012 strike. (Tr. 157–158, 202, 382–383.)

At approximately 2 a.m. on October 12 (during the same overnight shift that began on October 11), Van Riper and field project supervisor Carlita Jackson called all remodeling associates to a meeting. At the meeting, Van Riper announced that the remodeling associates were back from their strike, but would not be working with the remodeling crew and instead would be working with the store.[18] Van Riper added that although OUR Walmart was trying to unionize Walmart, that (unionization) was never going to happen. Next, Van Riper told the remodeling associates that they should not talk to the returning strikers. When Jackson and associate Semitra Lee asked Van Riper what he meant by that, Van Riper said that remodeling associates should not talk to returning strikers "about the situation." Finally, Lee asked what was going to happen to the returning strikers. Van Riper responded that they would be looking for new jobs.[19] (Tr. 237–240, 286, 288–289.)

3. October 17, 2012–associates submit written complaint about

[16] The transcript of this conversation in the record (Jt. Exh. 7(b)) is generally accurate. The conversation provided here generally tracks that transcript, except for a few non-substantive corrections that I made based on the video recordings in the record (Jt. Exhs. 7(a), 63).

[17] I have credited Tsang's account of Van Riper's remark because Tsang presented detailed and credible testimony, and because she was already in the role of monitoring Van Riper's conduct when he made the remark about shooting the union (and thus was tuned in to precisely what Van Riper was saying). In addition, Tsang's account was largely corroborated by Hammond's report and Bravo's testimony. (See Jt. Exh. 57(b), p. 13 (Hammond); Tr. 350 (Bravo).) I have given less weight to Patton's testimony that Van Riper said "You people ought to be shot," because she demonstrated difficulty with recalling some of the details about the interaction with Van Riper. (Tr. 204–207.)

[18] In future shifts, the remodeling associates who participated in the October 2012 strike rejoined the remodeling crew. (Tr. 289.)

[19] Lee's account of Van Riper's remarks at the October 12, 2012 meeting was not rebutted by any other evidence.

Van Riper

On October 17, six associates (Bravo, Hammond, Tanner, L.S., Washington and Timothy Whitney) signed and submitted a letter to Walmart to complain about Van Riper. The letter stated as follows:

We the Associates at Store #3455 in Richmond, California, are outraged at the behavior of Art Van Riper, a manager from Home Office. By using racist remarks and threats of physical violence towards Associates he has created a work environment that is threatening, harassing and intimidating.

> Because he is a manager from Home Office his behavior is either condoned by Walmart, or Walmart is unaware they have a manager representing them who uses racist comments and threatens associates with physical violence. Neither is acceptable. Because this behavior is outrageous and unacceptable, we call on Walmart to do the following:
>
> 1. Walmart remove Home Office remodel manager Art Van Riper. We also want a public apology from him to all associates in the store and want all managers of this store to attend a cultural competency training.
>
> 2. Because much of his behavior was directed at temporary associates helping us remodel and improve our store, and because Walmart will be staffing up Store #3455 for the holiday season, we want any temporary Associate who is ready and willing to take a position at Store #3455, be given first option for any available positions at the store after the completion of the remodel. If no positions are available, a list of current temporary associates will be created and called when new positions are available before the job is open to the public.
>
> 1. Store manager Robert Wainaina meets with members of OUR Walmart to discuss the above issues.

(Jt. Exh. 9; see also Tr. 354, 391, 400, 407.) For reasons that are not clear, market human resources manager Janet Lilly did not receive a copy of the October 17 letter until on or about October 31. Lilly forwarded the letter to Walmart's labor relations department, which in turn forwarded it to Hutchins for review and comment (since Hutchins was Van Riper's supervisor). (Tr. 519–520; see also R. Exh. 8; Jt. Exh. 42.)

F. November 2, 2012—Associate Work Stoppage at the Richmond, CA Store

1. Preparation for work stoppage

In mid-October, OUR Walmart members and UFCW staff met on two occasions to discuss and prepare for a work stoppage/protest that they planned to hold at the Richmond, California Walmart on November 2. The principal reason for the work stoppage was to protest Van Riper's treatment of the remodeling associates, and the meeting participants selected November 2 for the work stoppage because the Richmond store's grand reopening was scheduled that day (and thus the work stoppage/protest would also provide a good opportunity for OUR Walmart to state its cause). (Tr. 240–242, 291–293, 354–355; see also R. Exh. 3 (UFCW staff email dated October 29, 2012, listing the protest at the Richmond store as an upcoming event).)

At approximately 11 p.m. on November 1, Tanner approached assistant manager Tennille Tune asked Tune to send her home. Tanner explained that if she remained at the Richmond store, she would organize the work stoppage planned for the early morning of November 2. Tanner added that she might be able to call off the work stoppage if Tune could promise that the remodeling associates would be offered permanent positions with Walmart after the remodeling project concluded. Tune declined Tanner's request to be sent home, and notified Walmart's labor relations department of the work stoppage/protest plans. In addition, Tune altered her plans for the staff that night, to have them prioritize removing boxes and other obstacles from the floor before the work stoppage began. (Tr. 624–627; Jt. Exhs. 44–45.)

2. The grand reopening

In the early morning on November 2, Richmond store personnel were in the process of completing their remodeling work and readying the store for its grand reopening, which was scheduled to begin that day at 6 a.m. when the store opened to the public. (Tr. 124, 142, 240, 351; see also Tr. 270, 501–502 (noting that the remodeling project did not fully conclude until around November 7.) Walmart personnel characterized the grand reopening as a "big deal" for the store, with new meat and produce departments available for the first time, and vendors and costumed characters present to interact with customers and their families. (Tr. 541, 631–632.)

3. Lilly begins open door meetings concerning Van Riper

Shortly after 3 a.m. on November 2, Lilly and market asset protection manager Paul Jankowski arrived at the Richmond store to support the store in its grand reopening, and also to interview associates (under Walmart's open door policy) about their complaints and concerns about Van Riper. (Tr. 520–522, 574–575, 624, 681–682, 694; Jt. Exh. 58.) Lilly and Jankowski's first interview was with associate Washington. During that interview, Tanner knocked on the door and announced that she wanted to check on Washington. Tanner left after Washington confirmed that he was okay and wished to continue the meeting. (Tr. 525–527, 683–684; Jt. Exh. 58; see also Jt. Exh. 57(a) (notes from open door session with Washington).)[20]

4. Work stoppage activities inside the Richmond Walmart[21]

At approximately 5:24 a.m., Bravo, Hammond, Lee, Tanner, Washington and Whitney stopped the work that they were doing at the Richmond Walmart and walked to the customer service waiting area of the store (located immediately to the right of the

[20] Due to other events that required her attention on November 2, Lilly did not finish investigating the associates' complaints about Van Riper until November 16. As part of her investigation, Lilly met with associates Hammond and Whitney in open door meetings on November 7 (Bravo, Lee, Stewart and Tanner declined Lilly's requests to meet). Lilly also met with Hutchins, Jackson, Tune and Van Riper. (Tr. 269, 296, 498, 545–546; 557–558; Jt. Exhs. 51, 57(b)–(g).) The results of Lilly's investigation are not relevant to the complaint allegations in this case.

[21] The times that I reference in this section correspond to the times stated on the surveillance videos that the parties submitted as Joint Exhibit 26(a)–(b).

first floor store entrance) to begin a work stoppage/protest.[22] The store was not yet open to the public (opening hours began at 6 a.m.), and the customer service area was empty, save for one individual who was sitting in the customer service area and left shortly after the work stoppage began. Bravo, Hammond, Lee, Tanner, Washington and Whitney were all still on the clock when they began their work stoppage. Meanwhile, the remodeling associates that did not participate in the work stoppage continued to stock and clean the store for the grand reopening. (Tr. 125, 244–245, 300, 351, 378, 562, 627–628, 672–674; Jt. Exhs. 26(a) (clip 3), 26(b) (clips 2–3, 5); see also Jt. Exh. 16 (indicating that at some point on November 2, the work stoppage participants resubmitted their letter to Walmart regarding Van Riper's conduct).)[23]

At around 5:29 a.m., Lilly and Jankowski entered the customer service area and greeted the associates who were participating in the work stoppage. Lilly asked the work stoppage participants what they wanted, and offered to meet with them individually under Walmart's open door policy to discuss their concerns. The work stoppage participants refused Lilly's offer because they wanted to discuss their concerns as a group, and Lilly was not willing to do so because of Walmart's practices with its open door policy and her belief that associates' confidential information should not be shared in a group setting. The work stoppage participants also refused Lilly's request that they return to work, and continued to wait in the customer service area. (Tr. 252–253, 298–300, 358, 387–388, 534–537; Jt. Exhs. 26(a) (clip 3), 26(b) (clips 2–3, 5), 58–59; see also Tr. 516–518, 631 (agreeing that Walmart handles open door meetings on an individual basis); Tr. 326–327.) At around 6 a.m., Lilly repeated her requests that the work stoppage participants meet with her individually to discuss their concerns, and that they return to work—the work stoppage participants again refused to meet with Lilly unless she agreed to meet with them as a group, and again refused to return to work. (Tr. 537–538.)

Shortly after the store opened at 6 a.m., four non-associates (a mixture of UFCW staff and community members) entered the store and joined the work stoppage participants in the customer service area. After arriving, the non-associates and work stoppage participants displayed an 8–10 foot long green banner that stated:

> Stand Up
> Live Better
>
> ForRespect.org
> OUR Walmart
> Organization United for Respect at Walmart

(Jt. Exhs. 13(e)–(f).) Initially (at approximately 6:03 a.m.), the protesters held the banner in such a way that much of the front of the customer service counter was blocked.[24] However, at 6:05 a.m., the protesters moved the banner to the back of the customer service area, thereby leaving most of the customer service counter unblocked. (Tr. 256, 305–306, 355–356, 539–540, 563, 685; Jt. Exhs. 26(a) (clip 3), 26(b) (clips 2–3, 5), 58.)

