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

WISCONSIN BELL, INC. (AT&T WISCONSIN)

and

Cases 18–CA–147635
18–CA–163323

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 4622

Angela B. Jaenke, Esq., for the General Counsel.

Stephen J. Sferra, Esq. and *Jeffrey J. Moyle, Esq. (Littler Mendelson, P.C.)*, of Cleveland, Ohio, for the Respondent.

DECISION

CHARLES J. MUHL, Administrative Law Judge. This case is the second one involving an entity of AT&T prohibiting employees from wearing a union button with the acronym "WTF" on it. The button here states "CWA Local 4822," "WTF AT$T," and "Where's the Fairness" (the "WTF button"). The General Counsel alleges that Wisconsin Bell, Inc. (the Respondent) unlawfully promulgated a rule in January 2009 prohibiting its premises technicians from wearing any buttons. The General Counsel also claims the Respondent unlawfully prohibited its premises technicians and core technicians from wearing the WTF button on three occasions in November 2014 and May 2015. The Respondent counters that it has established "special circumstances" permitting it to restrict employees from wearing union insignia at work. The Respondent also argues that the Communications Workers of America union (the Union) waived its right to bargain over the button prohibition as to premises technicians.

In *AT&T*, 362 NLRB No. 105, slip op. at 1-14 (2015), the Board held that the Pacific Bell and Nevada Bell telephone companies unlawfully restricted employees from wearing a union button stating "WTF Where's the Fairness?" The Board rejected the argument that the companies established special circumstances. The Board found that the button language was not so offensive and vulgar as to lose the protection of the National Labor Relations Act (the Act) or damage the companies' public image with their customers. In so holding, the Board relied upon the button's inoffensive "Where's the Fairness" interpretation of WTF. The WTF button here includes the same innocuous interpretation. Accordingly, I conclude the Board's holding in *AT&T* is controlling and the Respondent has not established special circumstances. As a result, I

find that the Respondent violated Section 8(a)(1) by banning core technicians from wearing the button in May 2015.

However, I conclude that this case is distinguishable from *AT&T* on an issue the Board did not have occasion to reach in the prior decision: waiver. Prior to implementing the premises technician guidelines containing the no-buttons rule in 2009, the Respondent provided the guidelines to the Union 2 weeks in advance and invited discussion on them. The Union did not request to bargain or respond in any fashion. The Respondent reissued the guidelines, including the no-buttons rule, with the same advanced notification to the Union in 2010, 2011, and 2013. On each occasion, the Union did not make a request to bargain or respond in any fashion. When the Respondent enforced the rule in November 2014, the Union filed an unfair labor practice charge, but again failed to request bargaining. As explained fully herein and recognizing that establishing waiver is a heavy burden, I find that the Union did not act with the "due diligence" required under Board law. *KGTV*, 355 NLRB 1283 (2010); *Bell Atlantic Corp.*, 336 NLRB 1076 (2001). Accordingly, I hold that the Union, by its conduct, waived the right to bargain over the Respondent's decision to implement and maintain the ban on premises technicians wearing any buttons. Thus, the Respondent lawfully enforced the button prohibition against premises technicians in November 2014 and May 2015.

STATEMENT OF THE CASE

In Case 18–CA–147635, Communications Workers of America, Local 4622 (the Charging Party), by its President Robert Boelk, filed a charge on March 6, 2015. The General Counsel issued a complaint in that case on July 21, 2015. The complaint alleged that the Respondent violated Section 8(a)(1) by promulgating a work rule in June 2013 applicable to premise technicians ("prem techs"). The rule states "The branded apparel may not be altered in any way which includes adding buttons, pins, stickers, writing, etc." The complaint also alleged that the Respondent enforced this unlawful work rule against employees by prohibiting them from wearing the WTF button on November 17 and 21, 2014. The Respondent filed a timely answer, in which it denied the allegations and asserted numerous affirmative defenses. The trial in this case opened on October 22, 2015, and was adjourned on October 23, 2015.

The Charging Party filed a new charge on November 4, 2015, in Case 18–CA–163323. The General Counsel issued a complaint in that case on December 18, 2015. The complaint alleged the Respondent maintained an unlawful rule since at least May 7, 2015, banning both prem techs and core technicians ("core techs") from wearing the same WTF button. Again, the Respondent filed a timely answer denying the allegations and asserting multiple affirmative defenses.

On December 21, 2015, I issued an order rescheduling the hearing resumption in Case 18–CA–147635 for January 26, 2016. The General Counsel then filed a motion to consolidate Case 18–CA–163323 with Case 18–CA–147635 on December 29, 2015. I granted the motion to consolidate over the Respondent's objection on January 15, 2016. The Respondent filed a motion to postpone the hearing resumption on January 20, 2016, which I denied. The

consolidated cases were tried and concluded on January 26, 27, and 28, 2016.[1]

On the entire record, including my observation of the demeanor of witnesses and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent provides telecommunications services at facilities located throughout the State of Wisconsin, including in Fond du Lac and Sheboygan. In conducting its business operations in the past calendar year, the Respondent derived gross revenues in excess of $100,000. It also purchased and received, at its Wisconsin facilities, goods valued in excess of $5,000 directly from points located outside of Wisconsin. Accordingly, and at all material times, I find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as the Respondent admits in its answers to the complaints. The Respondent also admits, and I find, that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is one of five AT&T companies which comprise AT&T Midwest. The Communications Workers of America (CWA) international union and AT&T Midwest have a longstanding collective-bargaining relationship going back at least 50 years. The relationship has been embodied in successive collective-bargaining agreements covering, among others, prem techs and core techs. This included a contract which ran from April 8, 2012 to April 11, 2015. (GC Exh. 33.)

In addition to the international union, CWA had districts and locals which assist with the representation of employees. In particular, District 4 of the CWA covers roughly 15,000 represented employees of the AT&T Midwest companies. CWA District 4 is responsible for contract negotiations for these employees. CWA Local 4622 is a part of District 4. The local is responsible for representing prem and core techs in Fond du Lac and Sheboygan, Wisconsin.[2]

A. The Bargaining History Concerning Premises Technicians and Appearance Standards

The events giving rise to this case can be traced back to 2006. At that time and continuing to date, the Respondent has provided POTS to customers. POTS is an acronym which, amusingly, stands for "plain old telephone service." The Respondent also provided, and

[1] I grant the General Counsel's posthearing motion to include in the formal papers a full copy of the Respondent's amended answer in Case 18–CA–147635, filed October 21, 2015. (GC Exh. 1(ee).) I also grant the request to include a copy of my order denying the Respondent's January 20, 2016 motion to postpone resumption of the hearing on January 26, 2015. (GC Exh. 1(gg).)

[2] Hereinafter, the term "the Union" refers to the international union, District 4, and Local 4622 collectively. Where necessary, the specific branch of the Union is identified.

continues to provide, internet service known as DSL, or digital subscriber line, over existing phone lines. Core techs install and repair these services.

Core techs do not have any mandatory appearance standards.[3] However, they have had the option to voluntarily participate in the Respondent's Branded Apparel Program (BAP) since before 2006. The BAP allows core techs to purchase items of clothing branded with the AT&T name and logos to wear while working. At material times, employees who participated in the BAP wore a variety of company shirts, pants, jackets, and hats. The Respondent provides a certain dollar amount each year to enable employees to purchase BAP clothing. Core techs who opt-in must wear the BAP clothing they purchase or they are not permitted to participate in the BAP the following year. The BAP is not a part of the collective-bargaining agreement between AT&T Midwest and the Union.

In 2006, the Respondent began construction of an IP, or internet protocol, network. The purpose of the IP network was to provide faster telephone and internet service, as well as to enable the Respondent to establish a new television service. The Respondent's brand name for these new services was "U-Verse." The Respondent created a new job classification, prem tech, to install and repair U-verse services, once the brand was launched.

