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Banning the Buttons: Employer Interference with the Right to Wear Union Insignia in the Workplace

BY JOHN W. TEETER, JR.*

INTRODUCTION

This Article addresses an issue supposedly resolved many years ago—the right of employees to wear union insignia in the workplace. Since the infancy of the National Labor Relations Act¹ (the “Act”) workers have possessed, in principle, the right to wear union insignia without fearing retaliation by their employers.² In practice, however, this right has been constricted, undermined, and jeopardized by numerous judicial and National Labor Relations Board (“Board”) decisions. Tribunals frequently have upheld employers’ prohibitions on union insignia by concluding that bans were necessary to maintain production, avoid conflicts among employees, prevent accidents, assure good customer relations, or serve other business goals.³ Most

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¹ Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988)).

² See *infra* notes 11-18 and accompanying text.

³ As an administrative law judge recently explained, union emblems may be prohibited when “necessary to maintain production and discipline, diffuse employee dissension, insure employee safety, protect machinery and products from damage, assist employee concentration, or project a certain image to the public.” *Albertsons, Inc.*, 300 N.L.R.B. No. 142 (Dec. 21,

of these decisions are unpersuasive because they strip workers of the freedom to wear union insignia based on what frequently appear to be ad hoc rationalizations by employers. Furthermore, these cases commonly conflict with other decisions that uphold the right to wear union emblems. As a consequence, at least three problems arise: (1) litigation over this issue increases as the law becomes increasingly opaque;⁴ (2) workers are wrongfully denied the opportunity to proclaim their union sympathies; and (3) the Board and courts send an implicit message that the freedom to express union support is a second-class right that employers may override by offering a pretextual justification. This Article explores these problems and suggests alternative approaches to the issue of union insignia in the workplace.

Employers have asserted four primary justifications for banning union buttons: (1) the need to protect the employer's customer relations,⁵ (2) the need to maintain discipline,⁶ (3) the need to assure efficiency and production,⁷ and (4) the need to prevent safety hazards.⁸ The first two "justifications" should be repudiated by the Board and courts because prohibiting union buttons to preserve an employer's relationship with consumers or to prevent workplace violence is normally unnecessary and unjust.⁹

The second two justifications, though not inherently unreasonable, have been asserted in a discriminatory manner and in cases devoid of any significant risk to production or safety.¹⁰ To alleviate this problem, the Board and courts should impose strict requirements

1990) (citations omitted).

Union insignia may also be prohibited on the grounds that they are profane or disparage an employer's product. *See infra* notes 66, 76. This Article, however, focuses only on emblems that proclaim pro-union sentiments or condemn strikebreaking.

⁴ Conflicting opinions of the Board and appellate courts foster litigation in at least two ways. First, such conflict frustrates the informal settlement of cases because the parties cannot confidently predict how their legal disputes would be resolved. Second, parties are encouraged to appeal adverse decisions in the hope that the appellate tribunal will follow a contrary line of authority. Much has been written concerning the role of legal uncertainty in breeding litigation. *See, e.g.*, RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 511 (3d ed. 1986) (explaining that when legal uncertainty is great, "there will be much litigation, including much appellate litigation").

⁵ *See infra* Part II.A.

⁶ *See infra* Part II.B.

⁷ *See infra* Part II.C.

⁸ *See infra* Part II.D.

⁹ *See infra* Parts II.A.1-3, B.1-3. As explained below, however, an employer should be permitted to prohibit emblems that expressly call for acts of violence.

¹⁰ *See infra* Parts II.C.1-3, D.1-3.

on employers that prohibit insignia on these grounds. By adopting the approaches recommended in this Article, tribunals can clarify the law, reduce litigation, and protect the right of workers to demonstrate union support.

I. THE RIGHT TO WEAR UNION INSIGNIA

A. *The Importance of the Right*

The right to wear union emblems serves important collective and individual needs. On the collective level, wearing union insignia enhances group solidarity, encourages others to seek membership, and testifies to union strength. On the individual level, wearing insignia permits each worker to express union commitment and demonstrate pride in membership. This benefits not only the group, but the individual wearer as well. 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.

B. *The Supreme Court's Recognition of the Right*

As a general principle, employees long have been entitled to wear union emblems. In 1945, the landmark decision *Republic Aviation Corp. v. NLRB*¹¹ explicitly recognized this right. In *Republic Aviation*, the Supreme Court affirmed the holding of the Board¹² and court of appeals¹³ that the employer had violated sections 8(1)¹⁴ and 8(3)¹⁵ of the Act by discharging three employees for wearing

¹¹ 324 U.S. 793 (1945).

¹² *Republic Aviation Corp.*, 51 N.L.R.B. 1186 (1943), *enforced*, 142 F.2d 193 (2d Cir. 1944), *aff'd*, 324 U.S. 793 (1945).

¹³ *Republic Aviation Corp. v. NLRB*, 142 F.2d 193 (2d Cir. 1944), *aff'd*, 324 U.S. 793 (1945).

¹⁴ National Labor Relations Act, Pub. L. No. 74-198 § 8(1), 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 158(a)(1) (1982)). This section provides that it is an unfair labor practice for employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. § 157 (1982)]." Section 7 provides, in relevant part, that "[e]mployees shall have 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."

¹⁵ *Id.* § 8(a)(3) (codified as amended at 29 U.S.C. § 158(a)(3)). This section provides, in relevant part, that it is an unfair labor practice for employers "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

union steward buttons. Quoting the Board's trial examiner, the Court stated:

[T]he respondent's employees . . . were entirely deprived of their normal right to "full freedom of association" in the plant on their own time, the very time and place uniquely appropriate and almost solely available to them therefor. The respondent's rule is therefore in clear derogation of the rights of its employees guaranteed by the Act.¹⁶

Such language is instructive, for it recognizes that the workplace is an ideal forum for expressing union sympathies and that an employee's freedom of association includes the right to wear union insignia. The Court also quoted the Board's conclusion 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 respondent's curtailment of that right is clearly violative of the Act."¹⁷

To this extent, *Republic Aviation* affirmed the right to wear union insignia in the workplace. In a rather indirect fashion, however, the Court also planted the seeds for the defeasance of that right. In its discussion of union solicitation in the workplace, the Court explained the Board's approach:

¹⁶ *Republic Aviation*, 324 U.S. at 801 n.6 (quoting *Republic Aviation*, 51 N.L.R.B. at 1195).

¹⁷ *Id.* at 802 n.7 (quoting *Republic Aviation*, 51 N.L.R.B. at 1187-88). The Board based this conclusion on *Armour & Co.*, 8 N.L.R.B. 1100 (1938), which held that a union officer was entitled to wear a button signifying his position in the labor organization and that the employer therefore had violated the Act by discharging him for refusing to remove it. See *Republic Aviation*, 51 N.L.R.B. at 1188. The trial examiner in *Republic Aviation* also recognized that "[t]he right of employees to wear buttons showing their union affiliation upon their employer's premises is established by the courts," citing *NLRB v. Waterman Steamship Corp.*, 309 U.S. 206 (1940) and *Triplex Screw Co. v. NLRB*, 117 F.2d 858 (6th Cir. 1941). See *Republic Aviation*, 51 N.L.R.B. at 1199 & n.21. The employer in *Republic Aviation* did not even challenge this basic rule. See *id.* Instead, it argued that it lawfully forbade the employees from wearing union steward buttons because the union symbolized had not yet been recognized as the employees' representative and it did not want to convey the impression of favoring that union. See *Republic Aviation*, 324 U.S. at 793. The Court rejected the employer's argument, however, for the reason given by the Board:

"We do not believe that the wearing of a steward button is a representation that the employer either approves or recognizes the union in question as the representative of the employees, especially when, as here, there is no competing labor organization in the plant. Furthermore, there is no evidence in the record herein that the respondent's employees so understood the steward buttons or that the appearance of union stewards in the plant affected the normal operation of the respondent's grievance procedure."

Id. at 802 n.7 (quoting *Republic Aviation*, 51 N.L.R.B. at 1187-88).

It is . . . not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such 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.¹⁸

It is this “special circumstances” caveat that has engendered decades of litigation and circumscribed the protection of union activists. Employers have demonstrated an unceasing ability to argue that the presence of union insignia undermines customer relations, discipline, production, or workplace safety. For their part, the Board and courts frequently have accepted such arguments without carefully assessing their validity. As a consequence, the right of workers to wear union insignia has been relegated to a precarious and subordinate status.

II. THE EXCEPTIONS TO THE RIGHT TO WEAR UNION INSIGNIA

*Republic Aviation Corp. v. NLRB*¹⁹ retains considerable vitality as many employers continue to be found guilty of unfair labor practices for prohibiting union insignia.²⁰ In many other instances, however, employers have escaped liability by asserting that special circumstances necessitated the prohibition. Although these purported

¹⁸ *Republic Aviation*, 324 U.S. at 803-04 n.10 (quoting *Peyton Packing Co.*, 49 N.L.R.B. 828, 843-44 (1943)).

¹⁹ 324 U.S. 793 (1945). For a discussion of the case, see *supra* Part I.B.

²⁰ See, e.g., *Sirangelo*, 298 N.L.R.B. No. 141, 1989-90 NLRB Dec. (CCH) ¶ 16,130 (June 26, 1990) (employer ordered workers to remove union buttons and threatened to discharge those that continued to wear them); *Keystone Lamp Mfg. Corp.*, 284 N.L.R.B. 626 (1987) (employer ordered employee to remove union button); *Overnite Transp. Co.*, 254 N.L.R.B. 132 (1981) (employer asked worker as a “personal favor” to stop wearing Teamsters t-shirt); *McIndustries, Inc.*, 224 N.L.R.B. 1298 (1976) (employer requested that employees remove union buttons after union lost representation election); *Trailmobile Div., Pullman Inc.*, 160 N.L.R.B. 1348 (1966) (employer urged workers to remove union buttons), *enforced in relevant part*, 389 F.2d 195 (5th Cir. 1968); *Threads - Inc.*, 124 N.L.R.B. 968 (1959) (employer told employee wearing union button that he could be blackballed by textile industry); *Commercial Controls Corp.*, 118 N.L.R.B. 1344 (1957) (workers threatened with reprisals for wearing union insignia), *enforced per curiam*, 258 F.2d 102 (2d Cir. 1958); *Essex Wire Corp.*, 113 N.L.R.B. 344 (1955) (employer required employees to remove United Mine Workers of America buttons while permitting them to wear buttons supporting the incumbent union), *enforced*, 245 F.2d 589 (9th Cir. 1957); *Brown & Root, Inc.*, 112 N.L.R.B. 1068 (1955) (workers threatened and discharged for wearing union buttons and engaging in other protected activities); *Graber Mfg. Co.*, 111 N.L.R.B. 167 (1955) (worker asked to remove union button); *DeVilbiss Co.*, 102 N.L.R.B. 1317 (1953) (prohibiting union t-shirts and buttons).

justifications occasionally have validity, they often appear to be artful pretenses accepted by tribunals insufficiently protective of the workers' statutory rights.²¹ Cases allowing employers to prohibit union insignia, therefore, merit examination, even though the task may seem "like a weary pilgrimage amongst hints for nightmares."²²

A. *Avoiding Harm to Customer Relations*

Employers frequently have banned union insignia on the grounds that such displays of union loyalty could tarnish the company's image and alienate customers. The appellate courts often have validated this reasoning, refusing to enforce the Board's findings of an unfair labor practice. Moreover, the Board itself has wavered in its response to this issue. Without regard for consistency, the Board has rejected this line of defense in some cases while accepting it in others. This inconsistency has undermined the protection afforded by section 7²³ of the Act and *Republic Aviation*.

1. *Conflict Between the Board and Appellate Courts*

Floridan Hotel of Tampa,²⁴ first decided by the Board in 1961, exemplifies both the ambiguities of the Board's approach and the meddlesome role of the courts of appeals. In *Floridan*, unionized workers at a hotel and restaurant began wearing small union pins as part of an effort to increase membership.²⁵ The employer responded by posting the following notice:

BULLETIN

A number of guests have called to the attention of the Management that many employees are wearing union badges during working hours and on uniforms.

We do not feel that it lends to the dignity of our Hotel for employees to openly display badges of any sort, whether it be a union badge, lodge, or what have you.

²¹ The National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

²² JOSEPH CONRAD, *HEART OF DARKNESS* 14 (1963). Moreover, the reader may also be left with Marlow's feeling of "a mournful and senseless delusion." *Id.* at 13.

²³ 29 U.S.C. § 157.

²⁴ 130 N.L.R.B. 1105 (1961), *enforcement denied*, 300 F.2d 204 (5th Cir.), *on remand*, 137 N.L.R.B. 1484 (1962), *enforced as modified*, 318 F.2d 545 (5th Cir. 1963).

²⁵ See *Floridan Hotel of Tampa*, 130 N.L.R.B. 1105, 1109, 1111 (1961) (*Floridan I*), *enforcement denied*, 300 F.2d 204 (5th Cir.) (*Floridan II*), *on remand*, 137 N.L.R.B. 1484 (1962) (*Floridan III*), *enforced as modified*, 318 F.2d 545 (5th Cir. 1963) (*Floridan IV*).

Therefore, there is hereby established a rule that no badges of any kind will be worn by any employee so that they may be seen by any customer or guest.

Management
HOTEL FLORIDAN²⁶

This notice was misleading in two ways. First, only one guest had mentioned the pins to the employer.²⁷ Furthermore, notwithstanding the notice's wording, the employer applied the new rule to *all* employees, even if they had no contact with the hotel's patrons.²⁸ The employer warned that workers continuing to wear pins would be discharged or have to "suffer the consequences."²⁹

The employer defended its prohibition by claiming that the pins detracted from the hotel's dignity and offended many of its guests.³⁰ Even if true, that rationale could not excuse the rule's application to employees that did not interact with patrons.³¹ The Board therefore concluded that the employer had violated section 8(a)(1) of the Act.³² However, the Board expressly refrained from deciding whether the employer could prohibit employees that were in contact with patrons from wearing the pins.³³

The Fifth Circuit refused to enforce the Board's order.³⁴ The court argued that the employer's written rule applied only to employees interacting with the hotel's patrons and that "the Board's determination that the rule prohibited the wearing of union insignia by *all* employees . . . [was] unsupported."³⁵ The court then remanded the case so the Board could decide whether the employer lawfully prohibited pin-wearing by employees in regular contact with patrons.³⁶

²⁶ *Id.* at 1110.

²⁷ *See id.* at 1112. As the Board's trial examiner reasoned, "Certainly this one man, who allegedly was rebuffed by the appearance of the pins, does not represent a true cross-section of the opinion of the hotel guests." *Id.* Moreover, the Fifth Circuit later noted, "It is not claimed that [the guest's observation] was in the nature of a complaint." *Floridan IV*, 318 F.2d at 546 n.1.

²⁸ *See Floridan I*, 130 N.L.R.B. at 1106, 1111.

²⁹ *Id.* at 1106.

³⁰ *See id.* at 1111.

³¹ *See id.* at 1106, 1111.

³² *See id.* at 1106-07. Section 8(a)(1) is codified at 29 U.S.C. § 158(a)(1).

³³ *See id.* at 1107.

³⁴ *See Floridan II*, 300 F.2d at 205.

³⁵ *Id.* at 207 (emphasis added).

