Indiana Bell Telephone Company, Inc. *and* Communications Workers of America, Local 4900. Case 25–CA–218494

February 25, 2021

BY MEMBERS KAPLAN, EMANUEL, AND RING

DECISION AND ORDER

On September 17, 2019, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party Union filed answering briefs, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

I.

The Respondent employs premises technicians, represented by Communications Workers of America, Local 4900 (the Union), to install high-speed internet services and related products in customers' homes. Premises technicians are subject to a mandatory dress code that requires them to wear branded company apparel; the parties' collective-bargaining agreement incorporates appearance guidelines stating that "[t]he branded apparel may not be altered in any way."[2]

As more fully set forth by the judge, in March 2018, the Union distributed red buttons imprinted with the union logo and the messages "We Demand Good Jobs," and "Fighting Today, Focused on the Future," for premises technicians to wear to support the Union in upcoming negotiations for a successor collective-bargaining agreement. On April 16, 2018, Manager Joseph St. Clair asked a premises technician to remove the union button from his Company-branded shirt as he was leaving the Respondent's garage facility; when he failed to comply, St. Clair threatened him with discipline, including termination.

The judge found that the Respondent violated Section 8(a)(1) by maintaining the appearance guidelines and by discriminatorily enforcing the guidelines against employees who wore the union buttons.[3]

II.

We reverse the judge's finding that the Respondent violated Section 8(a)(1) by maintaining its appearance guidelines, and we adopt, based on a different rationale, the finding that the Respondent violated Section 8(a)(1) by enforcing the guidelines against employees who wore union buttons.

First, we dismiss on due process grounds the judge's finding that the Respondent unlawfully maintained its appearance guidelines. Paragraph 5(a) of the complaint alleged that the Respondent maintained the "branded apparel" guidelines; paragraph 5(b) alleged that the Respondent enforced the guidelines to prohibit employees from wearing union insignia. Paragraph 6 of the complaint alleged only that the conduct set forth in paragraph 5(b)—the Respondent's enforcement of the guidelines—was unlawful. Thus, the complaint did not allege a maintenance violation, and the General Counsel did not move to amend the complaint to include such a violation. In fact, counsel for the General Counsel explicitly stated at the hearing that she was pursuing only an enforcement allegation.[4] In these circumstances, finding a maintenance violation would be improper because the Respondent did not have adequate notice of the allegation, and it was not fully litigated.[5] See *Earthgrains Co.*, 351 NLRB 733, 733 fn. 4 (2007) (reversing judge's finding of unalleged violation); *Zurn/N.E.P.C.O.*, 329 NLRB

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Before 2016, the guidelines stated: "The branded apparel may not be altered in any way which includes adding buttons, pins, stickers, writing etc." The 2016 amendment of the guidelines deleted the examples.

[3] In so finding, the judge relied on the fact that the Respondent had permitted employees to wear union buttons during previous contract negotiations.

[4] Consistent with the complaint, counsel for the General Counsel represented to the judge in her opening statement that "this case involves [the Respondent] enforcing a work rule to prohibit employees from wearing union buttons," and she later reiterated that "our allegation is . . . that they unlawfully enforced the rule to prohibit [employees] from wearing the union buttons."

[5] Member Kaplan would find that, although the complaint did not allege expressly that the Respondent unlawfully maintained its appearance guidelines, this allegation was closely connected to the enforcement allegation and was fully litigated. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Having found that this issue is appropriately before the Board, Member Kaplan would find that the Respondent violated Sec. 8(a)(1) by maintaining the appearance guidelines. See *Casino Pauma*, 362 NLRB 421, 424–425 (2015).

484, 484 (1999) (refusing to address allegation consistently disclaimed by General Counsel during hearing).

Second, we find that the Respondent violated Section 8(a)(1) when it enforced its appearance guidelines to threaten an employee with discipline for wearing a union button as he was leaving Respondent's garage facility. The Respondent argues only that enforcement of the policy was justified by its desire to "enhance the customer experience and project a positive public image of Respondent to its customers." This argument fails as employees did not encounter customers at the Respondent's facility, and, in any event, the Board has long held that customer engagement alone is not a special circumstance justifying the banning of union insignia. See, e.g., *Meyer Waste Systems*, 322 NLRB 244, 244 (1996).[6] Accordingly, we find that the Respondent unlawfully enforced its guidelines against an employee who was wearing a union button.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 3 in the judge's conclusions of law:

3. The Respondent violated Section 8(a)(1) by enforcing its appearance guidelines to ban the wearing of union buttons absent special circumstances.