This business development led to bargaining between AT&T Midwest and District 4. Jerry Schaeff served as one of District 4's negotiators in 2006. AT&T Midwest's principal negotiator was Ron Wells. In May 2006, the parties reached a memorandum of understanding covering the prem tech job classification. (GC Exh. 13, appendix F.) Pursuant to the agreement, the Respondent voluntarily recognized the Union as the prem techs' bargaining representative. In exchange, the Union agreed to, among other things, section 5.01 of appendix F, entitled "Work Apparel." That section states in relevant part:

> 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 the employees in Appendix F, participation in the AT&T Branded Apparel Program (BAP) is mandatory.
>
> The Company can modify or discontinue this program at its discretion.

During bargaining for section 5.01, the Union agreed to the identical language first proposed by the Respondent. The only discussion the parties had concerning this provision was the Union's request that its own logo appear on branded apparel. The parties did not discuss

[3] Since at least the fall of 2012, the Respondent has maintained core technician "expectations" that are not mandatory. (R. Exh. 9.) Those expectations include that core techs should dress in a professional manner and present a professional appearance. They also state that core techs should "avoid" clothing with pictures, advertising, slogans, or unauthorized, non-AT&T logos. The Respondent and the Union did bargain over appearance standards for core techs, but never reached an agreement. (GC Exhs. 40 to 43.)

whether the language of section 5.01 prohibited employees from wearing other union insignia.[4] This provision was incorporated into the collective-bargaining agreement in 2009 and has remained in subsequent contracts in unchanged substantive form.

The Respondent launched U-verse in Milwaukee, Wisconsin, in early 2007. The Sheboygan area was a part of this launch. In June 2008, the Respondent made U-verse available in the Green Bay market, which included Fond du Lac. In 2009, Sheboygan became part of the Green Bay market.

In January 2009, the Respondent issued its first U-Verse Field Operations Premises Technician Guidelines (the "prem tech guidelines").[5] (GC Exh. 5.) Section 13 of the guidelines, issued pursuant to section 5.01 of appendix F, included the appearance standards for prem techs. Section 13.1 described the overall purpose of the appearance rules as "to ensure that AT&T employees project a professional, business-like image to our customers and community." The remaining provisions of section 13 at issue in this case state in relevant part:

> 13.2 U-verse BAP is mandatory for all Premises Technicians. No other shirt, hat or jacket will be worn without management approval . . .
>
> 13.3 The branded apparel may not be altered in any way which includes adding buttons, pins, stickers, writing etc.
>
> 13.13 Technicians must be ready for work at the start of their work day. This includes wearing the proper BAP attire. If the clothing is deemed inappropriate, the employee will be sent home unpaid. This will be considered an unexcused absence until the employee returns to work in the proper attire . . .

Additional provisions in section 13 address cleanliness, neatness, and the ability of customers to identify a prem tech as an employee of AT&T.

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[4] I credit Schaeff's testimony concerning what occurred during 2006 bargaining for appendix F. (Tr. 201–205.) His testimony in this regard was candid, forthright, and specific. It also is uncontroverted, as the Respondent did not call Wells or any witness who actually participated in the negotiations.

At the hearing, the Respondent moved to admit Wells' bargaining notes from 2006 into the record, despite his absence as a witness. The notes included a "handout for discussion only" prepared by the Respondent regarding the "Work Appearance" of prem techs. After the Respondent laid the proper foundation through witness testimony, I overruled the General Counsel's objection and received the bargaining notes as a business record. (R. Exh. 8; Tr. 642-655, 692–699, 739–744, 886-889.) However, the bargaining notes are of little evidentiary value. Nothing in the notes or handout contradicts Schaeff's testimony that the parties did not discuss union insignia, beyond the Union's request that its logo appear on the Company's branded apparel.

[5] The original complaint in Case 18–CA–147635 alleged that the Respondent promulgated the prem tech guidelines in June 2013. At the hearing and over the Respondent's objection, I permitted the General Counsel to amend the allegation. The amendment changed the alleged promulgation date to January 2009, when the Respondent first provided the Union with the guidelines prior to implementation.

When these guidelines were issued, William Helwig was the director of AT&T Midwest labor relations. He held the position from 2003 to 2013. Helwig followed a standard practice if AT&T Midwest intended to implement a new or revised policy. He emailed the policy to the District 4 officer responsible for the particular subject matter. The email included a message to the representative to give him a call if the Union had questions or wanted to discuss. Helwig then waited at least 2 weeks, before calling the Union representative if he had not heard back. Helwig confirmed that District 4 was fine with the policy being rolled out. Thereafter, Helwig notified management in the field that they could implement the policy.

Helwig followed his procedure with respect to the 2009 implementation of the prem tech guidelines. The guidelines were approved to be provided to District 4 on January 22, 2009. (GC Exh. 5; Tr. 1007.) After receiving the guidelines in 2009, District 4 did not respond with a request to bargain or in any other manner.[6]

Consistent with Helwig's practice, the guidelines were submitted to the field 2 weeks later. On February 4, 2009, Mark Priddis, then a U-verse area manager in the Green Bay market, emailed the guidelines to Robert Boelk, a core tech and the president of CWA Local 4622. (GC Exh. 6.) Priddis asked Boelk to review the document and contact him to discuss. Boelk responded via email 3 days later. Boelk stated "[w]e as a union do not agree with the document." Priddis responded and advised Boelk that the Respondent would be reviewing the guidelines with employees that week. He also stated: "I wanted to give your local the opportunity to review it and discuss any concerns on content and delivery prior to distribution. I am taking [Boelk's] e mail as your response to that offer."[7]

The Respondent reissued the prem tech guidelines, including section 13 in unchanged substantive form, in 2010, 2011, and 2013. (GC Exh. 7; R. Exhs. 17 and 18.) Helwig again followed his standard practice to notify District 4 of the revised guidelines. (GC Exhs. 58, 62; R. Exh. 21.) District 4 did not respond on any of the three occasions.

B. The Nature of the Work of Premises and Core Technicians

The Respondent operates facilities out of both Fond du Lac and Sheboygan, Wisconsin. Don Wirz is the area manager who oversees both facilities. In Sheboygan, Tim Miller became the prem tech manager in March 2014 and Scott Stilp was the core tech manager at material times. In Fond du Lac, Duane Boll was the sole prem tech manager beginning in January 2014. Tony Lind manages the core techs there. Each facility has in the neighborhood of 10–15 prem

[6] I credit Helwig's uncontroverted testimony in this regard. (Tr. 989–1008.) Helwig was confident and believable in describing his practice. In any event, the General Counsel does not contend that the Respondent failed to provide the prem tech guidelines to the Union prior to implementation in 2009, and Schaeff's testimony would not support such a contention. Schaeff testified only that the Respondent never bargained with the Respondent over the guidelines, a point not in dispute. (Tr. 207.)

[7] Although Priddis sent the guidelines to Boelk, the parties' collective-bargaining agreement and Boelk's testimony establish that Boelk was not authorized to bargain on the Union's behalf over the guidelines. The parties' contract states that all collective bargaining with respect to employees' terms and conditions of employment "shall" be conducted by duly authorized representatives of the Union and the Company respectively. (GC Exh. 33, article 8.01.) Boelk conceded at the hearing that he has never been designated as a duly authorized representative to bargain for the Union as to the guidelines. (Tr. 173.)

techs and 4–6 core techs.[8] Supervisors and employees refer to the facilities as garages.