Over the next several minutes, protesters periodically left the customer service area to exit the store, and then later returned. For example, at approximately 6:10 a.m., Lee left the customer service area for approximately five minutes to conduct a media interview in the parking lot.[25] Similarly, at approximately 6:16 a.m., UFCW staff delivered signs and OUR Walmart t-shirts to the protesters in the customer service area, and took photographs of the protest inside the store (notwithstanding Jankowski's warnings that the protesters could not take photos or hold signs, and that the protesters were trespassing and should leave the store). At times, up to 15–19 protesters (including the six associates who were continuing their work stoppage) were present in the customer service area. (Tr. 127–129, 146–152, 163–165, 258–259, 303–304, 311, 539, 688–689; Jt. Exhs. 12(a)–(b), 13(d)–(f), 26(a) (clips 1–3), 26(b) (clips 2–3, 5), 58–59.) Some of the UFCW staff and community members held signs and distributed leaflets outside of the store, as a protest conducted in support of (and in conjunction with) the work stoppage/protest that was in progress inside the store. Since the protesters outside the store were near a storage area for shopping carts (such that someone wanting to retrieve a cart would have to walk around the protesters), Walmart asked one of its greeters to assist customers with getting carts.[26] (Tr. 180–185, 321, 325, 540–542, 629, 685–687; Jt. Exhs. 13(a)–(c), 29, 58; R. Exh. 4.)

At approximately 6:29 a.m., Bravo, Hammond, Lee, Tanner, Washington, Whitney and two community members left the customer service area and stood in front of a display located in the store aisle leading from the first floor store entrance (Walmart refers to this aisle as "Action Alley" because the store features advertisements in that area – the display was approximately 20 feet from the entrance doors).[27] By this point, Bravo, Tanner and Lee had donned green OUR Walmart t-shirts, and Bravo was displaying a 3–by–2–foot sign that stated "ULP Strike." Three

[22] The customer service area has a long counter with three computers/cash registers, and a few seats for customers. A chest-high wall across and to the right of the customer service counter separates most of the customer service waiting area from the rest of the store. (Tr. 437–438; Jt. Exh. 12(b).)

[23] Although Van Riper's time at the Richmond store was coming to an end because the remodeling project was nearly concluded, associates were concerned that Van Riper might mistreat associates in other stores where he might be assigned in the future. (Tr. 243, 354.)

[24] During this timeframe, there were no customers in the customer service area. A Walmart associate briefly walked behind the customer service counter without difficulty or incident. (Jt. Exh. 26(a), clip 3 (6:04 a.m.).)

[25] Coincidentally, while Lee was standing behind a parked news vehicle doing her interview, Van Riper left the store and entered his car, which was parked next to the news vehicle. Van Riper yelled at Lee to move as he backed out his car, and then left the parking lot. (Tr. 264–265, 304–305; Jt. Exh. 26(a) (clip 1).)

[26] Customer service desk associate Maria Della Maggiora also testified about retrieving carts from the cart storage area outside of the front of the store. Specifically, Maggiora testified that although no one prevented her from retrieving shopping carts, she did not feel comfortable retrieving carts because protesters tried to speak to her about OUR Walmart. (Tr. 431–433.) I have given little weight to Maggiora's subjective reactions to the protest because they are not relevant to my analysis of the issues in this case.

[27] Lee estimated that the display was only 10 feet from the main entrance (Tr. 318.), but I have not credited her testimony on that point because the video footage in the record shows that there was no display located within ten feet of the main entrance.

other protesters remained in the customer service area, where they continued to display the green banner. Upon seeing the protesters move to Action Alley, Lilly and Jankowski approached and told them that they were blocking customers from entering and shopping in the store, and asserted that the protesters should either return to the customer service area or leave the store. Lilly added that she would prefer that the protesters simply leave the store. In response, at 6:32 a.m., the protesters left Action Alley and returned to the customer service area (to some brief applause from one of the protesters who had stayed behind in that area). (Tr. 260–262, 308–309, 316, 318–319, 357–358, 374–376, 542–545, 687–688; Jt. Exhs. 13(g), 26(a) (clip 3), 26(b) (clips 2–3, 5), 58–59.)

At approximately 6:37 a.m., two uniformed police officers entered the store and spoke with Lilly and Jankowski, and later, a representative of the protesters. After some discussion, the protesters agreed that they would leave the store after the six associates clocked out. Accordingly, the six associates left the customer service area at 6:38 a.m. to clock out, while UFCW staff and community supporters remained in and around the customer service area. All protesters (including the six associates) left the store by 6:52 a.m. (slightly before the end of the associates' scheduled shifts, which ran until 7 a.m. for remodeling associates, and 8 a.m. for Bravo). Some associates (e.g., Bravo, Lee) joined in circulating petitions, leafleting and protesting outside of the first floor store entrance. (Tr. 263, 265, 320–321, 325–326, 355, 376, 378, 691–692; Jt. Exhs. 26(a) (clip 3), 26(b) (clips 2–5), 29, 58–59.) At no point during the work stoppage did Walmart (through Lilly, Jankowski or another manager) warn the six associates that they must leave the store or face being disciplined. (Tr. 265, 361.)

From 6 a.m. onward, Maria Della Maggiora was the Walmart associate assigned to work at the customer service desk.[28] Although the customer service counter was open and accessible, Maggiora did her work elsewhere in the store during the protest. Maggiora testified that she avoided the customer service area because the area was noisy while the protesters were present. Other associates, however, periodically walked behind the customer service desk without apparent difficulty, and only a limited number of customers entered the store during the protest (and the video footage does not show that any of those customers sought assistance at the customer service desk). (Tr. 266, 311–312, 358, 377, 422, 425, 430; Jt. Exhs. 26(a) (clip 3), 26(b) (clips 2–3, 5); see also Tr. 310 (Lee acknowledged that with 15 or more people in a small enclosed area such as the customer service area, "voices carry a little bit").)

5. Protest continues outside the Richmond Walmart second floor entrance[29]

As part of the Richmond Walmart's November 2 grand reopening, the store had arranged for a few vendors to set up tables in a large concrete walking area to the left of the second floor store entrance. Consistent with that plan, vendors began arriving and setting up tables at around 7:23 a.m.. (Jt. Exhs. 26(a) (clip 4), 26(b) (clip 1), 58–59.)

At approximately 7:29 a.m., OUR Walmart members, UFCW staff and community supporters (including Bravo and other protesters who participated in the protest activities near the first floor entrance) began protesting in the same concrete walking area.[30] Initially, the demonstrators formed a line facing the parking lot, stretching a 15–foot long white banner (also used in the protest outside the first floor entrance) and a smaller green banner (also used during the work stoppage) across the protest line. The long white banner stated:

> On Strike
> Walmart: End the Retaliation

When they were facing the parking lot, the protesters were standing in the concrete walking area approximately 30 feet in front of where the vendors were setting up their tables. (Tr. 401–403, 406, 542, 689–690; Jt. Exhs. 26(a) (clip 4), 26(b) (clip 1), 58.)

After changing their alignment a couple of times (alternating between facing the parking lot and turning the line perpendicular to the parking lot), at approximately 7:39 a.m. the protesters moved their banners to stretch perpendicular to the parking lot, with the ends of the line curved slightly to make a long, flat "U"-shaped formation. With this alignment, the protesters left room for one or two people to walk between them and the first vendor table, and left approximately five feet for people to pass between the protesters and the parking lot. Because the protesters were located well to the left of the store entrance, it was also possible for pedestrians coming from the parking lot to walk through a lined crosswalk area in the driveway and directly to the store entrance, thereby passing the protest line altogether. (Tr. 401–405; R. Exh. 5; Jt. Exhs. 26(a) (clip 4), 26(b) (clip 1).)

At approximately 8:02 a.m., one or two protesters began distributing leaflets to individuals who passed through the concrete walking area. At around the same time (at 8:04 a.m.), the protesters holding the green banner moved to a different area of the concrete walkway, opening up 10–12 feet between the remaining line of protesters and the first vendor table. And, by 8:08 am,

[28] Normally, the customer service desk does not open until 7 a.m., and thus customers are rarely in the customer service area between 6 and 7 a.m. (Tr. 266, 361–362; GC Exhs. 3, 5; see also Tr. 633 (noting that the customer service area is not that busy between 6 a.m. and 8 a.m.).) Walmart opened the customer service desk earlier on November 2 because of the grand reopening. (Tr. 443–444.)

I have given little weight to Maggiora's testimony that she normally sees 8 or 9 customers in the customer service area between 6:30 a.m. and 9 a.m. (See Tr. 429.) Much of Maggiora's testimony was vague and therefore unreliable, and in any event, her testimony on this point is not probative because the estimate that she provided for the amount of customer traffic at the customer service desk covers a time period that extends well beyond the time (6:52 a.m.) that the work stoppage ended.

[29] The times that I reference in this section are taken from the time clock provided at the top of the video feed in Joint Exhibit 26(a), clip 4. I note that Joint Exhibit 26(b), clip 1 shows many of the same events, but its time clock lags four minutes behind (such that an event at 9 a.m. on Joint 26(a), clip 4 would appear at 9:04 a.m. on Joint Exhibit 26(b), clip 1).

[30] Mall security personnel informed Jankowski that it was permissible for the protesters to protest outside of the first and second floor entrances to the Richmond Walmart store. (Tr. 695; Jt. Exh. 58; see also Tr. 321 (a Walmart manager informed the associates that they had to leave the store, but did not have to leave the mall property outside).

the protesters had put away the green banner and concentrated the protest line behind the longer white banner, thereby leaving half of the concrete walkway clear. (Jt. Exhs. 26(a) (clip 4), 26(b) (clip 1).)

At around 8:15 a.m., several protesters left the area, and the protesters that remained began to wrap up their activities. Specifically, at around 8:23 a.m., the remaining protesters put away the long white banner and simply stood together in small groups (leaving 80% of the concrete walkway clear). All protest activity ended by 9:01 a.m., and at approximately 9:07 a.m., the protesters loaded their banners and signs into a sports utility vehicle. (Jt. Exhs. 26(a) (clip 4), 26(b) (clip 1), 58.)

Throughout the exterior protest, a light load of customer traffic proceeded in and out of the second floor store entrance without incident. The vendor tables were also up and running and open for visitors, but saw limited traffic. One news vehicle parked at the end of the concrete walking area to cover the event, and then left the area once the protesters began to disperse. (Jt. Exhs. 26(a) (clip 4), 26(b) (clip 1).)

G. Developments after the November 2 Work Stoppage

1. Work stoppage participants offer to return to work

On November 2, Bravo gave Walmart personnel a letter communicating his unconditional offer to return to work. Bravo and Lee returned to work at 11 p.m. on November 2 without incident.[31] On November 4, Hammond, Lee, Tanner and Washington also gave Walmart a letter communicating their unconditional offers to return to work (Whitney did not sign the letter). (Tr. 268–269, 390; Jt. Exhs. 17–18.)