AMENDED REMEDY

We shall modify the judge's recommended Order to conform to the amended conclusions of law and to the Board's standard remedial language, and in accordance with our decisions in *Excel Container, Inc.*, 325 NLRB 17 (1997), and *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified and set forth in full below.

ORDER

The National Labor Relations Board orders that the Respondent, Indiana Bell Telephone Company, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Enforcing its appearance guidelines to prohibit wearing union buttons and threatening discipline against employees who are wearing union buttons.

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

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

(a) Post at its Indianapolis, Indiana facilities copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 16, 2018.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

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

Dated, Washington, D.C. February 25, 2021

Marvin E. Kaplan, Member

[6] In adopting the finding of unlawful enforcement, we do not rely on the judge's conclusion that the Respondent's actions were discriminatory.

Member Emanuel believes that an employer has a right to prohibit buttons on uniforms worn by employees who interact with the public if a collective-bargaining agreement provides for that right. However, he finds that the Respondent gave up that right when it deleted the language referring to buttons and insignia from the 2016 appearance guidelines that were authorized by the agreement. He therefore joins his colleagues in affirming the 8(a)(1) violation.

[7] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT enforce our appearance guidelines to prohibit union buttons or threaten discipline against employees who are wearing union buttons.

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

INDIANA BELL TELEPHONE CO., INC.

The Board's decision can be found at www.nlrb.gov/case/25-CA-218494 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Patricia McGruder, Esq., for the General Counsel.
Michael Pedhirney, Esq. (Littler Mendelson, PC), of San Francisco, California, and *John Phelan, Esq. (AT&T),* of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, ADMINISTRATIVE LAW JUDGE. This case was tried in Indianapolis, Indiana on July 9, and August 6, 2019. Pursuant to charges brought by the Communications Workers of America, Local 4900 (the Union), the complaint alleges that the Indiana Bell Telephone Company, Inc. (the Company or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act)[1] in April 2018,[2] by instructing employees to remove union buttons or face discipline for insubordination. The Company denies the allegations and alleges that its conduct merely enforced a personal appearance policy and dress code in effect at the time of the incident that the Union clearly and previously waived its right to bargain over.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, provides telecommunications services at several facilities in the State of Indiana, including Indianapolis, where it annually derives gross revenue in excess of $100,000. It also purchased and received at its Indiana facilities goods valued in excess of $50,000 from outside of Indiana. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Collective-Bargaining History

AT&T Teleholdings, Inc. (AT&T) does business in the Midwest United States as AT&T Midwest through the following five subsidiaries: The Company, the Illinois Bell Telephone Company, the Ohio Bell Company, Wisconsin Bell, Inc., and the Michigan Bell Telephone Company. The Communications Workers of America International Union (CWA), through its District 4, represents and is responsible for contract negotiations covering roughly 8000 AT&T Midwest employees and local districts, including the Union.

The CWA/AT&T Midwest bargaining relationship spans over 50 years. The relationship has been embodied in successive collective-bargaining agreements recognizing the Union as the exclusive collective-bargaining agent for the Company's customer service specialists (core technicians), construction & engineering technicians, marketing support specialists, technical associates, dispatchers, maintenance administrators and

[1] 29 U.S.C. §§ 158(a)(1).
[2] All dates are in 2018 unless otherwise indicated.

premises technicians.

The Company and the Union previously negotiated two collective-bargaining agreements, each lasting approximately three years. The first agreement was effective April 8, 2012 through April 11, 2015 (the 2012 CBA). The agreement at issue in this case was effective April 12, 2015 through April 14, 2018 (the CBA).[3] It is undisputed that the CBA remained in effect on April 16, the date of the incident at issue.