Prem techs and core techs begin their days at their assigned garage. The employees obtain their job assignments for the day and prepare their vehicles for those jobs. They also frequently meet with their front line managers before heading to the field. These meetings take place in a crew room. The Sheboygan facility has one crew room that is about the size of a one-car garage. As a result, prem techs and core techs attend meetings there together. The Fond du Lac facility has two crew rooms. Management there holds separate meetings for prem and core techs. The crew meetings and other prep work at the start of a day typically require no more than 15 to 20 minutes.

Following the initial, brief check in at the garages, prem and core techs spend the remainder of their workdays in the field. To install and repair U-verse services, prem techs are inside customers' homes for almost the entirety of their work days. Core techs likewise perform work in customers' homes, including replacing wire and phone jacks. Core techs also assist prem techs with U-verse installs and repairs at times. However, the number of such "helper tickets" is small and the core techs' work on them frequently is outside. Overall, then, prem techs have more customer contact than core techs. Nonetheless, both classifications interact with customers. The interaction includes introducing themselves when they arrive at the job and performing an initial walk through. It also includes checking in with customers when the work has been completed and demonstrating how any new equipment is operated.[9]

C. The Respondent Prohibits Premises Technicians from Wearing the WTF Button

In early November 2014, CWA Local 4622 held a membership meeting. Due to concerns about overtime and unresolved grievances involving prem techs, the members voted to take action against the Respondent. They decided to wear the WTF button beginning November 17, 2014. On November 11, 2014, Boelk sent an email to the membership confirming these details. (GC Exh. 10.)

The WTF button at issue in this case is circular with a diameter of about 2-1/8 inches. (Jt. Exh. 1; GC Exh. 11; R. Exh. 2.) The button has an orange background. The letters "WTF" appear at the middle of the button. "AT$T" appears in a smaller font immediately below. The top of the button contains the text "CWA Local 4622." The bottom of the button states "Where's The Fairness." The text at the top and bottom of the circle is in an even smaller font than "AT$T." An unreadable graphic image is included between "AT$T" and "Where's The Fairness."

[8] The core techs involved in this case are a part of a larger universe of core techs who work for the Respondent, including at Sheboygan and Fond du Lac. Prem techs and the subgroup of core techs who work on POTS and DSL are a part of the Respondent's service, delivery, and assurance (SD&A) branch. The Respondent created that branch in early 2014.

[9] Witness testimony varied widely concerning how much time core techs actually spend in customers' homes. (Tr. 410–413, 493–494, 504-507, 659, 728–729.) I find the exact figure irrelevant. The witnesses were consistent as to the fact core techs have at least some contact with customers when performing their work. In a case like this involving a small union button, even minimal contact with a customer would permit the customer to observe and read any message on a button.

1. The events in Sheboygan on November 17, 2014

On the morning of November 17, 2014, the Respondent held its regular crew meeting in Sheboygan. Prem Tech Supervisor Tim Miller and Core Tech Supervisor Stilp were present. Over a half dozen prem techs and two core techs, Terry Johns and Craig Jankowski, attended the meeting as well. All of the employees were wearing the WTF button. Miller asked the prem techs to take off the buttons. Miller told the employees that the buttons violated the Respondent's appearance policy and needed to be removed.[10]

That same day, Boelk and certain of the Respondent's managers learned of the events in Sheboygan. Boelk then called Area Manager Wirz and asked why supervisors were telling techs to take the button off. Wirz responded that the button was not part of the BAP. Wirz told Boelk he would have to take the issue up with "labor." Boelk then called and left a voice message for Peggy Texeira, the labor relations manager for the State of Wisconsin for AT&T Midwest. Wirz also advised Texeira via email that Boelk instructed U-verse techs to wear a button. (GC Exh. 57.) Wirz attached a copy of section 13.3 of the prem tech guidelines. Wirz stated that the button appeared inappropriate under those guidelines and requested Texeira's advice. Texeira asked what the button said and looked like. Steve Miller, another front-line manager, then emailed her an image of the button. In turn, Texeira emailed her director, Steve Hanson, and asked for direction. However, Hanson did not immediately respond.

2. The events in Fond du Lac on November 21, 2014

On November 21, 2014, prior to the crew meeting, Tim Miller and Steve Miller were in the office of Fond du Lac U-verse manager Duane Boll. Neither of the Millers normally was present at that garage. Prem tech Christopher Ploense, then also a union steward for CWA Local 4622, looked into Boll's office. Tim Miller observed Ploense wearing the WTF button. After Ploense left the area, Tim Miller told Boll that the button was contrary to the personal appearance policy. Boll stated he would address it at the crew meeting.

[10] None of these findings of fact concerning what happened in the crew meeting are in dispute. Johns, prem tech Ellis Robson, and Tim Miller testified consistently in this regard. (Tr. 312–315, 499–500, 807–810.) The divergence in witness testimony concerns whether Miller also directed core tech Jankowski, who opted-in to the BAP, to remove his button. (Tr. 87, 314–315, 500, 808.) Because no dispute exists that Miller restricted at least some employees from wearing the button, the resolution of that question ultimately is unnecessary. However, if it was, I would credit Johns' testimony that Miller asked Jankowski to remove his button. Based on Miller's statements that day and on November 21 in Fond du Lac, it appears he mistakenly believed that all employees who participated in the BAP, including Jankowski, were subject to the Respondent's button restriction.

I also find it implausible, as Miller claimed, that he did not observe the two core techs wearing the WTF button in the meeting. As previously noted, the Sheboygan crew room is relatively small in size. Miller himself testified that Johns approached him and repeatedly asked if Miller was directing prem techs to remove the button. Since Johns likewise was wearing the WTF button, I find it unlikely that Miller did not see it. The Respondent did not call Stilp, the other manager at the meeting, to corroborate Miller's account. Accordingly, I conclude that Miller saw the core techs wearing the button, but only told Jankowski to remove it.

At the start of the meeting, Boll told Ploense and about a dozen other prem techs present that he noticed the buttons and they were to remove them before they left the garage in their vehicles.

Within 5 minutes, Tim Miller entered the crew room. Miller likewise told the prem techs they had to take the buttons off. He said the button violated the personal appearance guidelines. An employee responded that there was a case won on this and they did not have to take them off.[11] Miller reiterated that they had to remove the buttons before they went to work. When prem tech Dace Branson told Miller he was not taking the button off, Miller told Branson to get his steward and the two of them were going to the office. Miller stated to the remaining employees that anyone else who was wearing the button when he got to the door should meet him in the office. Some prem techs began removing the buttons. However, Ploense did not. Another employee asked Miller if he was going to suspend them all. Miller responded that no one was going to work that day with the buttons on. Miller then left the crew room.[12]

Shortly thereafter, Ploense met with both Millers in Boll's office. Tim Miller told Ploense that, if they continued wearing the button, it could either be considered a tardy because they were out of the work uniform or it could be considered insubordination. Ploense said he would remove his button. Ploense then asked about the pants he was wearing, because the pants were not a part of the BAP. Steve Miller stated that, because the pants were insulated and could save his life working out in the cold, they were acceptable to wear.

By the time Ploense exited the office, Boelk had arrived at the Fond du Lac garage. Boelk and Ploense went to speak to the two Millers. Boelk asked why the technicians could not wear the buttons. The Millers responded that it was not a part of the BAP and would not be allowed. The Millers also advised Boelk that they placed a call to the Respondent's labor relations department. [13]

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[11] The California case mentioned multiple times in the transcript is the previously-referenced *AT&T*, 362 NLRB No. 105, slip op. at 1-14 (2015). Given the timing of this meeting, the employee must have been relying on the administrative law judge's decision in that case, which issued on April 23, 2014. The Board did not issue its decision until June 2, 2015.

[12] I credit the testimony of Ploense and Tim Miller regarding what occurred in the November 21, 2014 crew meeting in Fond du Lac. (Tr. 553–554, 811–819.) Their testimony is consistent and contains no material differences. To the extent any differences exist, I credit Miller in this regard. His testimony concerning the meeting was lengthy, detailed, and specific, in contrast to Ploense's limited recall.

