JD−62−16
Austin, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

IN-N-OUT BURGER, INC.

and **CASES 16-CA-156147**
16-CA-163251

MID-SOUTH ORGANIZING COMMITTEE

Bryan Dooley, Esq., for the General Counsel.
Alicia Junco, Esq., of Houston, Texas, for the Charging Party.
Bruce J. Sarchet, Esq. (Littler Mendelson, P.C.), of Sacramento, California, for the Respondent.

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge. The Respondent maintained and enforced a rule prohibiting employees from wearing any unauthorized button or insignia, including buttons and insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities. The Respondent failed to carry its burden of proving that special circumstances justified making an exception to the general rule that Section 7 of the Act gives employees the right to wear such buttons and insignia. The Respondent's maintenance and enforcement of this overly broad prohibition therefore violated Section 8(a)(1) of the Act.

Procedural History

This case began on July 10, 2015, when the Charging Party, Mid-South Organizing Committee, filed an unfair labor practice charge against the Respondent, In-N-Out Burger, Inc., with Region 16 of the National Labor Relations Board. The Region docketed this charge as Case 16–CA–156417.

On October 30, 2015, the Charging Party filed another unfair labor practice charge against the Respondent. The Region docketed this charge as Case 16–CA–163251.

On February 16, 2016, the Acting Regional Director for Region 16, acting pursuant to authority delegated by the Board's General Counsel (here called the General Counsel or the government) issued an order consolidating cases, consolidated complaint, and notice of hearing (the complaint). The Respondent filed a timely answer.

On April 25, 2016, a hearing opened before me in Austin, Texas. The parties presented evidence on that day and the next, when the hearing closed. Thereafter, the parties filed briefs, which I have carefully considered.

Admitted Allegations

In its answer, the Respondent admitted a number of allegations. Based on these admissions, I find that the General Counsel has proven the allegations in complaint paragraphs 1(a), 1(b), 2, 3(a), 3(b), 5, 6, and portions of complaint paragraphs 4, 7(a), and 7(b).

More specifically, I find that the Charging Party filed and served the charges as alleged in the complaint.

Further, I find that the Respondent is a California corporation engaged in the retail sale of fast food and that it has a restaurant in Austin, Texas. Additionally, I conclude that the Respondent meets the statutory and discretionary standards for exercise of the Board's jurisdiction.

Respondent has admitted, and I find, that Store Manager Nick Palmini and Second Manager Daniel Moore were, at relevant times, its supervisors and agents within the meaning of Section 2(11) and (13) of the Act, respectively. A "second manager" is an assistant manager.

Based on Respondent's admissions, I find that, since about July 10, 2015, it has maintained the following work rule:

NAME TAGS/PINS

1. Each Associate should wear a nametag at all times during a shift. Temporary nametags should be worn no more than a maximum of two weeks and should be red & white in color (red letters only).

2. Attach nametags to the shirt or blouse on the flap beside the pen/pencil pocket.

3. Nametags must be clean and not worn-looking (especially the logo), and must be the most current style.

4. Wearing any type of pin or stickers is not permitted.

5. Nametags must use only formal or well-established proper first names. Nicknames or slang names are not permitted. If an Associate is not normally addressed by their formal first name, only another "recognized" first name may be used. For example, if the Associate's formal name is Robert Charles Johnson, but he has always been called "Chuck," he may use "Chuck" on his nametag. In this example, "Chuck" is generally recognized as a first name and would not be confused as a nickname. Names such as "Butch" or "Fanny" are clearly nicknames and are not permitted.

The Respondent also admitted portions of complaint paragraphs 7(a) and 7(b). Those admissions will be discussed below.

Contested Issues

Respondent owns and operates a chain of fast food restaurants, including in Austin, Texas. It requires employees to adhere to a dress code which includes the provision, quoted above, prohibiting employees from wearing "any type of pin or stickers." Complaint paragraphs 7(a) and 7(b) allege that Respondent's supervisors told employees to remove "Fight For $15" pins they were wearing. These pins express support for a campaign to raise the minimum wage to $15 per hour.

The complaint further alleges that the Respondent's prohibition on wearing buttons and its instructions to employees to remove the "Fight For $15" buttons violate Section 8(a)(1) of the Act by interfering with, restraining, and coercing employees in the exercise of their rights under Section 7 of the Act. In general, and with exceptions discussed below, the Respondent admits the alleged conduct. However, it maintains that it did not thereby violated the Act.

Complaint Paragraphs 7(a) and 7(b)

Complaint paragraph 7(a) alleges that about "April 17, 2015, at Respondent's facility located at 4515 Airport Blvd., Austin, Texas 78751, Respondent, by its agent Daniel (last name unknown), ordered employees to remove a Fight for 15 button or face unspecified consequences."