2. Walmart disciplines the six associates who participated in the work stoppage

Under Walmart's disciplinary policy, a coaching is a tool that Walmart uses to "provide instruction and assistance to [associates] if [their] job performance fails to meet the reasonable expectations and standards for all associates in the same or similar position or if [the associates'] conduct violates a company policy or interferes or creates a risk of interfering with the safe, orderly and efficient operation of [Walmart's] business." Although Walmart has three levels of coaching (first, second and third written coachings) that associates typically progress through if they are coached on multiple occasions (i.e., an associate who has an active first written coaching will normally receive a second written coaching if the need for another coaching arises), supervisors have the discretion to skip levels of coaching if they determine a higher level of coaching is warranted based on the particular circumstances. (Jt. Exh. 6, p. 1.)

Between November 5 and 8, Walmart disciplined each of the work stoppage participants with a two-level coaching, such that Hammond, Lee, Tanner, Washington and Whitney received a second written coaching (because they had no active coachings at the time), while Bravo received a third written coaching (because he had an active first written coaching at the time). Before deciding to issue two-level coachings, Lilly searched Walmart's online coaching records and performed a "consistency search" to review what level of coaching Walmart used when associates committed similar infractions in the past. Based on that search, Lilly found that multiple associates in the Richmond store had either skipped levels or had been coached for similar infractions, and therefore determined that the proposed two-level coaching would be appropriate for the associates who participated in the work stoppage. (Tr. 560–561.) Each associate's coaching document stated as follows:

> Reason(s) [for coaching]:
>
> Inappropriate Conduct, Unauthorized Use of Company Time
>
> Observations of Associate's Behavior and/or Performance:
>
> Abandoned work immediately befor[e] Grand Opening event and refused to return to work after being told to do so. [T]hen engaged in a sit-in on the sales floor and physically occupied a central work area. [T]hen joined with a pre-coordinated flash mob during Grand Opening to further take over, occupy, and deny access to the main customer pathway through the front of the store. Refused to stop/leave when told to do so.
>
> Impact of Associate's Behavior:
>
> Disrupted business and customer service operations during key Grand Opening event and interfered with your co-workers' ability to do their jobs. Created a confrontational environment in our store with customers and co-workers at a time when we were trying to make a crucial first impression with potential long term customers; likely lost customers as a result.
>
> Behavior Expected of Associate:
>
> Work as directed and do not attempt to occupy Walmarts property, disrupt operations, or interfere with customer service or co-workers job tasks. You are encouraged, but not required to use the company's Open Door to address any issues you want to share.

(Jt. Exh. 19; see also Tr. 266–268, 322, 359–361, 558–565, 587; Jt. Exh. 20 (Bravo's pre-existing first written coaching, given on August 19, 2012 for attendance/punctuality problems).) Walmart emphasized that it disciplined the associates for unauthorized use of company time (not using their time on the clock to do productive work), and not because of the work stoppage. (Tr. 268, 322, 565.)

Walmart's coaching paperwork includes an "Action Plan" that associates may complete to respond to the coaching, or articulate how they will correct the problems or concerns set forth in the coaching. (See Jt. Exh. 6.) Bravo, Lee, and Whitney left their action plans blank, while Tanner did not report for work after November 2, and thus was not present to enter an action plan when her coaching was issued. Washington wrote: "just get back to work and stay [focused]." And Hammond stated: "I only participated in the sit-in because I was tired of the verbal abuse and other unfair labor practices made by Art [Van Riper] from Store Planning. With that being said, I will continue to work hard as I move forward here at Walmart. I have always done my best and

[31] Bravo did attempt to complete his shift in the morning on November 2 (after the work stoppage concluded), but was told he could not do so without first participating in an open door meeting. Bravo declined, and instead returned to work on his next scheduled shift (in the evening on November 2). (Tr. 390.)

more since I started here and I love working here. I hope this doesn't reflect negatively on my work ethic because I will still be knocking out pallets like crazy. I apologize for my inappropriate behavior and this will not happen again." (Jt. Exh. 19; see also Tr. 558, 561, 563.)

3. November 7—remodeling project concludes

On November 7, Walmart informed the remodeling associates at the Richmond store that the remodeling project had concluded and that the associates would receive their last checks in the mail. Accordingly, Hammond, Washington and Whitney worked their final day on November 8, while Tanner and Lee worked their final days on November 2 and 7, respectively. Of the 27 associates who worked on the remodeling project between August 13 and November 8, only one associate (associate C.R.) was placed directly into a permanent position at the store. (Tr. 270, 279–280, 283; Jt. Exhs. 23, 25 pp. 56–60.)

Discussion and Analysis

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Locomotives, Inc.*, 358 NLRB 298, 309 (2012), see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Relco Locomotives,* supra. My credibility findings are set forth above in the findings of fact for this decision.

B. The Placerville Store

1. Complaint allegations and applicable legal standard

The General Counsel alleges that, on or about June 1, 2012, Walmart unlawfully engaged in surveillance and/or created the impression of surveillance by photographing or videotaping associates (or appearing to do so) while the associates engaged in a protest at the Placerville store. (GC Exh. 1(bb), par. 6(a)(1).)

The General Counsel also alleges that, in or about the second week of July 2012, Walmart implicitly threatened an associate by asking the associate if she was afraid Walmart might close its Placerville store if too many associates joined OUR Walmart. (GC Exh. 1(bb), par. 6(a)(2).)

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. *Relco Locomotives,* 358 NLRB 298, 309 (2012), enfd. 734 F.3d. 764 (8th Cir. 2013).

In general, the test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. Id. Apart from a few narrow exceptions (none of which apply in this case), an employer's subjective motivation for its conduct or statements is irrelevant to the question of whether those actions violate Section 8(a)(1) of the Act. See *Station Casinos, LLC*, 358 NLRB 1556, 1573–1574 (2012).

2. Did Walmart violate the Act by engaging in surveillance or creating the impression of surveillance on June 1, 2012?

A supervisor's routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. However, an employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is out of the ordinary and thereby coercive. Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848,865–866.

The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether, under all the relevant circumstances, reasonable employees would assume from the statement or conduct in question that their union or other protected activities have been placed under surveillance. Id.; see also *New Vista Nursing & Rehabilitation*, 358 NLRB 473, 483 (2012) (noting that the standard for creating an unlawful impression of surveillance is met "when an employer reveals specific information about a union activity that is not generally known, and does not reveal its source"); *Flexsteel Industries,* 311 NLRB 257, 257 (1993) (noting that an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement). The standard is an objective one, based on the rationale that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 861–862.

In this case, the General Counsel fell short of establishing facts demonstrating that Walmart unlawfully engaged in surveillance or created the impression of surveillance at the June 1 protest. Although several people participated in the protest, the General Counsel relied solely on the testimony of associate Carpenter, who testified that from a distance of up to 30 feet, he saw store manager Hileman hold a black, shiny object in her hands and make a scanning motion as if she was photographing or videotaping the protesters. (Findings of Fact (FOF) Section II(B)(1).)

Although Carpenter was a candid witness, I find that the General Counsel did not present enough evidence to establish that Hileman videotaped, photographed, or made a scanning motion

towards protesters as alleged on June 1.[32] First, Carpenter's account was tentative and uncorroborated. Carpenter admitted to being up to 30 feet away from Hileman when he made his observations, and also admitted that he was uncertain about exactly what he saw Hileman holding in her hands when she allegedly made the scanning motion. And, although several other protesters were present on the sidewalk when the alleged surveillance occurred, the General Counsel did not call any other witnesses to corroborate Carpenter's account. Second, Hileman credibly denied videotaping, photographing or scanning the protesters as alleged, and drew support in her denial from Snodgrass, who was present for the majority of the protest and did not see Hileman take photographs or videos, and did not see her make any scanning motions. (FOF, sec. II(B)(1).)

In light of the weaknesses in Carpenter's testimony, and Hileman's credible denial, I cannot find that Hileman unlawfully engaged in surveillance, nor can I find that Hileman engaged in conduct that would reasonably create the impression of surveillance as the General Counsel alleges.[33] Accordingly, I recommend that the allegation in paragraph 6(a)(1) be dismissed.

3. Did Walmart violate the Act when Stafford asked Collins if she was concerned that the Placerville store might close if too many associates joined OUR Walmart?

The Board has explained that an employer may lawfully communicate to its employees carefully phrased predictions about "demonstrably probable consequences beyond [the employer's] control" that unionization will have on the company, provided that the predictions are based on objective facts. However, if the employer implies that it may or may not take action solely on its own initiative for reasons unrelated to economic necessities and known only by the employer, then the employer's prediction is a threat of retaliation that violates Section 8(a)(1) of the Act. *Daikichi Sushi*, 335 NLRB 622, 623–624 (2001), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Thus, if an employer predicts, without any supporting objective facts, that its company could close if employees unionize, the employer violates Section 8(a)(1) because its prediction communicates an unlawful message that the employer might decide on its own initiative to shut down operations if its employees unionize. Id. at 624 (noting that it is not a defense if the employer's prediction of plant closure is couched as a possibility instead of a certainty); see also *Dlubak Corp*, 307 NLRB 1138, 1151–1152 (1992) (finding that the employer violated Section 8(a)(1) by warning employees, without a basis in objective fact, that the plant could close if employees selected the union as their collective-bargaining representative), enfd. 5 F.3d 1488 (3d Cir. 1993).

As set forth in the findings of fact, in early July 2012, assistant store manager Stafford asked associate (and OUR Walmart supporter) Collins if she (Collins) was concerned that Walmart might close the Placerville store if OUR Walmart grew too large. (FOF, Section II(B)(3).) Although Stafford's raised the prospect of plant closure in the form of a question, Stafford's question implicitly communicated that plant closure might be a risk if OUR Walmart grew too large. More important, the asserted risk of plant closure was not based on any objective facts – instead, the implication was that Walmart might close the Placerville store if Walmart believed OUR Walmart was gaining too much traction. A reasonable employee confronted with such a risk would be more likely to avoid supporting OUR Walmart. Accordingly, I find that Stafford's statement to Collins violated Section 8(a)(1) of the Act because Stafford's statement about the risk of plant closure had reasonable tendency to interfere with, restrain or coerce associates in their union or protected activities.[34]

Dress Code Allegations

1. Complaint allegations and applicable legal standards

The General Counsel alleges that Walmart violated Section 8(a)(1) of the Act by

(a) maintaining its July 2010 dress code for California associates until at least September 14, 2012 (GC Exh. 1(bb), par. 6(d));
(b) maintaining its February 2013 dress code for California associates (GC Exh. 1(bb), par. 6(f)); and
(c) applying its July 2010 dress code for California associates selectively and disparately insofar as Walmart applied it to an employee (Raymond Bravo) who formed, joined or assisted OUR Walmart and/or the United Food and Commercial Workers, while not enforcing it against other associates (GC Exh. 1(bb), par. 6(e)).

