

United Parcel Service and Highway and Local Motor Freight Employees, Local Union No. 677, affiliated with International Brotherhood of Teamsters, AFL-CIO. Case 26-CA-14618

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On December 7, 1992, Administrative Law Judge Hubert E. Lott issued the attached decision. The General Counsel filed exceptions and a supporting brief.¹

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

The single issue presented in this case is whether the Respondent unlawfully prohibited feeder driver employees at its Memphis, Tennessee facility from wearing on their uniforms a lapel pin portraying union insignia. We find, contrary to the judge, that the Respondent did so violate the Act.

I. FACTUAL BACKGROUND

The Respondent is engaged in the business of nationwide and international small package distribution. The Respondent employs 1000 employees at its Memphis facility, including 130 feeder drivers and 170 package drivers. Feeder drivers principally drive tractor-trailers between the Respondent's various facilities, sometimes pick up full customer trailers and leave empty trailers, and occasionally pick up packages at customer warehouses. Package drivers deliver packages to customers.

In June 1991,² Chief Job Steward and feeder driver Mike Brewer attended the Union's convention in Orlando, Florida. On his return to the Memphis facility, he distributed 50 lapel pins he had purchased at the convention to feeder drivers who in his view were loyal union members and in appreciation for their support of his attendance at the convention. The pin displays a union logo and an abbreviation of the Union's name. The approximately dime-sized pin measures five-eighths of an inch across and three-sixteenths of an inch in length.

Several feeder drivers commenced wearing the pin on the left collar of their company uniform. Feeder

Manager Art Shumway directed these employees to remove the pin because it was not part of their uniform. They complied and informed Brewer. On July 11, Brewer discussed the matter with Shumway. Shumway ordered Brewer to remove his pin. Brewer refused. Shumway consequently issued Brewer a written memorandum dated July 11 prohibiting Brewer from wearing union insignia pins on his uniform. The memorandum was placed in Brewer's personnel file.

On July 12, Feeder Division Manager Adkins issued the following notice to all feeder drivers:

I've inquired about the IBT [pin] that some of the drivers have been wearing.

You can not wear these pins according to Article 4 of the Contract. Job stewards, or designated alternates, shall be allowed to wear an identifying steward's badge, provided by the union, at all times while on the employer's premises.

At the present time only the steward's badge may be worn on the uniform and while on duty on UPS premises.

So please do not wear these pins.

Brewer continued to wear his pin, however. Several days later, Brewer and Adkins agreed that Brewer would have all the other feeder drivers remove their pins and Brewer would receive a written notice for wearing the unauthorized union lapel pin. On July 17, the Respondent issued a disciplinary warning to Brewer for wearing the union insignia pin.

A. The Respondent's Personal Appearance Guidelines

The parties' most recent collective-bargaining agreement provides, in pertinent part, that "[t]he employer has the right to establish and maintain reasonable standards concerning personal grooming and appearance and the wearing of uniforms and accessories." The Respondent has long maintained such written personal appearance guidelines, which all of its uniformed employees are required to sign. These guidelines provide, inter alia, that "[t]he complete uniform is to be worn while on duty. Uniforms are to be changed prior to starting work and after completing work each day. Only designated uniform items approved by UPS are acceptable."

The record establishes that the Respondent maintains these guidelines to ensure a public image of neat, clean, uniformed drivers. The record further establishes that the Respondent has issued or authorized its drivers employed at the Memphis facility to wear safe driving pins, United Way pins, 1-million mile Mack truck pins, and pins in support of Operation Desert Storm.

¹ By letter dated February 9, 1993, the Respondent's answering brief was rejected by the National Labor Relations Board as untimely filed. The Respondent thereafter filed a motion to file brief in support of decision of administrative law judge under Sec. 102.111(c), appealing the rejection of its answering brief. The Board denied the Respondent's motion. 312 NLRB 595 (1993) (Member Devaney dissenting).

² All dates are in 1991.