³⁶ *See id.*

On remand, the Board decided that the employer's rule violated the Act even as applied to such employees.³⁷ The Board reasoned:

The right of employees to wear union insignia at work has long been recognized as a protected activity. The promulgation of a rule prohibiting the wearing of such buttons constitutes a violation of Section 8(a)(1) in the absence of evidence of "special circumstances" showing that such a rule is necessary to maintain production and discipline. No "special circumstances" appear to have existed at the Respondent's hotel. As the facts show, there was no strike, and there was no union animosity or friction between groups of employees. The buttons were being worn only as part of the recognized and certified Union's campaign to increase its membership. Nor were the legends on the buttons provocative in any way. Indeed, there is no contention that a prohibition against wearing the buttons was in any way necessary to maintain employee discipline. Moreover, the evidence does not support the Respondent's assertion that the buttons, which were small, neat, and inconspicuous, detracted from the dignity of the hotel, and there is no evidence that they caused any diminution of the Respondent's business. Under these circumstances, we find that the fact that the employees involved come in contact with hotel customers does not constitute "special circumstances" as to deprive them of their right, under the Act, to wear union buttons at work.³⁸

The Fifth Circuit then enforced the Board's order, albeit "with the caveat that our approval is related specifically to the factual situation here presented, or in a like or substantially related manner."³⁹ Judge Lewis, however, dissented from even this grudging enforcement. Lewis emphasized the hotel's need "to avoid customer irritation," asserted that "unionism is a source of controversy," and argued that an employer should not be "required to await diminution of business" before prohibiting union insignia.⁴⁰ He therefore would have denied enforcement of the Board's order to the extent that it protected employees "in continuous and daily contact with the public."⁴¹

Taken as a whole, the *Floridan* opinions are less a reaffirmation of the right to wear union insignia than a warning that this freedom is highly precarious. The Board's second opinion pointedly observed

³⁷ See *Floridan III*, 137 N.L.R.B. 1484, 1486.

³⁸ *Floridan III*, 137 N.L.R.B. at 1486 (footnotes omitted).

³⁹ *Floridan IV*, 318 F.2d at 548-49 (footnote omitted).

⁴⁰ *Id.* at 549 (Lewis, J., dissenting).

⁴¹ *Id.* at 550.

that "special circumstances" could curtail this right, and the Fifth Circuit's hesitant enforcement of the Board's ultimate order is hardly reassuring to those committed to the protection of section 7 rights. Indeed, Judge Lewis's dissent foreshadowed the approach of appellate courts that have overruled the Board based on speculative fears of customer disgruntlement.

The Ninth Circuit's 1964 decision in *NLRB v. Harrah's Club*⁴² typifies this development. In *Harrah's Club*, an operator of casinos, lounges, and restaurants maintained a longstanding rule providing that "no emblems, badges, buttons, jewelry, or ornaments of any kind, except name pins, shall be displayed on uniforms worn by employees who come into contact with the public."⁴³ Having applied this rule to other types of insignia, the employer also enforced it when employees began wearing union buttons provided by their collective bargaining representative. The employer warned that employees that insisted upon wearing these or other buttons would be discharged.⁴⁴

The Board concluded that the employer's actions were unlawful. As the Board explained:

There is no evidence that the union pins caused customer complaints, occasioned any loss of business to Respondent, caused friction between union and nonunion employees, or detracted from the dignity of Respondent's business operation.

...

... Accordingly, for the reasons expressed in our *Floridan* decision, we find that Respondent's rule as applied to wearing union insignia, violates Section 8(a)(1) of the Act.]⁴⁵

The Ninth Circuit refused to enforce the Board's order.⁴⁶ The court argued that the wearing of these union buttons was not protected by section 7 of the Act because the employees already were represented by a union and were not wearing the buttons as part of a campaign to increase union membership or improve their terms and conditions of employment.⁴⁷ The court asserted:

⁴² 337 F.2d 177 (9th Cir. 1964), *denying enforcement to* 143 N.L.R.B. 1356 (1963).

⁴³ *Harrah's Club*, 143 N.L.R.B. 1356, 1369 (1963), *enforcement denied*, 337 F.2d 177 (9th Cir. 1964).

⁴⁴ *See id.* at 1368-69.

⁴⁵ *Id.* at 1356-57.

⁴⁶ *See NLRB v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964), *denying enforcement to* 143 N.L.R.B. 1356 (1963).

⁴⁷ *See id.* at 178-79.

The Supreme Court [in *Republic Aviation*] has held that the wearing of union buttons comes under [section 7's protection] of "other concerted activities." However, we do not think that the Supreme Court intended to erect this into a rule which makes the wearing of union buttons per se a guaranteed right. We think there must be evidence of a purpose protected by the [Act] - i.e., collective bargaining or other mutual aid or protection. This record is totally devoid of any evidence of such a purpose. On the contrary, the only evidence on the question of purpose - the testimony of the employees themselves - shows that they had no express purpose in mind in wearing the buttons. There was no attempt to organize the employees: they were already organized. There was no attempt to wring from management better wages, hours, or working conditions.⁴⁸

The court's argument reflects an impoverished understanding of section 7. In addition to assuring workers the right to form unions and bargain collectively, section 7 also guarantees the freedom "to engage in *other* concerted activities for the purpose of . . . *other* mutual aid or protection."⁴⁹ Such broad language would clearly seem to encompass the right of workers to nurture unity and collective strength by wearing insignia. The court's insistence that the buttons be related to an immediate and specific objective ignores the union's interest in maintaining loyalty and morale on a daily basis.

Taking its cue from Judge Lewis's dissent in *Floridan*, the court also emphasized the employer's desire to project a professional, noncontroversial image to the public:

Most business establishments, particularly those which, like respondent, furnish service rather than goods, try to project a certain type of image to the public. One of the most essential elements in that image is the appearance of its uniformed employees who furnish that service in person to customers. The evidence shows that respondent has paid close attention to its public image by a uniform policy of long standing against the wearing of jewelry of any kind on the uniform. Respondent should not be required to wait until it receives complaints or suffers a decline in business to prove special circumstances. Businessmen are required to anticipate

⁴⁸ *Id.* at 179 (footnotes omitted). The court also maintained that "in *Floridan* the wearing of the buttons was a part of the 'Union's campaign to increase its membership' and the company rule was not announced until after the wearing of the union buttons had begun. . . . *Floridan* is clearly distinguishable from this case." *Id.*

⁴⁹ 29 U.S.C. § 157 (emphasis added).

such occurrences and avoid them if they wish to remain in business. This is a valid exercise of business judgment, and it is not the province of the Board or of this court to substitute its judgment for that of management so long as the exercise is reasonable and does not interfere with a protected purpose.⁵⁰

Again, however, the court's reasoning was too shallow. First, the court failed to explain how the union insignia detracted from the professional appearance of its employees. The implicit corollary to the court's argument is that there is something unprofessional about an employee's quiet expression of union solidarity. Yet, the court offered no support for such a harsh, anti-labor assumption. Furthermore, it simply is irrelevant that the employer also forbade the wearing of jewelry and other emblems, for they were not related to the workers' statutorily protected right to signify loyalty to their union. Finally, the court's conclusion that union insignia may be prohibited before even a single patron complains subordinates workers' rights to an employer's unilateral, unsubstantiated speculation. For these reasons, the Ninth Circuit's ruling in *Harrah's Club* represents an unjustifiable undermining of rights recognized and protected by the Act and *Republic Aviation*.⁵¹

Nevertheless, the Fifth Circuit followed *Harrah's Club* in *Davison-Paxon v. NLRB*.⁵² In *Davison-Paxon*, a department store permitted its salesclerks to wear tiny blue union buttons but objected when they began wearing yellow buttons the size of a Kennedy half dollar. The employer stated that such "gaudy" buttons violated its dress code, which required employees to maintain a "businesslike appearance," and could not be worn in areas frequented by customers.⁵³ A salesclerk that persisted in wearing the yellow button on the selling floor was then terminated.⁵⁴

⁵⁰ *Harrah's Club*, 337 F.2d at 180 (footnote omitted).

⁵¹ The Board refused to follow *Harrah's Club* in *Consolidated Casinos Corp.*, 164 N.L.R.B. 950 (1970), where it held that a casino operator violated § 8(a)(1) of the Act by prohibiting workers from wearing union steward buttons. The Board distinguished *Harrah's Club* because, in *Consolidated*, the union was attempting to organize the workers and the employer had committed numerous unfair labor practices to prevent unionization. See *Consolidated*, 164 N.L.R.B. at 950-51. The Board also emphasized, however, that "there was no substantial evidence that [the buttons] affected Respondent's business or that the prohibition against wearing them was necessary to maintain employee discipline." *Id.* at 950. This approach is preferable to the Ninth Circuit's unthinking acceptance of the employer's self-serving assertion of a business justification.

⁵² 462 F.2d 364 (5th Cir. 1972), *denying enforcement to* 191 N.L.R.B. 58 (1971).

⁵³ See *Davis-Paxon Co.*, 191 N.L.R.B. 58, 58-59 (1971), *enforcement denied*, 462 F.2d 364 (5th Cir. 1972).

⁵⁴ See *id.* at 59-60.

In an opinion adopted by the Board, the trial examiner held that the employer's actions violated sections 8(a)(1) and 8(a)(3) of the Act. The trial examiner reasoned that the employer could not ban the buttons from the selling floor based on the speculation that they might offend customers.⁵⁵ He further found that the buttons had not caused undue tension among employees and concluded that there was "no business, efficiency, or controversial reason here to curtail the general right of salespeople to wear union campaign buttons . . . even on the selling floor."⁵⁶

The Fifth Circuit⁵⁷ refused to enforce the Board's order for a series of unpersuasive reasons. First, the court emphasized that the employer's dress code forbade items "which are unfashionable or in bad taste" and had been applied to other articles such as culottes and miniskirts.⁵⁸ As in *Harrah's Club*, however, such reasoning is intellectually anemic. As an initial matter, it reveals the court's perception that union buttons are inherently unrespectable or unbusinesslike. Furthermore, it is irrelevant that the dress code covered miniskirts and other matters of sartorial taste because such items do not involve organizational rights protected by the Act. It is one thing to forbid employees from wearing "gaudy" clothing; it is quite different to prohibit them from engaging in statutorily protected organizational activity simply because one does not like the size and color of their buttons. The court's blindness to this critical difference leaves employees at the mercy of an employer's subjective judgment of what is déclassé and trivializes the workers' need for expression.

The court also reasoned that the employer "was concerned primarily with the button's capacity to antagonize its customers" and admonished the Board to recognize this "immediate and press-

⁵⁵ See *id.* at 60-61.

⁵⁶ *Id.* at 61.

⁵⁷ *Davis-Paxon v. NLRB*, 462 F.2d 364 (5th Cir. 1972), denying enforcement to 191 N.L.R.B. 58 (1971).

⁵⁸ *Id.* at 368 & n.12. The court also noted that the yellow buttons were somewhat larger than the insignia in *Floridan* and *Consolidated Casinos*. See *id.* at 368. As the trial examiner had reasoned, however, "When general principles of labor law are determined by the eighth or the quarter of an inch . . . , then it will be time for 'Bumble' to turn over in his grave and repeat his famous observation, 'the law is a Ass.'" *Davis-Paxon Co.*, 191 N.L.R.B. at 61 (quoting CHARLES DICKENS, *OLIVER TWIST* 335 (Kathleen Tillotson ed., Clarendon ed., Oxford 1982) (1846)). The court's testy response, that "it would be equally asinine . . . to ignore the size of the button and its capacity for being noticed," *Davis-Paxon*, 462 F.2d at 368, does nothing to blunt the trial examiner's point: Section 7 rights cannot be measured by a ruler. Furthermore, the court seemed oblivious to the fact that a button's *raison d'être* is to be noticed.

ing concern to retail and service establishments.”⁵⁹ Moreover, the court asserted that an employer “should not be required to wait until it receives complaints or suffers a decline in business to prove special circumstances” that would justify prohibiting union insignia.⁶⁰

This argument, however, is too quick to make the dual assumptions that the buttons would alienate customers and that such alienation would justify the prohibition. Neither assumption is necessarily valid. The assumption that the store’s patrons would be offended by the buttons is unwarranted because customers, due to their own union sympathies, are more likely to be pleased rather than offended by the insignia.⁶¹ Indeed, the repeated insistence by employers and courts that union insignia could destroy a company’s public image has little basis in reality. As polls reveal, far more Americans have approved rather than disapproved of labor unions throughout the history of the Act.⁶² In 1988, for example, sixty-one percent of Americans polled approved of unions, compared to only twenty-five percent that disapproved.⁶³ Furthermore, sixty-nine percent of those polled agreed that “labor unions are good for the nation as a whole,” and eighty-one percent stated that workers should be free to choose union representation.⁶⁴ These findings controvert the fear that the public would not frequent establishments that allow employees to wear union emblems.

Furthermore, the fact that some unspecified minority of customers might be offended by union buttons should not deprive workers of their section 7 rights. For many years, the Board and courts have emphasized that an employer’s fear of losing customers is no excuse for violating the Act.⁶⁵ As Judge Learned Hand declared:

⁵⁹ *Davis-Paxon*, 462 F.2d at 370 (footnote omitted).

⁶⁰ *Id.* at 371 (quoting *Harrah’s Club*, 337 F.2d at 180). For a discussion of *Harrah’s Club*, see *supra* notes 42-51 and accompanying text.

⁶¹ In 1972, when the Fifth Circuit decided *Davison-Paxon*, 59% of Americans polled stated that they approved of labor unions whereas only 26% expressed disapproval. See MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 35 (1987).

⁶² For a summary of public opinion polls taken from 1936 to 1985, see *id.* Even in 1981, when public support for unionism reached its nadir, 55% of Americans approved of labor organizations compared to 35% that disapproved. See *id.* at 35.

⁶³ PAUL WEILER, *GOVERNING THE WORKPLACE* 106 n.3 (1990).

⁶⁴ See *id.* at 299-300.

⁶⁵ See, e.g., *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942) (holding that employer violated Act by discharging employee for his role in passing resolution critical of the employer’s stance in labor controversy), *enforcing* 33 N.L.R.B. 1170 (1941).

[S]o long as the [concerted] "activity" is not unlawful, we can see no justification for making it the occasion for a discharge; a union may subsidize propaganda, distribute broadsides, support political movements, and in any other way further its cause or that of others whom it wishes to win to its side. Such activities may be highly prejudicial to its employer; *his customers may refuse to deal with him*, he may incur the enmity of many in the community whose disfavor will bear hard upon him; but the [Act] forbids him by a discharge to rid himself of those who lay such burdens upon him. Congress has weighed the conflict of his interest with theirs, and has pro tanto shorn him of his powers.⁶⁶

The *Davison-Paxon* court next argued that there had been tension between pro-union and anti-union employees and that the employer reasonably feared "that the union conflict might erupt on the sales floor if proper steps were not taken against use of the yellow button."⁶⁷ That assertion, however, had been decisively refuted by the trial examiner. As the trial examiner had concluded, the employer's fears of worker conflict "were not only speculative, but, indeed, unwarranted in this case."⁶⁸

The court also emphasized that the case involved union *campaign* buttons, which it asserted are inherently "more provocative" than emblems that merely signify union membership.⁶⁹ This assumption

⁶⁶ *Peter Cailler*, 130 F.2d at 506 (emphasis added).

Peter Cailler must be distinguished from instances when employees disparage the quality of their employer's product in a manner that bears no discernible relation to a pending labor controversy. In *NLRB v. Local Union No. 1229*, 346 U.S. 464 (1953), for example, technicians publicly attacked the quality of their employer's broadcasting in handbills that made no reference to their union, collective bargaining, or their labor dispute with the employer. Under these circumstances, the Supreme Court ruled that the employer's discharge of those employees was not violative of the Act. *See id.* at 476-78. Such misconduct, of course, bears no relation to the peaceful wearing of union symbols that do not disparage the employer or its products. Furthermore, it bears emphasis that Judge Hand's statement remains good law and has been quoted with approval in more recent Board and judicial opinions. *See, e.g., Kaiser Eng'rs v. NLRB*, 538 F.2d 1379, 1385 n.4 (9th Cir. 1976) (holding that employer violated Act by retaliating against employees that lobbied Congress), *enforcing* 213 N.L.R.B. 752 (1974); *Hennepin Broadcasting Assocs.*, 225 N.L.R.B. 486, 506 (1976) (holding that strikers' appeals to customers not to patronize employer during labor dispute were protected by § 7), *enforced*, 96 L.R.R.M. (BNA) 2585 (8th Cir. 1977).

⁶⁷ *Davison-Paxon*, 462 F.2d at 369.

⁶⁸ *Davison-Paxon*, 191 N.L.R.B. at 61. For a discussion of fear of employee conflicts as a justification for prohibiting union insignia, see *infra* notes 134-199 and accompanying text.