Regarding the General Counsel's allegations that Walmart's dress code policies were facially unlawful (GC Exh. 1(bb), pars. 6(d), (f)), it is well established that employees have a statutorily protected right to wear union insignia on their employer's premises, including buttons, t-shirts and other articles of clothing. *Stabilus, Inc.*, 355 NLRB 866, 868 (2010); *W San Diego*, 348 NLRB 372, 373 (2006). However, an employer may lawfully restrict the wearing of union insignia where "special circumstances" justify the restriction. Special circumstances justify

[32] The General Counsel does not claim that Hileman or other Walmart managers engaged in unlawful surveillance when they were merely present at the protest and speaking on their cell phones.

[33] I note that even if Carpenter's and Hileman's testimony were equally credible, Walmart would prevail on this issue because the General Counsel bears the burden of proving the allegations in the complaint by a preponderance of the evidence. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that the General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB 591, 591–592 (1954) (same), questioned on other grounds *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997).

[34] The cases that Walmart cited about warnings of plant closure are distinguishable. In the cases that Walmart cited, the Board did not find that predictions of plant closure violated the Act because the employee initiated the discussion, and the supervisors explicitly stated that they were providing their personal opinions about the risks of unionization. See *Selkirk Metalbastos*, 321 NLRB 44, 52 (1996), enf. denied on other grounds, 116 F.3d 782 (5th Cir. 1997) ; *Standard Products Co.*, 281 NLRB 141, 151 (1986), enf. denied in part on other grounds, 824 F.2d 291 (4th Cir. 1987). Those factors are not present here, as Stafford initiated the discussion with Collins, and Stafford did not qualify her remarks as merely opinion.

restrictions on union insignia or apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees. The employer bears the burden of proving such special circumstances. *Stabilus*, 355 NLRB at 868; *W San Diego*, 348 NLRB at 373; see also *Nordstrom, Inc.*, 264 NLRB 698, 701–702 (1982) (noting that customer exposure to union insignia, standing alone, is not a special circumstance that permits an employer to prohibit employees from displaying union insignia).

2. Did Walmart violate Section 8(a)(1) by maintaining its July 2010 California dress code?

As indicated in the complaint, the General Counsel asserts that the following language in Walmart's July 2010 dress code for California associates is facially unlawful:

Logos or graphics on shirts/blouses, pants, skirts, hats, jackets or coats are not permitted, except the following, so long as the logo or graphic is not offensive or distracting:

1. A Walmart logo of any size;
2. A clothing manufacturer's company emblem no larger than the size of the associate's name badge; or
3. logos allowed under federal or state law.

(FOF, sec. II(C)(2); see also GC Exh. 1(bb), par. 6(d).)

Based on the applicable case law, I find that Walmart's July 2010 dress code is facially unlawful because it is overbroad and unduly infringes on the rights of associates to wear union insignia. The July 2010 dress code explicitly prohibits associates from wearing all logos except for Walmart logos, clothing manufacturer logos, and "logos allowed under federal or state law." The exception for "logos allowed under federal or state law," however, does not save the dress code from violating Section 8(a)(1) of the Act, because the Board has explained that an employer may not validate an overbroad work rule by placing the burden on employees to determine their legal rights. *Trailmobile, Division of Pullman*, 221 NLRB 1088, 1089 (1975) (holding that an employer's work rule that prohibited solicitation and distribution on company premises "except as provided by law" was unlawfully overbroad because the rule prohibited solicitation and distribution in nonwork areas during nonwork time, and the employer could not place the burden on employees to determine their rights under the rule).

In its posttrial brief, Walmart maintains that the logo restrictions in its dress code are justified because the dress code, together with Walmart's workplace standards policy, ensures that associates are professional, neat and clean in their appearance, and thus dress in a manner that supports Walmart's public image of providing excellent customer service in a family-friendly environment. (See R. Posttrial Br. at 33.) In support of its argument, Walmart relies on case law that supports the proposition that an employer may demonstrate special circumstances by proving that union insignia would unreasonably interfere with an employer's established public image. See, e.g., *W San Diego*, 348 NLRB at 372–373 & fn. 4 (finding that the employer lawfully restricted hotel personnel from wearing any uniform adornments, including union buttons and other insignia, in public areas of the hotel, and noting that the employer invested between $88,000 and $100,000 in 2004 and 2005 on uniforms aimed at achieving a "trendy, distinct and chic look"); *United Parcel Service*, 195 NLRB 441, 441 & fn. 2, 449 (finding that the employer lawfully restricted its drivers from wearing a union button while exposed to customers and the general public, noting that the employer invested $3.75 million per year to provide and maintain uniforms to preserve its public image of a neatly uniformed driver).

Although "public image" may be a valid justification for restricting union insignia, I find that Walmart fell short of establishing the "public image" special circumstances defense in this case. First, the evidentiary record shows that Walmart was generally loose with enforcing its dress code policy. (FOF, sec. II(C)(2).) Where that is the case, the "public image" justification fails because the Board has held that an employer may not use an inconsistently applied uniform policy to establish special circumstances. *Airport 2000 Concessions, LLC*, 346 NLRB 958, 960 (2006).

Second, the evidentiary record does not show that Walmart's July 2010 dress code is sufficiently strict, standardized and formal to be covered by the case law (noted above) in which the Board has found that an employer is justified in restricting employees' right to wear union insignia to protect the employer's public image when employees work in areas where they may come in contact with the public. Under Walmart's policy, employees select the clothing they will wear to comply with Walmart's broad-brush dress code—he record does not show that Walmart has invested considerable resources in developing (much less providing uniforms for) an employee "look" to portray to the public. As a result, Walmart's public image justification simply falls short, because its July 2010 dress code is not part of a comprehensive public image business plan akin to what the Board has required when finding that union insignia would unreasonably interfere with an employer's public image. See *Raley's Inc.*, 311 NLRB 1244, 1250 (1993) (explaining that public image concerns did not justify a large retail grocery store's dress code because "[t]he aprons and smocks of [the grocery store's] cashiers, clerks, and meatcutters worn over employee selected white shirts, dark slacks, and shoes are simply not the equivalent of traditional uniforms in the sense of distinctive clothing intended to identify the wearer as member of a certain organization or group. Thus, the employee appearance produced by conformity to [the grocery store's] dress code does not rise to the level of the liveries and uniforms of the world class restaurants or United Parcel Services drivers either in appearance or in tradition."); see also FOF, sec. II(C).)

And third, Walmart's July 2010 dress code is overbroad because it not only prohibits union insignia for associates who work in public areas of the store, but also prohibits union insignia for associates in situations where any public image concern is limited or nonexistent (e.g., when associates work in nonpublic areas of the store, or when associates work while the store is closed to the public altogether, such as from midnight to 6 a.m. at the Richmond store). *Target Corp.*, 359 NLRB 953, 974 (2013) (rejecting the employer's argument that its ban on all buttons was justified to preserve its public image and business plan, and noting that the ban was overbroad because it applied to

overnight employees who worked when the store was closed to the public); *W San Diego*, 348 NLRB at 374 (finding that the hotel did not demonstrate that its prohibition on wearing union insignia was justified by special circumstances in nonpublic areas of the hotel, where employees would not be seen by the public and thus the hotel's public image was not at issue).[35]

Accordingly, for the foregoing reasons, I find that Walmart violated Section 8(a)(1) by maintaining its July 2010 dress code, a facially overbroad policy that unduly restricted associates' right to wear union insignia.

Did Walmart violate Section 8(a)(1) by maintaining its February 2013 California dress code?

As indicated in the complaint, the General Counsel asserts that the following language in Walmart's February 2013 dress code for California associates is facially unlawful:

> Walmart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts/blouses, pants, skirts, hats, jackets or coats are also permitted, subject to the following . . .

(FOF, sec. II(C)(4) (noting that the February 2013 dress code goes on to say that "[t]he logo or graphic must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional messaging"); see also GC Exh. 1(bb), par. 6(f).)

Like the July 2010 dress code discussed above, I find that Walmart's February 2013 dress code is facially unlawful because it is overbroad and unduly infringes on the rights of associates to wear union insignia. Although the February 2013 dress code differs from the July 2010 version in that the February 2013 dress code does not explicitly prohibit union insignia or other logos, it remains overbroad because it requires logos to be "small" and "non-distracting." Those restrictions do not find sufficient support in the Board's case law[36] – to the contrary, the Board has upheld the right of employees to wear union insignia of a variety of sizes, including insignia sizes much larger than Walmart's limitation that any logos must be smaller than associates' 2 x 3 inch name tags. See, e.g., *Serv-Air, Inc.*, 161 NLRB 382, 401–402, 416–417 (1966) (finding that the employer violated the Act by prohibiting assorted union insignia that included: an improvised, crudely printed, paper badge that was 3 inches in diameter; a 2.25 inch red button; and 14-inch signs that two employees taped to their backs), enfd. 395 F. 2d 557 (10th Cir. 1968), cert. denied, 393 U.S. 840 (1968).

Furthermore, for the same reasons noted above regarding the July 2010 dress code, Walmart fell short of demonstrating that the logo restrictions in its February 2013 dress code are justified by Walmart's desire to foster a public image of providing excellent customer service in a family-friendly environment. Specifically, Walmart did not establish its "public image" justification because Walmart: has not applied its February 2013 dress code consistently; did not show that its February 2013 dress code is part of a comprehensive public image business plan similar to those that the Board has recognized in prior cases; and applies its dress code not only to associates when they are in public areas of the store, but also to associates when they are working in nonpublic areas and when the store is closed to the public. (See Discussion and Analysis, Section (C)(2), supra.) Therefore, I find that Walmart violated Section 8(a)(1) by maintaining its February 2013 dress code, a facially overbroad policy that unduly restricted associates' right to wear union insignia.[37]

3. Did Walmart violate Section 8(a)(1) by disparately and selectively applying it to associate Raymond Bravo in August and September 2012?

Separate and apart from its arguments that Walmart's July 2010 and February 2013 California dress codes were facially unlawful, the General Counsel asserts that Walmart violated Section 8(a)(1) of the Act by applying the July 2010 dress code selectively and disparately against Raymond Bravo to restrict Bravo's protected activities. See *Stabilus, Inc.*, 355 NLRB 836, 837–840 (2010) (employer violated Section 8(a)(1) of the Act by enforcing its uniform policy in selective and overbroad manner against union supporters, and in a disparate manner against Section 7 activity).