Complaint paragraph 7(b) alleges that on about April 18, 2015, "in the manager's office at Respondent's facility located at 4515 Airport Blvd., Austin, Texas 78751, Respondent, by its agent Nick Palmini, ordered employees to remove a Fight for 15 button pursuant to the rule described in Paragraph 6 or leave Respondent's facility."

Respondent's answer stated that it "admits that one or more associates[1] at its Austin, Texas store have been directed to remove items from their uniforms which are not part of the In-N-Out uniform. Except as specifically admitted above, Respondent denies each and every remaining allegation of paragraph 7 of the Complaint." The Respondent has admitted that its supervisors have engaged in the type of conduct alleged in complaint paragraphs 7(a) and 7(b) but does not admit the specific alleged incidents.

To prove the allegation in complaint paragraph 7(a), that on April 17, 2015 a supervisor named Daniel told an employee to remove a "Fight For $15" button, the government relies on the testimony of Amanda Healy, a former employee of the Respondent who worked at the Austin restaurant. Although Healy described a conversation she had with the second manager, Daniel Moore, her testimony does not establish that he told her to remove the button.

Healy testified that she did wear a "Fight For $15" pin to work on April 17, 2016, but that no manager spoke with her about it on that day. According to Healy, when she again wore the pin to work the next day, Moore asked her about it:

> Q. Okay, and do you remember how that conversation began?
> A. Yes. He-- first he noticed it, and kind of was just asking me about it, and why I was wearing it. And then, after I answered, he asked if I thought Nick would be okay with me wearing it, and I said, "I believe so, but from what I understand -- I --I don't believe he is able to ask me to take it off, so I don't think he would," is what I said.
>
> Q. Do you remember exactly what you told Mr. Moore about what the button was?
> A. Yeah, just what I had said earlier, that it's the "Fight for $15" fast food workers working for a higher minimum wage, living wages.
>
> Q. And you said Moore asked you whether Nick would—
> A. Whether I thought Nick would be okay with—
>
> Q. and can you identify Nick?
> A. Nick is our manager, our Store Manager, Nick Palmini.
>
> Q. Thank you. And how did that conversation end? Did

[1] The record establishes that the Respondent calls its employees "associates."

anything else happen?
A. Not that day.

Moore testified that he did not recall this conversation. The parties entered into a stipulation that on about April 17, 2016, Moore told an employee that a button supporting the fight-for-15 movement was not part of the In-N-Out uniform. Based on that stipulation, I find that Moore did make the statement quoted in the stipulation even though he did not remember it.

Because the stipulation tends to corroborate Healy's testimony, and because Moore did not flatly deny making the statements Healy attributed to him but only said that he could not remember, I believe Healy's testimony is generally credible. Nonetheless, I have some concerns about it.

Healy did not specifically testify that Moore told her that wearing the button was not part of the In-N-Out uniform. That fact comes from the stipulation. However, the stipulation does not establish that Moore asked Healy if she thought the store manager would be "okay" with Healy wearing the fight-for-15 button. Those words come from Healy's testimony, not the stipulation.

If Moore specifically had said that the Respondent's dress code prohibited wearing the button, and then if he had asked whether Healy thought the store manager would be "okay" with her doing so, the statement and the question together arguably would have violated the Act. In *Comcast Cablevision of Philadelphia, L.P.*, 313 NLRB 220 fn. 3 (1993), the Board found that, even assuming a supervisor had not told an employee to remove a union button, the supervisor transgressed Section 8(a)(1) by telling employees that the button violated the employer's uniform policy and then asking, rhetorically, if they thought they should nevertheless wear it. The Board concluded that the employees would understand the "rhetorical question" to be a prohibition.

Here, the parties did not stipulate that Moore told Healy that wearing the button violated the Respondent's dress code. Rather, the parties stipulated that he told her that the button was not part of the uniform. It could be argued that Healy reasonably would understand "not part of the uniform" to mean "prohibited by the dress code." However, to reach that conclusion requires drawing an inference.

To find a violation, I would have to draw this inference, and then draw the further inference that Healy would understand Moore's question - did she think the store manager would be "okay" with her wearing the button - to amount to a prohibition on wearing the button. Thus, a decision to find a violation would rest on two inferences.

Even though I credit Healy's testimony, I do not believe it includes enough detail to warrant the inference that Moore was posing a rhetorical question when he asked Healy if she thought the store manager would be "okay" with her wearing the button. Very possibly, he was

expressing uncertainty about what the store manager would do. If so, presumably Healy would have been aware of that uncertainty and would not have understood the question to be a prohibition in disguise.