⁶⁹ *See Davison-Paxon*, 462 F.2d at 369.

seems counterintuitive⁷⁰ and would deprive workers of the right to wear insignia when it arguably is most crucial, when a union organization drive is underway and employees are appealing to their co-workers to make common cause.⁷¹ In essence, the Fifth Circuit in *Davison-Paxon* made the converse error of the Ninth Circuit in *Harrah's Club*. Whereas the Ninth Circuit blundered by assuming that employees are entitled to wear union insignia *only* for a specific purpose, such as to organize co-workers, the Fifth Circuit erred by suggesting that workers enjoy *less* protection when the insignia are for such a purpose. Both perspectives are incomplete, for they underestimate the breadth of section 7's protection and the need of workers to demonstrate union solidarity both in times of challenge and in times of relative calm. Although the Fifth Circuit purported "to maintain a proper balance between conflicting interests of management and labor,"⁷² it tipped the scales by according great weight to the employer's conjectural fears and virtually none at all to the workers' organizational rights.

The Sixth Circuit's 1984 decision, *Burger King Corp. v. NLRB*,⁷³ displays similar insensitivity to workers' rights. In *Burger King*, the management of a fast-food restaurant forbade employees from wearing union buttons.⁷⁴ The Board held that this violated section 8(a)(1) of the Act, stating:

It is well settled that, in the absence of special circumstances, an employee's wearing a union button at work is protected activity under Section 7 of the Act. Respondent argues . . . that [the employee's] contact with customers constituted such a special circumstance, reasoning that Respondent seeks to project a neat, standard appearance by its employees and is therefore justified in

⁷⁰ Even assuming *arguendo* that some of the store's customers were hostile to unions, it would seem that they would be more provoked by union membership buttons, which signify that employees are in fact represented by a labor organization, than by union campaign buttons, which merely reflect the aspiration of individual wearers to be unionized.

⁷¹ As the Board has stated, "The right of workers to organize freely for the purpose of collective bargaining is a very strong Section 7 right, one found by the Supreme Court to be 'at the very core of the purpose for which the [Act] was enacted.'" *New Process Co.*, 290 N.L.R.B. No. 83, 1987-1988 NLRB Dec. (CCH) ¶ 19,520 (July 29, 1988) (footnote omitted) (ordering employer to cease and desist from wiping dirt or grease on union insignia worn by employees) (quoting *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978)), *enforced without opinion*, 872 F.2d 413 (3d Cir. 1989).

⁷² *Davison-Paxon*, 462 F.2d at 372.

⁷³ 725 F.2d 1053 (6th Cir. 1984), *denying enforcement in relevant part to* 265 N.L.R.B. 1507 (1982).

⁷⁴ See *Burger King Corp. v. NLRB*, 725 F.2d 1053, 1053 (6th Cir. 1984), *denying enforcement in relevant part to* 265 N.L.R.B. 1507 (1982).

prohibiting employees with substantial customer contact from wearing union buttons. However, "mere contact with customers is not a basis for barring the wearing of union buttons," and absent "substantial evidence that the button affected Respondent's business or that the prohibition was necessary to maintain employee discipline," requiring the removal of such a small, nonprovocative button is unlawful. Respondent here has shown nothing more than that [the employee] had customer contact. This does not, in and of itself, constitute a "special circumstance" and does not justify prohibiting employees with customer contact from wearing such a union button.⁷⁵

Although the Board reached a just result, its reasoning was too limited. By emphasizing that the button was "small" and "non-provocative" (one and one-half inches in diameter), it left open the issue of when insignia would be considered so large or inciting as to be validly banned.⁷⁶ Such a vague limitation offers little protection to workers and invites future litigation.

Even this limited protection was disapproved by the Sixth Circuit, however, which refused to enforce this aspect of the Board's decision. The court emphasized that the restaurant required all employees to wear uniforms and, with occasional lapses, had enforced a rule that "only company approved name tags, buttons and alterations in uniforms are allowed."⁷⁷ The court then concluded:

Here Burger King has attempted to project a clean, professional image to the public. It has consistently enforced its policy against wearing unauthorized buttons in a nondiscriminatory manner. It is a national fast food chain deriving much of its recognition from its uniform public image. It is not asserted that this policy had its inception because of labor unions or union activities. There are special circumstances which justify this prohibition.⁷⁸

The court proceeded to promulgate a per se rule that "where an employer enforces a policy that its employees may only wear

⁷⁵ Burger King Corp., 265 N.L.R.B. 1507, 1507-08 (1982) (citations omitted), enforcement denied in relevant part, 725 F.2d 1053 (6th Cir. 1984).

⁷⁶ The Board's distinction of its prior decisions in United Parcel Serv., 195 N.L.R.B. 441 (1972), discussed *infra* at notes 93-102 and accompanying text, and Great Western Coca Cola Bottling Co., 256 N.L.R.B. 520 (1981), discussed *infra* at note 110, was also unsatisfactory. The Board simply argued that in those cases the employees could at least wear "small unprovocative union buttons," whereas, in the case at bar, the employer had prohibited the wearing of similarly sized insignia. See *Burger King*, 265 N.L.R.B. at 1508 n.4.

⁷⁷ *Burger King*, 725 F.2d at 1055.

⁷⁸ *Id.*

authorized uniforms in a consistent and nondiscriminatory fashion and where those employees have contact with the public, a 'special circumstance' exists as a matter of law which justifies the banning of union buttons."⁷⁹

This approach is unjustifiable. First, as Judge Merritt noted in his partial dissent, "There [was] no evidence in the record indicating even the possibility that customers might complain about such buttons or that these buttons damaged the employees' image more than the few [non-union] buttons sanctioned by the employer."⁸⁰ Indeed, it borders on the facetious to suggest that Burger King's "image" could be devalued by the presence of union insignia. The court's emphasis that Burger King employees wear uniforms is also misguided, for that should not defeat a worker's right to signify union sympathies. Finally, the court's per se rule, that union buttons may be forbidden if employees wear uniforms and have contact with the public, gives extreme and unjustifiable weight to the dual assumptions that customers would be alienated by the presence of union insignia and that this would necessarily justify such a prohibition.⁸¹

⁷⁹ *Id.* The Sixth Circuit recently reaffirmed its *Burger King* rule in *Hertz Corp. v. NLRB*, 136 L.R.R.M. (BNA) 2064 (6th Cir. 1990) (per curiam), *remanding* 297 N.L.R.B. No. 54, 1989-90 NLRB Dec. (CCH) ¶ 15,905 (Nov. 21, 1989), *acq. in result*, 305 N.L.R.B. No. 47 (Oct. 21, 1991). In sharp contrast to the Sixth Circuit, the Board, in *Glenlynn, Inc.*, 204 N.L.R.B. 299 (1973), held that the operator of a McDonald's drive-in restaurant violated the Act by insisting that an employee remove his union button.

⁸⁰ *Burger King*, 725 F.2d at 1056 (Merritt, J., concurring and dissenting).

⁸¹ The Sixth Circuit also reversed the Board in *Borman's, Inc. v. NLRB*, 676 F.2d 1138 (6th Cir. 1982), *denying enforcement* to 254 N.L.R.B. 1023 (1981). In *Borman's*, the Board found that the employer violated § 8(a)(1) by forbidding employees from wearing a T-shirt bearing a union inscription and the statement: "I'm tired of bustin' my ass." See *Borman's Inc.*, 254 N.L.R.B. 1023, 1023-25 (1981), *enforcement denied*, 676 F.2d 1138 (6th Cir. 1982). The Sixth Circuit refused to enforce that order, stating that the employer's conduct was "isolated" and that wearing the T-shirt was not protected by the Act. See *Borman's*, 676 F.2d at 1139. The court offered no analysis or citations to support these cryptic conclusions. The T-shirt in *Borman's* is materially different from the union emblems discussed throughout this Article, however, because it contained language that could be construed as profane rather than just pro-union. See also *Southwestern Bell Tel. Co.*, 200 N.L.R.B. 667 (1972) (upholding employer's ban on sweatshirts stating "Ma Bell is a Cheap Mother"). For further commentary regarding the regulation of profanity in the workplace, see James Atleson, *Obscenities in the Workplace: A Comment on Fair and Foul Expression and Status Relationships*, 34 *BUFF. L. REV.* 693 (1985); Ken Jennings, *Verbal and Physical Abuse Toward Supervision*, 29 *ARB. J.* 258 (1974).

Although not involving union insignia, and therefore beyond the scope of this Article, *Midstate Tel. Corp. v. NLRB*, 706 F.2d 401 (2d Cir. 1983), *denying enforcement in relevant part* to 262 N.L.R.B. 1291 (1982), further exemplifies the eagerness of some appellate tribunals to override the Board's determinations. In *Midstate*, employees returning to work after a prolonged strike wore T-shirts featuring a cracked facsimile of the employer's trademark and

Even when appellate courts protect the right to wear union insignia, they usually do so in a vague and unsatisfactory manner. In the Ninth Circuit's 1981 *Pay 'N Save Corp. v. NLRB*⁸² decision, for example, the court affirmed the Board's conclusion that a drug store operator violated sections 8(a)(1) and 8(a)(3) by discharging two sales clerks that had worn union buttons on the selling floor.⁸³ The court soundly rejected the employer's argument that it had acted to avoid offending customers, but its efforts to distinguish its previous decision in *Harrah's Club* were weak and troublesome. The court first emphasized that the wearing of insignia in *Pay 'N Save* was part of a union's organizational efforts whereas no such purpose existed in *Harrah's Club*.⁸⁴ The court then reasoned:

In our case the employee interest [in wearing insignia] is much stronger [than in *Harrah's Club*] since an organizing drive was under way, and the employer's interest in employee appearance is much weaker, since Pay 'N Save's clerks in their bright orange smocks have little in common with the service personnel of a casino/restaurant "on a par with . . . the finest theatre-restaurants in the world."⁸⁵

Similarly, the court attempted to distinguish the Fifth Circuit's opinion in *Davison-Paxon* by noting the existence of tension between pro-union and anti-union employees in that case. Furthermore, *Davison-Paxon* "involved a fashionable department store that liked its

the words, "I survived the Midstate Strike of 1971-1975-1979." *Midstate Tel. Corp.*, 262 N.L.R.B. 1291, 1291 (1982), *enforcement denied in relevant part*, 706 F.2d 401 (2d Cir. 1983). The Board determined that the employer's prohibition of these shirts violated the Act, emphasizing that the shirts "were clearly directed at promoting . . . solidarity" in the strike's aftermath and that there was no evidence that they would "tend to impair discipline, safety, or production." *Id.* at 1291-92.

The Second Circuit disagreed with the Board, arguing that the shirts could irritate relations between management and the workers and "might improperly suggest to the public that the Company was in some way coming apart." *Midstate*, 706 F.2d at 404. Each of these rationales is rather weak. First, it is doubtful that the rather innocuous T-shirt would either engender or worsen any animosity between employees and management. The hypothetical hypersensitivity of some management personnel is hardly adequate cause to stifle the workers' quest for solidarity. Second, the Board specifically noted that most of the workers wearing the shirts did not have regular working contact with the public. *Midstate*, 262 N.L.R.B. at 1291. Finally, it seems rather fanciful to assume that the public would misconstrue the shirts as evidence that the corporate employer was on the verge of collapse.

⁸² 641 F.2d 697 (9th Cir. 1981), *enforcing* 247 N.L.R.B. 1346 (1980).

⁸³ See *Pay 'N Save Corp. v. NLRB*, 641 F.2d 697, 704 (9th Cir. 1981), *enforcing* 247 N.L.R.B. 1346 (1980).

⁸⁴ See *Pay 'N Save*, 641 F.2d at 700-01.

⁸⁵ *Id.* at 701 n.10 (quoting *Harrah's Club*, 337 F.2d at 178 n.1).

employees to double as customers and models for its merchandise.”⁸⁶ Finally, the Ninth Circuit distinguished both *Harrah's Club* and *Davison-Paxon* by observing that the drug store in *Pay 'N Save* had permitted employees to wear other “potentially controversial” buttons while on duty.⁸⁷

Such distinctions, unfortunately, do little to clarify when employees may safely wear union insignia. First, as explained earlier,⁸⁸ it is misguided to hold that employees lose the right to wear union insignia unless they have an immediate goal in mind such as obtaining Board certification. Furthermore, drawing distinctions among drug stores, casinos, and department stores is arbitrary. The *Pay 'N Save* court's rationale appears to be that union buttons may be acceptable in menial work settings but not when the workplace is more exclusive or the clientele more wealthy or sophisticated. As such, the court's reasoning repeats the unjustifiable assumption that there is something déclassé or undignified about union insignia. Such an analysis inevitably implies that the workers' expression of union support is less important than an employer's desire for a sterile, bourgeois atmosphere. Finally, the *Pay 'N Save* court emphasized that the drug store had disparately applied its rule against insignia, but it failed to clarify which result it would have reached had the rule been applied in a nondiscriminatory manner.

The weakness of the Ninth Circuit's approach is further exemplified by *NLRB v. Rooney*,⁸⁹ a 1982 decision. In *Rooney*, the Board decided that a restaurant had discriminated against a waitress by laying her off for wearing a union button. The Board ordered the restaurant to cease and desist from “[d]emanding that employees remove union buttons and sending them home from work because they refuse to do so.”⁹⁰ The Ninth Circuit agreed that the restaurant had acted unlawfully, but held that the Board's order was overly broad because it would have prohibited any anti-button policy.⁹¹ Relying upon *Harrah's Club*, the court stated that “legitimate concern over the appearance of employees providing direct service to the public may justify restrictions on the right to wear buttons,”

⁸⁶ *Id.* at 701.

⁸⁷ *See id.*

⁸⁸ *See supra* notes 48-49 and accompanying text.

⁸⁹ 677 F.2d 44 (9th Cir. 1982), *modifying and remanding* 247 N.L.R.B. 1004 (1980).

⁹⁰ *Rooney*, 247 N.L.R.B. 1004, 1004 n.2, 1013-15 (1980), *modified and remanded*, 677 F.2d 44 (9th Cir. 1982).

⁹¹ *See NLRB v. Rooney*, 677 F.2d 44, 46-47 (9th Cir. 1982), *modified and remanded*, 247 N.L.R.B. 1004 (1980).

and concluded that "a business such as the restaurant involved here, that caters to theatre patrons, may place reasonable restrictions on the type of buttons worn, as long as such restrictions are not applied discriminatorily and do not unreasonably bar the wearing of appropriate union insignia."⁹²

Such reasoning is a study in vagueness. The court failed to explain why a restaurant serving theater patrons is materially different from a drug store, as in *Pay 'N Save*, or what constitutes appropriate union insignia. This cloudy analysis can only lead to further litigation. Even worse, such reasoning deters employees from wearing union emblems because they cannot predict with confidence when courts will protect their right to do so.

2. *The Board's Internal Inconsistency*

Although the appellate courts have played the primary role in limiting the right to wear union insignia, the Board itself must also bear part of the responsibility. In its 1972 *United Parcel Services, Inc.*⁹³ opinion, for example, the Board bowed to an employer's alleged need to protect its public image. In *United Parcel*, the employer required delivery truck drivers to be uniformed neatly and enforced a rule providing that "[v]isible garments which are not part of the uniform are never worn with it."⁹⁴ The only emblems permitted were small buttons signifying that workers had paid their union dues or had been recognized for safe driving.⁹⁵

Controversy arose when one of the drivers, who sought to be elected union business agent, distributed campaign pins. Numerous employees began wearing them and the employer responded by posting a notice reminding employees of the rule against unauthorized accessories.⁹⁶ Twenty drivers were discharged for continuing to wear buttons. An arbitrator ordered reinstatement of the fired workers, however, and they later filed charges with the Board.⁹⁷

The trial examiner held that the wearing of these buttons was "protected under Section 7 of the Act in that the employees have as much interest in who represents them in their affairs with the employer as they have in fixing the terms of their collective-bargain-

⁹² *Id.* at 47.

⁹³ 195 N.L.R.B. 441 (1972).

⁹⁴ *Id.* at 443.

⁹⁵ *See id.*

⁹⁶ *See id.* at 443-44.