I find that the evidentiary record supports the General Counsel's argument. Walmart generally did not object to associates' attire (including Bravo's attire) in 2012 when they wore noncompliant clothing such as black shirts, khaki shorts or sweat pants. Similarly, Walmart supervisors generally did not object when associate Victor Mendoza wore (in 2012): a blue shirt with the words "Free Hugs" written in large white letters on the front of the shirt; or a blue and white checkerboard flannel shirt.[38] However, when Walmart supervisor Peggy Licina saw Bravo wearing

[35] In this connection, I note that Walmart did not show that it would be impractical for associates to don or doff union insignia when moving between the public and nonpublic areas of the store (or when the store opened or closed). A mere hypothetical impracticality with removing union insignia does not justify a blanket, property-wide prohibition on union insignia. See *W San Diego*, 348 NLRB at 374.

[36] The Board has observed in the past that certain union insignia do not interfere with a company's public image because the union insignia are small, neat and inconspicuous. See *Nordstrom, Inc.*, 264 NLRB 698, 701 (1982) (noting that the union pin at issue was "muted in tone, discrete in size and free from provocative slogans or mottos"); see also *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994). It does not follow, however, that union insignia **must** be small, neat or inconspicuous to be protected, particularly in workplaces where (as here) the employer has not implemented a comprehensive public image business plan.

[37] The General Counsel also argued that Walmart's February 2013 dress California code is a facially unlawful work rule that reasonably tends to chill employees' exercise of their Sec. 7 rights. See GC Posttrial Br. at 48–50; see also *First Transit, Inc.*, 360 NLRB 619, 619 fn. 1 (2014) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), and describing the legal standard that applies when such challenges to work rules are at issue); *Hitachi Capital America Corp.*, 361 NLRB 123, 124–125 (2014) (same, and noting that "the Board gives the rule a reasonable reading and refrains from reading particular phrases in isolation"). Since I have found that the February 2013 dress code is facially unlawful because it improperly restricts employees' Section 7 right to wear union insignia, I decline to rule on the General Counsel's alternate (work rule) theory for why the February 2013 dress code is unlawful.

[38] When Walmart supervisors did object upon seeing an associate wearing a shirt with a noncompliant logo, Walmart's addressed the issue by permitting the associate to continue wearing the shirt, but with the shirt turned inside out to hide the logo. (FOF, sec. II(C)(2).)

a green OUR Walmart t-shirt (on August 21, 2012) and saw Bravo wearing a white t-shirt with UFCW logos (on September 14, 2012), she suddenly became more strict with the dress code and directed Bravo to remove the shirts. Notably, in each instance, Licina did not object to Bravo continuing to wear other clothing (a black thermal shirt, and khaki shorts) that did not comply with the dress code. (FOF, sec. II(C)(3).) By applying the July 2010 dress code in this disparate manner (i.e., by invoking the dress code when Bravo wore noncompliant clothing with OUR Walmart or UFCW logos, but not when Bravo or other associates wore other noncompliant clothing), Walmart violated Section 8(a)(1) of the Act as alleged in paragraph 6(e) of the complaint.

D. The Richmond Store—Alleged Unlawful Threats

1. Complaint allegations and applicable legal standard

The General Counsel alleges that Walmart (through field project supervisor Van Riper) violated Section 8(a)(1) of the Act by:

> (a) on or about October 11, threatening associates that he (Van Riper) would shoot the union when some associates returned from striking at Walmart's Bentonville, Arkansas headquarters (GC Exh. 1(bb), par. 6(b)(1));
>
> (b) on or about October 12, threatening associates that: Walmart would never be union and thereby informing associates that it would be futile for them to select OUR Walmart as their collective-bargaining representative (GC Exh. 1(bb), par. 6(b)(2)(A));[39]
>
> (a) on or about October 12, threatening associates by telling them that the associates returning from strike would be looking for new jobs (GC Exh. 1(bb), par. 6(b)(2)(B)); and
>
> (b) on or about October 12, prohibiting associates from speaking to associates returning from strike about the returning strikers' activities on behalf of OUR Walmart (GC Exh. 1(bb), par. 6(b)(2)(C)).

As previously noted, the test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Farm Fresh Company, Target One, LLC*, 361 NLRB 848, 861

2. Was Van Riper one of Walmart's agents?

As an initial matter, Walmart denies that Van Riper was one of its supervisors or agents, as those terms are defined in Board precedent. On the question of whether Van Riper was Walmart's agent, "[t]he Board applies the common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action." *Pan Oston Co.*, 336 NLRB 305, 305 (2001) (collecting cases and other supporting authority). "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question." Id. at 305–306. "Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief." Id. at 306. "The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management," taking into account "the position and duties of the employee in addition to the context in which the behavior occurred." Id. "The Board may find agency where the type of conduct that is alleged to be unlawful is related to the duties of the employee. . . . In contrast, the Board may decline to find agency where an employee acts outside the scope of his or her usual duties." Id. "Although not dispositive, the Board will consider whether the statements or actions of an alleged employee agent were consistent with statements or actions of the employer. The Board has found that such consistencies support a finding of apparent authority." Id. And finally, the Board has emphasized that "an employee may be an agent of the employer for one purpose but not another." Id.

Applying that standard, I find that Van Riper was one of Walmart's agents.[40] Walmart gave Van Riper the responsibility to manage the work that the remodeling crew performed, and the responsibility to keep the remodeling project moving forward.

[39] I am not persuaded by Respondent's argument that I should dismiss this futility allegation on the ground that it is not closely related to the allegations in an underlying unfair labor practice charge. (See R. Posttrial Br. at 31.) To decide whether complaint allegations are closely related to the allegations in a timely filed charge, the Board evaluates whether the complaint allegations are factually and legally related to the charge. *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988).

In an unfair labor practice charge that was timely filed on November 2, OUR Walmart asserted that Walmart violated the Act by: threatening associates on or about October 9 that it would fire all OUR Walmart members who walked off the job in a workplace action; and, on or about October 11, telling associates not to speak to associates who participated in a strike. (See GC Exh. 1(c).) I find that the futility allegation in the complaint is factually related to the November 2 charge because the complaint alleges (and clarifies) that Van Riper made statements about futility in the same October 12 meeting in which he threatened that associates returning from strike would be looking for new jobs, and prohibited associates from speaking to the returning strikers about their activities on behalf of OUR Walmart.

I also find that the futility allegation in the complaint is legally related to the November 2 charge because it was part of the remarks that Van Riper made to associates on October 12, essentially in response to the buzz in the workplace that arose when associates returned from a strike and announced their unconditional offer to return to work a few hours before the October 12 meeting. As the Board has explained, the "legally related" prong of the *Redd-I* test is satisfied "where the two sets of allegations demonstrate similar conduct, usually within the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity." *SKC Electric, Inc.*, 350 NLRB 857, 858 (2007) (citing *Carney Hospital*, 350 NLRB 627, 630 (2007).) Since the futility allegation in the complaint satisfies both prongs of the *Redd-I* test (as it demonstrates conduct that is similar to the other alleged coercive statements that Van Riper made at the October 12 meeting), I will consider the merits of that allegation.

[40] Since I find that Van Riper was one of Walmart's agents during the relevant time period, I need not address the parties' arguments about whether Van Riper was a supervisor under Section 2(11) of the Act.

Consistent with those responsibilities, Van Riper held daily meetings with remodeling associates, at which he announced the tasks that they would be working on for the day. Van Riper also trained associates on how to carry out various assignments, and had the discretion to assign particular associates to daily tasks as he deemed necessary to complete the work as efficiently as possible. In addition, although Richmond store managers generally had authority over remodeling associates in personnel matters, when members of the remodeling team returned from strike and made their unconditional offer to return to work on October 11, Richmond store assistant manager Atlas Chandra called Van Riper over to handle the matter, thereby indicating that Van Riper was the proper recipient of the associates' offers to return to work.[41] (FOF, Section II(D), (E)(2).) Given the extent of Van Riper's responsibilities, associates would reasonably believe that Van Riper had the authority to speak and act as Walmart's agent regarding the associates assigned to the remodeling project. See *SAIA Motor Freight, Inc.*, 334 NLRB 979, 979 (2001) (finding that a foreman was an agent vested with apparent authority, and noting that the foreman, *inter alia*, assigned and directed the employees' work, and conducted employee meetings at which he discussed employment-related matters); *Cooper Industries*, 328 NLRB 145, 146 (1999) (finding that three hourly paid "facilitators" were agents who had actual and apparent authority to act on the employer's behalf because the employer vested the facilitators with authority to implement the employer's policies on the production floor, and because the employer held out the facilitators as the "primary conduits for communications between management and team employees on a wide variety of employment and production matters"), enfd. 8 Fed. Appx. 610 (9th Cir. 2001).)

3. Did Walmart (through Van Riper) make statements or engage in conduct that violated Section 8(a)(1)?

Having established that Van Riper was Walmart's agent, I now turn to the merits of the allegations that Van Riper made four statements that violate Section 8(a)(1). At the outset, I note that Walmart did not call Van Riper to testify at trial, even though he remained one of Walmart's associates at the time. Furthermore, although the record includes a written statement that Van Riper provided when Lilly interviewed him about his interactions with the Richmond store remodeling crew, Van Riper's written statement does not address any of the statements at issue here. Thus, the only questions are whether the General Counsel's witnesses were credible in their testimony about what Van Riper said, and if so, whether Van Riper's statements violated the Act.

As indicated in the findings of fact, I credited witness Mabel Tsang's testimony about the specific words that Van Riper used when associates presented him with a return to work letter on October 11. Tsang was actively keeping track of Van Riper's behavior and comments when he told associates "If it were up to me, I'd shoot the union," and Tsang's testimony on that point was credible and was corroborated by Raymond Bravo's testimony and Demario Hammond's written statement (given during Walmart's investigation of Van Riper's interactions with associates). Although Walmart points out that other witnesses differed from Tsang about Van Riper's exact words, Tsang's account remains credible, and I note in any event that the other witnesses all agreed that Van Riper made a statement that threatened associates with physical violence because they supported a union.[42] (FOF, sec. II(E)(2).) I therefore find that Walmart, through Van Riper's remarks on October 11, violated Section 8(a)(1) of the Act as alleged in the complaint. See *Farm Fresh Company, Target One, LLC*, 361 NLRB 848, 861 (explaining that an employer's statements or conduct violate Section 8(a)(1) if they have a reasonable tendency to interfere with, restrain or coerce union or protected activities).