On a related but separate subject, I do not credit Ploense's testimony that Boll repeatedly told employees not to wear the WTF button in crew room meetings beginning November 17. (Tr. 547–549; 578–582.) Ploense did not offer this testimony when he initially provided an affidavit to the General Counsel. No other witness corroborated the testimony at the hearing. Moreover, if this had occurred, it would have been logical for Ploense to notify Boelk as of November 17. Instead, Boelk testified that Ploense did not call and report the prohibition to him until after the crew meeting on November 21.

[13] I credit Boelk's and Ploense's testimony as to what occurred at the facility following the crew meeting on November 21. (Tr. 89–93, 554–557.) Both provided specific, detailed, and believable accounts of the meetings with the Millers. In contrast, I do not find Tim Miller's testimony in this regard to be reliable. (Tr. 820–824.) During this portion of his testimony, Miller frequently paused and appeared uncertain before answering questions. In addition, Steve Miller did not testify and thus Miller's testimony is uncorroborated.

Later that same day, Boelk talked to Texeira and told her that Tim Miller had been suspending techs for wearing the WTF button. Texeira called Miller, who advised her that he had not done so. Texeira spoke again with Boelk and communicated that information. She also told him wearing the button was against the BAP and the California case was on appeal. Boelk objected and said the techs should be allowed to wear the buttons while the case was on appeal. Texeira disagreed and said they could not wear the buttons.[14]

A week or two after the events in Fond du Lac, Hanson and Randy White, the Respondent's vice president of labor relations for the Midwest, spoke about the WTF button. They determined that prem techs could not wear the button in front of customers, because the mandatory BAP prohibited such buttons. They also decided prem techs could wear the buttons inside the Respondent's facilities, including in crew rooms, but had to take them off when they left for the field. Hanson then called Texeira and said the Company was going to allow prem techs to wear the buttons in the garage, but not out in the field with customers.[15]

Following the events in November 2014, no further issues arose concerning the WTF button for over 4 months. That changed in May 2015.

D. The Respondent Expands the WTF Button Prohibition to Core Technicians in May 2015

With the collective-bargaining agreement set to expire on April 11, 2015, the Union began mobilization efforts with its technicians to show solidarity entering negotiations. As a result, Boelk, a core tech, resumed wearing the WTF button in March 2015, including at a meeting with Wirz and Steve Miller.

White, Hanson, and other directors in labor relations for AT&T Midwest also met in April 2015. They discussed whether core techs could wear the WTF button. The supervisors

[14] The findings of fact in this paragraph are based on Boelk's testimony, which I credit. (Tr. 92–93.) Texeira's testimony in this regard contained no contradictions. (Tr. 752–755.) Each witness remembered different portions of the conversation.

However, I do not credit Texeira's testimony as to an alleged conversation she had with Boelk about the WTF button prior to November 17. (Tr. 746–748.) Texeira contended she observed Boelk wearing a WTF button and told him prem techs could not wear it. She alleged she told him the button violated the BAP and was offensive. Had this occurred, it is logical that Texeira would have contacted Hanson prior to the email exchange she had with Wirz on November 17. However, she did not do so. I also found Texeira's testimony that she told Boelk during this conversation that the button was not "positive to the AT&T logo" or the "company brand" to be dubious.

[15] The findings of fact in this paragraph are based on the credited testimony of Boelk, Texeira, and White. (Tr. 87–88, 663–665, 752, 756–757.) However, I also note that White provided unclear testimony as to two issues. (Tr. 662–665, 685–687.) The first was whether the decision to ban the buttons as to prem techs was contemporaneously due, in part, to the button being offensive. White's testimony on that issue was inconsistent and largely elicited through leading questions. The second was if the supervisors had any discussions about core techs wearing the WTF button during this same time period. White's answers to open-ended questions on that issue again were imprecise. In light of the inconsistent and nonspecific testimony, I conclude that, while White and Hanson may have found the WTF button offensive at the time, the Respondent actually justified its ban on the button based upon it violating the prem tech guidelines. I also find, as discussed further herein, that the Respondent's supervisors did not discuss banning the button as to core techs until April 2015.

agreed the button was offensive, profane, and inappropriate. They believed customers who saw it would interpret "WTF" to mean "what the fuck." Accordingly, they determined that core techs likewise would be prohibited from wearing the button.[16]

At the time, Texeira had been detailed to the Respondent's contract negotiation team. When she became aware of the core tech ban, she communicated the decision to other managers of labor relations during a separate meeting at the end of April 2015. That group included Jeff Siegel, who primarily oversaw the State of Illinois. However, from January 1 to May 12, 2015, Siegel covered Texeira's day-to-day responsibilities in Wisconsin.

The Respondent's decision regarding core techs then filtered its way down to the front lines. In Sheboygan, Tim Miller advised core techs of the ban on the WTF button. Prior to then, Sheboygan core tech Johns repeatedly wore the WTF button in the field on the outside of his clothing since November 17, 2014. At the Respondent's Beaver Dam facility, Manager Tony Lind told the core techs of the prohibition. Prior to then, core tech Anthony Sauer likewise wore the WTF button. He did so from November 2014 to early January 2015, then again from mid-March 2015 to April 2015.

On May 7, 2015, Boelk emailed Siegel and questioned why the Respondent told core techs in Fond du Lac that they could not wear the WTF button. (GC Exh. 12.) He noted the Company's prior position that the WTF button violated the "dress code." Siegel responded that "[t]he company's position is the 'WTF' button is inflammatory and cannot be worn by any technicians."

E. The Respondent's Historical Enforcement of the Premises Technician Guidelines

The Respondent's supervisors are in the field nearly daily observing prem techs on the job for a variety of reasons, including safety and quality inspections. Safety inspections include a supervisor confirming that the prem tech is wearing apparel that conforms to the guidelines. The supervisor documents the results of the inspection in a database. (R. Exhs. 14, 15, 22, and 23.) Despite the guidelines being in effect for roughly 7 years at the time of the hearing, the Respondent did not introduce any records confirming that its supervisors observed a prem tech in nonconforming apparel in the field or in front of a customer and addressed it. Instead, supervisors testified generally about their expectations as to enforcement of the guidelines and what they would do, in theory, if they observed a prem tech in the field with nonconforming apparel. (Tr. 791, 841-843, 918-919.) All but one supervisor stated they had not seen, or could not recall seeing, any prem tech in the field wearing nonconforming apparel.[17]

The specific examples the Respondent provided of enforcement of the guidelines occurred when supervisors, including Tim Miller and Boll, observed prem techs in the garages with nonconforming apparel. (Tr. 797–801, 919-920, 930.) In those cases, they instructed or

[16] The Respondent's witnesses did not explain why the labor leadership team had this discussion in April 2015. However, the timing and its proximity to the upcoming contract negotiations suggest it was due to the Union's mobilizations efforts, including core techs wearing the WTF button.

[17] Former U-verse manager Priddis provided brief testimony that he "periodically" would see a prem tech in improper attire and would ask them to correct the issue. Priddis supervised prem techs for two years from 2008 to 2010. (Tr. 900.)

expected prem techs to immediately comply with the guidelines. Yet, other supervisors, including White and Wirz, indicated that prem techs must comply with the guidelines only once they leave the garage or were in front of customers. (Tr. 664–665, 839.) The latter approach conflicts with section 13.13 of the guidelines, which requires that prem techs wear the proper branded apparel at the start of their workdays.

The Respondent's supervisors also conceded they either have made or are willing to make certain exceptions to the requirement that prem techs wear branded apparel. In particular, supervisors permit prem techs to wear jackets, overalls, bibs, earmuffs, and gloves during the winter. (Tr. 782–786, 915, 930-931.)