⁹⁷ *See id.* at 444-45.

ing agreement.”⁹⁸ He then held that the employer’s notice “TO ALL EMPLOYEES” violated the Act because it banned all workers, including those that had no contact with the public, from wearing campaign buttons.⁹⁹

The Board overruled this determination on the ground that the prohibition, despite its wording, was applied only to drivers “when they were exposed to customers and the general public.”¹⁰⁰ The Board accepted, however, the trial examiner’s reasoning that such a limited ban would be lawful. The trial examiner asserted that the drivers’ appearance was essential to the employer’s public image and that the employer should not be forced to wait until receiving complaints or losing customers to prohibit the buttons.¹⁰¹ Finally, the trial examiner concluded:

As a practical matter, the driver on the route is giving up very little in not wearing the button. His union affiliation and union activities are made known to the public by wearing his union dues button. The public, at large, is little, or not at all, interested in the competition for the post of business agent that recurs internally to Local 294. The purpose of the button is to induce other members of Local 294 to vote for [the candidate]. This purpose may be achieved at the plant or in places where other members of Local 294 are present. The probabilities are very small that this purpose will be achieved were the button worn by the driver on his route. The record contains no evidence on this subject. Nevertheless, it is not unreasonable to find that the number of Local 294 members that a UPS driver meets on the delivery route is negligible. Thus, in balancing conflicting rights . . . , the restriction posted here

* *Id.* at 448 (footnote omitted) (citing *Aerodex, Inc.*, 149 N.L.R.B. 192, 198 (1964); *General Aniline & Film Corp.*, 145 N.L.R.B. 1215, 1218 (1964)). The Board found it unnecessary to review this aspect of the trial examiner’s decision, *see id.* at 441 n.3, but his conclusion was plainly correct. As the Sixth Circuit explained in *General Motors Corp. v. NLRB*, 512 F.2d 447, 448 (6th Cir. 1975), *enforcing as modified* 212 N.L.R.B. 133 (1974) and 211 N.L.R.B. 986 (1974):

[T]he election of officers has a significant bearing on the character of the union and hence contributes to the selection or rejection of the union as the employees’ bargaining representative. Consequently, we agree with the Board that a ban on the distribution of literature pertaining to the candidacy of individuals for union office is invalid

⁹⁹ *United Parcel*, 195 N.L.R.B. at 448.

¹⁰⁰ *Id.* at 441.

¹⁰¹ *See id.* at 450. The trial examiner also argued that the campaign buttons, which were two and one-half inches in diameter, were “conspicuous,” whereas the union dues buttons, which were less than an inch in diameter, were not. *See id.* at 443-44, 450. He failed, however, to explain at what point a button becomes “conspicuous” and thus validly objectionable.

deprives the employee of something of small value in relation to the potential damage to UPS.¹⁰²

Such reasoning is hollow and disturbing. First, the trial examiner fell into the *Harrah's Club* error of permitting the employer to enjoin union buttons based on the mere surmise that they could tarnish its public image. This assumption was unsupported by any evidence and is internally inconsistent with the examiner's assumption that the public had little or no interest in the campaign for union business agent. Given that people would already be apprised of the drivers' union membership, because of their union dues buttons, and presumably would have no interest in the intra-union campaign, they would not be offended by the buttons. Simply put, no "special circumstances" existed to justify the employer's prohibition.

The trial examiner's belief that the drivers derived little benefit from wearing the buttons is equally groundless. Obviously the drivers, who were in the best position to know, believed that wearing the buttons was useful. Otherwise they would not have risked their jobs by continuing to do so. Moreover, the trial examiner admitted that no evidence was presented regarding whether or not drivers saw one another on their routes, such as by meeting for lunch or on breaks. The examiner, therefore, had no objective basis for his conclusion that the workers' right to wear the buttons was outweighed by the employer's concern for its public image.

Despite these weaknesses, the Board soon relied on *United Parcel* later in 1972. In *Evergreen Nursing Home & Rehabilitation Center*,¹⁰³ a nursing home forbade employees from wearing any insignia except for nametags and pins related to nursing service.¹⁰⁴ When the employees began wearing union campaign buttons, the employer ordered removal of the emblems. In an opinion adopted by the Board, the trial examiner held that this did not violate the Act.¹⁰⁵

The trial examiner rested his decision on two grounds. First, he emphasized that the employees worked with "confused and disoriented" patients whose "reactions to outside stimuli of any sort are unpredictable and could cause severe agitation, upsetting Respondent's operations and control."¹⁰⁶ Second, he found that the buttons

¹⁰² *Id.* at 450.

¹⁰³ 198 N.L.R.B. 775 (1972).

¹⁰⁴ See *Evergreen Nursing Home & Rehabilitation Center*, 198 N.L.R.B. 775 (1972).

¹⁰⁵ See *id.* at 778-79.

¹⁰⁶ *Id.* at 779.

“detract[ed] from the dignity of the all-white uniform worn by the employees,” and that “[t]he neat and professional appearance of the nurses is an important part of Respondent’s image both to its patients and the public.”¹⁰⁷ He therefore concluded: “[T]he ‘special circumstances’ found herein justified Respondent’s rule on dress, implemented to ban the wearing of the union buttons used herein.”¹⁰⁸

Nursing home residents must be treated with care and respect, yet this does not justify the trial examiner’s conclusions. In the absence of actual complaints, the examiner was rash, and patronizing, to assume that patients would be agitated by the buttons.¹⁰⁹ Furthermore, the trial examiner’s assertion that the buttons detracted from the nurses’ dignity and professional appearance reflects anti-union bias rather than careful analysis. He failed to explain why the expression of union support is necessarily undignified or unprofessional. Finally, it is troubling that the Board adopted the trial examiner’s resolution of this issue without any substantive discussion.¹¹⁰

Other Board decisions, however, demonstrate a higher regard for workers’ section 7 rights. Indeed, the most striking feature of

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ The employer argued that one senile patient became upset by the buttons, but the trial examiner stated that he was “not convinced of the occurrence of this isolated incident,” and that even if it had occurred it would not have affected his disposition of the case. *See id.* at 778.

¹¹⁰ The Board merely stated in a footnote that the trial examiner’s conclusion was in accord with the reasoning of *United Parcel*. *See id.* at 775 n.1; *see also Great Western Coca Cola*, 256 N.L.R.B. 520 (holding that employer lawfully forbade employees from wearing union insignia in areas visible to the public). In contrast to *Evergreen*, in *Ohio Masonic Home*, 205 N.L.R.B. 357 (1973), *enforced*, 511 F.2d 527 (6th Cir. 1975), the Board found that a nursing home’s enforcement of an anti-button rule violated the Act. The Board distinguished *Evergreen* as follows:

In *Evergreen*, the employer had since its formation and prior to the union organizing campaign enforced a rule prohibiting employees from wearing any attachments to their clothing while at work except for name tags and pins relating to nursing service. The union insignia in that case consisted of bright yellow buttons 1-7/8 and 2-1/4 inches in diameter. The size and color of the buttons obviously detracted from the all white uniforms worn by the employees. In the present case, in contrast, the prohibition was against the wearing of union insignia but not other attachments. It was not adopted until the onset of the union organizing campaign, and the insignia was noticeably less conspicuous in size and color than the union buttons in *Evergreen*. In all the circumstances, we find that the prohibition against employees wearing union insignia at work was promulgated not because of Respondent’s concern with the health and welfare of its residents, but to thwart the Union’s organizational campaign.

Id. at 357; *see also Holladay Park Hosp.*, 262 N.L.R.B. 278 (1982) (distinguishing *Evergreen* based on employer’s discriminatory enforcement of dress code).

the Board's approach is its inconsistency. Despite *United Parcel* and its progeny, other opinions have continued to shelter employees from employer interference. As a consequence, the Board resembles "a double-minded man, unstable in all his ways."¹¹¹

In *Howard Johnson Motor Lodge*,¹¹² for example, the Board held that a motel's ban on union buttons violated section 8(a)(1) of the Act.¹¹³ As the administrative law judge explained:

Respondent's argument that it was justified in proscribing union button wearing by its employees because it feared that some of its customers or potential customers might react adversely or withhold their trade, is without merit. Respondent could as well argue that it is for that reason permitted to operate, and publicize that it operates, a "non-union motel." (Of course, it may conversely be conjectured that some of Respondent's potential customers might react favorably to employees wearing union buttons.) The lawfulness of the exercise by employees of their rights under the Act, including union button wearing, does not turn upon the pleasure or displeasure of an employer's customers.¹¹⁴

This analysis is commendable because it recognizes that the specter of consumer disapproval must not extinguish the right to wear union insignia. During the past decade, however, the Board's protection of union insignia typically has been less absolute. In *Holladay Park Hospital*,¹¹⁵ for example, the Board explained:

[E]ven though a health care employer claims to be motivated by a legitimate need to protect its patients from controversial issues, the Board will not find such "special circumstances" justifying a prohibition against wearing union insignia if the employer has discriminatorily enforced its dress code to allow employees to wear other types of buttons or attachments.¹¹⁶

Albertsons, Inc. (Albertsons II),¹¹⁷ also emphasizes the need for equal treatment of union and non-union adornments. As the ad-

¹¹¹ *James* 1:8.

¹¹² 261 N.L.R.B. 866 (1982), *enforced*, 702 F.2d 1 (1st Cir. 1983).

¹¹³ See *Howard Johnson Motor Lodge*, 261 N.L.R.B. 866, 872 (1982), *enforced*, 702 F.2d 1 (1st Cir. 1983).

¹¹⁴ *Id.* at 868 n.6; see also *Sierra Dev. Co.*, 231 N.L.R.B. 22, 28 (1977) (stating that "mere contact with customers is manifestly not a sufficient reason" for prohibiting union insignia), *enforced per curiam*, 604 F.2d 606 (9th Cir. 1979).

¹¹⁵ 262 N.L.R.B. 278 (1982).

¹¹⁶ *Id.* at 279.

¹¹⁷ 300 N.L.R.B. No. 142 (Dec. 21, 1990).

ministrative law judge explained, "Restrictions against wearing of any union emblem to further an employer's public image are occasionally approved. However, such cases appear against a backdrop of evidence showing that the employer strictly limits the wearing of any other emblems by employees coming in contact with the public."¹¹⁸

This approach assures that union emblems are not singled out for disadvantageous treatment. Such assurance is insufficient, however, because union emblems are entitled to *more* protection than fraternity pins, bracelets, and other personal trinkets. Unlike these latter items, the former pertain directly to rights enumerated in the Act. For that reason, the right to wear union insignia should not be predicated upon unequal wording or enforcement of a company's dress code.

The Board also has emphasized that a ban on union insignia must not be overly broad. In *Albertsons, Inc. (Albertsons I)*¹¹⁹ the Board stated:

[A]n employer may restrict the wearing of union emblems for considerations such as production, discipline, or customer relations. In this case, we conclude that the Respondent's restriction of buttons is unlawfully broad because it applies to nonselling as well as selling areas of the stores and applies to employee breaktime as well as time when employees are working. Accordingly, we find that the rule constitutes an unreasonable impediment to employee union activity and a violation of section 8(a)(1).¹²⁰

The significance of this declaration lies not in the protection afforded but rather in the protection impliedly withheld. *Albertsons I* clearly suggests that an employer *may* ban union insignia when employees are working in areas visible to the public,¹²¹ yet the Board

¹¹⁸ *Albertsons, Inc.*, 300 N.L.R.B. No. 142 (Dec. 21, 1990). Other recent cases also have emphasized that dress codes must not discriminate against union insignia. See, e.g., *Sears Roebuck & Co.*, 300 N.L.R.B. No. 102 (Nov. 30, 1990); *Uniontown Hosp. Ass'n*, 277 N.L.R.B. 1298 (1985).

¹¹⁹ 272 N.L.R.B. 865 (1984).

¹²⁰ *Albertsons, Inc.*, 272 N.L.R.B. 865, 866 (1984).

¹²¹ As one administrative law judge has observed, *Albertsons I* "implies that the current Board would find lawful a rule prohibiting the wearing of union insignia provided it permits employees the right to wear such insignia in nonselling areas, and does not apply to employee breaktimes when employees are not working." *Kroger Co.*, 284 N.L.R.B. 663, 684 (1987) (finding violation where rule applied to nonselling areas and nonworking time). In contrast, another administrative law judge has asserted that *Albertsons I* "gives no hint that the Board intended to depart from existing union emblems precedent." *Albertsons II*, 300 N.L.R.B. No. 142. This disagreement between the Board's own administrative law judges underscores the sadly indeterminate nature of current doctrine.

offered no explanation for this apparent shift in philosophy. The 1985 *Brocal Corp.*¹²² decision is to similar effect: After holding that an ambulance service had unlawfully prohibited union buttons, the Board ordered it to post the following notice to employees:

WE WILL NOT remove union buttons from your clothing, forbid you to wear union buttons, or threaten to discharge you for wearing union buttons; but we can restrict the wearing of union buttons during working hours while employees have contact with the public, if such a restriction is motivated by a legitimate non-pretexual reason which does not involve any element of union animus or discrimination between union insignia and other forms of insignia.¹²³

Once again, the Board apparently would permit employers to ban union insignia in many instances. However, no guidance is given as to precisely when an employer's fears of consumer disgruntlement would outweigh the employees' right to express union sympathies. The Board therefore leaves both employers and workers uncertain as to their legal rights and duties.

Yet another distinction drawn by the Board centers on the dignity or conspicuousness of the emblem in question. In *Nordstrom, Inc.*,¹²⁴ for example, the Board held that an employer unlawfully prevented a sales clerk from wearing a small union steward pin.¹²⁵ In an opinion approved by the Board, the administrative law judge explained:

The controlling fact of this case is that the button at issue is small, tasteful, and inconspicuous. The lack of an intrusive insignia . . . is likely to reduce controversy among the clientele and to avoid debasement of the fashionable image of the selling floor employees. . . . The instant steward pin is not of a size and intrusiveness which unreasonably interferes with Respondent's operations, when balanced against the recognized right to wear union insignia in the absence of special considerations.¹²⁶

Similarly, in *Hertz Corp.*,¹²⁷ the Board emphasized that union steward pins were protected because they were "unobtrusive and con-

¹²² 276 N.L.R.B. 631 (1985).

¹²³ *Brocal Corp.*, 276 N.L.R.B. 631, 631 (1985).

¹²⁴ 264 N.L.R.B. 698 (1982).

¹²⁵ See *Nordstrom, Inc.*, 264 N.L.R.B. 698 (1982).

¹²⁶ *Id.* at 702. The same approach was taken in *Albertsons II*, where the administrative law judge emphasized that the union emblems were protected because they were "subtle" and "consumer passive." See *Albertson II*, 300 N.L.R.B. No. 142, at 8-9.

¹²⁷ 297 N.L.R.B. No. 54 (Nov. 21, 1989), *remanded per curiam*, 136 L.R.R.M. (BNA) 2064 (6th Cir. 1990), *acq. in result*, 305 N.L.R.B. No. 47 (Oct. 21, 1991).

vey[ed] no message beyond the mere identification of the wearers as representatives of the Union.”¹²⁸ As one administrative law judge has concluded:

It appears . . . that an employer’s concern for the image it presents to the public may justify some limitation on employees’ wearing of union insignia if the employees to whom the prohibition is directed have significant contact with the public and if (at least in the Board’s view) the insignia are conspicuous. . . .¹²⁹

This, of course, is precisely the problem: How does one determine whether a union emblem is so conspicuous or intrusive that it loses the protection of section 7? Instead of safeguarding the right of employees to signify their union allegiance, the Board appears to be acting as an arbiter of fashion. The Board presents no principled way to determine the applicability of section 7 based on the size, color, or design of union insignia. Vague and subjective approaches only discourage the wearing of union insignia because, under such analyses, workers can never be certain when the Board will recognize and protect their rights.

3. *A Proposal to End the Conflict*

Stated bluntly, employers should no longer be permitted to prohibit union insignia by arguing that they could jeopardize customer relations. First, there is nothing in *Republic Aviation*¹³⁰ to suggest that the Justices ever envisioned such a rationale. Although the Court acknowledged that a ban on insignia could be justified “to maintain production or discipline,”¹³¹ it did not mention an employer’s conjectural fears of consumer alienation. Second, these fears *are* conjectural. In no case has an employer demonstrated a loss in business due to the wearing of union insignia by employees. Third, the general public approval of unions¹³² indicates that far more consumers would be pleased, rather than angered, by the sight of union insignia. Fourth, even assuming that some consumers

¹²⁸ Hertz Corp., 279 N.L.R.B. No. 54, at 1-2 (Nov. 21, 1989) (footnote omitted), *remanded per curiam*, 136 L.R.R.M. (BNA) 2064 (6th Cir. 1990).