Lee's testimony about Van Riper's statements at the October 12 meeting was credible and was not rebutted by any other evidence. As a result, the evidentiary record establishes that Van Riper told associates that: Walmart would never unionize; the remodeling crew should not talk to returning strikers about the situation; and that the returning strikers would be looking for new jobs. (FOF, sec. II(E)(2).) Based on well-established Board precedent, each of those statements violated Section 8(a)(1) of the Act. See *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 865 (explaining that an employer violates Section 8(a)(1) if it communicates to employees that they risk their job security if they support a union); *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1438–1439 (2010) (explaining that an employer violates Section 8(a)(1) when it permits employees to discuss nonwork-related subjects during worktime, but prohibits employees from discussing union-related matters); *Goya Foods*, 347 NLRB 1118, 1128–1129 (2006), enfd 525 F.3d 1117 (11th Cir. 2008) (explaining that an employer may not tell employees that it would be futile for them to support a union).

In sum, each of Van Riper's statements discussed here had a reasonable tendency to interfere with, restrain or coerce

[41] I have considered the fact that Van Riper also tried to pass the buck when Chandra directed the returning strikers to speak to Van Riper. The fact remains, however, that when Chandra instructed associates to speak to Van Riper when the associates offered to return to work, a reasonable associate would have concluded that Van Riper had the authority to handle the matter (based on Chandra's actions, and based on Van Riper's general authority over the remodeling team).

[42] Contrary to Walmart's argument in its posttrial brief, Van Riper's remark that "if it were up to me, I'd shoot the union" cannot be excused as a mere statement of opinion, a flip or intemperate remark, or hyperbole that no reasonable employee could have taken seriously. See R. Posttrial Br. at 23–27; see also, e.g., *Trailmobile Trailer, LLC*, 343 NLRB 95, 95 (2004) (noting that flip and intemperate remarks are protected as free speech by Section 8(c) of the Act); *Mid-State, Inc.*, 331 NLRB 1372, 1372 (2000) (supervisor's statements to employees about kicking a union representative's ass, or filling the union representative's butt with lead did not violate the Act, because the context for those statements was such that the statements would not reasonably tend to coerce employees in the exercise of their Section 7 rights). Instead, the evidentiary record shows that out of anger after having to deal with associates who were returning from a strike, Van Riper essentially communicated to associates that future protected activity could put associates at risk for unspecified reprisals (even if it was clear that he would not actually "shoot" OUR Walmart supporters). As such, Van Riper's statement violated Section 8(a)(1) of the Act. See *Jax Mold & Machine, Inc.*, 255 NLRB 942, 946 (1981) (supervisor's remarks about shooting union supporters were made in anger and were believable, and thus violated Section 8(a)(1) of the Act), enfd. 683 F.2d 418 (11th Cir. 1982).

associates in the exercise of their Section 7 rights. Accordingly, I find that the General Counsel established that Walmart (through Van Riper) violated Section 8(a)(1) of the Act as alleged in paragraph 6(b)(1)–(2) of the complaint.

E.. The Richmond Store—Alleged Unlawful Disciplinary Coaching

1. Complaint allegations and applicable legal standard

Last, the General Counsel alleges that from November 4–7, Walmart unlawfully issued two-level coachings to associates Raymond Bravo, Semetra Lee, Demario Hammond, Misty Tanner, Markeith Washington and Timothy Whitney because those associates engaged in a protected work stoppage on November 2, and to discourage associates from engaging in those or other protected activities. (GC Exh. 1(bb), pars. 7(b), (d)–(e).)

To establish that an adverse employment action violates Section 8(a)(1) of the Act, the General Counsel must demonstrate that: the employee engaged in activity that is "concerted" within the meaning of Section 7 of the Act; the respondent knew of the concerted nature of the employee's activity; the concerted activity was protected by the Act; and the respondent's decision to take adverse action against the employee was motivated by the employee's protected, concerted activity. *Relco Locomotives,* 358 NLRB No. 37, slip op. at 12, 17; see also id. at 14 (observing that "[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation"). If the General Counsel succeeds in making an initial showing of discrimination, then the respondent has the opportunity to demonstrate, by a preponderance of the evidence, that it would have taken the adverse employment action against the employee even in the absence of the employee's protected concerted activities. Id. at 12.

The Board has held that while on-the-job work stoppages may be a form of economic pressure that is protected under Section 7 of the Act, not all work stoppages are protected because at some point "an employer is entitled to exert its private property rights and demand its premises back." *Quietflex Mfg. Co.*, 344 NLRB 1055, 1056 (2005) (quoting *Cambro Mfg. Co.*, 312 NLRB 634, 635 (1993). "To determine at what point a lawful on-site work stoppage loses its protection, a number of factors must be considered, and the nature and strength of competing employee and employer interests must be assessed." *Quietflex*, 344 NLRB at 1056. Those factors include:

> (1) the reason the employees have stopped working;
> (2) whether the work stoppage was peaceful;
> (3) whether the work stoppage interfered with production, or deprived the employer access to its property;
> (4) whether employees had adequate opportunity to present grievances to management;
> (5) whether employees were given any warning that they must leave the premises or face discharge;
> (6) the duration of the work stoppage;
> (7) whether employees were represented or had an established grievance procedure;
> (8) whether employees remained on the premises beyond their shift;
> (9) whether employees attempted to seize the employer's property; and
> (10) the reason for which employees were ultimately discharged.

Id. at 1056–1057; see also *Los Angeles Airport Hilton Hotel & Towers*, 360 NLRB 1080,1081–1083 (2014) (citing *Quietflex Mfg. Co.*).

2. Did Walmart violate the Act when it issued disciplinary coachings to the six associates who participated in the November 2 work stoppage?

The General Counsel and Charging Party maintain that since Bravo, Hammond, Lee, Tanner, Washington and Whitney engaged in a protected work stoppage on November 2, Walmart violated the Act when it disciplined them for "inappropriate conduct" and "unauthorized use of company time" based on their actions during the work stoppage. To address the merits of that claim, I now consider the ten *Quietflex* factors to assess whether the work stoppage was protected by the Act.[43]

Factor one (the reason the employees stopped working): The evidentiary record shows that the six associates stopped working because of their ongoing concerns about Van Riper and his treatment of associates. In that connection, I note that the associates did not receive a response from Walmart when they submitted a letter outlining their concerns about Van Riper on October 17, two weeks before the work stoppage. To be sure, as Walmart observes, associates also hoped to use the work stoppage to

[43] Walmart suggests that instead of considering this matter under *Quietflex*, I should consider this case under *Restaurant Horikawa*, 260 NLRB 197 (1982), and similar cases. (See R. Posttrial Br. at 61–63.) The Board's decision in *Restaurant Horikawa*, however, does not involve a work stoppage. Instead, *Restaurant Horikawa* involved a demonstration that began outside of a restaurant, and then lost the protection of the Act when thirty demonstrators (including one off duty employee) entered the restaurant for 10–15 minutes and "seriously disrupted" the business by "parading boisterously about during the dinner hour when patronage was at or near its peak" before confronting the restaurant manager in the restaurant's administrative offices. *Restaurant Horikawa*, 260 NLRB 197, 197–198 (1982); see also *Thalassa Restaurant*, 356 NLRB No. 129, slip op. at 1 fn. 3 (2011) (agreeing that an off duty restaurant employee engaged in protected activity when he and a group of nonemployees entered the restaurant during evening dining hours to deliver a letter protesting the employer's alleged labor law violations; the Board noted that there was no evidence that the group: disturbed the handful of customers present, blocked the egress or ingress of anyone, was violent or caused damage, or prevented any other employees from performing their work).

Although I take Walmart's point that the work stoppage in this case was augmented from 6 to 6:52 a.m. by assorted non-associates who entered the Richmond Walmart to support the associates in their work stoppage, I find that facts of that nature are best considered within the *Quietflex* framework because it is undisputed that the six associates were on duty and were engaged in a work stoppage while in the store. Walmart's arguments about any disruption that the associates and their supporters caused relate to the *Quietflex* factors and the nature and strength of the associates' and Walmart's interests.

publicize OUR Walmart and its efforts to advocate for various changes in working conditions, benefits and workplace policies at Walmart. It is also clear that associates selected November 2, the day of the Richmond store grand reopening, as the day for the work stoppage because it would be a good day to publicize their concerns and OUR Walmart's goals to a large audience. (FOF, Section II(E)(3), (F)(1), (4).)

Factor two (whether the work stoppage was peaceful): Based on the evidentiary record, which includes extensive video footage of the work stoppage inside the Richmond Walmart and protest activities that occurred outside the store, I find that the work stoppage was peaceful. There is no evidence that associates or their supporters were violent or unruly in any manner. (FOF, sec. II(F)(4)–(5).)

Factor three (whether the work stoppage interfered with production or deprived the employer access to its property): During the portion of the work stoppage that occurred before the store opened at 6 a.m., the work stoppage had a minimal effect on Walmart's operations. Walmart had access to all of its property (including the customer service area), and the production of other associates was only affected to the limited extent that Walmart had to streamline its remodeling crew work to focus on preparing store aisles and shelves for the grand reopening (e.g., by ensuring that all freight was removed from the floor and properly stored). (FOF, Section II(F)(4); see also *Los Angeles Airport Hilton Hotel & Towers*, 360 NLRB 1080, 1085 (2014) (explaining that for purposes of factor 3 in the *Quietflex* analysis, the focus is on "whether striking employees interfere with production or the provision of services by preventing *other* employees who are working from performing their duties," since striking employees do not forfeit the Act's protection by withholding their own services) (emphasis in original).

Once the store opened, Walmart continued to have access to its property and maintain production even though 10–14 non-associates entered the store to support the work stoppage periodically between 6 and 6:52 a.m. Apart from a 3–minute visit to Action Alley that did not cause disruption, the work stoppage remained confined to the customer service area, leaving the rest of the store unaffected. As for the customer service area, the record shows that Walmart associates had access to the customer service counter as needed during the work stoppage (notwithstanding customer service associate Maggiora's subjective decision to avoid the area, and the 2–minute period when protesters blocked the front of the customer service counter). Furthermore, the record does not show that any customers attempted to access, or were prevented from accessing (due to noise, crowding or otherwise), the customer service area, which is not surprising since the customer service area generally does not open until 7 a.m. and only has limited traffic at that early hour. (FOF, sec. II(F)(4).)

Finally, I do not give weight to the fact that the work stoppage occurred on the same day as the Richmond store's grand reopening. Although Walmart maintains that the decision to hold the work stoppage during the grand reopening made the work stoppage more disruptive, the Board has held that "the protected nature of [a] work stoppage is not vitiated by the effectiveness of its timing." *Atlantic Scaffolding Co.*, 356 NLRB 21, 23 (2011) (explaining that the basic principles underlying the Act include the right of employees to withhold their labor in seeking to improve the terms of their employment, and the right to use economic weapons such as work stoppages as part of the free play of economic forces that should control collective bargaining).