In these circumstances, I conclude that the evidence is insufficient to establish conduct similar to that found violative in *Comcast Cablevision*. More specifically, I find that the government has not proven that on April 17, 2016, a supervisor of Respondent ordered employees to remove a fight-for-15 button or face unspecified consequences, as alleged in complaint paragraph 7(a).

However, based on other evidence, including the Respondent's admissions and the testimony of its supervisors, I find that the Respondent maintained the uniform policy quoted above, which prohibited the wearing of pins or insignia and that on about April 18, 2015, the Respondent enforced this policy by directing an employee, Brad Crowder, to remove a fight-for-15 button, as alleged in complaint paragraph 7(b). The testimony of Store Manager Palmini, quoted below, establishes that he gave Crowder this instruction. Therefore, I must consider whether these actions violated Section 8(a)(1) of the Act.

Legal Analysis

It is well settled that an employer violates Section 8(a)(1) of the Act when it prohibits employees from wearing union insignia[2] at the workplace, absent special circumstances. *Boch Honda*, 362 NLRB No. 83 (2015), enf. sub nom *Boch Honda v. NLRB*, ___F.3d___ (1st Cir. June 17, 2016), citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945); *Ohio Masonic Home*, 205 NLRB 357, 357 (1973), enfd. mem. 511 F.2d 527 (6th Cir. 1975).

An employer that prohibits employees from wearing such insignia bears the burden of proving that such special circumstances do, in fact, exist. Moreover, the prohibition must be narrowly tailored to address the special circumstances justifying an exception to the general rule.

This case therefore turns on whether, as the Respondent claims, special circumstances existed warranting an exception to the rule and, if so, whether the Respondent's prohibition was narrowly tailored to those special circumstances.

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[2] In this case, the Respondent did not order an employee to remove insignia related to a particular labor organization but rather a button supporting a movement to increase the minimum wage. However, Sec. 7 of the Act protects more than the right to engage in union activities. It also protects the right of employees to engage in concerted activities for their mutual aid and protection. The message on the button concerned wages, clearly a term and condition of employment. Therefore, I conclude that the Act protected employees' right to wear this button to the same extent it would have protected their right to wear a button referring to a union. *AT&T*, 362 NLRB No. 105 (June 2, 2015).

Before considering the Respondent's evidence and argument, it will be helpful to review the Board's relevant caselaw. The Board has found that special circumstances warranted an exception to the general rule where the wearing of union insignia would 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. *Boch Honda*, above; *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), enfd. *Communications Workers of America, Local 13000 v. NLRB*, 99 Fed.Appx. 233 (D.C. Cir. 2004).

The Board has stressed that the special circumstances exception is narrow, and a rule that curtails an employee's right to wear union insignia at work is presumptively invalid. *Quantum Electric, Inc.*, 341 NLRB 1270 (2004). An employer's status as a retail employer does not, standing alone, constitute a "special circumstance." *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284 fn. 1 (2001); *Albertson's, Inc.*, 351 NLRB 254 (2007). Moreover, an employer cannot avoid the special circumstances test simply by requiring its employees to wear uniforms or other designated clothing. *World Color (USA) Corp.*, 360 NLRB No. 37 fn. 3 (2004).

The relatively infrequent cases in which the Board *has* found special circumstances involve unusual facts. For example, the Board has held that a supermarket lawful could prohibit its butcher from wearing, where customers could see it, a shirt bearing the words "Don't Cheat About The Meat." Those words could lead customers to fear that they were being cheated. *Pathmark Stores*, 342 NLRB 378 (2004).

The Board held that an employer lawfully could prohibit an employee from placing on his hardhat a sticker that was "unquestionably vulgar and obscene" even though it related to a union. *Leiser Construction, LLC*, 349 NLRB No. 41 (2007). However, an employer violated the Act by prohibiting the wearing of buttons stating "Cut the Crap! Not My Healthcare." In the same case, the Board held that the employer also could not ban the wearing of a button stating "WTF Where's The Fairness" because the "WTF" acronym would be understood to mean "Where's The Fairness." *AT&T*, 362 NLRB No. 105 (June 2, 2015).

In the present case, the "fight for 15" button did not imply that the Respondent was dishonest. It did not cast aspersions of any sort. The button also was not obscene or even mildly vulgar. Moreover, the Board precedents cited above hold that an employer cannot establish special circumstances simply because it is a retail store, and an employer also cannot establish special circumstances by showing that it requires employees to wear uniforms. The Respondent had to have some additional basis to warrant making an exception to the general rule that employees had the right to wear buttons related to their union or other protected activities.