¹²⁹ Page Avjet Corp., 275 N.L.R.B. 773, 777 (1985) (finding ban on union insignia unlawful because it applied to all employees regardless of whether they interacted with the public).

¹³⁰ For a discussion of *Republic Aviation*, see *supra* notes 11-19 and accompanying text.

¹³¹ *Republic Aviation*, 324 U.S. at 803-04 n.10.

¹³² See *supra* notes 61-64 and accompanying text.

would be displeased by union insignia, that does not legitimate an employer's interference with the workers' statutory rights.¹³³ Fifth, the "customer relations" exception has engendered a tide of litigation as employers, unions, and workers are confronted with poorly reasoned and conflicting opinions by the Board and courts of appeals.

Rather than continue in this unprincipled and indeterminate vein, the Board and courts should eliminate the "customer relations" exception. Doing so would clarify the law, decrease litigation, and treat section 7—and the American worker—with the respect they deserve. Until this step is taken, the right to wear union insignia will languish in a precarious state.

B. The Preservation of Workplace Discipline

Employers also have defended bans by alleging that union insignia could incite arguments and violence in the workplace. Such claims initially were greeted with skepticism, but employers have invoked them successfully in a number of questionable circumstances. As in the "customer relations" cases, the Board and courts have been too eager to accept employers' unilateral assertions and negate the right to display union insignia.

1. Conflict Between the Board and Appellate Courts

As early as 1938, the Board rejected an employer's "discipline" rationale.¹³⁴ In *Armour & Co.*,¹³⁵ a worker in a meatpacking house was discharged for refusing to remove a union steward button.¹³⁶ The employer argued that its action had been necessary because "the button was causing confusion and commotion in the plant and . . . 'there was very likely to be trouble, friction, fights, and even riots.'" ¹³⁷ The Board disagreed. Although "some confusion" had been created by employee reactions to the insignia, the Board found no basis "for the fear asserted by the respondent regarding a serious disturbance in the plant."¹³⁸

¹³³ See *supra* notes 65-66 and accompanying text.

¹³⁴ See *Armour & Co.*, 8 N.L.R.B. 1100 (1938).

¹³⁵ 8 N.L.R.B. 1100 (1938).

¹³⁶ See *id.*

¹³⁷ *Id.* at 1111.

¹³⁸ *Id.* at 1111 & n.5, 1112.

In contrast, the Fifth Circuit condoned an employer's prohibition in *NLRB v. El Paso Electric Co.*¹³⁹ In earlier proceedings, the court had enforced a Board order requiring the employer, *inter alia*, to cease and desist from interfering with its employees' section 7 rights.¹⁴⁰ The Board later petitioned to have the employer held in contempt, in part for prohibiting its workers from wearing union insignia.¹⁴¹ The Fifth Circuit refused, stating:

The company has a rule of long standing which requires that its employees do not display union insignia when on duty. We *surmise* the purpose is to discourage union arguments and disputes among the men on duty. In any case, it appears to have been enforced without discrimination. We do not think the enforcement of it since our decree is shown to have been intended to deny the right of the employees to organize, or to violate the decree in any manner.¹⁴²

The court's reasoning is disturbing. A mere *surmise* by an appellate tribunal cannot justify depriving workers of their right to display union insignia. Even if the court was correct in declining to hold the employer in contempt, it carefully should have examined the alleged interference with the employees' section 7 rights. Even more regrettably, the *El Paso* decision foreshadowed unquestioning use of the "discipline" rationale by subsequent tribunals.

The Ninth Circuit's *Boeing Airplane Co. v. NLRB*¹⁴³ decision shows this development. Following a bitter strike, subsequently found unlawful, the union responsible for the work stoppage and a rival union, unlawfully supported by the employer, began organizing campaigns to compete for the workers' allegiance.¹⁴⁴ The Board held that the employer violated the Act by prohibiting members of the

¹³⁹ 133 F.2d 168 (5th Cir. 1943) (per curiam).

¹⁴⁰ See *El Paso Elec. Co.*, 13 N.L.R.B. 213 (1939), *enforced as modified*, 119 F.2d 581 (5th Cir. 1941).

¹⁴¹ See *NLRB v. El Paso Elec. Co.*, 133 F.2d 168 (5th Cir. 1943) (per curiam).

¹⁴² *Id.* (emphasis added).

¹⁴³ 217 F.2d 369 (9th Cir. 1954), *denying enforcement in relevant part* to 103 N.L.R.B. 1025 (1953).

¹⁴⁴ See *Boeing Airplane Co. v. NLRB*, 217 F.2d 369, 371-72, 377 (9th Cir. 1954), *denying enforcement in relevant part* to 103 N.L.R.B. 1025 (1953). The strike had been found unlawful because it violated both the sixty day "cooling off" requirement of 29 U.S.C. § 158(d) and a no-strike provision in the collective bargaining agreement. See *Boeing Airplane Co. v. NLRB*, 174 F.2d 988 (D.C. Cir. 1949), *denying enforcement* to 80 N.L.R.B. 447 (1948). The employer's assistance of the rival union violated 29 U.S.C. § 158(a)(2), which, in relevant part, provides that it is unlawful for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

striking union from wearing their insignia.¹⁴⁵ The Board denied that the prohibition was needed to prevent friction between the rival unions, stating:

[T]he rules here in question were neither necessary to accomplish that objective nor reasonably related to that end. The Respondent had adopted other rules, such as those prohibiting name calling or derogatory remarks, which would accomplish the same results. . . . As for the "I am loyal to 751 [the striking union]" streamers, we find no reasonable basis in the record upon which it can be said that they are any more inflammatory, or any more likely to provoke clashes or other types of disorder, than any other manifestation of union adherence, such as a membership button.¹⁴⁶

The Ninth Circuit refused to enforce this aspect of the Board's decision. The court reasoned:

With such extremely inflammable materials as the passions of the rival unions, the Teamsters and 751, the wearing of the streamers and shop buttons must be viewed as the spark which might in a second set everything afire again. No doctrine can give immunity to symbols and expressions which are incitements to crime or violent action in breach of peace. . . . In the emergency, the supervisors did discourage the wearing of these symbols for the time, but there is no justification in the record for the conclusion of the Board that there was a "rule" on either, or that the prohibition lasted beyond the emergency.¹⁴⁷

The court's analysis contains several flaws. First, it distorts the facts to describe the rather innocuous buttons and streamers as "incitements to crime or violent action."¹⁴⁸ Second, the employer did not report any violence between followers of the rival unions, and, as the Board recognized, the employer's actions were unnecessary and inappropriate. Third, the court disingenuously suggested that the employer had no rule against wearing the insignia even though two employees were discharged or suspended for doing so.¹⁴⁹

¹⁴⁵ Boeing Airplane Co., 103 N.L.R.B. 1025, 1026 (1953), *enforcement denied in relevant part*, 217 F.2d 369 (9th Cir. 1954).

¹⁴⁶ *Id.* at 1026-27. In accordance with this reasoning, the Board also found that the employer had violated the Act by discharging an employee that refused to remove his union committeeman button and suspending a co-worker that wore a loyalty streamer. *See id.* at 1027 & n.6.

¹⁴⁷ *Boeing*, 217 F.2d at 375.

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* at 375. Even the court "reluctantly" accepted the Board's determination that the employer had discriminated against the union committeeman that refused to remove his button. *See id.* at 374.

Fourth, an employer should not be able to lend unlawful assistance to one of two competing unions and then seize upon the inter-union rivalry as a pretext for banning the disfavored union's insignia. Indeed, the court displayed a lack of impartiality by characterizing the union insignia as dangerous and obnoxious while excusing the employer's repeated violations of the law.¹⁵⁰

The Seventh Circuit's 1956 *Caterpillar Tractor Co. v. NLRB*¹⁵¹ decision also disregarded the Board's determinations. In *Caterpillar*, the certified union distributed buttons proclaiming "DON'T BE A SCAB!" and similar messages as part of its effort to increase membership.¹⁵² The employer did not object to the other messages but asserted that the "scab" buttons were inflammatory and suspended employees that continued wearing them.¹⁵³ The Board held that these actions violated sections 8(a)(1) and 8(a)(3) of the Act.¹⁵⁴ The Board reasoned:

It is to be expected that, in the heat of an organizational campaign, union members may solicit the loyalties of fellow employees with purpose and zeal, at times drawing upon the time-worn jargon of trade unionism. When this Board is called upon to strike down the statutory rights of employees embodied in Section 7 of the Act because of the content of organizational slogans which appear on campaign badges, the Board should do so only upon a clear showing that special circumstances exist which justify such action and that the interests to be thus served manifestly outweigh those of the employees whose rights are thereby being withheld. On the basis of the record before us, we do not believe that the Respondent's fears and anxieties concerning the wearing of the "Scab" button constitute, without more, such special circumstances as would justify curtailment of rights statutorily guaranteed to the Respondent's employees.¹⁵⁵

The Board's reasoning was clear and persuasive. It correctly emphasized that the statutorily guaranteed right to wear insignia

¹⁵⁰ For example, the court displayed apparent bias by stating: "[I]t is remarkable that, even if it were assumed that all the violations now found by the Board were to be accepted, Boeing was able to keep the *great organization* from any more acts which the Board would construe as violations." *Id.* at 377 (emphasis added).

¹⁵¹ 230 F.2d 357 (7th Cir. 1956), *denying enforcement to* 113 N.L.R.B. 553 (1955).

¹⁵² See *Caterpillar Tractor Co.*, 113 N.L.R.B. 553, 554 (1955), *enforcement denied*, 230 F.2d 357 (7th Cir. 1956). The other buttons stated: "I'M PAYING MY WAY ARE YOU?," "DON'T BE A FREE RIDER!," and "I JOINED HAVE YOU?" *Id.*

¹⁵³ See *id.* at 554-55.

¹⁵⁴ *Id.* at 555.

¹⁵⁵ *Id.* at 556.

should not be defeated by an employer's speculative allegations. Indeed, that right would be meaningless if it could be ignored whenever an employer raised fears of disruption. As the Board explained:

The "Scab" button was worn for approximately 2 1/2 days before its ban, and yet the record fails to disclose a single instance in which the Respondent's production processes suffered interruption or the threat of interruption, nor does it indicate that so much as a solitary murmur of resentment was heard from any employee because of the display of that button. To permit the abridgement of statutory rights on the basis of the anxieties expressed herein by the Respondent, without the least scintilla of evidence that production would be disrupted or breaches of discipline would erupt, would be tantamount to administrative withdrawal of rights legislatively endowed.¹⁵⁶

The Seventh Circuit, however, refused to enforce the Board's order.¹⁵⁷ The court asserted:

[T]he protective mantle of Section 7 is tempered by the employer's right to exact a day's work for a day's pay and to maintain discipline, and does not reach activities which inherently carry with them a tendency toward, or likelihood of, disturbing efficient operation of the employer's business. Perhaps no greater disruptive force can be found in the field of labor relations than that innate in the application of the term "scab" to one employee by his fellow workman. The term, when applied to one embraced in a labor group, bears an inescapable connotation of opprobriousness and vileness commonly recognized by all members of modern American society.¹⁵⁸

The court then argued that the employer's "*anticipation* that the 'Scab' button would prove disruptive of employee harmony in its plant and destructive of discipline in production was fully justified," and concluded that the employer "was under no compulsion to wait until resentment piled up and the storm broke before it could suppress the threat of disruption."¹⁵⁹

¹⁵⁶ *Id.* at 557.

¹⁵⁷ *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357 (7th Cir. 1956), *denying enforcement to* 113 N.L.R.B. 553 (1955).

¹⁵⁸ *Id.* at 358-59.

¹⁵⁹ *Id.* at 359 (emphasis added). The same approach was taken more recently in *Virginia Elec. & Power Co. v. NLRB*, 703 F.2d 79 (4th Cir. 1983), *denying enforcement to* 260 N.L.R.B. 408 (1982). In *Virginia Electric*, the Fourth Circuit overruled the Board and held

Here the court stumbled into error. In light of the Board's finding that the scab buttons had not caused the slightest tension among workers, the employer's claims of potential disruption were speculative and could not justify abridgement of the workers' section 7 rights.¹⁶⁰ Furthermore, as the Supreme Court later emphasized, "[I]n a number of cases, the Board has concluded that epithets such as 'scab,' 'unfair,' and 'liar' are commonplace in [labor] struggles and not so indefensible as to remove them from the protection of § 7, even though the statements are erroneous and defame one of the parties to the dispute."¹⁶¹ The Seventh Circuit's opinion was therefore an unjustifiable interference with the Board's efforts to protect the workers' rights.

Not all of the Board's efforts to protect union advocates have met the same arbitrary fate as in *Caterpillar*. In fact, *Kimble Glass Co.*,¹⁶² decided by the Board on the same day, was enforced by the Sixth Circuit. In *Kimble*, members of an incumbent union warned

that the employer did not violate the Act by asking a receptionist to remove a large union button. As the court concluded, "[T]he employer was not required to wait until a disturbance actually occurs before taking reasonable steps to maintain employee discipline and efficiency." *Id.* at 83.

¹⁶⁰ As a dissenting Board member observed, the relations between the employer and the union "were exceptionally cordial and harmonious." *Caterpillar*, 113 N.L.R.B. at 560 (Rodgers, dissenting). This history of peaceful cooperation diminished the risk of disruption or violence in the workplace.

¹⁶¹ *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 60-61 (1966). Although the *Linn* Court held that a state court libel action for malicious defamation was not preempted by the Act, the Justices emphasized that statements made in labor disputes are ordinarily protected by the Act. *See id.* at 60-61. Furthermore, in *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974), the Court held that a union's use of the term scab to describe workers that refused to become members was protected speech under the federal labor laws and could not be the basis for a state law defamation judgment. The Court stated:

Rather than being a reckless or knowing falsehood, naming the appellees as scabs was literally and factually true. One of the generally accepted definitions of "scab" is "one who refuses to join a union," and it is undisputed that the appellees had in fact refused to join the Branch. To be sure, the word is most often used as an insult or epithet. But *Linn* recognized that federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point. Indeed, the Court observed that use of this particular epithet is common parlance in labor disputes and has specifically been held to be entitled to the protection of § 7 of the NLRA.

Id. at 283 (citation omitted). The same logic should have been applied in *Caterpillar*. "Scab" is a recognized term for workers that refuse to join a union, and the court should not have deprived the employees of their § 7 protection simply because the word might bruise a co-worker's feelings.

¹⁶² 113 N.L.R.B. 577 (1955), *enforced per curiam*, 230 F.2d 484 (6th Cir. 1956).

that there could be violence and wildcat strikes¹⁶³ unless the employer prohibited supporters of a rival union from wearing insignia.¹⁶⁴ The employer succumbed to this pressure, banned all union emblems, and discharged twenty-one employees that refused to honor the prohibition.¹⁶⁵

The Board spurned the employer's defense that the incumbent union's threats constituted "special circumstances" and held that the employer's actions violated sections 8(a)(1) and 8(a)(3) of the Act.¹⁶⁶ The Board reasoned:

In our opinion, "special circumstances" require more than an employer's submission to the demands of an incumbent union or its members to prevent adherents of a rival union from exercising their legitimate self-organizational rights. Indeed, it has long been the settled law that an employer cannot excuse his interference with employees' rights because of pressure exerted upon him by a union. Yet, this appears to be precisely the case here. Instead of taking appropriate measures against the employees who threatened violence and a work stoppage, as would normally be expected, the Respondent took the course of least resistance and adopted the no-badge rule to the detriment of fellow employees seeking to exercise their legitimate rights.¹⁶⁷

The Board's conclusion was correct. Section 7 rights must not be extinguished by the pressure of employers or competing unions. The Board was also correct in rejecting the employer's argument that it could ban the buttons to preempt the possibility of conflict. The Board conceded that "an employer may not be required to wait for actual violence to occur in all circumstances," but explained that the employer should have sought "to enjoin the abusive conduct" instead of compelling employees to "abandon their statutory rights."¹⁶⁸ The Board found it "difficult to believe that the employer could not have maintained complete order and efficiency by making clear to employees that it would punish violation of rules against

¹⁶³ Wildcat strikes are work stoppages that either violate a collective bargaining agreement or are unauthorized by the union. See generally ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 307-11 & 604-20 (1976) (discussing wildcat strikes and the enforcement of no-strike clauses).