B. *The Judge's Decision*

The judge found that the Respondent lawfully prohibited its feeder drivers from wearing the union pin. The judge found that the proscription of the pin arises from the Respondent's strict personal appearance guidelines for its uniformed drivers, which have been applied nondiscriminatorily and are sanctioned by the parties' contractual provision permitting the Respondent to establish standards regarding the wearing of uniforms and accessories. The judge concluded that permitting display of the union lapel pin would jeopardize the Respondent's goal of projecting a public image of its drivers as neatly uniformed. The judge additionally observed that the prohibition against the pin worked little hardship to employees' union activities because the pins were distributed by Brewer for "personal reasons" and had little to do with union support or mutual aid and protection.

The General Counsel argues in his exceptions, inter alia, that employees have a protected right to wear union insignia, and additionally argues that the Respondent has discriminatorily proscribed wearing the union lapel pin while permitting its uniformed drivers to wear a variety of other pins. We find merit in the General Counsel's exceptions.

II. DISCUSSION

It is well established that an employee has the protected right to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945). In the absence of "special circumstances," the prohibition by an employer against the wearing of union insignia violates Section 8(a)(1) of the Act. See, e.g., *Ohio Masonic Home*, 205 NLRB 357 (1973), enfd. mem. 511 F.2d 527 (6th Cir. 1975). The Board has found special circumstances justifying the proscription of union insignia when its display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image which the employer has established, as part of its business plan, through appearance rules for its employees. *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982). The Respondent submits here that the latter concern justifies its prohibition of the union lapel pin.

In determining whether an employer, in furtherance of its public image business objective, may lawfully prohibit uniformed employees who have contact with the public from wearing union insignia, the Board considers the appearance and message of the insignia to determine whether it reasonably may be deemed to interfere with the employer's desired public image. *Nordstrom, Inc.*, supra at 700-702. See *Page Avjet Corp.*, 275 NLRB 773, 776-777 (1985). Indeed, in an earlier case the Board has held that the Respondent here lawfully prohibited uniformed drivers from wear-

ing a button 2-1/2 inches in diameter in support of a candidate in an intraunion election because the button was found to be conspicuous in nature and interfered with the projected public image of its drivers. *United Parcel Service*, 195 NLRB 441 (1972).

We fully appreciate the Respondent's history of presenting to the general public its image of a neatly uniformed driver and acknowledge that this image is an important business objective of the Respondent. Contrary to the judge, however, we cannot find that the pin at issue in this case may reasonably be deemed to interfere with the Respondent's objective. The pin is small, neat, inconspicuous, and free of any provocative message or language.³ In these circumstances, we cannot find that the pin when worn by the Respondent's uniformed drivers interferes in any meaningful way with their desired image as neatly attired. We accordingly conclude that the Respondent has not demonstrated special circumstances sufficient to justify its prohibition of the unobtrusive union lapel pin. Cf. *Floridan Hotel of Tampa*, 137 NLRB 1484, 1486 (1962), enfd. as modified on other grounds 318 F.2d 545 (5th Cir. 1963). Customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia by employees. *Nordstrom, Inc.*, supra at 701-702.⁴

Our conclusion is buttressed by the Respondent's discriminatory conduct respecting the wearing of pins. As the judge found, the Respondent has authorized its Memphis facility drivers while in contact with the public to wear safe driving pins, United Way pins, 1-million mile Mack truck pins, and pins in support of Operation Desert Storm. Indeed, the Respondent itself issued some of those pins, at least two of which have no apparent relation to the Respondent's business. All of these pins are at least equal or greater in size than the lapel pin at issue in this case. The Respondent has thus discriminatorily enforced its personal appearance guidelines by forbidding the union pin while permit-

³The pin is in fact significantly smaller than the union button, noted in the earlier case involving this Respondent, worn by its drivers without objection from the Respondent. That button was slightly less than 1 inch in diameter and displayed union insignia signifying that current dues had been paid. *United Parcel Service*, supra, 195 NLRB at 443, 450.

⁴The judge failed to cite any authority supporting his assertion that employees' subjective reasons for wearing union insignia are a relevant factor in determining whether special circumstances have been demonstrated justifying an employer's proscription of union insignia.