The Respondent relies on *W. San Diego*, 348 NLRB 372 (2006). In that case, the Board found that a hotel lawfully could prohibit room service employees from wearing a button stating

"Justice NOW! JUSTICIA AHORA! H.E.R.E. LOCAL 30." The employer persuaded the majority of a Board panel that it was no ordinary hotel but marketed itself "as providing an alternate hotel experience referred to as 'Wonderland' where guests can fulfill their 'fantasies and desires' and get 'whatever [they] want whenever [they] want it.'"

The hotel dressed its room service employees in black shirts, slacks, and apron. The Board held that if an employee wore a button with a controversial message it would detract, or could detract, from this "Wonderland" effect.

In the present case, the Respondent tries to squeeze itself into the *W. San Diego* mold.[3] However, it does not claim that it is trying to turn a fast food hamburger restaurant into "Wonderland." Instead, it argues that its business plan involves creating a public image of a very clean restaurant where all employees dress alike. The Respondent's brief states:

> In-N-Out's public image (its brand identity) has been carefully cultivated and has remained basically unchanged since the opening of its first store in 1948. Among the core components of this consistent image and identity are:
>
> The menu from 1948 included only burgers, fries and drinks, made to order from only fresh ingredients-this remains unchanged today. (Lang 165).
>
> The 1948 logo was red and white with simple block lettering-the same as today.
>
> Glass surrounds the kitchen so that customers can see their food prepared and handled by Associates in a sparkling clean environment.
>
> Excellent, warm and friendly customer service has always been a high priority. Associates have always been paid more than minimum wage, and paid more than their counterparts at competing quick-service restaurants. (Lang 72).
>
> In-N-Out has never had any franchisees. All of its stores are Company-owned. (Lang 46).
>
> Associates have always worn white uniforms with a limited number of specific identified elements, and have always been directed that they are not to take

[3] In addition to *W. San Diego*, the Respondent relies on the administrative law judge's decision in *Grill Concepts, d/b/a The Daily Grill*, 31–CA–126475 (August 6, 2015). However, the Board, reversing the judge, recently held that this respondent had not established special circumstances sufficient to make an exception to the general rule that an employer may not prohibit the wearing of union buttons. *Grill Concepts Services*, 364 NLRB No. 36 (June 30, 2016).

> anything away from the uniform, nor add anything to the uniform. (Lang 51-52; Palmini 235-236).
>
> Associates have always been subject to strict grooming requirements.
>
> In-N-Out's business philosophy is unique. Other quick service restaurants use the franchisor-franchisee model, their kitchens are not open for view, employee uniforms are dark in color, frozen foods and microwave ovens are used, new items are constantly being added to the menu, employees are paid minimum wage, and so on. These differences, which are all part of In-N-Out's unique business plan, differentiate it from other quick service restaurants and form its brand identity and public image.

Even assuming that Respondent has tried to create a business identity based on these factors, most of them appear irrelevant to the issue in this case: Whether special circumstances exist which justify making an exception to the rule that employees may wear buttons with messages related to union or protected activities.

For example, the fact that the Respondent has not changed its menu or logo since 1948 has no obvious connection with whether the Respondent has some need, based on special circumstances, to ban the wearing of such buttons. Similarly, although the Respondent's ownership of all restaurants bearing the "In-N-Out" name might be relevant to a case involving a joint employer allegation, there is no such allegation here.

The Respondent's focus on customer service also has no apparent relevance. The record reveals no reason to believe that wearing a button would slow an employee down or otherwise impair the employee's ability to serve customers. Likewise, the Respondent has established no reason why wearing a button would make an employee less friendly or less attentive to a customer's needs.

However, it might be somewhat relevant that "customers can see their food prepared and handled by Associates in a sparkling clean environment." The Board distinguishes between public areas where customers might see a button and nonpublic areas where only employees are present. Because glass walls allow the public to view the kitchen, I will assume that all or almost all of the store constitutes a public area. Therefore, I will apply the Board's standards applicable to employees in public areas.

In determining whether special circumstances exist sufficient to justify an exception to the rule, I will consider not only each circumstance individually but also the totality of all such circumstances together. The Respondent offers, as one such circumstance, that employees "have always worn white uniforms with a limited number of specific identified elements, and have

always been directed that they are not to take anything away from the uniform, nor add anything to the uniform." By itself, this circumstance would not suffice, *World Color (USA) Corp.*, above, but I will consider it along with other circumstances.

The fact that employees "have always been subject to strict grooming requirements" also would not constitute special circumstances warranting an exception to the rule. However, the Respondent appears to be arguing that for almost 70 years, it has presented to the public a consistent image of immaculately groomed employees in a "sparkling clean" work environment. Allowing an employee to wear the "fight-for-15" button would, it argues, detract from this well-groomed/clean image.