¹⁶⁴ *Kimble Glass Co.*, 113 N.L.R.B. 577, 593-94 (1955), enforced per curiam, 230 F.2d 484 (6th Cir. 1956).

¹⁶⁵ See *Kimble Glass*, 113 N.L.R.B. at 578-80.

¹⁶⁶ See *id.* at 583.

¹⁶⁷ *Id.* at 579 (footnotes omitted).

¹⁶⁸ *Id.* at 581.

disorder and interruption of production and by directing its managerial powers to that end rather than to banning union insignia."¹⁶⁹

The Sixth Circuit enforced the Board's order as "a reasonable exercise" of the Board's powers.¹⁷⁰ This decision was sound because it would have been unprincipled to allow a third party's unlawful threats to deprive employees of statutory rights. Regrettably, neither the Board nor the Sixth Circuit persuasively addressed the conflict between *Kimble* and *Boeing*.¹⁷¹ As Board member Rodgers emphasized in his *Kimble* dissent, the cases are factually analogous because each involved inter-union rivalry and an alleged fear of violence and disruption.¹⁷² The Board majority in *Kimble* downplayed this similarity, noting that in *Boeing* the Ninth Circuit "found an incendiary situation in the plant stemming from a history of violence and intimidation during a recent illegal strike."¹⁷³ This distinction contradicts the Board's own reasoning in *Boeing*, however, and the Board would have been more forthright if it explicitly had repudiated the Ninth Circuit's approach.¹⁷⁴ In this manner, the Board could have forcefully declared its commitment to protecting the workers' section 7 rights. The Sixth Circuit also made no effort to reconcile the two opinions, and simply cited *Boeing* without discussion.¹⁷⁵

¹⁶⁹ *Id.* at 580-81.

¹⁷⁰ *Kimble Glass Co. v. NLRB*, 230 F.2d 484, 485 (6th Cir. 1956) (per curiam), enforcing 113 N.L.R.B. 577 (1955).

¹⁷¹ For a discussion of *Boeing Airplane*, see *supra* notes 143-150 and accompanying text.

¹⁷² See *Kimble Glass*, 113 N.L.R.B. at 586-87 (Rodgers, dissenting).

¹⁷³ *Id.* at 579 n.7.

¹⁷⁴ In numerous cases the Board has refused to follow the conflicting views of appellate courts. See, e.g., *Insurance Agents' Int'l Union*, 119 N.L.R.B. 768 (1957), enforcement denied, 260 F.2d 736 (D.C. Cir. 1958), *aff'd*, 361 U.S. 477 (1960). In *Insurance Agents'*, the Board stated:

It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise.

Id. at 773. This decision is quoted in Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 707 (1989). Estreicher and Revesz acknowledge "the legitimacy of an agency's desire to maintain a uniform administration of its governing statute while it reasonably seeks the national validation of its preferred position." See *id.* at 771.

¹⁷⁵ See *Kimble Glass*, 230 F.2d at 485. An appellate court also supported the Board's approach in *Singer Co. v. NLRB*, 480 F.2d 269 (10th Cir. 1973), enforcing 199 N.L.R.B. 1195 (1972). In *Singer*, the Tenth Circuit accepted the Board's conclusion that fears of "interfactual hostilities" and a decrease in production did not justify the employer's prohibition of union insignia. See *id.* at 270-71.

2. *The Board's Internal Inconsistency*

The law in this area is further complicated by the Board's failure to speak in a clear and consistent manner. In *United Aircraft Corp.*,¹⁷⁶ for example, the Board accepted the employer's justification for banning union insignia.¹⁷⁷ In this case, there was a lengthy economic dispute in which only some 4,500 of approximately 16,000 employees remained on strike until a settlement was reached. The union sold special loyalty pins to employees that had honored the strike throughout the conflict. About 615 pins were sold and approximately forty-three employees wore them to work.¹⁷⁸

The employer demanded the removal of these pins, arguing that they could interfere with discipline and production by deepening animosities between loyal strikers and those that had crossed the picket line.¹⁷⁹ The trial examiner held that the employer had transgressed the Act,¹⁸⁰ but he was overruled by the Board. Because of continuing violence and threats against nonstrikers, the Board concluded that the prohibition was "a reasonable precautionary measure under the circumstances."¹⁸¹

United Aircraft is a difficult case. The tension in the plant was undeniable; certain union loyalists had vowed that "every strike-breaker will be hunted down," and "the cry 'scabbie' will ring loud and clear" and "follow some employees to their graves."¹⁸² Moreover, there were two reported instances of fighting, and three involving name-calling between strikers and nonstrikers following the settlement.¹⁸³ Such actions are regrettable, and one can certainly sympathize with the employer's desire for a peaceful and productive working environment.

Nonetheless, the Board exaggerated the extent of such problems and unjustifiably overrode the workers' section 7 rights. The threats and fighting involved only a few workers in a plant with approximately 16,000 employees.¹⁸⁴ Indeed, only forty-three employees, less than one percent of the work force, wore the loyalty pins, and the

¹⁷⁶ 134 N.L.R.B. 1632 (1961).

¹⁷⁷ *United Aircraft Corp.*, 134 N.L.R.B. 1632 (1961).

¹⁷⁸ *See id.* at 1633, 1636.

¹⁷⁹ *See id.* at 1633, 1638. The employer did not, however, ban the wearing of other union insignia. *See id.* at 1634 n.4.

¹⁸⁰ *See id.* at 1639-40.

¹⁸¹ *See id.* at 1633-35.

¹⁸² *See id.* at 1634.

¹⁸³ *See id.* at 1635 n.6.

¹⁸⁴ *See id.* at 1637.

Board did not indicate a single instance where the pins themselves incited disobedience or undermined production. Moreover, the union loyalists' threats rang hollow given that the overwhelming majority of workers had crossed the picket line. Furthermore, the employer could have maintained order by discharging those employees that threatened co-workers or disrupted production.¹⁸⁵ As the Board recognized in *Kimble*, the employer should have disciplined the actual instigators of violence instead of forbidding all employees from peacefully wearing loyalty pins. In fact, the union itself could have been prosecuted under section 8(b)(1)(A)¹⁸⁶ of the Act if it unlawfully coerced any workers. Finally, the Board naively assumed that prohibiting the loyalty pins would alleviate tensions. Bitterness ingrained over the course of a lengthy strike may not disappear with the compelled removal of union buttons. If anything, depriving the loyal strikers of a peaceful means of expression might harden their resentment and rekindle thoughts of retaliation.

Unfortunately, the *United Aircraft* decision ignored the strikers' interest in wearing their pins. These workers had endured weeks without pay, risked being permanently replaced,¹⁸⁷ and suffered the demoralization of seeing thousands of co-workers cross the picket line. In return for their sacrifices, the union could offer only loyalty pins. Such recognition, small as it may seem, could help restore the strikers' self-esteem and enhance the union's ability to preserve group solidarity in the event of future disputes. These aims are in keeping with the spirit of section 7 and should not be crushed because of isolated threats and misconduct.

¹⁸⁵ Employers clearly may discharge employees that assault or batter their co-workers. As one court explained, "All who 'gang up' or participate with others in assaulting and illegally intimidating a non-striking employee to prevent him from pursuing lawful gainful employment become particeps criminis and aiders and abettors and 'forfeit[] any right they may have had to reinstatement as employees.'" *Trailmobile Div., Pullman Inc. v. NLRB*, 407 F.2d 1006, 1018 n.7 (5th Cir. 1969) (quoting *NLRB v. Longview Furniture Co.*, 206 F.2d 274, 277 (4th Cir. 1953)); see also *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196, 206 (1962) (explaining that "conduct calculated to put a nonstriker in fear of bodily harm is sufficient to justify the employer in denying the status of employee to the misbehaving striker").

¹⁸⁶ 29 U.S.C. § 158(b)(1)(A) (prohibiting unions and their agents from restraining or coercing employees in the exercise of their § 7 rights).

¹⁸⁷ As the Supreme Court stated in *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938), an employer may hire permanent replacements to fill the positions of economic strikers. The Court explained that it is not "an unfair labor practice to replace the striking employees with others in an effort to carry on the business," and an employer "is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them." *Id.* at 345-46 (footnote omitted). For cogent criticism of the *Mackay Radio* doctrine, see WEILER, *supra* note 63, at 264-69.

The Board's 1989 decision in *Reynolds Electrical & Engineering Co.*¹⁸⁸ reflects the continuing vitality of *United Aircraft*. In *Reynolds*, after a strike marked by violence, many employees wore buttons with a red diagonal line slashed through the word scab.¹⁸⁹ When violence and harassment against the nonstrikers continued, the employer prohibited the wearing of that button.¹⁹⁰ The Board upheld the ban, stating:

In this case, there were numerous hostile acts by strikers against nonstrikers during and continuing after the strike. These acts included verbal abuse, vandalizing automobiles, the firing of shots into a home, threats of personal injury, and threats to drive nonstrikers from their jobs. On the other hand, there is no evidence that the Respondent bore any animosity towards the strikers. During the strike, it did not hire replacements. When the strike ended, the Respondent reemployed all returning strikers, and it had concluded new bargaining agreements with most of the unions representing its employees. Most importantly, both before and after the strike, the Respondent undisputably permitted the wearing of all other types of union insignia. Under these particular circumstances, . . . we find, based on *United Aircraft Corp.*, that the Respondent's prohibition against wearing the buttons in the plant was "a reasonable precautionary measure" and hence did not violate Sec. 8(a)(3) and (1) of the Act.¹⁹¹

The misconduct of certain strikers was both brutal and grotesque.¹⁹² Nonetheless, the case was wrongly decided. The employer's proper remedy for the abuses was to terminate the actual wrongdoers and pursue criminal and tort actions against the most egregious offenders, not to ban the buttons. The overwhelming majority of workers wearing anti-scab buttons may never have engaged in abusive acts.¹⁹³ Instead of limiting the section 7 rights of all strikers, the Board should have insisted that the employer concentrate its energies on identifying and disciplining the actual perpetrators of misconduct.

¹⁸⁸ 292 N.L.R.B. 947 (1989).

¹⁸⁹ See *Reynolds Elec. & Eng'g Co.*, 292 N.L.R.B. 947, 949 (1989).

¹⁹⁰ See *id.* at 949.

¹⁹¹ *Id.* at 947 n.1 (citation omitted).

¹⁹² See *id.* at 948, 949 (noting that strikers allegedly had urinated on a nonstriker's lunch).

¹⁹³ See *id.* at 950. Numerous workers testified that the anti-scab buttons were not a call to violence but rather a way "to express solidarity with the Union," "an invitation for people who crossed the picket line not to do it in the future," or "a symbol that [the strikers] would stick together if they had to go out again." *Id.* The administrative law judge, however, found such explanations unconvincing against the background of abuses by other strikers. See *id.*

3. *A Proposal for Reform*

The discipline rationale for banning union insignia must be strictly limited. Although the Board's decisions are typically thoughtful and well reasoned,¹⁹⁴ judicial opinions such as *Boeing*¹⁹⁵ subordinate section 7 to speculative fears of conflict. Even the Board has been insufficiently protective of the workers' rights. Although the Board's concerns in *United Aircraft*¹⁹⁶ and *Reynolds*¹⁹⁷ are legitimate, the solution is to punish those actively engaged in violent or threatening behavior, not those merely wearing union buttons.

At some point the Board should draw the line. An employer should be free, for example, to prohibit emblems that expressly advocate and are likely to produce violence.¹⁹⁸ The Board and courts, however, have withdrawn protection from buttons *not* expressly or impliedly calling for any violence.

At their root, *Boeing* and its progeny embody the belief that workers are Pavlovian creatures that will leap to violence at the sight of union buttons. This belief insults the intelligence and decency of union advocates that restrain themselves to peaceful forms of protest.¹⁹⁹ The discipline justification should therefore be limited

¹⁹⁴ See, e.g., *Boise Cascade Corp.*, 300 N.L.R.B. No. 13 (Sept. 28, 1990) (emphasizing that "general, speculative, isolated or conclusory evidence of potential disruption does not amount to 'special circumstances'").

¹⁹⁵ For a discussion of *Boeing*, see *supra* notes 143-150 and accompanying text.

¹⁹⁶ See *supra* note 176.

¹⁹⁷ See *supra* note 188.

¹⁹⁸ Relying by analogy on constitutional jurisprudence, employers should be able to prohibit a button that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (footnote omitted). The *Brandenburg* standard obviously would provide potent protection to workers wishing to express union sympathies. As Professor Tribe explains, "Laws that on their face burden speech in terms of its content but do not limit their reach to the sort of incitement noted in *Brandenburg* are void." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-9, at 848 n.56 (2d ed. 1988).

Although the First Amendment applies only to speech regulated by government actors, similar safeguards should be extended to private sector employment. As one scholar has noted, "The exercise of . . . managerial authority is closer, more regular, and often more salient to the worker than is the exercise of government authority." See WEILER, *supra* note 63, at 143.

¹⁹⁹ Extremely few cases report workplace confrontations arising directly from union or anti-union emblems. See, e.g., *Purolator Prods., Inc.*, 270 N.L.R.B. 694, 699-700 (1984) (employee argued with supervisor that wore anti-union T-shirt), *enforced*, 121 L.R.R.M. (BNA) 2120 (4th Cir. 1985); *Harrison Steel Castings Co.*, 262 N.L.R.B. 450, 461 (1982) (employee tore union button from co-worker's jacket), *enforced*, 728 F.2d 831 (7th Cir.), and *enforced en banc as modified*, 735 F.2d 1049 (7th Cir. 1984); *Louisville Chair Co.*, 161 N.L.R.B. 358, 367-70 (1966) (employee insulted co-worker for wearing anti-union emblems), *enforced*, 385 F.2d 922 (6th Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968). The sparsity and trivial nature of such instances underscore the unlikelihood that union buttons actually would disrupt discipline.

to prohibitions aimed at buttons that expressly advocate the use of violence or other lawless action.

C. *Maintaining Efficiency and Production*

1. *The Approach of the Board and Judiciary*

Even when there is no fear of violence, employers have prohibited union emblems on the grounds that they could distract employees from their tasks or otherwise interfere with production. The Board repeatedly has rejected this defense when employers have failed to substantiate their claims.²⁰⁰ In numerous other decisions, however, the employer has prevailed before the Board or on appeal.

In *Fabri-Tek, Inc. v. NLRB*,²⁰¹ for example, the Eighth Circuit set aside the Board's finding that the employer had violated the Act.²⁰² In this case, the manufacturer of computer components permitted its employees to wear union buttons that were approximately one inch in diameter.²⁰³ The employer, however, prohibited buttons three inches in diameter, "vari-vue" buttons in which more than one image appeared, buttons that had been fashioned into earrings, and a blouse stenciled with a union slogan.²⁰⁴ The employer's justification for prohibiting these kinds of insignia was that they could distract employees from their delicate work, which required great concentration.²⁰⁵

The Board rejected this defense, holding that the employer had violated the Act. As the trial examiner reasoned, the employer permitted other activities that could disturb the workers' concentration, such as the use of buzzers to announce break periods, constant paging of employees over the plant's loud speaker, and the passing of various collection boxes.²⁰⁶ Furthermore, the employer had "failed to prove its contention that the wearing of union insignia in the

²⁰⁰ See, e.g., *Larand Leisurelies, Inc.*, 213 N.L.R.B. 197 (1974), *enforced*, 523 F.2d 814 (6th Cir. 1975); *Swain Mfg. Co.*, 201 N.L.R.B. 681 (1973); *Standard Fittings Co.*, 133 N.L.R.B. 928 (1961); *Stewart Hog Ring Co.*, 131 N.L.R.B. 310 (1961).

²⁰¹ 352 F.2d 577 (8th Cir. 1965), *denying enforcement to* 148 N.L.R.B. 1623 (1964).

²⁰² See *Fabri-Tek, Inc. v. NLRB*, 352 F.2d 577 (8th Cir. 1965), *denying enforcement to* 148 N.L.R.B. 1623 (1964).