B. The Company's Appearance Standards and Dress Code

The Company's premises technicians install high speed internet services, DirecTV, and U-verse products. They report to garages, where they are inspected by supervisors, and then dispatched into the field. They are covered by the Company's Premises Technician Guidelines, dated January 22, 2009, January 26, 2010, and February 7, 2011,[4] as well as its June 2013 U-Verse Field Operations Technicians Guidelines.[5] All of those guidelines, collectively referred to as the pre-2016 guidelines, included, in pertinent part, the following introductory explanation:

> They do not provide an all encompassing list of rules, but rather a set of guidelines to help complete daily assignments while meeting customer service requirements and service objectives. These are not intended to change, alter or supersede existing contractual provisions, OSHA requirements, safety requirements, Company policy, Company Code of Business Conduct or public laws.
>
> These guidelines should be uniformly and fairly applied, taking into account surrounding circumstances. Subsequent to the implementation of these guidelines, it will be the supervisors responsibility to review them annually with each employee and with any new employee that is added to the workforce. These guidelines will be updated and revised as required.
>
> These expectations are intended to address routine situations that arise on a regular basis. Every situation must be assessed based on its own merits and supervisors have the discretion to determine what the appropriate course of action is depending on the situation. If you have any questions regarding how to deal with a particular situation, please consult with your supervisor.

In addition to the Company's stated goal of maintaining a brand of professionalism among its employees while interacting with customers in a very competitive environment, the pre-2016 guidelines incorporated a personal appearance and dress code policy. As such, the Company provides field employees with branded apparel free of charge, including hats that bear the ATT and Union logos.[6] Otherwise, the Company has applied the following conditions with respect to clothing and appearance at Section 13, which states, in pertinent part:

> 13. PERSONAL APPEARANCE
>
> 13.1. The intent of the Branded Apparel Program (BAP) and the requirements of an employees' personal appearance is to ensure that AT&T employees project and deliver a professional, business-like image to our customers and community.
>
> 13.2. U-verse BAP is mandatory for all Premises Technicians. No other shirt, hat or jacket will be worn without management approval. Shirts must be tucked into the employees pants at all times. Technicians must wear a belt, threaded through the pant belt loops. Pants must be worn around the waist with no undergarments showing.
>
> 13.3. The branded apparel may not be altered in any way which includes adding buttons, pins, stickers, writing etc.

Premises technicians were covered under Appendix F to the 2012 CBA and CBA, both of which incorporated the BAP:[7]

> 5.01 Work Apparel
> The Company may, at its discretion, implement appearance standards and/or a dress code consistent with State and Federal laws. The Company may change the standards and code at its discretion.
>
> For employees in Appendix F, participation in the U-verse Branded Apparel Program (BAP) is mandatory.
>
> The Company can modify or discontinue this program at its discretion. If the BAP is discontinued for the employees listed in Appendix F, the Company will give those employees a minimum notice of thirty (30) days prior to such discontinuance.

The parties bargained over Appendix F in 2012. The Union sought to eliminate the BAP or make the program voluntary for premise technicians as it is for other employee classifications in the bargaining unit. The Company rejected that proposal.[8]

Consistent with the Company's past practice, on April 8, 2016, Stephen Hansen, the Company's labor relations director, notified Ron Gay, a District 4 representative, that the Company would be issuing Premises & Wire Technician Guidelines (the 2016 guidelines) to employees the following week and asked Gay to contact him if he had any questions.[9] Gay acknowledged the email, and said he would review the revision and call him if he had any questions. Gay did not, however, get back to Hansen with any questions or concerns about the 2016 guidelines. This was also generally consistent with the Union's past practice.[10] The introductory explanation was the same as the

[3] GC Exh. 2.
[4] R. Exh. 4(b)–(c).
[5] R. Exh. 2.
[6] GC Exh. 14.
[7] Appendix F applies only to premises technicians. Except in special circumstances, the Company has never applied a mandatory appearance standard or dress code to other technicians. (GC Exhs. 3–4.)
[8] R. Exh. 4(a).
[9] Hansen's notification to Gay of the impending guideline revision was consistent with the practice of his predecessor, William Helwig. It is undisputed that Helwig gave the Union the opportunity to bargain over the new guidelines, but the Union never requested it. (R. Exh. 4(a) at 988–993, 1004–1011.)
[10] Helwig's undisputed prior testimony established a past practice that CWA representatives routinely expressed to him that it was not willing to bargain over any policy that involved discipline, because they believed such bargaining could hurt them in the grievance process. (R. Exh. 4(a) at 993–994.)

previous version, but the personal appearance provision was partially modified and renumbered as Section 14:[11]