However, the Respondent faces a problem making this argument. At certain times of the year, the Respondent not only allows but requires employees to wear buttons. At Christmas, employees must wear a button which states:

Merry Christmas
In-N-Out
No Delay

In April, each employee must wear a button seeking donations to the In-N-Out Foundation, a nonprofit organization established by the Respondent's owners which focuses on child abuse and neglect. The button states:

Text
"4Kids"
to 20222
to donate
Your $5 Will Help
Prevent Child Abuse

In-N-Out Burger
Foundation

When an employer allows employees to wear other buttons, it casts some doubt on any claim that special circumstances require the employee's clothing to be button free. In *Airport 2000 Concessions, LLC*, 346 NLRB 958 (2006), the employer had allowed employees to wear buttons other than the union button it had prohibited. The Board found that it had not carried its burden of showing that special circumstances warranted an exception to the rule. See also *Vestal Nursing Center*, 328 NLRB 87, 97 (1999).

Both the Merry Christmas button and the In-N-Out Foundation button are from 2 to 3

times larger in diameter than the fight-for-$15 button. Therefore, the required buttons were significantly more conspicuous than the fight-for-$15 button, which was only the size of a quarter.

However, the Respondent characterizes the fight-for-$15 button as an "individualized" button, that is, one chosen by the individual employee rather than mandated by management. It argues that allowing an employee to wear an individualized button would have a negative impact on its ability to achieve its mission. The Respondent's employee handbook includes this mission statement:

> COMPANY MISSION/PURPOSE STATEMENT
>
> In-N-Out Burger exists for the purpose of:
>
> 1. Providing the freshest, highest quality foods and services for a profit, and a spotless, sparkling environment whereby the customer is our most important asset.
>
> 2. Providing a team-oriented atmosphere whereby goal-setting and communications exist, and to provide excellent training and development for all of our Associates.
>
> 3. Assisting all communities in our marketplace to become stronger, safer and better places to live.

It is not self-evident how an "individualized" button would negatively affect the achievement of these goals in a way that the larger buttons did not. However, the Respondent's vice president of operations, Robert J. Lang, Jr., gave this explanation:

> Q. MR. SARCHET: If I can direct your attention to Page 1 in the Company mission statement again.
> A. Okay.
>
> Q. Allowing employee -- associates to wear individualized button of their own choice in the workplace, would that have an impact on your ability to meet mission statement, part of your mission statement no. 1?
> A. I would say yes.
>
> Q. How so?
> A. I would say, you know, it could potentially from a food safety end, the highest quality foods.

Q. Any other ways?
A. Just one?

Q. Yeah.
A. Yeah, as far as a sparkling environment, you know, our uniform is part of our environment, so again, it is -- it would be interfering with that image that we project.

Q. And then, number 2, would allowing associates to add an individualized button to their uniform have an impact on your ability to meet Item No. 2 on your mission statement?
A. I would say provided a team-oriented atmosphere. You know, we do promote teamwork and togetherness, and all being consistent and the same, and that would change it?

Q. How so?
A. Well, if everybody was allowed to wear what they wanted, it would just -- I mean, where would the end be.

Respondent's argument that the fight-for-$15 button might have an impact of food safety will be discussed later in this decision. Here, it may be noted that Lang only testified that an "individualized" button *potentially* could affect food safety. Presumably, the potential danger would depend on the characteristics and cleanliness of the particular button.

As noted above, even if special circumstances might justify *some* exception to the rule that employees have the right to wear buttons related to union and protected activities, the exception still must be narrowly tailored to impinge no more than necessary on employees' Section 7 rights. However, the Respondent has not limited its ban to any particular subset of buttons which might pose a particular danger but instead has prohibited all "individualized" buttons.

Lang also suggest that an individualized button could negatively affect achieving the Respondent's goal of a "sparkling environment. He testified, "you know, our uniform is part of our environment, so again, it is—it would be interfering with that image that we project."

Presumably, by "sparkling environment" the Respondent means a very clean environment. The record would not support a conclusion that the fight-for-$15 button was less hygienic than the buttons which the Respondent required employees to wear at specific times of the year.

If the Respondent had been concerned about the cleanliness of buttons, it could have narrowly tailored its rule to prohibit only unhygienic buttons or required employees to disinfect them. Even if the Respondent meant something else other than cleanliness by the term "sparkling

environment," presumably it could have narrowly tailored its prohibition to address such a concern.