As to prem techs' lack of compliance with the guidelines, Christopher Ploense wore nonconforming clothing from 2012 to the present. (Tr. 528–535.) This included winter jackets, facemasks, stocking caps, and insulated pants. Some of this clothing contained a different company's logo. The clothing also included a hoodie sweatshirt with a non-AT&T logo on it in the spring and fall. Sheboygan prem tech Ellis Robson wore plain winter hats many times from 2012 to the present. (Tr. 496-497; GC Exh. 44.)

Ploense also observed three other prem techs wearing nonconforming apparel. (Tr. 538–546.) This included baseball caps with the logo of a professional sports team or a fishing company on the front. Prem techs wore these caps only a few times each year. They did so both at crew meetings with managers present and in the field. Ploense also saw one prem tech wearing a sweatshirt with another company's logo in the spring and fall. This occurred 2 to 3 times a week. He also observed prem techs wearing jackets, sweatshirts, bibs, and stocking caps in the winter, with non-AT&T logos on them. Prem techs wore these items ranging from a few times a week to a few times a month during the winter.

Core tech Johns observed six prem techs in Sheboygan wearing nonconforming apparel from 2010 to the present. (Tr. 292–311.) The clothing included baseball caps, winter hats, winter coats, and bibs. Prem techs wore the caps between 1 and 4 times per week. They wore the winter items ranging from 2 to 5 times a week.

Notwithstanding all of these examples of prem techs in nonconforming attire, the record evidence is insufficient to establish that supervisors or customers observed this in the field.[18]

Finally, in April 2015, prem techs put plain red, 8-1/2 by 11-inch shop towels in their back pockets at the start of their workdays. (Tr. 535-538.) The action was taken as part of the Union's mobilization efforts to support contract negotiations. Boll observed Christopher Ploense

[18] I reach this determination based upon the lack of details or any specific examples provided by the employees who testified on this question. Both Ploense and Robson testified in conclusory fashion that supervisors observed them wearing nonconforming clothing and did not say anything. (Tr. 437, 530–531.) However, the witnesses provided no foundational details for when or how often this occurred, where the employees were, and which supervisors were present. Ploense also did not specifically say he wore the clothing in front of customers or provide any details about that. As to other employees, Ploense never saw a prem tech wear nonconforming items in the field with a supervisor or customer present. Johns said only that he observed nonconforming clothing on a "job," without providing further details on whether a customer actually observed it. (Tr. 302–303.)

and other prem techs wearing the towels in the crew room. Boll asked questions, but ultimately did not tell the employees they had to remove the towels. A few of the prem techs then wore the red shop towels in the field for multiple weeks.[19]

F. The History of Buttons Worn by Core Technicians

With no mandatory apparel restrictions, core techs have worn a variety of union buttons and apparel adorned with the logos of other companies throughout the time period material to this case. Core tech Sauer, who voluntarily opted into the BAP, wore a variety of union buttons. (Tr. 416-419.) One button had a picture of a cobra snake and the message "Will Strike If Provoked" above "CWA Local 4622." (GC Exh. 21.) A second had the text "No Contractors" with a diagonal line striking through the text and "CWA" below it. (GC Exh. 22.) The third had an image of a person holding a gravestone, which stated: "Customer Service R.I.P." (GC Exh. 23.) The text "2012 Strike Ready" appeared above the image; "CWA 4622 Army" appeared below the image. Sauer wore the buttons during multiple contract negotiations, from the date a contract expired to the date a new contract was reached. In addition to the button, Sauer also wears a red T-shirt or sweatshirt on Thursdays to show solidarity with other union members. (Tr. 415-416.) Several managers have seen Sauer wear the red shirt. However, Sauer also conceded that he puts a company sweatshirt on top of whatever clothing he is wearing. He stated he could not wear a piece of clothing branded with another company's logo on the outside.

Core tech Johns, who did not opt in to the BAP, also has worn a variety of union clothing. (Tr. 274–280.) This included a red polo shirt with a union logo every Thursday. He also wore the same three union buttons that Sauer did. Johns also sported a "Native American veteran" hat and buttons supporting cancer organizations and soldiers.

Core tech Boelk, who like Johns did not opt into the BAP, has worn the cobra snake and RIP union buttons during contract negotiations. (Tr. 62–63, 68.) He also observed other core techs who opted in to the BAP wearing winter jackets and hats branded with different company logos. (Tr. 70-80.)

In nearly all these instances, the record is unclear as to whether supervisors or customers observed core techs wearing these clothing items in the field. Supervisors did see the nonconforming apparel in the morning meetings in the crew room. Core techs intermittently wore these items from contract negotiations in 2009 to October 2015.

ANALYSIS

It is well established that employees have a statutorily protected right to wear union insignia in the workplace, including buttons, T-shirts, and other articles of clothing. *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007); *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 801-803 (1945). The right must be balanced against the right of an employer to manage its business.

[19] I credit Ploense's testimony in this regard, as I do not find plausible Boll's testimony that he told technicians he was fine with the towels as long as the technicians left them in the truck when they went into a customer's home. (Tr. 953.) It defies logic that Boll would give this instruction, when no customer could read anything into a technician having a plain shop towel on a job.

Thus, employers may lawfully restrict the wearing of union insignia where "special circumstances" exist. Special circumstances include where the message is inflammatory and offensive. *Komatsu America Corp.*, 342 NLRB 649, 650 (2004). They also include situations where display of union insignia might 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. 99 Fed.Appx. 233 (D.C. Cir. 2004). A respondent bears the burden of proving the existence of special circumstances that would justify a restriction. *W San Diego*, 348 NLRB 372, 372 (2006).

On its face, section 13.3 of the prem tech guidelines is an overly broad prohibition on employees' right to wear union insignia. The language sets forth a wholesale ban on "adding buttons, pins, stickers, writing, etc." to branded apparel. Likewise, no doubt exists that the Respondent prohibited both premises technicians and core technicians from wearing the WTF button. On November 17, 2014, Miller instructed premises technicians in Sheboygan to remove the button. On November 21, Miller told Fond du Lac premises technicians that they could not wear the WTF button. He also told those employees that no one was going to work that day with the buttons on. Finally, he stated to Ploense that employees who continued wearing the button could be considered either tardy or insubordinate. Then on May 7, 2015, Siegel set forth the Respondent's revised position that the prohibition applied to all technicians, including core techs.

Accordingly, the Respondent must establish special circumstances, or another defense, for its restrictions on the technicians wearing union insignia.

I. THE RESPONDENT'S CONTENTION THAT IT ESTABLISHED SPECIAL CIRCUMSTANCES JUSTIFYING ITS BANS ON THE WTF BUTTON

A. Is the WTF Button Offensive and Vulgar?

The Respondent asserts it has established special circumstances on multiple bases. The first is that the WTF button is offensive and vulgar, based upon *Leiser Construction, LLC*, 349 NLRB 413, 415 (2007); *Honda of America Mfg.*, 334 NLRB 746, 747-749 (2001); and *Southwestern Bell Telephone Co.*, 200 NLRB 667, 669–671 (1972). The Respondent's contention is premised on the fact that one common meaning of "WTF" is "what the fuck."[20]

As previously noted, this case is not the first one involving an entity of AT&T and technicians wearing a button with the "WTF" acronym on it. In *AT&T*, 362 NLRB No. 105, slip op. at 2 (2015) (the "*Pacific Bell"* decision), both Pacific Bell and Nevada Bell prohibited prem techs from wearing a button similar to the one here. The *Pacific Bell* button was red and included "WTF" in a large font with "Where's the Fairness?" directly underneath. (Jt. Exh. 2.) The button did not contain any additional text. The Board rejected the argument that the button

[20] The parties needlessly presented a myriad of documents regarding what "WTF" means. (R. Exhs. 11–13; GC Exhs. 65–83.) The documents were unnecessary, because the General Counsel is not really contesting that one of the meanings of "WTF" is "what the fuck." Nonetheless, these documents did result in one of the more ironic moments of the 5-day hearing. The General Counsel's first example of an alternative meaning for "WTF" came from the U.S. National Park Service's website. (GC Exh. 65.) The webpage sought public comment on a project entitled "AT&T WTF Colocation." The Respondent used "WTF" in its project materials as shorthand for "wireless telecommunications facility."

was so offensive as to lose the Act's protection. Because the button provided a nonprofane, inoffensive interpretation of "WTF" on its face, any potential negative connotation to the acronym was negated. The "Where's the Fairness" text was legible and clearly visible to customers. The button's text also did not impugn the companies' business practices or product.