> PERSONAL APPEARANCE
>
> 14.1 The intent of the Branded Apparel Program (BAP) and the requirements of a technician's personal appearance are to ensure that AT&T technicians project and deliver a professional, business-like image to our customers and community.
>
> 14.2 BAP is mandatory for all SD&A Premises & Wire Technicians on work time. No other shirt, hat, pants/shorts, shorts or jacket will be worn without management approval. Shirts must be tucked into the technician's pants/shorts at all times. Technicians must wear a belt, threaded through the pant/short belt loops. Pants/shorts must be worn around the waist with no undergarments showing.
>
> 14.3. The branded apparel may not be altered in any way.[12]

C. The Historical Use of Union Buttons at the Company

In 2012 or earlier, technicians attempting to wear Union apparel over their uniforms were instructed by supervisors to remove the shirts. Technicians did, however, display their support for the Union by wearing CWA buttons on Company branded shirts and lanyards in the Company's Indianapolis and South Bend garages, and on job assignments during collective bargaining in 2009, 2012, and 2015. Prior to April 2018, the Company did not enforce the pre-2016 guidelines or 2016 guidelines to ban union buttons, much less discipline any employee for violating those rules.[13] In 2012 and 2015, the Union distributed small red buttons that said, "CWA."[14] In 2018, the Union distributed two types of red buttons; the first button was the size of the bottom of soda can and said, "Fighting Today, Focused on the Future" and it was attached to a lanyard. The second was a quarter-sized button that said, "We Demand Good Jobs."[15]

D. The Company Threatens Disciplinary Action if Employees Wear Union Buttons

In conjunction with collective bargaining in March 2018, technicians displayed their support for the Union at several Indianapolis garages. Danny Collum, the Union's area representative, coordinated the effort through informational picketing and the distribution of CWA buttons, which technicians wore on their branded company shirts or attached to lanyards.

In its opening salvo, the Company's labor relations arm responded by instructing supervisors to enforce the 2016 guidelines.[16] On March 15, Larry Robbins, a core technician serving as the Union's vice president, was informed that premises technicians were told that they could not wear CWA buttons offsite. Robbins called Bickel and inquired about the incident. Bickel confirmed the policy prohibiting the wearing of buttons on company shirts. Robbins then emailed Grace Biehl, a labor relations manager, who confirmed the policy on the basis that the buttons constituted an alteration.[17] Notwithstanding the Company's position regarding union buttons, the technicians continued to wear them without incident for about 1 month.[18]

On April 16, at the Hanna Avenue garage in Indianapolis, Joseph St. Clair, the manager of network services, noticed a premises technician surnamed Terry leaving the facility wearing a CWA button on his company shirt. St. Clair ordered Terry to remove the button. Terry ignored him and St. Clair repeated the directive. Terry refused. St. Clair replied that Terry's continued refusal to remove the button constituted insubordination and subjected him to discipline, including termination. Terry removed the button and informed Collum of the incident.[19]

After speaking with Terry, Collum immediately went to the Hanna Avenue garage. He spoke to St. Clair, who confirmed that employees were prohibited from wearing the CWA buttons and faced discipline if they did. Collum protested that the buttons merely displayed support for the bargaining team. Collum also called Bickel, who confirmed the policy on the ground that the buttons could be construed negatively by the public. Collum's last appeal was to Biehl, who reiterated the Company's position that the buttons violated the 2016 guidelines because they constituted an alteration to the Company's branded apparel. During the subsequent grievance meeting, St. Claire informed Collum that the Company's enforcement of the guidelines with respect to the CWA buttons was at the instruction of the Company's bargaining team. St. Claire proceeded to deny the grievance on the ground that the buttons could be construed negatively by customers. Collum disagreed.[20]

Company discipline is set forth in its guide for corrective action by supervisors and managers, which states in pertinent part:

> It is intended that the guidelines be used by management as a tool to ensure consistent treatment of employees who exhibit behaviors considered unacceptable. When referring to management or managers, these guidelines refer to the first level of supervision responsible for managing the employee reporting to them, for example, the Field Managers who supervise

[11] GC Exh. 6; R. Exh. 2.

[12] In contrast to the previous guidelines, reference to buttons, pins, stickers, and writing was deleted.