Factor four (whether employees had adequate opportunity to present grievances to management): The six associates who participated in the work stoppage presented their grievances about Van Riper to Walmart on October 17, over two weeks before the work stoppage. They did not receive a response from Walmart, however, until the morning of the work stoppage, when Lilly and Jankowski (before and during the work stoppage) offered to meet with the associates individually under Walmart's open door policy to discuss the associates' concerns. It is undisputed that Lilly, citing Walmart's open door policy and concerns about employee confidentiality, refused the associates' requests to meet with her as a group. It is also undisputed, however, that Walmart ultimately used its open door policy to meet with willing associates on an individual basis from November 2–7 to hear their concerns about Van Riper.

For purposes of the *Quietflex* analysis, the Board has indicated that an open door policy may provide an adequate opportunity for employees to present grievances to management, particularly where the evidentiary record shows that the employer has an established past practice of using its open door policy to consider and resolve group grievances. See *HMY Roomstore*, 344 NLRB 963, 963 fn. 2 & 965 (2005) (citing *Cambro Mfg. Co.*, 312 NLRB at 636). However, the Board has also indicated that if an employer's open door policy has been used to address only individual complaints of employees, and not group complaints, then the open door policy carries less weight. See *HMY Roomstore*, 344 NLRB at 963 fn. 2 & 965.

Here, I find that Walmart's open door policy carries less weight as an opportunity for the work stoppage participants to present their grievances to management because, as Walmart essentially admits, the open door policy does not allow for group action. (FOF, sec. II(F)(3)–(4).)

Factor five (whether employees were given any warning that they must leave the premises or face discipline): It is undisputed that Walmart did not warn the six associates that they must leave the store or face discipline. Instead, the record shows that when Walmart, assisted by two police officers who were present, instructed the associates to leave the store, the associates agreed to do so, and left the store after clocking out. (FOF, Section II(F)(4).)

Factor six (the duration of the work stoppage): The work stoppage in this case began at 5:24 a.m. and ended at 6:52 a.m., and thus lasted for a total of 88 minutes. The store was open to the public for 52 minutes of the work stoppage (i.e., from 6 to 6:52 a.m.). (FOF, sec. II(F)(4).)

Factor seven (whether employees were represented or had an established grievance procedure): The six associates that participated in the work stoppage were members of OUR Walmart, but were not represented in a formal sense (i.e., for collective-bargaining purposes) by OUR Walmart, the UFCW, or any other union. As noted above (in connection with factor four), while Walmart did offer associates the opportunity to voice their concerns about Van Riper individually to Lilly and Jankowski through Walmart's open door policy, Walmart does not have an

established grievance procedure for group complaints. (FOF, sec. II(A), (E)(2), (F)(1), (3)–(4).)

Factor eight (whether employees remained on the premises beyond their shift): It is undisputed that all six associates clocked out and left the inside of the store by 6:52 a.m., before the end of their shifts. Although at least two of the associates subsequently joined OUR Walmart protest activities that were ongoing outside of the Richmond store, the evidentiary record shows that both mall security personnel and Walmart managers accepted that the protesters had a right to continue their activities outside the store. (FOF, sec. II(F)(4)–(5).)

Factor nine (whether employees attempted to seize the employer's property): There is no evidence that associates attempted to seize Walmart's property during the work stoppage. Walmart associates who did not participate in the work stoppage remained free to continue working throughout their shifts, and once the store opened, customers had full access to all areas of the store. (FOF, Section II(F)(4).)

Factor ten (the reason for which employees were ultimately disciplined): Walmart issued a two-level disciplinary coaching to each of the six associates who participated in the work stoppage, stating that each of the six associates engaged in inappropriate conduct and unauthorized use of company time. In support of the disciplinary coachings, Walmart explicitly referred to the associates' activities during the work stoppage, noting that the associates abandoned work, refused to return to work after being told to do so, and engaged in a sit-in on the sales floor that (in Walmart's view) disrupted business and customer service operations during the Richmond store grand reopening event.[44] (FOF, sec. II(G)(2).)

Considering the ten *Quietflex* factors as a whole, I find that the November 2 work stoppage is protected by the Act. Factors 1, 2, 3, 5, 6, 8, 9 and 10 clearly favor the six associates. The associates stopped working to protest Van Riper's treatment of associates on the remodeling crew, and also to protest alleged retaliation and unfair labor practices. All of those reasons were fair game for concerted action.[45] See *Cambro Mfg. Co.*, 312 NLRB at 636 (observing that employees were entitled to persist for a reasonable period of time in a peaceful in-plant work stoppage that focused on specific, job-related complaints and caused little disruption of production by those who continued to work). In addition, the work stoppage: was peaceful; had limited (if any) impact on Walmart's operations and access to its property; ended promptly when Walmart and the associates agreed that the associates would clock out and leave the store (before their shifts ended); and was limited in duration (88 minutes).[46] See *Los Angeles Airport Hilton Hotel & Towers*, 360 NLRB 1080, 1084 and fn. 16 (noting that employees are entitled to engage in work stoppages for a reasonable period of time, and collecting cases where work stoppages of up to 5-1/2 hours were protected by the Act); *HMY Roomstore*, 344 NLRB at 963 fn. 2, 965 (45–60 minute work stoppage was protected, in part because the employees complied immediately when the employer asserted its property rights and directed the employees to leave the store). It is also clear that Walmart disciplined associates because they participated in the work stoppage. Although Walmart asserted that the discipline was based on "inappropriate conduct" and "unauthorized use of company time," the discipline paperwork is clear that Walmart disciplined the six associates based on their protected work stoppage activities (e.g., abandoning work, refusing to return to work, and engaging in the work stoppage). (See FOF, sec. G)(2); see also *Quietflex Mfg. Co.*, 344 NLRB at 1055 fn. 1 (noting that refusing to work during a work stoppage is protected activity); *Cambro Mfg. Co.*, 312 NLRB at 636–637 (same, but noting that after a reasonable period of time the employer may instruct employees to either return to work *or* clock out and leave the premises).)

The remaining *Quietflex* factors (factors 4 and 7, which both relate to grievance procedures) are neutral, at best. Although Walmart has an established open door policy that it offered to the associates during the work stoppage, that offer was somewhat belated since it came on the day of the work stoppage, more than 2 weeks after the associates submitted their October 17 letter calling for Walmart to take action to address Van Riper's conduct. In addition, consistent with Walmart's past practices with open door meetings, Lilly only offered to meet with associates on an individual basis—thus, Lilly's offer to meet under the open door policy was arguably inadequate, since the offer was predicated on the associates giving up their right to act as a group. Compare *HMY Roomstore*, 344 NLRB at 963 fn. 1, 965 (work stoppage was valid despite the employer's open door policy, which had been used to resolve individual problems, but not group problems) with *Cambro Mfg. Co.*, 312 NLRB 634, 636 (1993) (giving weight to the employer's open door policy because the employer had an established past practice of allowing employees to meet as a group with the company president). Viewing the 10 *Quietflex* factors as a whole, I find that the associates' right to participate in their (limited) work stoppage outweighs Walmart's rights as the property owner, and I accordingly find that the November 2 work stoppage was protected by the Act.

Since the November 2 work stoppage was protected by the

[44] Walmart asserted that the work stoppage was particularly disruptive because once the store opened at 6 a.m., non-associates joined the six associates in protesting inside the store. (See R. Posttrial Br. at 61–62.) Although the non-associates added to the size of the protest inside the store (adding up to 10–13 people to the group at times), I do not find that the work stoppage/protest became unduly disruptive after the non-associates arrived. To the contrary, the non-associates remained in the customer service area (apart from two non-associates who joined the six associates for their 3–minute visit to Action Alley), and generally limited their activities to taking and posing for photographs, holding signs, and providing a representative to negotiate the agreement with Walmart that the six associates would clock out and leave the store (thereby ending the work stoppage). (FOF, Section II(F)(4).)

[45] I am not persuaded by Walmart's contention that the work stoppage/protest was merely a publicity vehicle for OUR Walmart. While publicity was certainly a bonus for OUR Walmart if it materialized, that does not change the fact that the work stoppage participants raised assorted concerns that relate to the terms and conditions of their employment (as noted above).

[46] Protest activities did continue outside of the store until 9:07 a.m. Those activities, however, occurred on mall property, and thus did not infringe on Walmart's private property rights. (See FOF, Section II(F)(4)–(5).)

Act, Walmart could not discipline associates for participating in the work stoppage without running afoul of Section 8(a)(1) of the Act. Walmart, however, did just that, because as noted above, the discipline paperwork demonstrates Walmart disciplined the six associates based on their protected work stoppage activities (e.g., abandoning work, refusing to return to work, and engaging in the work stoppage). In light of the strong prima facie case that Walmart unlawfully disciplined the six associates for engaging in the protected November 2 work stoppage, and the lack of any evidence that Walmart would have disciplined the six associates even in the absence of their participation in the work stoppage, I find that Walmart violated Section 8(a)(1) of the Act when it disciplined Bravo, Hammond, Lee, Tanner, Washington and Whitney. See *Molon Motor & Coil Corp.*, 302 NLRB 138, 139 (1991), enfd. 965 F.2d 523 (7th Cir. 1992).

CONCLUSIONS OF LAW

1. By, in or about the second week of July 2012, implicitly threatening an associate by asking the associate if she was afraid Walmart might close its Placerville, California store if too many associates joined OUR Walmart, Walmart violated Section 8(a)(1) of the Act.

2. By at least until September 14, 2012, maintaining a July 2010 dress code for California associates that was facially overbroad because it unduly restricted associates' right to wear union insignia, Walmart violated Section 8(a)(1) of the Act.

3. By, since about February 2013, maintaining a February 2013 dress code for California associates that was facially overbroad because it unduly restricted associates' right to wear union insignia, Walmart violated Section 8(a)(1) of the Act.

4. By, on or about August 21 and September 14, 2012, selectively and disparately applying its July 2010 dress code for California associates to Richmond, California store associate Raymond Bravo when he wore clothing with OUR Walmart or UFCW logos, but not when Bravo or other associates wore other clothing that did not comply with the dress code, Walmart violated Section 8(a)(1) of the Act.

5. By, or about October 11, threatening Richmond, California store associates (through Van Riper) that it would "shoot the union," Walmart violated Section 8(a)(1) of the Act.

6. By, on or about October 12, threatening Richmond, California store associates that Walmart would never be union and thereby informing associates that it would be futile for them to select OUR Walmart as their collective-bargaining representative, Walmart violated Section 8(a)(1) of the Act.

7. By, on or about October 12, threatening Richmond, California store associates by telling them that the associates returning from strike would be looking for new jobs, Walmart violated Section 8(a)(1) of the Act.