Based on the Board's *Pacific Bell* decision, the WTF button in this case likewise is not so offensive and vulgar as to establish special circumstances. The button here again includes the phrase "Where's the Fairness," the same innocuous interpretation of "WTF." When compared to the *Pacific Bell* button, that phrase is printed in a smaller font at the bottom of the button, rather than underneath "WTF." Nonetheless, the text remains legible and clearly visible to anyone who observes the button. A residential customer opening the front door to greet a technician, as would be expected upon initial contact, could read all the text on the button. Moreover, the inclusion of the Union's name and the dollar sign in "AT$T" adds additional meaning to "Where's the Fairness." The text conveys that the button's message relates to a labor dispute. The Respondent argues, in conclusory fashion, that the use of the "$" symbol in AT&T impugns the Company's business practices. I do not agree. "AT$T" coupled with "Where's the Fairness" suggests the technicians wearing the button had complaints about their wages. The button's message does not vilify the Respondent's products or services.

Because of the nonprofane meaning provided for "WTF," the cases relied upon by the Respondent are distinguishable. See *AT&T*, supra, 362 NLRB No. 105, slip op. at 3. In *Southwestern Bell*, the phrase "Ma Bell is a Cheap Mother" stood alone on a sticker as a potentially profane statement without an inoffensive interpretation. *Honda of America* and *Leiser Construction* both involved language with explicit, vulgar connotations. This included a sticker portraying someone or something urinating on a nonunion rat and a pro-union newsletter stating "bone us" and "come out of the closet." Like *Pacific Bell*, this case is distinguishable. The WTF button includes the nonoffensive "Where's the Fairness?" interpretation. The language, with that clarification, does not contain an explicit, vulgar connotation.

Accordingly, I do not find the WTF button offensive and vulgar under Board precedent. Thus, the Respondent has not established special circumstances on that basis. At the hearing and in its brief, the Respondent asserted this as its sole defense to banning core techs from wearing the button in May 2015. Therefore, I conclude that the ban on core techs wearing the WTF button violated Section 8(a)(1), as alleged in the complaint in Case 18–CA–163323.

B. Does the WTF Button Unreasonably Interfere with the Respondent's Public Image or Damage the Company's Relationship with Customers?

The Respondent next argues that its ban on the WTF button as to prem techs is justified, because the button's message unreasonably interferes with the public image the Company has established for its U-verse business. In a related vein, the Respondent contends it could prohibit the button, because its supervisors reasonably believed that permitting prem techs to wear it would damage the Company's relationship with U-verse customers.

An employer's concern about the public image presented by the apparel of its employees is a legitimate component of a special circumstances defense. See, e.g., *W San Diego*, supra, 348 NLRB at 373 (hotel could ban buttons in public areas with guest contact, where particular

uniform it used created "special atmosphere"); *Bell-Atlantic-Pennsylvania*, supra, 339 NLRB at 1086-1087 (upholding arbitrator's determination that "Road Kill" T-shirts, depicting employees as squashed and lying in a pool of blood, were disruptive of employer's public image).

In evaluating this standard, several guiding principles must be observed. These include that customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia. *Meijer, Inc.*, 318 NLRB 50, 50 (1995), enfd. 130 F.3d 1209 (6th Cir. 1997); *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982). Nor is the requirement that employees wear a uniform a special circumstance justifying a button prohibition. *United Parcel Service*, 312 NLRB 596, 596–598 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994). Finally, the fact that the prohibition applies to all buttons, not solely union buttons, is not a special circumstance. *Harrah's Club*, 143 NLRB 1356, 1356 (1963), enf. denied 337 F.2d 177 (9th Cir. 1964); *Floridan Hotel of Tampa*, 137 NLRB 1484 (1962), enfd. as modified 318 F.2d 545 (5th Cir. 1963). In light of this precedent, the prem techs' mandatory branded apparel, their interaction with customers, and the Respondent's total ban on all buttons, pins, and stickers do not establish special circumstances.

After that filtering, the Respondent's entire argument as to the WTF button unreasonably infringing on its public image is reduced to the claim that customers would perceive "WTF" to mean "what the fuck." The record contains no evidence that any customer actually interpreted the button that way or otherwise complained about the button. Moreover, the Board already addressed, and rejected, this argument in *Pacific Bell*, based upon the inclusion of "Where's the Fairness?" on the button. The WTF button here goes even further in clarifying its non-offensive message, by including the Union's name and "AT$T." Finally, and again as in *Pacific Bell*, the Respondent did not narrowly tailor its prohibition to buttons it viewed as offensive and vulgar.

The Respondent's argument is further undermined by the fact it permitted core techs, including ones who had voluntarily opted in to the BAP, to wear the WTF button from November 2014 to May 2015. The Respondent contends this disparate treatment is immaterial, because core techs have limited customer contact and no appearance standards. I disagree. However limited, core techs still have contact with the public, including on jobs with prem techs. A customer encountering an AT&T technician wearing a WTF button at the door would have no idea whether the employee was a prem or core tech and what apparel standards, if any, applied to the employee. Furthermore, the lack of appearance standards for core techs is irrelevant. If the WTF button was offensive and interfered with the customer relationship, the Respondent could have banned core techs from wearing the button back in November 2014, with or without appearance standards. Indeed, that is what the Respondent ultimately did in May 2015.[21]

[21] In its original answer, the Respondent's affirmative defense in this regard referred to its overall public image, with no reference to U-verse. (GC Exh. 1(d), no. 5.) At a prehearing conference call addressing then disputed issues regarding the General Counsel's document subpoena, counsel for the General Counsel discussed the Respondent permitting core techs to wear the WTF button and how documents to that affect were relevant to this affirmative defense. Thereafter and the day before the hearing, the Respondent filed an amended answer contending that the button interfered solely with its relationship with U-verse customers. (GC Exh. 1(ee).) For the reasons stated in this paragraph, I reject the contention that the Respondent created a separate, U-verse public image through its BAP, which core techs could participate in. I further note that branded apparel always contains the name "AT&T," the company's logo, or both. However, the apparel does not always include a reference to U-verse.

I also conclude this case is distinguishable from the situations in *W San Diego* and *Bell-Atlantic-Pennsylvania*, supra. In comparison to the "Road Kill" button, the WTF button here, with its "Where's the Fairness" interpretation, is inoffensive. And a customer service visit from an AT&T technician in branded apparel, no matter how courteous and effective the technician was, hardly could generate a "special atmosphere" that would warrant a ban on all buttons.