[13] Angela Bickel, the Company's area manager, observed the rule being enforced "in 2012 or earlier" when "technicians would attempt to wear a t-shirt over their uniforms" but did not mention buttons. (Tr. 102–105.) Core technician Preston Dorfmeyer distributed union buttons to premises technicians in 2009 and saw them wear the buttons in the garages and as they left to work sites, all in the presence of managers. (Tr. 122–124.) Union officials Timothy Strong and Danny Collum credibly testified that technicians also wore union buttons in garages and while leaving for service calls in 2012 and 2015 without any restraint by Company supervisors. (Tr. 30–37, 40–42, 55–56, 67–68, 117, 124.)

[14] GC Exhs. 11–12.

[15] GC Exhs. 13(a)–(b), 15.

[16] This finding is based on Collum's credible and undisputed testimony that St. Clair subsequently attributed the enforcement action to a directive from the Company's bargaining team. (Tr. 67.)

[17] GC Exh. 10.

[18] This finding is based on Robbins' credible and unrefuted testimony. (Tr. 50–51.)

[19] St. Clair's credible testimony indicates that Terry was wearing a button, not a lanyard. (Tr. 86–87.)

[20] Collum's credible version of these conversations was not disputed. (Tr. 61–67, 86–88.)

technicians or the Center Managers who supervisor clerical employees. Management should apply these guidelines fairly and evenly, taking into account surrounding circumstances. Evaluation of trends, past history and mitigating circumstances should serve to guide management in making "firm but fair" decisions.

LEGAL ANALYSIS

I. THE 2016 PERSONAL APPEARANCE AND DRESS CODE GUIDELINES

The complaint alleges that the Company violated Section 8(a)(1) of the Act by maintaining the 2016 guidelines and threatening employees with discipline if they violated them. Specifically, the General Counsel alleges that: (1) premises technicians engaged in protected activity when they wore CWA buttons during contract negotiations to show solidarity for the bargaining team; (2) the Company failed to enforce guidelines prohibiting the use of buttons or otherwise prove the existence of special circumstances justifying its interference with such activity; and (3) neither the CBA nor the 2016 guidelines support a waiver argument.

The Company contends that: (1) its guidelines do not restrict all forms of union insignia and, in fact, it provides technicians with company hats that bear the CWA logo at no cost; (2) any restrictions on protected conducted is outweighed by the legitimate business purpose of promoting a brand of professionalism to customers and projecting a positive public image of the Company; (3) the Union consistently waived any objection to maintenance of the guidelines; and (4) the Company has consistently enforced the pre-2016 guidelines and the 2016 guidelines.

Employees have "a protected Section 7 right to make public their concerns about their employment relation, including a right to wear union insignia at work." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). This "right of self-organization," however, must be balanced against "the equally undisputed right of employers to maintain discipline in their establishments." *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). The Board recently reiterated this balancing test in *Boeing Co.*, 365 NLRB No. 154, slip op. at 14 (2017):

> In cases in which one or more facially neutral policies, rules, or handbook provisions are at issue that, when reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on [rights under the Act], *and* (ii) legitimate justifications associated with the requirement(s). Again, we emphasize that the Board will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy. (emphasis in original)

It is axiomatic that "a rule that curtails employees' Section 7 right to wear union insignia in the workplace must be narrowly tailored to the special circumstances justifying maintenance of the rule, and the employer bears the burden of proving such special circumstances." *Boch Honda*, 362 NLRB 706, 707 (2015), enfd. 826 F.3d 558 (1st Cir. 2016); see also *W San Diego*, 348 NLRB 372, 373–374 (2006) (special circumstances that justified employer's ban on buttons worn in public areas did not justify a ban on buttons worn in nonpublic areas).

The Board has found special circumstances justifying the ban of union insignia and apparel when their display may "jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees." *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), enfd. *Communications Workers of America, Local 13000 v. NLRB*, 99 Fed. Appx. 233 (D.C. Cir. 2004) (employees lawfully prohibited from wearing union tee shirts depicting them as road kill and driven over by trucks with employer's name); *Komatsu America Corp.,* 342 NLRB 649, 650 (2004) (permitting foreign Japanese-owned company to ban "inflammatory and offensive" union tee shirts comparing company's outsourcing plans with the Japanese attack on Pearl Harbor); *Evergreen Nursing Home and Rehabilitation Center, Inc.*, 198 NLRB 775, fn. 1, 778–779 (1972) (nursing home's ban on buttons deemed lawful since employees were in intimate contact with elderly ill patients, many of whom are "confused and disoriented and their reactions to outside stimuli are unpredictable and could cause severe agitation, upsetting [employer's] operations and control").