8. By, on or about October 12, prohibiting Richmond, California store associates from speaking to associates returning from strike about the returning strikers' activities on behalf of OUR Walmart, Walmart violated Section 8(a)(1) of the Act.

9. By, on or about November 4–7, unlawfully issuing two-level disciplinary coachings to associates Raymond Bravo, Semetra Lee, Demario Hammond, Misty Tanner, Markeith Washington and Timothy Whitney because those associates engaged in a protected work stoppage on November 2, and to discourage associates from engaging in those or other protected activities, Walmart violated Section 8(a)(1) of the Act.

10. By committing the unfair labor practices stated in conclusions of law 1–9 above, Walmart has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

11. I recommend dismissing the complaint allegations that are not addressed in the Conclusions of Law set forth above (to the extent that those allegations have not been severed from this consolidated case).

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Since certain unfair labor practices only apply to particular stores, I will require Respondent to post separate notices that apply to: Placerville, California store 2418; Richmond, California store 3455; and all California stores.

I will also require Respondent, to rescind its unlawful July 2010 and February 2013 California dress codes. Respondent may comply with this aspect of my order by rescinding the unlawful dress code provision(s) and republishing a California employee dress code at its California stores without the unlawful provision. Since republishing the California employee dress code for all California stores could be costly, Respondent may supply the associates at its California stores either with an insert to the California dress code stating that the unlawful policy has been rescinded, or with a new and lawfully worded policy on adhesive backing that will cover the unlawfully broad policy, until it republishes the California dress code either without the unlawful provision or with a lawfully-worded policy in its stead. Any copies of the California dress codes that are printed with the unlawful July 2010 and/or February 2013 language must include the insert before being distributed to associates at Respondent's California stores. *World Color (USA) Corp.*, 360 NLRB 227. 229 (2014) (citing *2 Sisters Food Group*, 357 NLRB 1816, 1823 fn. 32 (2011); *Guardsmark, LLC*, 344 NLRB 809, 812 & fn. 8 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

In addition to the standard remedies that I described above, the General Counsel requested that I also order Respondent to have a representative read a copy of the notice to associates in each of its California stores during work time. The Board has required that a notice be read aloud to employees where an employer's misconduct has been sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. This remedial action is intended to ensure that employees will fully perceive that the respondent and its managers are bound by the requirements of the Act. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 868.

Applying that standard, I do not find that Respondent's misconduct in this case was sufficiently serious and widespread to warrant an order requiring the notice to be read aloud to employees by one of Respondent's representatives at each of its California stores. Although I have found that Respondent committed two unfair labor practices that affect all California stores (maintaining two facially overbroad dress codes), this case does not

involve widespread misconduct at all of Respondent's California stores, and I find that a standard notice posting remedy will be sufficient to address those violations and ensure that associates are advised of their Section 7 rights.

I also find that a standard notice posting remedy will be sufficient to address the violations at Placerville, California store 2418. Only one additional unfair labor practice occurred at the Placerville store in this case—the unlawful threat of plant closure. That violation may also be addressed with a standard notice posting.

However, I do find that a notice reading remedy is warranted at Richmond, California store 3455 in this case. Respondent's misconduct at the Richmond, California store was sufficiently serious and widespread to warrant an order requiring the notice to be read aloud to associates in the presence of the manager of store 3455. The evidentiary record shows that in addition to maintaining two unlawfully overbroad dress codes, Respondent repeatedly took swift action against Richmond, California store associates who supported OUR Walmart, including: twice directing Bravo to remove union insignia in a disparate and selective manner; threatening associates who participated in a strike in October 2012; threatening other associates that the returning strikers would be looking for new jobs; directing associates not to speak to returning strikers about their activities in support of OUR Walmart; telling associates that it would be futile to select OUR Walmart as their collective-bargaining representative; and issuing unlawful two-level disciplinary coachings to six associates who participated in a protected work stoppage. In light of those serious and widespread actions, I agree that a notice reading is necessary to assure employees at Richmond, California store 3455 that they may exercise their Section 7 rights free of coercion. Accordingly, I will require that the remedial notice in this case be read aloud to employees in English and Spanish by Respondent's store 3455 manager or, at Respondent's option, by a Board agent in Respondent's store 3455 manager's presence. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 868.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

Respondent, Walmart Stores, Inc., Bentonville, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening associates by asking them if they are afraid Walmart might close Placerville, California store 2418 if too many associates join OUR Walmart.

(b) Maintaining a July 2010 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

(c) Maintaining a February 2013 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

(d) Selectively and disparately applying its July 2010 dress code for California associates to Richmond, California store 3455 associates when they wear clothing with OUR Walmart or UFCW logos, but not when they wear other clothing that does not comply with the dress code.

(e) Threatening Richmond, California store associates that it would "shoot the union."

(f) Threatening Richmond, California store associates that Walmart would never be union and thereby informing associates that it would be futile for them to select OUR Walmart as their collective-bargaining representative.

(g) Threatening Richmond, California store associates by telling them that associates returning from strike would be looking for new jobs.

(h) Prohibiting Richmond, California store associates from speaking to associates returning from strike about the returning strikers' activities on behalf of OUR Walmart.

(i) Issuing disciplinary coachings to associates because they engaged in a protected work stoppage, and to discourage associates from engaging in those or other protected activities.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the overbroad policy in its July 2010 California employee dress code that unduly restricts associates' right to wear union insignia.

(b) Rescind the overbroad policy in its February 2013 California employee dress code that unduly restricts associates' right to wear union insignia.

(c) Furnish all current employees in its California stores with inserts for its California employee dress code that (1) advise that the unlawful July 2010 and February 2013 policies have been rescinded, or (2) provide the language of a lawful policy; or (in the alternative) publish and distribute to employees at its California stores revised copies of its California employee dress code that (1) do not contain the unlawful policies, or (2) provide the language of a lawful policy.

(d) Within 14 days from the date of the Board's Order, remove from its files any references to the November 2012 two-level disciplinary coachings that Respondent issued to Raymond Bravo, Demario Hammond, Semetra Lee, Misty Tanner, Markeith Washington and Timothy Whitney because those associates engaged in a protected work stoppage on November 2, and to discourage associates from engaging in those or other protected activities, and within 3 days thereafter notify Raymond Bravo, Demario Hammond, Semetra Lee, Misty Tanner, Markeith Washington and Timothy Whitney in writing that this has been done and that the disciplinary coachings will not be used against them in any way.

(e) Within 14 days after service by the Region: post at store 2418 in Placerville, California, copies of the attached notice marked "Appendix A"; post at store 3455 in Richmond, California, copies of the attached notice marked "Appendix B"; and post at all other California stores copies of the attached notice marked

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

"Appendix C."[48] Copies of the notices, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed one or more of the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the appropriate notice (Appendix A, B, or C) to all current associates and former associates employed by Respondent at the closed facilities at any time since July 8, 2012.

(f) Within 14 days after service by the Region, hold a meeting or meetings at Respondent's Richmond Store 3455, scheduled to have the widest possible attendance, at which the attached notice marked "Appendix B" shall be read to employees in both English and Spanish, by Respondent's store 3455 manager or, at Respondent's option, by a Board agent in Respondent's store manager's presence.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 9, 2014

APPENDIX A
(PLACERVILLE, CALIFORNIA
STORE 2418)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten associates by asking them if they are afraid Walmart might close Placerville, California store 2418 if too many associates join OUR Walmart.

WE WILL NOT maintain a July 2010 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT maintain a February 2013 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind the overbroad policy in our July 2010 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL rescind the overbroad policy in our February 2013 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL furnish all current associates in our California stores with inserts for our California employee dress code that (1) advise that the unlawful July 2010 and February 2013 policies have been rescinded, or (2) provide the language of a lawful policy; or (in the alternative) WE WILL publish and distribute to employees at our California stores revised copies of our California employee dress code that (1) do not contain the unlawful policies, or (2) provide the language of a lawful policy.

WAL-MART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-090116 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B
(RICHMOND, CALIFORNIA
STORE 3455)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a July 2010 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT maintain a February 2013 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT selectively and disparately applying our July 2010 dress code for California associates to Richmond, California store associates when they wear clothing with OUR Walmart or UFCW logos, but not when they wear other clothing that does WE WILL NOT threaten Richmond, California store associates that we will "shoot the union."

WE WILL NOT threaten Richmond, California store associates that Walmart will never be union and thereby inform associates that it would be futile for them to select OUR Walmart as their collective-bargaining representative.

WE WILL NOT threaten Richmond, California store associates by telling them that associates returning from strike will be looking for new jobs.

WE WILL NOT prohibit Richmond, California store associates from speaking to associates returning from strike about the returning strikers' activities on behalf of OUR Walmart.

WE WILL NOT issue disciplinary coachings to associates because they engage in protected work stoppages, and to discourage associates from engaging in those or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce associates in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL NOT remove from our files any references to the unlawful November 2012 two-level disciplinary coachings that we issued to associates Raymond Bravo, Demario Hammond, Semetra Lee, Misty Tanner, Markeith Washington and Timothy Whitney because they engaged in a protected work stoppage on November 2, 2012, and to discourage associates from engaging in those or other protected activities, and WE WILL notify Raymond Bravo, Demario Hammond, Semetra Lee, Misty Tanner, Markeith Washington and Timothy Whitney in writing that this has been done and that the unlawful disciplinary coachings will not be used against them in any way.

WE WILL rescind the overbroad policy in our July 2010 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL rescind the overbroad policy in our February 2013 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL furnish all current associates in our California stores with inserts for our California employee dress code that (1) advise that the unlawful July 2010 and February 2013 policies have been rescinded, or (2) provide the language of a lawful policy; or (in the alternative) WE WILL publish and distribute to employees at our California stores revised copies of our California employee dress code that (1) do not contain the unlawful policies, or (2) provide the language of a lawful policy.

WAL-MART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-090116 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX C (CALIFORNIA STORES)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a July 2010 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT maintain a February 2013 dress code for California associates that is facially overbroad because it unduly restricts associates' right to wear union insignia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind the overbroad policy in our July 2010 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL rescind the overbroad policy in our February 2013 California employee dress code that unduly restricts associates' right to wear union insignia.

WE WILL furnish all current associates in our California stores with inserts for our California employee dress code that (1)

advise that the unlawful July 2010 and February 2013 policies have been rescinded, or (2) provide the language of a lawful policy; or (in the alternative) WE WILL publish and distribute to employees at our California stores revised copies of our California employee dress code that (1) do not contain the unlawful policies, or (2) provide the language of a lawful policy.

WAL-MART STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-090116 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.