The Respondent's contention that its supervisors reasonably believed the WTF button would harm the Company's relationship with customers is premised almost entirely on the D.C. Circuit's decision in *Southern New England Telephone Co. v. NLRB*, 793 F.3d 93 (D.C. Cir. 2015). The Court of Appeals there refused to enforce a Board order finding that the employer unlawfully banned a shirt stating "Inmate #" on the front and "Prisoner of AT$T" on the back. The appellate court concluded that the company could reasonably believe the message may harm its relationship with its customers or its public image. Thus, the court ruled, the employer established special circumstances justifying the shirt prohibition. I decline the Respondent's invitation to follow the D.C. Circuit's decision. An administrative law judge has no authority to adopt a decision of a circuit court of appeals. *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn.1 (2004). I must apply established Board precedent which the Supreme Court has not reversed.

The better argument, and one which the Respondent alludes to, is that the Board itself, at least on occasion, has acknowledged that an employer need not show actual harm to customers when sustaining a special circumstances defense based upon injury to its public image. In particular, in *Pathmark*, supra, 342 NLRB 379–380, an employer lawfully banned clothing with the slogan "Don't Cheat About the Meat" on it. The Board found that the slogan "reasonably threatened to create concern among the Respondent's customers about being cheated, raising the genuine possibility of harm to the customer relationship." The employer there did not present any evidence that customers did not buy meat due to the slogan. See also *Nordstrom, Inc.*, supra, 264 NLRB at 701 fn. 12 (employer "need not await customer complaint before it takes legitimate action to protect its business").

Nonetheless, this case is distinguishable from *Pathmark*. In *Pathmark*, the Board relied upon the ambiguous nature of the "Don't Cheat About the Meat" slogan. Because the meaning of the slogan was unclear, the company appropriately gauged it on the more adverse, reasonable construction. Once again, the WTF button here removes any ambiguity by including "Where's the Fairness" in the text. The message here, as the Board held in *Pacific Bell*, is a nonprofane, inoffensive one. Thus, the Respondent could not reasonably conclude that message would harm its customer relationships.

For all these reasons, I find the Respondent has not demonstrated that the ban on prem techs wearing union insignia was justified by the harm the button would do to the company's public image or its relationship with customers.

C. Does the Respondent's Historical Enforcement of the Premises Technician Guidelines Support Its Special Circumstances Defense?

The Respondent also argues that its consistent enforcement of the prem tech guidelines since their 2009 implementation buttresses its special circumstances defense here. See *United Parcel Service*, supra, 312 NLRB at 597–598. The General Counsel counters that the numerous

examples of prem techs wearing nonconforming apparel demonstrates the Respondent did not consistently enforce section 13 of the guidelines.[22]

My impression is that the reality here falls somewhere in between what the Respondent and the General Counsel are arguing. The evidence establishes only that, once the Respondent implemented the guidelines, its prem techs by and large complied with the appearance standards. The Respondent had little occasion to enforce the guidelines and only in garages. Even though a handful of prem techs wore nonconforming apparel in the field without management approval, the record does not establish that supervisors were aware of this.

As for the Respondent's evidence presentation, no specific examples were offered of supervisors enforcing the guidelines when observing a particular prem tech on a job or in front of a customer in inappropriate attire. The only specific enforcement examples occurred in garages when prem techs were not in front of customers. Even more telling, the Respondent did not introduce any records from its database which demonstrated a supervisor actually enforced the appearance standards. Instead, the Respondent's supervisors repeatedly testified that they did not observe, or could recall observing, a prem tech in the field wearing something that did not comply with the guidelines. But that would establish only that prem techs complied with the guidelines, not that the Respondent enforced them.

On the General Counsel's side, the evidence likewise does not demonstrate that supervisors were aware of prem techs violating the appearance standards in the field or in front of customers and did nothing about it. The record establishes that a small number of prem techs wore nonconforming apparel from 2010 to the present. It also establishes that they did so in front of supervisors in the crew rooms. However, employee testimony regarding supervisors observing prem techs in the field wearing inappropriate attire largely was conclusory or lacking in details. As with the Respondent's witnesses, no specific examples were offered. This evidentiary showing stands in stark contrast to the high level of lax enforcement with supervisory knowledge present in *Pacific Bell*. I find it insufficient to establish supervisory knowledge.

For all these reasons, the record does not establish that the Respondent consistently enforced the appearance standards in the prem tech guidelines or that it was aware of prem techs violating those standards and did nothing about it. Thus, I conclude the evidence in this regard strengthens neither the Respondent's nor the General Counsel's case.

II. THE RESPONDENT'S CONTENTION THAT THE UNION WAIVED ITS RIGHT TO BARGAIN OVER THE WTF BUTTON BAN

Finally, the Respondent contends that the Union waived its right to bargain over whether prem techs can wear union insignia, including the WTF button. The argument is two-fold. First, the Respondent argues that the Union's agreement to section 5.01 of appendix F in 2006 constituted a clear and unmistakable waiver of the technicians' right to wear union insignia.

[22] In light of my finding that the Respondent has not established special circumstances, the discussion herein regarding the Respondent's enforcement of the prem tech guidelines is an issue that need not be reached. *Hertz Rent-A-Car*, 297 NLRB 363, 363 (1989). However, I set forth my analysis as to the enforcement of the guidelines in the event the Board disagrees with me as to special circumstances.

Second, the Respondent asserts that the Union's failure to request bargaining after the issuance and implementation of the prem tech guidelines in 2009, 2010, 2011, and 2013 constituted a waiver by conduct.

Waiver of a statutory right must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708-710 (1983). Establishing waiver is a heavy burden, not to be lightly inferred. *American Medical Response of Connecticut, Inc.*, 361 NLRB No. 53, slip op. at 1 (2014), affg. 359 NLRB No. 144, slip op. at 3 (2013); *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998). Waiver can occur in any of three ways: 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. *American Diamond Tool,* 306 NLRB 570, 570 (1992). The waiver of a statutorily protected right will not be inferred from a general contract provision. Rather, it requires that either the contract language relied on be specific or an employer showing the issue was fully discussed and the union consciously yielded its interest in the matter.

The Respondent's evidence as to contractual waiver falls short of the required standard. The contractual language in section 5.01 gave the Respondent the right, at its discretion, to implement or change "appearance standards and/or a dress code *consistent with State and Federal laws*" (emphasis added). The provision states nothing about union insignia. The language cannot amount to a waiver of employees' right to wear insignia, because it does not foreclose the Respondent from adopting an appearance standard which permits that conduct. Such a standard would be consistent with Federal law. Furthermore, when bargaining over this provision in 2006, the parties did not discuss a prohibition on technicians wearing union insignia. The only discussion concerned the Union's request that its own logo appear on the branded apparel. No evidence suggests the parties talked about that being the only union logo permitted. The handout on "Work Appearance" from Wells' bargaining notes likewise made no mention of prohibiting union insignia. Thus, the record does not establish that the issue was fully discussed and consciously explored or that the Union consciously yielded its interest in the matter. Accordingly, I conclude the Union did not waive employees' right to wear such insignia based on the language of section 5.01.

However, the issue of whether the Union waived its right to bargain by its conduct returns a different result. The Board described the relevant standard in *KGTV*, 355 NLRB 1283 (2010):

> Once notice is received, the union must act with "due diligence" to request bargaining, or risk a finding that it has waived its bargaining right. A union may be excused from the bargaining request requirement if the employer's notice provides too little time for negotiation before implementation, or if the employer otherwise has made it clear that it has no intention of bargaining about the issue. In these circumstances, a bargaining request would be futile, because the employer's notice informs the union of nothing more than a "fait accompli." A fait-accompli finding requires objective evidence. A union's subjective impression of its bargaining partner's intention is insufficient.

In this case, analyzing waiver by conduct must start with the acknowledgment that the parties have a longstanding and productive collective-bargaining relationship. Their experience when the Respondent created U-verse exemplifies this. In the middle of a contract, AT&T Midwest and the Union reached an agreement, whereby the Company voluntarily recognized the Union as the bargaining representative of prem techs. In exchange, the Union agreed to a permit the Respondent to unilaterally adopt appearance standards and to make the BAP mandatory for these employees. This background provides the framework for evaluating the parties' conduct as to the subsequently-issued prem tech guidelines.