Here, the 2016 guidelines do not explicitly restrict activity protected by Section 7 of the Act, nor is there evidence that they were adopted in response to protected activity. The Company insists that it has maintained rules for the past 9 years banning buttons based on the stated purposes of promoting a brand of professionalism in its premises technicians and a positive public image of the Company. During the same period of time, however, the Company has also issued these employee hats branded with the ATT and CWA logos. It is undisputed that the 2016 guidelines, as applied on April 16, constitute work rules that restrict the exercise of Section 7 rights by precluding unit employees from wearing buttons with the CWA logo.

There is no showing that the Company would be adversely impacted by employees wearing union buttons. See *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003) (for employee's message to lose the protection of the Act, employer must establish that the material was obscene or derogatory and improperly cites or causes disruption or results in an adverse impact on production). Even if the ban were limited to customer engagement, those circumstances alone do not constitute a special circumstance justifying the banning of union insignia. *Meijer, Inc.,* 318 NLRB 50, 50 (1995), enfd. 130 F.3d 1209 (6th Cir. 1997) (no special circumstances exist where employees wear "Union Yes" pins in customer-facing roles in spite of work rule permitting only approved pins to be worn).

In *Long Beach Memorial Medical Center*, 366 NLRB No. 66 slip op. at 2 (2018), enfd. 774 Fed. Appx. 1 (D.C. Cir. 2019), the Board recently evaluated a similar rule requiring that "only [employer-] approved pins, badges, and professional certifications may be worn." The employer sought to justify the rule as "a standardized, easily-identifiable, customized, consistent and professional look in accordance with its business strategy of providing quality patient care." The Board rejected the em-

ployer's justification that the rule was necessary to create a "unique experience distinct from its competitors." Id. at 3. See also *Casino Pauma*, 362 NLRB 421 (2015) (handbook rule stating that employees may not wear "any badges, emblems, buttons or pins on their uniforms" other than their identification badge is presumptively unlawful, and its enforcement violated Section 8(a)(1) of the Act).

The notion that the display of a CWA button appended to the Company's uniform unreasonably interferes with its public image or business plan, when it already provides employees with a hat that bears the CWA and Company logos, is specious. Accordingly, the Company's maintenance of the 2016 guidelines, which contained an overly broad prohibition of the display of union insignia in the workplace, violated Section 8(a)(1) of the Act.

II. THE UNION'S ALLEGED WAIVER OF ITS RIGHT TO BARGAIN OVER THE 2016 GUIDELINES[21]

The Company also alleges that the Union clearly and unmistakably waived its right to bargain over premises technicians' rights to wear union insignia over their branded apparel. It bases that defense on two grounds: (1) the Company's contractual right to implement appearance standards "at its discretion;" and (2) the Union's failure to request bargaining over the premises technicians guidelines in 2009, 2010, 2011, 2013, and 2016. The General Counsel disagrees for three reasons: (1) if there was a clear waiver in the past, it expired when the contract expired; (2) the Company replaced the old rule with one that was even broader (prohibiting any alterations to branded apparel) and made no mention of buttons; and (3) the parties never discussed the 2016 guidelines after the Company informed the Union that they would be implemented.

It is well established that a union may waive a statutory right where its waiver is "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007).[22] Waiver can occur by "express provision in a collective-bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two." *Northwest Airport Inn*, 359 NLRB 690, 693 (2013), citing *American Diamond Tool*, 306 NLRB 570 (1992).

In instances "where an employer gives a union advance notice of its intention to change a term or condition of employment, the union must make a reasonably timely demand for bargaining over the matter to avoid a finding of waiver or acquiescence." *Reynolds Metal Co.*, 310 NLRB 995, 1000 (1993). For example, in *WPIX, Inc*., 299 NLRB 525 (1990), the employer planned to change the reimbursement rate it paid employees for mileage. The employer did not notify the union of the change, but the union learned of it in an interoffice memorandum obtained by a union representative. The Board held that the union waived its right to bargain over the change because it had actual notice of the change a week prior to its implementation but did not request bargaining. Id. at 525–526. See also *Ohio Edison Co*., 362 NLRB 777, 788–789 (2015) (employer announced its intention to change the policy 3 months before implementation, told the union if it had any questions to contact the employer, and reminded the union of the upcoming change twice before implementation).