The Respondent's mission statement referred to a "sparkling environment whereby the customer is our most important asset" so, clearly, Respondent's goal involved having a restaurant so obviously clean and wholesome it would attract customers. However, it was not obvious how an employee wearing a small button would detract from this environment, so I asked Lang for a clarification:

> THE WITNESS: Well, it is not something that is normal for our uniform at all. It is something that is different, and it is—to me, it is just—it is not just about that button. It is about, you know, what else would somebody want to wear, but it is—that button could be that it is different than our uniform. To me, it does take away.

Lang's testimony also suggested that allowing employees to wear "individualized" buttons would impede the Respondent's goal of having a "team-oriented environment." However, his explanation for why that might happen doesn't obviously relate to teamwork: "Well, if everybody was allowed to wear what they wanted, it would just—I mean, where would the end be[?]"

This question - where would the end be? - mirrors Lang's statement that "It is about, you know, what else would somebody want to wear. . ." Lang's testimony bolsters the impression I formed from other parts of the record, that the Respondent banned wearing "individualized" buttons not out of a desire to achieve a particular business objective but out of a fear of losing control.

Respondent maintained a stringent appearance code which extended even to the type of underwear an employee could wear. It instilled this code in new employees through intensive training administered by a computer. The computer program began with a cheerful lecture about the importance of a uniform. Then, it required the employee to use the mouse to dress a virtual mannequin onscreen. When the employee made the correct choices the computer gave him a reward of praise. Although human beings typically program computers, in this case the roles were reversed.

The Respondent enforces its appearance code through daily inspections and documents the warnings it gives for infractions. These records show that a supervisor will even warn an employee for having a "visible hickey."

In describing the intensity of the Respondent's insistence upon standardized appearance I will avoid any adjective that might carry some arguably negative connotation and instead observe

simply that it is rigorous. That may risk understatement, except perhaps in the sense that a drill sergeant at boot camp is rigorous. However, it is not necessary to address why the Respondent feels so strongly about uniformity because the Respondent has the right to choose its methods of doing business so long as they don't impinge unlawfully on employees' exercise of Section 7 rights.

The narrow question here concerns whether Respondent's strict dress code, including its prohibition against wearing "individualized" buttons, is to further a business plan similar to that of the hotel in *W. San Diego*. The explanation given by Vice President Lang—"it is not just about that button. It is about, you know, what else would somebody want to wear"—does not indicate that the Respondent was trying to create a customer experience analogous to the alternate reality "Wonderland" of the hotel.

To the contrary, it simply suggests a fear of losing control. Lang's words—"if everybody was allowed to wear what they wanted, it would just—I mean, where would the end be"—indicate that he foresaw a slippery slope. Under such a theory, for example, if the Respondent allowed an employee to pin on a small button today, then tomorrow the employee might report for work wearing a tie-dyed shirt, frayed blue jeans, and love beads. Such a fear, however, would not justify a button ban because that prohibition would not address the wearing of the unacceptable clothing. Moreover, the Respondent could prohibit wearing of such attire while allowing employees to wear buttons.

The Respondent also argues that its prohibition of "individualized" buttons is necessary to further a "team-oriented atmosphere." However, it is not self-evident how wearing a small button would affect teamwork in any way.

From its mission statement, it appears that Respondent defined a "team-oriented atmosphere" as one which fostered goal setting and communications. Lang's testimony did not explain how wearing the button could affect either. However, the Respondent's brief did offer an explanation of the relationship between the no-button rule and "team-oriented atmosphere." It stated:

> As a part of its business plan and its public image, In-N-Out takes steps to foster a team-oriented atmosphere in the workplace. This is emphasized in a multitude of ways, most predominantly in the Company's mission statement: "In-N-Out exists for the purpose of... providing a team-oriented atmosphere where goal-setting and communications exist, and to provide excellent training and development for all of our Associates." (JX 2 p. 1).
>
> Allowing individual associates to choose their own adornments to the uniform, such as a pin or a button, would undermine this team-oriented atmosphere. The

> focus would be on the individual worker, not on the group. As an example of just how important this is to In-N-Out, the Company provides service pins to employees on achieving their five-year anniversary. (Lang 186). However, individual associates may not wear these pins on the job. Allowing them to do so would place the focus on the individual, rather than on the team.

The brief thus seems to argue that individuality must be drastically suppressed, even to the prohibition of small buttons, for a team to be effective. Were that the case, the best team would not be human but animatronic. The Respondent's argument strikes me as one created after the fact, perhaps more ingenious than ingenuous.

The Respondent's attempt to make itself resemble the hotel in *W. San Diego* fails because it ignores the underlying reason why the hotel deserved an exception to the rule. The hotel essentially was doing theater, creating a make-believe environment the same as actors on a stage. The main difference was that the room service employees were the actors.