Applying the *KGTV* factors here, the Respondent provided sufficient, advance notice of the issuance of the prem tech guidelines to allow for meaningful bargaining prior to implementation. Helwig's notices in 2009, 2010, 2011, and 2013 all were sent at least 2 weeks in advance. The Respondent's conduct when issuing the prem tech guidelines also did not make it objectively clear to the Union that the company had no intention of bargaining. When the guidelines were provided to the Union, Helwig stated nothing more than "[l]et me know if you have any questions or want to discuss." (R. Exh. 21; GC Exh. 58.) If anything, this language suggests a willingness to bargain, had the Union made a request. I reject the General Counsel's argument that this language was pro forma and thereby revealed the Respondent would not bargain if the Union had requested.

In contrast, the Union's conduct here does not demonstrate the due diligence required under Board law. See *Bell Atlantic Corp.*, 336 NLRB 1076, 1086-1089 (2001) (union waived right to bargain over relocation of union work, where request to bargain was not made until more than four months following notice); *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790–791 (1990) (union waived right to bargain over reclassification of employees, where it made no request to bargain after receiving notice and change made 5 weeks later). Even a cursory review by the Union of section 13.2 of the prem tech guidelines would have revealed that the total ban on buttons, pins, and stickers was a potential violation of not only employees' statutory right to wear union insignia, but also the provision of appendix F, section 5.01 requiring that any appearance standard unilaterally adopted by the Respondent be in conformance with Federal law. Despite the obvious overreach of the provision, District 4 did not request to bargain, or respond in any fashion, over the implementation of the guidelines in 2009. District 4 likewise did not request to bargain, or respond in any fashion, when Helwig provided the revised guidelines in 2010, 2011, and 2013 containing the identical button prohibition. The record is not entirely clear as to the reason for District 4's lack of response. It appears that Schaeff believed AT&T Midwest had the right to implement the guidelines unilaterally pursuant to appendix F. (Tr. 206-207, 237–240.) But his subjective belief does not establish that a request to bargain would have been futile.

The facts here on waiver contrast with those present in *Pacific Bell*. The administrative law judge there concluded that the union had not waived its right to bargain over insignia, when the same button ban was instituted through the prem tech guidelines. However, the union in that case objected to the guidelines, and an employer representative then told the union that the company had no obligation to bargain. In this case, District 4, the Union's designated bargaining

representative, did not object to the guidelines and no representative of AT&T Midwest stated, at any time, that it had no obligation to bargain.[23]

The General Counsel argues that the Union did not agree to the guidelines, relying upon Boelk's email to Priddis in 2009. Leaving aside that Boelk was not a designated bargaining agent for the Union, he only told Priddis he "did not agree" with the guidelines. That comment amounts to a protest insufficient to constitute a request to bargain. *AT&T Corp.*, 337 NLRB 689, 691–693 (2002) (union representative's statement that he disagreed with employer's decision regarding closure of facility and intended to "push this issue up the line" was not a request to bargain); *Clarkwood Corp.*, 233 NLRB 1172, 1172 (1977) (union waived right to bargain over removal of phones and closing of bathroom when it protested changes, but made no request to bargain).

Relying on *Burrows Paper Corp.*, 332 NLRB 82, 83-84 (2000) and *Metropolitan Edison*, supra, 460 U.S. at 708-710, the General Counsel also contends that silence, such as the Union's here, cannot constitute a clear and unmistakable waiver. The Board's *Burrows Paper* holding did not establish such a per se rule and was limited to the circumstances of that case. In any event, the facts here are distinguishable. In *Burrows Paper*, the employer announced a wage increase to employees, a day after proposing the increase during contract negotiations. That limited timeframe did not afford the union an opportunity to bargain prior to the announcement. The employer proposed a second wage increase during negotiations, then implemented it prior to the next scheduled negotiation session. The union's silence in response to the wage increase proposals did not amount to a clear and unmistakable waiver. In contrast here, the Respondent provided the prem tech guidelines to the Union well in advance of their implementation. The Respondent also did not announce the guidelines to employees before or simultaneously with its notification to the Union.

The facts here likewise contrast with the situation in *Metropolitan Edison*. In that case, an employer disciplined union officials more severely than unit employees for participating in a strike which violated the parties' contract. Two arbitrators previously had concluded that the employer's imposition of more severe discipline on union officials in these circumstances did not violate the parties' contract. The Supreme Court rejected the employer's argument that the two prior arbitration decisions were incorporated into the parties' subsequent collective-bargaining agreement, because the union was silent on the issue during contract negotiations. In this case, the Respondent provided the Union with the prem tech guidelines containing the button ban no less than 4 times over the course of 5 years. The Respondent also invited the Union to discuss any concerns it had. The Union's repeated silence in response is a clear and unmistakable acquiescence to the guidelines' implementation and maintenance. The Board's waiver by inaction doctrine would have little remaining application were it found not to apply in these circumstances.

Even after the guidelines were enforced in November 2014, the Union did not request to bargain. Instead, Boelk filed an unfair labor practice charge, but not until March 6, 2015. The

[23] The Board did not address the judge's waiver conclusion in its *Pacific Bell* decision, as no party filed exceptions on that issue.

filing of an unfair labor practice charge does not relieve a union of its obligation to request bargaining. *Associated Milk Producers*, 300 NLRB 561, 563-564 (1990).

The record evidence here establishes the Union, by its inaction, waived the right to bargain over prem techs wearing union insignia. Accordingly, the complaint allegations in Case 18–CA–147635 are dismissed. The Respondent did not violate Section 8(a)(1) by promulgating and maintaining the prem tech guidelines. It also did not violate the Act by enforcing section 13.2 of the prem tech guidelines and prohibiting prem techs from wearing the WTF button in November 2014 and May 2015.

CONCLUSIONS OF LAW

1. The Respondent Wisconsin Bell, Inc. (AT&T Wisconsin) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Communications Workers of America, Local 4622 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 promulgating a rule on May 7, 2015, and since then maintaining the rule, banning core technicians from wearing a union button stating "CWA Local 4622," "WTF AT$T," and "Where's the Fairness."

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 complaints.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist 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 core technicians from wearing the WTF button. I also shall order the Respondent to rescind the rule prohibiting core technicians from wearing the WTF button and, after the rescission, to advise core 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[24]

[24] 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.

ORDER

The Respondent, Wisconsin Bell, Inc. (AT&T Wisconsin), at its facilities in the State of Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Maintaining and enforcing a rule prohibiting core technicians from wearing the WTF 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 core technicians from wearing the WTF 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 Wisconsin, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 18, 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 May 7, 2015.

   (c) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Insofar as the complaints alleged violations of the Act not specifically found, IT IS

[25] 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."

FURTHER ORDERED that those allegations are dismissed.

Dated, Washington, D.C., July 12, 2016.

Charles J. Muhl
Administrative Law Judge

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 do anything to prevent you from exercising the above rights.

WE WILL NOT promulgate and maintain a rule prohibiting core technicians from wearing the pictured union button, stating: "CWA Local 4622," "WTF AT$T," and "Where's the Fairness."

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 core technicians from wearing the "WTF Where's the Fairness" button pictured above, and after the rescission WE WILL advise you in writing that this unlawful rule is no longer being maintained.

WISCONSIN BELL, INC. (AT&T WISCONSIN)
(Employer)

Dated _____ By _____
(Representative) (Title)

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

310 West Wisconsin Avenue, Suite 450W, Milwaukee, WI 53203-2211
(414) 297-3861, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/18-CA-147635 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 297-3819.