In addition to an express contractual waiver, the Board will also find that a union can waive its right to bargain over a subject based on its conduct. However, an employer must first provide the union with a timely and meaningful opportunity to bargain. *Taft Coal Sales & Associates, Inc*., 360 NLRB 96, 100 (2014), enfd. 586 Fed. Appx. 525 (11th Cir. 2014) (the unlikelihood of any meaningful bargaining was a fait accompli where the employer refused to give notice of impending layoffs to the union until after advising the affected workers). A timely notice is one which is given far enough in advance to allow a reasonable opportunity to bargain. If the employer merely informs the union of the upcoming changes with no real intent to bargain, or it gives a union untimely notice, the employer has not met the Board's standard. Id.

The Company did not indicate openness to bargain but was receptive to "any questions" the Union might have. See *U.S. Lingerie Corporation*, 170 NLRB 750 (1968) (sufficient notice and opportunity to bargain existed even where employer did not directly provide notice and offer to negotiate, but the union found out about the policy change by other means). For its part, the Union representative confirmed receipt via email, and indicated he would review the policy and "call with any questions." The Union did not, however, seek to bargain over the 2016 guidelines or discuss them until the April 2018 incident. Historically, the Union purposefully avoided bargaining over the guidelines in order to preserve its position at the grievance stage.

It is clear that the Union waived any objection to the Company's maintenance of the pre-2016 guidelines, all of which specifically prohibited the wearing of buttons on company apparel. *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982) (once union receives notice of an employer' s intent to change a condition of employment, it must "promptly request that the employer bargain over the matter"). The Company's notice of implementation of the 2016 guidelines—1 week—was relatively short, but the Board has accepted less time as sufficient for a union to request bargaining. *Hartmann Luggage Co.*, 173 NLRB 1254, 1255–1256 (1968) (a 4 ½ day notice of impending layoffs was "adequate to alert and afford the Union an opportunity to protest . . ."); see also *Holiday Inn Central*, 181 NLRB 997 (1970) (less than 4 days' notice was sufficient). Since the notification of the impending change was sufficient, the only remaining issue is whether the CBA lan-

[21] The Company's reliance on *Wisconsin Bell,* JD–67–16, as controlling law is baseless. That proceeding involved similar issues between affiliates of the parties. As explained at the hearing, however, that decision lacks any precedential weight since no exceptions were filed. See generally *Operating Engineers Local 39 (Mark Hopkins Intercontinental Hotel*), 357 NLRB 1683, 1683 fn. 1 (2011); and *Trump Marina Associates LLC,* 354 NLRB 1027, 1027 fn. 2 (2009), re'affd. 355 NLRB 585 (2010), enfd. 435 Fed. Appx. 1 (D.C. Cir. 2011).

[22] The Board recently replaced the "clear and unmistakable waiver standard" with the narrower "contract coverage standard" in *MV Transportation, Inc*., 368 NLRB No. 66, slip op. at 1–2 (2019). That decision, however, specifically limited application of the new standard to "pending unilateral-change cases where the determination of whether the employer violated Sec. 8(a)(5) turns on whether contractual language granted the employer the right to make the change in dispute."

guage, including the 2016 guidelines and/or the parties' conduct clearly and unmistakably waived any objection by the Union to a ban on wearing buttons at any time since April 8, 2016.

Neither the language of the 2016 guidelines nor the parties' conduct since April 2016 support a waiver of premises technicians' rights to wear union buttons. In *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 281 (1956), the court found that provisions alleged to waive employees' rights are appropriately read "in context and in the light of the law under which the contract was made." In this case, the language of Appendix F, Section 5.01 of the CBA, which incorporates the 2016 guidelines, enables the Company to implement a dress code "consistent with State and Federal Laws." In contrast to earlier written versions of the policy, however, the 2016 guidelines omitted specific reference to union insignia. Moreover, the provision states that the Company will comply with federal law, which includes the Section 7 right to wear union insignia.