²⁰³ See *id.* at 578-80.

²⁰⁴ See *id.* at 581.

²⁰⁵ See *id.* at 578-81.

²⁰⁶ See *Fabri-Tek, Inc.*, 148 N.L.R.B. 1623, 1629 (1964), *enforcement denied*, 352 F.2d 577 (8th Cir. 1965).

plant had an effect of distracting the attention of other employees or disrupting their work concentration."²⁰⁷

The Eighth Circuit disagreed.²⁰⁸ The court noted that the employer had tried to prevent numerous forms of distraction by placing "sneeze boards" on work tables, forbidding females from wearing "short shorts," and "separating talkative women from each other."²⁰⁹ These examples are instructive because they reveal the court's failure to appreciate the importance of section 7. The court categorized union buttons with sneezing, gossip, and sexually provocative attire instead of recognizing the importance of the workers' right to display union sympathy. In short, the court treated union buttons as a mere nuisance and permitted the employer to strike preemptively before production was affected. The court explained that the employer was not obligated "to wait until its production records dropped and the efficiency of its employees went down before concluding that [the insignia] would have a tendency to distract."²¹⁰

This approach is misguided because it permits an employer to allege that union buttons impede production as a pretext for quelling union activity. In this sense, *Fabri-Tek* repeats the error of *Harrah's Club*²¹¹ and *Caterpillar*²¹² by allowing an employer to override section 7 rights through conjecture. As a consequence, workers are left at the mercy of an employer's self-serving appraisal of a button's effect on productivity.²¹³

The court also belabored the fact that the employees "never lost their right" to wear the small "customary buttons."²¹⁴ This fact has undeniable relevance because it shows that the employees remained

²⁰⁷ *Id.* at 1630.

²⁰⁸ See *Fabri-Tek*, 352 F.2d 577.

²⁰⁹ See *id.* at 580. The court belittled the fact that the employer tolerated other sources of potential distraction. It stated that "the fact that certain things may still remain to be done" to remove distractions was no basis for criticizing the employer's actions regarding the insignia. See *id.* at 587. The question left unanswered by the court is *why* the employer chose to crack down on union insignia while ignoring more obvious threats to the workers' concentration.

²¹⁰ *Id.* at 584.

²¹¹ For a discussion of *Harrah's Club*, see *supra* notes 42-51 and accompanying text.

²¹² For a discussion of *Caterpillar*, see *supra* notes 151-161 and accompanying text.

²¹³ *Fabri-Tek* emphasized the degree of concentration required of its workers and stressed that producing defective goods could result in "great economic loss" to the company. See *Fabri-Tek*, 352 F.2d at 579, 586. These concerns are clearly legitimate, but the court needed to scrutinize whether the buttons raised a real risk of disturbance. Furthermore, the court failed to examine the cost to the employees of having their section 7 rights circumscribed and the damage done to the union's campaign efforts by the employer's prohibition.

²¹⁴ See *id.* at 585.

free to signify their support for the union. The problem with the court's reasoning here is that it predicates the right to wear union buttons on custom. This vague standard is of little comfort to workers that risk being discharged if their buttons are deemed uncustomary, because they are too large, numerous, provocative, or otherwise beyond the pale.

The Board itself has often accepted the argument that union buttons could interfere with production and quality control. The Board's holding in *Hanes Hosiery, Inc.*²¹⁵ exemplifies how employees' section 7 rights have been limited despite evidence that an employer's actions were unlawfully motivated. In *Hanes*, a foreman repeatedly warned employees to remove or cover their Teamsters campaign buttons, ostensibly because they could damage the yarn used in producing hosiery.²¹⁶ The employer defended this order by demonstrating that damaged yarn was a constant problem and that it had taken other steps to minimize its occurrence.²¹⁷ In a ruling adopted by the Board, the administrative law judge upheld the employer's actions. Finding that the buttons presented a risk of snagging the yarn, he concluded that there was a legitimate business reason for requiring that they be covered or removed.²¹⁸

This conclusion failed to respond to several pressing concerns. As the administrative law judge conceded, the employer did not consistently enforce its rule against wearing items that could damage the yarn.²¹⁹ The judge reasoned, however, that the inconsistency was immaterial because the employer's "inefficiency on some occasions does not warrant a finding that occasions of efficiency amount to unfair labor practices even if some restriction of employee rights to propagandize is involved."²²⁰ This reasoning is myopic because it fails to recognize that the employer's heightened efficiency in banning union buttons may have been motivated by a desire to quash section 7 rights. The other ways in which the employer violated the Act, such as by unlawfully interrogating employees regarding their union sympathies and discriminatorily applying a no-solicitation

²¹⁵ 219 N.L.R.B. 338 (1975).

²¹⁶ See *Hanes Hosiery, Inc.*, 219 N.L.R.B. 338, 346 (1975).

²¹⁷ See *id.* at 345-46. For example, workers were required to wear gloves and to cover their watches. See *id.* at 346.

²¹⁸ See *id.* at 347; see also *Campbell Soup Co.*, 159 N.L.R.B. 74 (1966) (condoning ban on insignia as lawful means to protect purity of food products), *modified per curiam on other grounds*, 380 F.2d 372 (5th Cir. 1967).

²¹⁹ See *Hanes*, 219 N.L.R.B. at 347.

²²⁰ See *id.*

rule,²²¹ supports this suspicion. Moreover, the administrative law judge appeared eager to minimize the importance of the employer's interference. He hypothesized, for example, that workers could have satisfied the order to remove or cover the buttons by simply applying a transparent substance.²²² The employer, however, neither apprised the workers of that unorthodox option²²³ nor assured workers that their right to wear union emblems would be respected if they did not endanger the product's quality.²²⁴

This failure to assure workers should be considered a violation of the Act. When management limits its workers' freedom to exercise section 7 rights, it should have the burden of communicating the reason for that limitation and expressly advising the workers that they may continue to wear buttons in ways that will not endanger production standards. Employees then could appraise the legitimacy of the employer's business justification and understand when they could wear buttons without fear of reprisal. The Board, however, did not consider this approach.²²⁵

The Board also affirmed an administrative law judge's ruling without substantive comment in *Magic Pan, Inc.*²²⁶ In *Magic Pan*, the complaint alleged that the employer had threatened to discharge a crepe assembler unless he removed his union button.²²⁷ The administrative law judge dismissed this allegation on the grounds that the employer's food handling and sanitation manual forbade kitchen workers from wearing jewelry.²²⁸

Such a conclusion hardly rises to the level of serious analysis. At no point did the administrative law judge even allude to section 7 or the right to wear union buttons. Moreover, he failed to consider whether the prohibition was necessary to preserve hygiene or had been enforced in a discriminatory manner. Instead, without citing a single authority, he ruled that the Act had not been violated.

The flaws of *Magic Pan* reappeared in the Board's 1985 *University of Richmond*²²⁹ decision. In *University of Richmond*, the

²²¹ See *id.* at 338-39, 347-50.

²²² See *id.* at 347.

²²³ See *id.* at 346.

²²⁴ See *id.*

²²⁵ See *id.* at 338-39.

²²⁶ 242 N.L.R.B. 840 (1979).

²²⁷ See *Magic Pan, Inc.*, 242 N.L.R.B. 840, 847 (1979).

²²⁸ See *id.* at 847-48. The administrative law judge also ruled that instead of threatening to "discharge" the crepe assembler, the employer "merely told [him] he could not continue working while wearing the button." *Id.* This distinction appears utterly semantic and the administrative law judge made no effort to elaborate.

²²⁹ 274 N.L.R.B. 1204 (1985).

employer forbade employees that handled food from wearing jewelry other than earrings and wedding rings.²²⁰ The Board's general counsel and the administrative law judge agreed that this rule was facially valid because jewelry could carry germs and fall into food. The general counsel asserted, however, that the employer had enforced the rule in a discriminatory manner because it occasionally had permitted employees to wear holiday pins and other jewelry.²²¹ In his opinion, the administrative law judge ruled that the employer had not violated the Act. He concluded: "Given the clear justification for the announced policy and evidence that even prior to the organizational campaign the Respondent enforced this policy, albeit imperfectly, I cannot conclude that the employees' Section 7 rights were somehow interfered with by the Respondent."²²²

This conclusion assumes the existence of a "clear justification" for the employer's policy. Certainly, earrings and wedding bands could contaminate food, but neither the employer nor the administrative law judge explained why they should be allowed and union buttons prohibited. The administrative law judge erred by uncritically assuming that union buttons are less legitimate than wedding bands or even earrings.

Furthermore, the employer forbade union buttons even when they posed no conceivable threat to food purity. One worker, for example, was ordered to remove her button even though it was placed under her hairnet.²²³ Finally, although the employer did not always compel workers to remove union buttons,²²⁴ this fact is of little relevance. The employer failed to demonstrate the legitimacy of *any* ban and should not be absolved of violating the Act simply because it occasionally respected the rights of its work force.

In sum, the traditional approach to the efficiency and production rationale is unsatisfactory. An employer has a legitimate interest in maintaining the quality of its product, but in many cases the Board and judiciary have not evaluated carefully whether union buttons actually imperiled production. Furthermore, tribunals have paid scant attention to the workers' competing interest in wearing buttons to demonstrate their union sympathies. Finally, it is disturbing that the Board often has affirmed the findings of administrative law judges

²²⁰ See *University of Richmond*, 274 N.L.R.B. 1204, 1210 (1985).

²²¹ See *id.* at 1210.

²²² *Id.*

²²³ See *id.* at 1210.

²²⁴ See *id.*

despite a clear lack of analysis. The Board's passivity in this area is regrettable and provides little guidance as to how such cases should be resolved.

2. *A Proposal for a New Approach*

To safeguard the interests of both management and labor, the Board and courts should adopt the following approach. First, the employer should have the burden of demonstrating by clear and convincing evidence²³⁵ that a limitation on the right to wear insignia is necessary to protect its product. This standard should prevent employers from raising pretextual defenses and should lead tribunals to examine each case with a critical eye. Second, any limitation on union buttons must be narrowly tailored so as not to exceed the legitimate reason for its enactment. Third, the employer must communicate the reason for the limitation to its workers and assure them that it will otherwise respect their right to wear union buttons. Finally, the employer must enforce its limitation in a nondiscriminatory manner. Unless the Board and courts apply this mode of analysis, workers will continue to be deprived of their section 7 rights without adequate justification.²³⁶

D. *Preventing Safety Hazards*

1. *Weaknesses in the Board's Approach*

Employers also have cited worker safety as a justification for banning union insignia. The Board initially was wary of this argu-

²³⁵ In general, the clear and convincing standard means that the party on whom the burden of proof rests must demonstrate that the truth of an asserted fact is highly probable. As one scholar has explained, "The litigant upon whom this burden of persuasion is placed should lose if the trier or triers of the fact are not convinced upon all the evidence that the facts upon which his claim depends or his defense rests are highly probably true." J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 254 (1944); see also CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 340 (E. Cleary ed., 3d ed. 1984) (discussing the clear and convincing standard).

²³⁶ Employers engaged in manufacturing, packing, or holding human food may rely upon 21 C.F.R. § 110.10 (1989) as justification for limiting the wearing of union buttons. This regulation requires such employers to ensure that workers remove "all insecure jewelry and other objects that might fall into food, equipment, or containers." In *Jennie-O Foods, Inc.*, 301 N.L.R.B. No. 43 (Jan. 25, 1991), for example, the administrative law judge alluded to this regulation in deciding that an employer lawfully ordered a worker to remove her union button. In *Pepsi Cola Bottling Co.*, 301 N.L.R.B. No. 117 (Feb. 28, 1991), however, the employer's reliance on the regulation failed because it applied its prohibition of jewelry in a discriminatory fashion. As *Pepsi Cola* demonstrates, employers must not be permitted to use the regulation as a pretext for banning union insignia.

ment, but employers successfully have invoked it in recent decisions. As in the cases involving alleged concerns for customer relations, workplace discipline, and production, the Board has paid insufficient attention to the workers' section 7 rights by validating this justification under questionable circumstances.

The Board's *Standard Fittings Co.*²³⁷ opinion exemplifies its initial skepticism toward the safety rationale. In an opinion adopted by the Board, the trial examiner reasoned:

The Respondents . . . contend that the badges constituted a safety hazard and that they could physically interfere with the employees' work performance. However, other than some testimony that employees are generally prone to industrial accidents when working with machinery, there is no evidence to substantiate this contention. Certainly, there is nothing indicative about the badges to the naked eye which would impel this conclusion. Respondents advance the theory that, insofar as the welders were concerned, sparks from the blowtorches could cause the badges to ignite or to explode. Again, there is no expert testimony to substantiate this contention. As the evidence stands, it does not appear that the badges were any more flammable than the clothing which the men wore. Respondent's [sic] contentions . . . appear to be more in the nature of afterthoughts. Accordingly, and there being no evidence to substantiate them, they are rejected.²³⁸

This approach is commendable, for the trial examiner properly demanded that the employer's claims be supported by expert testimony and he refused to let afterthoughts substitute for clear evidence of an actual hazard. The same result was reached in *Keller Aluminum Chairs Southern, Inc.*²³⁹ In *Keller*, the trial examiner concluded that an employee's union sign did not constitute a safety hazard and held that his discharge for wearing it violated sections 8(a)(1) and 8(a)(3) of the Act.²⁴⁰

In numerous other opinions, however, the Board has been more receptive to employers' arguments concerning safety. In the 1965

²³⁷ 133 N.L.R.B. 928 (1961).

²³⁸ *Standard Fittings Co.*, 133 N.L.R.B. 928, 945 (1961). The trial examiner also rebuffed the employer's assertion that the union badges had interfered with production. As he explained, "[T]here no doubt were some minor interruptions of production, but . . . these largely resulted from management's interference with the right of employees to wear badges." *Id.* at 944 (footnote omitted).

²³⁹ 165 N.L.R.B. 1011 (1967), *enforced per curiam*, 425 F.2d 709 (5th Cir. 1970).

²⁴⁰ See *Keller Aluminum Chairs Southern, Inc.*, 165 N.L.R.B. 1011, 1014-15 (1967), *enforced per curiam*, 425 F.2d 709 (5th Cir. 1970). As in *Standard Fittings*, the Board adopted the trial examiner's conclusion without substantive discussion.

*Shelby Manufacturing Co.*²⁴¹ decision, the trial examiner upheld the suspension of a worker that had covered himself with at least a dozen union stickers.²⁴² The trial examiner tersely stated, "Conceivably [the employee's] exhibitionism may have caused machine operators to look around at him and thus endanger their operations."²⁴³

The trial examiner's reasoning, however, was far from adequate. The conclusion that union insignia could "conceivably" cause an accident is not sufficient. As in *Standard Fittings*, the trial examiner should have insisted on clear proof that the stickers actually presented a hazard. Moreover, assuming that such a hazard existed, the employer should have explained this to the worker and reassured him that he was entitled to wear a safe number of stickers. In this manner, the employer could have safeguarded the workplace without unduly infringing upon the worker's section 7 rights.

Unfortunately, *Shelby* is not an isolated holding. To the contrary, the Board has recognized the safety exception in a variety of circumstances. The 1967 decision in *Standard Oil Co.*,²⁴⁴ for example, upheld an oil refinery's prohibition against placing union insignia on hard hats.²⁴⁵ In *Standard Oil*, employees wore hard hats specifically marked to indicate their positions at the refinery. The employer argued that these markings were crucial because, in the event of a fire, its firefighting force could readily discern which workers could render assistance in various parts of the refinery. The employer then asserted that the union decals were prohibited because they could obscure the refinery's markings.²⁴⁶

This justification is problematic because workplace safety is indeed essential. The union decals, however, posed an unlikely risk. As long as the decals did not cover the position markings, they could not have hampered the firefighters' efforts. The Board, however, ruled for the employer on the following grounds:

²⁴¹ 155 N.L.R.B. 464 (1965), *enforced per curiam in relevant part*, 390 F.2d 595 (6th Cir. 1968).

²⁴² See *Shelby Mfg. Co.*, 155 N.L.R.B. 464, 474 (1965), *enforced per curiam in relevant part*, 390 F.2d 595 (6th Cir. 1968).