Playing a part requires an actor to suppress his own identity and assume that of the assigned role. His costume must not include any element that conflicts with or contradicts that pretend identity. Under such very special and unusual circumstances, wearing a button might indeed reduce the actor's ability to be convincing.

However, the present Respondent is not calling upon its employees to be actors. It is not making itself a stage upon which to conjure an alternate reality. It is not casting its employees for parts in a "Wonderland" or even a *Fantasy Island*. It has not posted any employee out front to ring a bell and announce "the plane, the plane!"

The Respondent is not trying to create the illusion of a sparkling clean restaurant but rather the reality. In other words, the Respondent's business objective is not to become something other than a fast food burger restaurant, but rather to be the very best in its category. Therefore, its circumstances are similar to those of other such restaurants and not special enough to warrant an exception to the general rule.

The Respondent also argues that health and safety concerns justify an exception to the rule that employees may wear buttons with messages relating to union or protected activities. Thus, its brief stated, in part:

> In *W San Diego*, the Board concluded: "foreign objects in food preparation areas pose risks of contamination," and "the danger that . . . loosely attached stickers would fall into the food or onto food preparation surfaces constitutes special circumstances justifying the sticker prohibition." 348 NLRB at 375.

However this argument is subject to question: If the smaller fight-for-$15 button presents a health or safety risk, why don't the larger buttons which the Respondent requires the employees to wear?

Respondent's answer to that question is, essentially, that its own buttons are better built. The Respondent's brief criticizes the construction of the fight-for-$15 button:

> The button at issue in this case (GCX 2) consists of two separate pieces: a front piece, and pin mechanism which is held into place simply by spring tension. If not properly affixed to clothing, or if the spring tension weakens, or if the pin becomes bent, the button could fall off of the clothing. The button is quite small and is very lightweight. If it fell off of the clothing, its absence might not be noticed. Associates are quite busy during a shift, moving from one task to another, working in virtually all areas of the store during a shift.

The Respondent's brief then goes on to laud the construction of its own buttons:

> The Company-approved buttons (RX 17, RX 19) are materially different from the button introduced into evidence by the General Counsel. They are significantly larger. They must always be worn in a prominent location, on the front of the uniform shirt above the nametag.
>
> They consist of three pieces - a front, a back, and a pin mechanism. The pin mechanism is affixed to the back part of the button by passing through two small holes. The pin mechanism of the In-N-Out-approved button is far sturdier than the pin mechanism of the button introduced into evidence by the General Counsel.

This argument strikes me as more impressive than persuasive. Certainly, it demonstrates elegant advocacy to compare the two buttons in such detail. However, the argument might have been more convincing if I had not examined the buttons. Discerning no apparent, significant difference in safety, my reaction to the argument is "nice try."

Implicit in the Respondent's argument is the recognition that not all buttons pose a health or safety risk. The Respondent would not require its employees to wear any button if it considered all of them harmful. However, the Respondent has banned all buttons other than its own without regard to their safety. Its prohibition is not narrowly tailored to address the perceived problem in a way that least interferes with employees' Section 7 rights.

Moreover, the record does not establish that Store Manager Palmini, who directed employee Brad Crowder to remove the fight-for-$15 button he was wearing, examined the button to determine whether it raised any health or safety concerns. According to Palmini, his assistant

manager noticed that Crowder was wearing the button and reported it to Palmini, who called Crowder into his office. Palmini described the meeting, in part, as follows:

> I asked him if he was—if he knew and was familiar with the Uniform policy, the Uniform guidelines that we have. He said he was. I informed him that he was not—I made sure that he understood that he was not able to add anything to the uniform, which he said that he did. He said that—I said, that being that that is the rule, I am going to have to ask you to take that off. He said, okay. He let me know that he would be making a claim with the NLRB. I asked him what that was, because I wasn't familiar with that. He explained to me that they are Board that oversees labor. I said, "Great."

Neither Palmini's testimony nor that of Assistant Manager Moore, who also was present, indicates that they made any effort to examine the button before Palmini directed Moore to remove it.

Palmini's testimony, which I credit, leads me to that conclude that health and safety concerns did not cause him to tell Crowder to remove the button. Rather, he was enforcing the Respondent's appearance code with the rigor expected. However, the code's ban on buttons was not narrowly tailored.

In other respects, no evidence establishes that wearing the fight-for-$15 button did or foreseeably would adversely affect the Respondent's business in any way. See *Register Guard*, 351 NLRB 1110 (2007).

The record does not establish any special circumstance which would justify an exception to the rule that employees generally have a Section 7 right to wear buttons with messages related to a union or to terms and conditions of employment. Therefore, I conclude that Respondent has not carried its burden of establishing grounds to justify making an exception to the general rule. *United Parcel Service*, 312 NLRB 596 (1993).