III. THE COMPANY'S ENFORCEMENT OF THE RULE

The General Counsel contends that, even if the Union waived its right to bargain over the 2016 guidelines, the evidence established that they were arbitrarily enforced at the Hanna Avenue garage on April 16, in order to restrict Section 7 activity—that is, ban employees from attaching CWA buttons to their company shirts during bargaining. Similar buttons had been worn by premises technicians over the previous nine years during similar activities and, in contrast to tee shirts, supervisors never ordered them to remove the buttons. On April 16, however, the Company's labor relations department encroached upon its operations by directing supervisors to do so just as the Union began mobilizing members for contract negotiations.

Where there is consistent failure in the enforcement of a dress code, its enforcement in response to protected or union activity is a violation of the Act. See *Meijer*, 318 NRLB at 50 (employer with a pattern of permissiveness toward non-union buttons discriminatorily applied the rule). See also *Pacific Bell Telephone Co.*, 362 NLRB 885, 888 (2015) (rejecting employer's prohibition of union insignia citing, among other things, a "history of lax enforcement" allowing premises technicians to wear a variety of nonbranded apparel in violation of the dress code). The Board does, however, require more than a few lapses of enforcement to establish a pattern of failure to implement a rule. Cf. *Hertz Rent-A-Car,* 305 NLRB 487, 487–488 (1991) (rejecting a disparate enforcement allegation where a few incidents of non-enforcement were cited against a record of ongoing, concrete steps to enforce the dress code); *Burger King Corp. v. NLRB*, 725 F.2d 1053 (6th Cir. 1984) (declining to enforce Board order on the grounds that a consistently applied no-button rule did not encroach on Sec. 7 rights); *United Parcel Service v. NLRB*, 41 F.3d 1068 (6th Cir. 1994) (declining to enforce a Board order on the ground that a dress code barring any changes applied consistently did not infringe on Section 7 rights).

Employees wore buttons frequently throughout bargaining sessions in 2009, 2012, and 2015, within sight of supervisors and without restraint. On April 16, however, a Company supervisor enforced the 2016 guidelines at the direction of the Company's labor relations team. That backdrop clearly entwined the action with the collective-bargaining process. As the Board reiterated in *Boeing*, supra at 16, an otherwise lawful work rule can still be rendered unlawful if applied to employees who engage in protected conduct under the Act:

> For example, if the Board finds that an employer lawfully maintained a "courtesy and respect" rule, but the employer invokes the rule when imposing discipline on employees who engage in a work related dispute that is protected by Section 7 of the Act, we may find that the discipline constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1).

Id. (citing *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996); *Adtranz ABB Daimler-Benz Transportation, N.A. v. NLRB,* 253 F.3d 19, 28 (D.C. Cir. 2001).

Under the circumstances, the Company discriminatorily enforced the 2016 guidelines to restrain unit employees' Section 7 rights in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Indiana Bell Telephone Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Communications Workers of America, Local 4900 is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by maintaining a rule since April 8, 2016 banning premises technicians from wearing a union button stating "CWA" and discriminatorily enforcing that ban on April 16, 2018.
4. The above unfair labor practice affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.
5. The Respondent has not violated the Act in any of the other manners alleged in the Complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I shall order the Respondent, at all of its facilities, to cease and desist from maintaining a rule prohibiting premises technicians from wearing the CWA button. The Respondent is also ordered to rescind the rule prohibiting premises technicians from wearing the CWA button and, after the rescission, to advise premises technicians in writing that this unlawful rule is no longer being maintained.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Indiana Bell Telephone Company, Inc., In-

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

dianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a rule prohibiting premises technicians from wearing the CWA button.

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

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

(a) Rescind the rule prohibiting premises technicians from wearing the CWA button, and

advise employees in writing that this unlawful rule is no longer being maintained.

(b) Within 14 days after service by the Region, post at all of its facilities in the State of Indiana, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 8, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

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

Dated, Washington, D.C. September 17, 2019

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and enforce a rule prohibiting premises technicians from wearing the union button stating: "CWA."

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

WE WILL rescind the rule prohibiting premises technicians from wearing the "CWA" button and after the rescission WE WILL advise you in writing that this unlawful rule is no longer being maintained.

INDIANA BELL TELEPHONE COMPANY, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-218494 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.