²⁴³ *Id.* at 474 n.9. This holding was not appealed and was adopted *pro forma* by the Board. See *id.* at 465 n.2. The trial examiner and Board agreed, however, that the employer had violated the Act by suspending other workers that had worn fewer stickers. See *id.* at 465, 473-74. This aspect of the Board's opinion was enforced in *NLRB v. Shelby Mfg. Co.*, 390 F.2d 595 (6th Cir. 1968) (*per curiam*).

²⁴⁴ 168 N.L.R.B. 153 (1967).

²⁴⁵ See *Standard Oil Co.*, 168 N.L.R.B. 153, 153 (1967).

²⁴⁶ See *id.* at 159.

The Respondent established that it had a legitimate, longstanding, and not unwarranted concern about the threat to safety posed by the use of unauthorized decorations on work hats. Furthermore, the evidence shows that employees were freely permitted to wear emblems signifying union affiliation on any part of their clothing except their safety hats.²⁴⁷

The Board's reasoning has undeniable force. The employer appeared to have a legitimate safety objective, and employees freely wore other forms of union insignia. Yet, three aspects of the opinion are disturbing. First, the refinery's rationale, that union decals could obscure identification markings and thus delay response to a fire, seems contrived. The employer did not allege that employees had covered the helmet identification markings with union decals, and no one testified to experiencing difficulty in seeing such markings. The refinery's argument that the decals posed a hazard was therefore unsubstantiated. Second, the refinery suppressed the insignia in a discriminatory manner. Although the refinery took action against workers that painted their hats or adorned them with pornography, it appears that it did not consistently prohibit other forms of unauthorized, nonunion decorations.²⁴⁸ The refinery's motive in prohibiting the union decals is thus questionable. Third, the workers' ability to wear union insignia elsewhere on their clothing should not be dispositive of the case. Without any clear evidence of a compelling safety reason, the refinery simply had no right to interfere with the workers' choice to decorate their hats instead of other clothing. By permitting the refinery to ban decals from the hats, without adequate evidence that they posed a hazard, the Board allowed employers excessive control over the display of union insignia.²⁴⁹

In *Andrews Wire Corp.*,²⁵⁰ the Board followed *Standard Oil*. In *Andrews*, workers had worn hard hats that stated their names, protected them from falling objects, and were brightly colored to increase visibility and thus prevent accidents.²⁵¹ Five employees were

²⁴⁷ *Id.* at 153 n.1.

²⁴⁸ *See id.* at 156-60 (describing various humorous stickers employees wore on helmets).

²⁴⁹ *See also* *Clover Indus. Div. of GTI Corp.*, 188 N.L.R.B. 252 (1971). In *Clover*, the Board held that the employer did not violate the Act when it instructed an employee to remove a large union button, which ostensibly could be dangerous around machinery, but permitted her to wear smaller insignia. *Id.* at 252-53.

²⁵⁰ 189 N.L.R.B. 108, *enforced per curiam sub nom.* *United Steelworkers of America v. NLRB*, 79 L.R.R.M. (BNA) 2164 (4th Cir. 1971).

²⁵¹ *See Andrews Wire Corp.*, 189 N.L.R.B. 108, 113, *enforced per curiam sub nom.*, *United Steelworkers of America v. N.L.R.B.*, 79 L.R.R.M. (BNA) 2164 (4th Cir. 1971).

discharged when they attached United Steelworkers insignia to their hard hats and refused to remove them.²⁵² The Board held that the employer had acted lawfully because the insignia could have presented a hazard by making the hard hats more difficult to see and the workers freely wore union insignia on other parts of their attire.²⁵³

This decision overruled the trial examiner's carefully reasoned opinion that found a violation of the Act. As the trial examiner explained, the employer's supposed safety concern had little force: the sticker did *not* make the hats less visible; the employer had permitted other decorations on hats before the union began its campaign; and the employer even had discharged a worker whose Steelworkers insignia was placed inconspicuously under the hat's brim.²⁵⁴ Moreover, the employer had failed to explain the alleged concern for safety to all members of the workforce when he demanded that the sticker be removed.²⁵⁵ As the trial examiner explained, "[E]ven assuming such special circumstances existed, it was incumbent upon the Respondent to advise the employees why it was ordering them to give up a protected right."²⁵⁶

Indeed, the employer's prohibition of union insignia appeared to be part of a larger effort to discourage support for the Steelworkers. The employer banned the insignia within seven days of the representation election, harshly condemned the Steelworkers and their supporters, and unlawfully discharged a union organizer.²⁵⁷ In

²⁵² See *id.* at 108.

²⁵³ See *id.* at 109.

²⁵⁴ See *id.* at 116.

²⁵⁵ See *id.*

²⁵⁶ *Id.* (quoting *Mayrath Co.*, 132 N.L.R.B. 1628, 1630 (1961), *enforced as modified*, 319 F.2d 424 (7th Cir. 1963)). In *Mayrath*, the Board rejected the employer's argument that it had lawfully ordered employees to remove their union buttons because they were interfering with production. The Board stated:

Though we agree with the Trial Examiner that Respondent did not prove the special circumstances which might warrant its orders to remove the buttons or leave the plant, we also are of the opinion that, even assuming such special circumstances existed, it was incumbent upon Respondent to advise the employees why it was ordering them to give up a protected right. Instead, *Mayrath*, without advising the employees as to his alleged reasons, peremptorily ordered them to remove the buttons or leave. The reasonable inference from this is that if the employees did not remove the buttons, they would be discharged. By such peremptory order, we find, *Mayrath* conveyed to the employees the idea that they had no right to wear the buttons at work and gave them a Hobson's choice of either foregoing [sic] the protected right or being discharged.

Mayrath, 132 N.L.R.B. at 1630 (footnote omitted).

²⁵⁷ *Andrews Wire*, 189 N.L.R.B. at 116-17. The Board affirmed the trial examiner's finding that the employer unlawfully had discharged the union organizer. See *id.* at 108.

light of these abuses, the trial examiner was justified in concluding that the prohibition of insignia "was void of valid business considerations and was inherently destructive of important employee rights."²⁵⁸

An employer's stated concern for safety is not inevitably a subterfuge for suppressing union support. Some instances show that an employer's need to prevent a hazard can be both real and immediate. In *Brown Mfg. Corp.*,²⁵⁹ for example, the employer ordered a welder to remove approximately fifteen to twenty union stickers from his attire.²⁶⁰ Because these flammable paper legends could have endangered the welder's life, the administrative law judge concluded that the employer had not violated section 8(a)(1) of the Act.²⁶¹ The employer apparently explained its concern for safety and did not order the worker to remove all of his stickers,²⁶² so the intrusion on section 7 rights was minimal and justified.

In many cases, however, the Board has accepted an employer's rationale without critically appraising its validity. *Fluid Packaging Co.*,²⁶³ a 1980 decision, exemplifies this predilection. In this case, the employer ordered an employee to remove a large union sign from her back, arguing that it was causing a dangerous distraction.²⁶⁴ The administrative law judge upheld this order without discussing whether the employer's claim was legitimate or merely pretextual.²⁶⁵ This bald conclusion, without any legal reasoning or examination of the surrounding circumstances,²⁶⁶ failed to protect section 7 rights.

The Board's decision in *Kendall Co.*²⁶⁷ further demonstrates the precarious position of the right to wear union insignia. In *Kendall*, the employer maintained a dress code to limit the wearing of jewelry

²⁵⁸ See *id.* at 117.

²⁵⁹ 235 N.L.R.B. 1329, 1331-32 (1978).

²⁶⁰ See *Brown Mfg. Corp.*, 235 N.L.R.B. 1329, 1331-32 (1978).

²⁶¹ See *id.* at 1332.

²⁶² See *id.* at 1332 & nn. 8 & 10.

²⁶³ 247 N.L.R.B. 1469 (1980), *enforced*, 108 L.R.R.M. (BNA) 2279 (3d Cir. 1981).

²⁶⁴ *Fluid Packaging Co.*, 247 N.L.R.B. 1469, 1474 (1980), *enforced*, 108 L.R.R.M. (BNA) 2279 (3d Cir. 1981).

²⁶⁵ See *id.*

²⁶⁶ The order to remove the sign occurred amid repeated violations of the workers' rights. For example, the administrative law judge found that the employer had violated the Act by discriminatorily discharging union supporters, interrogating employees regarding their concerted activities, threatening to move or close the plant if the union became the workers' bargaining agent, and engaging in numerous other coercive acts. See *id.* at 1480. Such contempt for section 7 rights obviously raises questions regarding the employer's motive for banning the sign.

²⁶⁷ 267 N.L.R.B. 963 (1983).

and other items that could endanger employees by becoming snared in machinery.²⁶⁸ In accordance with this rule, the employer ordered an employee to remove a keychain that contained a union slogan. The administrative law judge held that this violated section 8(a)(1) of the Act. Although he acknowledged that the keychain could pose a safety hazard, he emphasized that the employer had not explained this peril to the employee and had not consistently enforced its dress code against nonunion items.²⁶⁹

The Board, however, disagreed.²⁷⁰ Based on *Hanes Hosiery*,²⁷¹ the Board concluded that the employer's occasional past lapses in enforcing its dress code did not render its presently considered actions discriminatory.²⁷² Furthermore, the Board held that the employer adequately informed the employee of its safety concern by informing the worker that he had violated the dress code.²⁷³

The Board's reasoning is problematic. As in *Hanes Hosiery*, the Board ignored the possibility that a facially neutral rule had been applied in a discriminatory manner. An employer cannot enforce its rules with perfect consistency, but questions of discriminatory motive should be treated seriously in cases of disparate application against union supporters. The issue of discriminatory motive was particularly acute in *Kendall* because the employer had violated the same worker's rights in numerous other ways.²⁷⁴ Viewed together, the employer's harassment of the worker and spotty enforcement of its dress code indicate that the employer was motivated by anti-union animus rather than a legitimate concern for safety.

2. A Proposal for Reform

Cases such as *Kendall* underscore the inadequacy of the Board's approach. The Board has been too complacent in accepting employers' claims of danger and too slow to appreciate facts suggesting anti-union intent. Workplace safety is a pressing concern, but it must not be used as a pretext for suppressing section 7 rights. While respecting an employer's need to eliminate genuine hazards, tribunals

²⁶⁸ See *Kendall Co.*, 267 N.L.R.B. 963, 963-964 (1983).

²⁶⁹ See *id.* at 968-70.

²⁷⁰ See *id.* at 963-65.

²⁷¹ For a discussion of *Hanes*, see *supra* notes 215-25 and accompanying text.

²⁷² See *Kendall*, 267 N.L.R.B. at 965.

²⁷³ See *id.*

²⁷⁴ The Board concluded, for example, that the employer violated §§ 8(a)(1) and (a)(3) of the Act by repeatedly warning and suspending that worker in retaliation for his union activities. See *id.* at 963-66.

must not permit the rights of union supporters to be unreasonably curtailed.

The best approach to this predicament would be for tribunals to adopt the same proposal offered in cases concerning alleged threats to production. The employer should have to prove by clear and convincing evidence that the union emblems pose an actual safety hazard. Furthermore, the limitation on insignia must be non-discriminatory and narrowly tailored to enhance safety. Finally, the employer must be required to inform workers of the reasons for the limitation and assure them that they may continue to wear union insignia when it will not present a hazard.

This proposal, of course, is not infallible. Hard cases will continue to arise when the necessity for banning buttons is debatable. Nonetheless, the proposal would at least provide tribunals with an analytical framework for deciding such cases in a principled and consistent manner. Employers would be discouraged from implementing unnecessary prohibitions and workers would be assured that their rights would not be extinguished by pretextual safety concerns.

CONCLUSION

The right to wear union insignia in the workplace has been undermined by numerous Board and judicial opinions. These decisions have belittled the practical and symbolic importance of union emblems while uncritically accepting employers' self-serving concerns for customer relations, discipline, production, and safety.²⁷⁵ Indeed, the simple union button has been treated as a malevolent *boi tâtá*,²⁷⁶ capable of frightening the public, instigating violence, destroying production, and endangering the lives and limbs of workers. In addition to circumscribing the protective scope of section 7, such opinions imply that the right to display union buttons is a privilege that easily may be eliminated.

²⁷⁵ Tribunals also have revealed a low regard for union insignia by repeatedly dismissing employer interference as *de minimis*. See, e.g., *Yeargin Constr. Co.*, 271 N.L.R.B. 725, 726 (1984) (finding no violation when supervisor told employee that wearing union badge could "be hazardous to his health"); *Phillips Indus. Components, Inc.*, 216 N.L.R.B. 885 (dismissing foreman's tearing of union sticker from employee's toolbox as "an isolated event"), *enforced*, 91 L.R.R.M. (BNA) 2194 (7th Cir. 1975); *Gold Merit Packing Co.*, 142 N.L.R.B. 205 (1963) (finding no violation from foreman's implication that employees could improve working conditions by removing union buttons); *Ohio Aviation Co.*, 114 N.L.R.B. 1142 (1955) (finding no violation when supervisor told employee wearing union button to "shove it up" the body of another union advocate).

²⁷⁶ A mythical fire-breathing ox from Brazilian lore. See, e.g., JORGE AMADO, *THE VIOLENT LAND* 275 (S. Putnam trans. 1988).

This subordination of the right to wear union insignia must not continue. As a matter of social policy, the Board and courts must not condone practices that unnecessarily undermine the ability of unions to garner and maintain support. As one scholar has observed, organized labor is "the only agency in this society which can prevent the growth of absolutism in industry which inevitably spreads when power is unrestrained."²⁷⁷ By affording employers an ever-growing power to prohibit union symbols, the Board and courts are facilitating an ominous movement toward managerial absolutism in the workplace.²⁷⁸

Stripping workers of their right to wear union insignia also takes its toll on their individual dignity. As Paul Weiler perceives, "For the employee work is . . . a major source of personal identity and satisfaction, of his sense of self-esteem and accomplishment, and of many of his closest and most enduring relationships."²⁷⁹ When employees are forbidden from peacefully signifying their union sympathies, they relinquish a fundamental aspect of that personal identity. This needless subjugation of individual autonomy can only fuel feelings of resentment and alienation in the workplace.²⁸⁰

A new approach toward union symbols is in order. The customer relations rationale for banning buttons should be abolished because it embodies the unjustifiable assumptions that signs of union support are undignified, unpopular, and jeopardize employers' economic health. The discipline justification should also be abandoned except for emblems expressly calling for lawless behavior. Employers right-

²⁷⁷ PHILLIP TAFT, *ORGANIZED LABOR IN AMERICAN HISTORY* 709 (1964).

²⁷⁸ The continuing decline in union membership has drawn the attention of numerous scholars. See, e.g., GOLDFIELD, *supra* note 61.

For example, Weiler asserts:

Since 1955, . . . private sector union membership has not only declined somewhat in absolute numbers, but its share of the ever-increasing labor force has been cut fully in half from over thirty-eight percent in 1954 to just nineteen percent in 1984. Absent some dramatic changes in this trend, the supposed right to engage in collective bargaining will be largely illusory by the turn of this century for non-union private sector workers.

Paul Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 *HARV. J. ON LEGIS.* 1, 3-4 (1986) (footnote omitted).

As Weiler realizes, this decrease in unionism shows no sign of abating. According to the Bureau of Labor Statistics, "union membership stood at 16.1 percent of total employment in 1990, down from 16.4 percent estimated for 1989." *Union Membership Down to 16.1 Percent*, 136 *Lab. Rel. Rep. (BNA)* 174 (Feb. 18, 1991).

²⁷⁹ WEILER, *supra* note 63, at 143.

²⁸⁰ For an insightful discussion of worker alienation, see ROBERT BLAUNER, *ALIENATION AND FREEDOM* (1964).

fully concerned with keeping order can concentrate on removing actual hoodlums rather than silencing peaceful expression. Concerns for productivity and safety should be treated differently because in some instances union buttons could directly jeopardize an employer's product or the health of its employees. Even in these cases, however, the Board and courts must rigorously appraise employers' concerns and insist that justifications for bans be supported by clear and convincing evidence.

These proposals are hardly a panacea for the multitude of troubles confronting the nation's work force. If section 7 and American workers are to receive the respect they deserve, however, providing adequate protection for the right to wear union insignia is a step in the right direction.