Accordingly, I recommend that the Board find that the Respondent violated Section 8(a)(1) of the Act by maintaining a policy prohibiting the wearing of all buttons and insignia except for the buttons it approved or required, and by instructing employees to remove the fight-for-$15 button, the message of which related to a term or condition of employment and the wearing of which was protected by the Act.

Remedy

To remedy its unfair labor practices, the Respondent must post the notice to employees attached to this decision as Appendix A. Because the Respondent owns and operates more than

300 restaurants, a question arises concerning whether the Respondent should be required to post the notice at all of its facilities or just at the restaurant in Austin, Texas, that is specifically mentioned in the complaint.

The unlawful rule appears in the Respondent's employee handbook. It appears likely that the Respondent provided this handbook to employees working at other facilities besides the Austin restaurant. The General Counsel's brief argues that the Respondent should be required to "post a notice at all locations, including by electronic means, where the unlawful policy prohibiting pins and stickers has been in effect."

However, the parties have not litigated the issue of how widely the Respondent distributed the handbook. Therefore, I recommend that, should an issue arise concerning the scope of notice posting, it be addressed at the compliance stage of this proceeding. *Boch Honda*, 362 NLRB No. 83, slip op. at 3.

The Respondent also must rescind the unlawful prohibition and remove it from its employee handbook. Further, I recommend that the Board order the Respondent to provide written notice to each current employee who received the handbook that it has rescinded the unlawful rule. Any issue regarding which employees should receive such notice—only the employees at the Austin, Texas restaurant or current employees at all restaurants—could be resolved, if necessary, at the compliance proceeding.

The written notice to be given each current employee recipient would be separate from and in addition to the notice, set forth in Appendix A below, to be posted in the workplace. With respect to this latter notice, I further recommend that the Board require the Respondent to comply with the requirements of *J. Picini Flooring*, 356 NLRB 11 (2010), which provides that in addition to physical posting of paper notices, noticed shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

With respect to the separate written notice to be given to each recipient of the handbook who is currently employed by Respondent, if issues arise regarding the scope or means of notification, I recommend that such issues be addressed and resolved at the compliance stage.

Because the Respondent maintains records of the warnings it gives to employees for violations of its appearance policy, I recommend that the Board order the Respondent to remove from its records any reference to the instruction it gave to employee Brad Crowder to remove the fight-for-$15 button from his clothing.

Conclusions of Law

1. The Respondent, In-N-Out Burger, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a rule which prohibited employees from wearing while on duty any button or other insignia except for those buttons it provided, and which made no exception for buttons displaying messages pertaining to wages, hours, working conditions, or to union or protected activities. The Respondent further violated Section 8(a)(1) of the Act by enforcing this rule, and by directing an employee to remove a button advocating an increase in the minimum wage.

3. The Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[4]

ORDER

The Respondent, In-N-Out Burger, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a rule which prohibits employees from wearing, while on duty, any button or insignia apart from those it approved, and which made no exception for buttons and insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

(b) Directing employees to remove from their clothing any button or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to

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

refrain from any and all such activities.

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

(a) Rescind the rule in its appearance policy which prohibits employees from wearing any button or insignia without making exception for buttons or insignia pertaining to wages, hours, terms and conditions of employment or wages, or other protected activities.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful instruction and/or warning it gave to employee Brad Crowder, requiring him to remove a button pertaining to terms and conditions of employment, from his clothing and, within 3 days thereafter, notify Brad Crowder in writing that this has been done and that the warning will not be used against him in any way, and to take similar remedial steps with respect to any other employee to whom it gave similar instructions.

(c) Within 14 days after service by the Region, post at its facilities in Austin, Texas, copies of the attached notice marked "Appendix A."[5] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 18, 2015. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(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 Regional Director attesting to the steps that the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice 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.

Dated Washington, D.C. July 11, 2016

Keltner W. Locke
Administrative Law Judge

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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 abide by 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 interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT maintain or enforce a rule prohibiting employees from wearing, during working time, any button or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL NOT tell any employee to remove a button or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

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

WE WILL immediately rescind our rule prohibiting employees from wearing during working time any button or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to any instruction and/or warning we gave to an employee which directed the employee to remove a button or insignia pertaining to wages, hours, terms and conditions of employment or union, or other protected activities and WE WILL, within 3 days thereafter, notify each such employee that the instruction or warning will not be used against the employee in any way.

IN-N-OUT BURGER, INC.

(Employer)

Dated _____ By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Ft. Worth, TX 76102-6178
Telephone: (817) 978-2921; Hours: 9:15 a.m. to 5:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-156147 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (713) 209-4885.