Additionally, we cannot agree with the judge that dismissal of the instant complaint is supported by his observation that at most a grievance should have been filed protesting the Respondent's conduct at issue here. Inasmuch as the Respondent did not assert the appropriateness of deferral to the grievance-arbitration procedure as an affirmative defense in its answer to the complaint, nor raise any such contention at the hearing, it was error for the judge to suggest sua sponte that the instant case should be deferred to arbitration. *Alameda County Assn.*, 255 NLRB 603, 605 (1981).

ting, and even issuing to its drivers, a variety of pins containing other messages. *Pay 'N Save Corp.*, 247 NLRB 1346 (1980), *enfd.* 641 F.2d 697 (9th Cir. 1981).⁵

We accordingly find that the Respondent violated Section 8(a)(1) of the Act by ordering Brewer to remove a pin displaying union insignia, by issuing to Brewer on July 11 a written memorandum prohibiting him from wearing union insignia pins on his uniform, and by issuing to Brewer on July 17, 1991, a disciplinary warning for wearing the union insignia pin.⁶

CONCLUSIONS OF LAW

1. The Respondent, United Parcel Service is now and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Highway and Local Motor Freight Employees, Local Union No. 677, affiliated with International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By ordering Mike Brewer to remove a pin displaying union insignia, by issuing him a written memorandum prohibiting him from wearing union insignia pins on his uniform, and by issuing him a disciplinary warning for wearing the union insignia pin, the Respondent has violated Section 8(a)(1) of the Act.

4. By the conduct described above in paragraph 3, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, we shall order the Respondent to cease and desist from engaging in such conduct and to take certain affirmative action. We shall order the

⁵In agreeing with his colleagues that the Respondent unlawfully prohibited its employees from wearing a small union lapel pin, Member Raudabaugh relies here solely on the ground that the Respondent enforced its personal appearance guidelines in a discriminatory manner.

⁶We recognize that this case arises in the Sixth Circuit—because that is the circuit in which the unfair labor practices occurred—and that the Sixth Circuit has articulated its own view for determining whether special circumstances have been demonstrated warranting prohibition of union insignia. See *Burger King Corp. v. NLRB*, 725 F.2d 1053 (6th Cir. 1984). The venue provisions of Sec. 10(f) of the Act are such that our Order in this case may be subject to review in other circuits, however. *Arvin Industries*, 285 NLRB 753, 757 (1987). In any event, we note that our unfair labor practice findings are sustainable under Sixth Circuit precedent. Thus, in *Burger King*, the court stated that a finding of “special circumstances” is not warranted where, as here, the employer failed to enforce its policy in a consistent and nondiscriminatory fashion. 725 F.2d at 1055.

Respondent, *inter alia*, to remove from its files any reference to the written memorandum and disciplinary warning issued to Brewer for wearing the union insignia pin, and to notify him in writing that this has been done and that the warning notice and memorandum will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Resposndent, United Parcel Service, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Ordering employees to remove a pin displaying union insignia, issuing employees written memoranda prohibiting them from wearing union insignia pins on their uniforms, and issuing employees disciplinary warnings for wearing union insignia.

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

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

(a) Remove from its files any reference to the written memorandum dated July 11, 1991, issued to Mike Brewer prohibiting him from wearing union insignia pins on his uniform and the disciplinary warning dated July 17, 1991, issued to Brewer for wearing union insignia, and notify him in writing that this has been done and that the warning notice and memorandum will not be used against him in any way.

(b) Post at its facility in Memphis, Tennessee, copies of the attached notice marked “Appendix.”⁷ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁷If 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT order employees to remove pins displaying union insignia and WE WILL NOT issue employees written memoranda prohibiting them from wearing union insignia pins on their uniforms or issue employees disciplinary warnings for wearing union insignia.

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 notify Mike Brewer that we have removed from our files any reference to the written memorandum dated July 11, 1991, issued to him and prohibiting him from wearing union insignia pins on his uniform and the disciplinary warning dated July 17, 1991, issued to him for wearing the union insignia pin and that the written memorandum and the disciplinary warning will not be used against him in any way.

UNITED PARCEL SERVICE

Susan B. Greenberg, Esq., for the General Counsel.
Charles White, Esq., for the Respondent.
Danny Milam, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was heard in Memphis, Tennessee, on December 19, 1991, on unfair labor practice charges filed by Teamsters Local 667 on July 30, 1991. Complaint issued September 6, 1991, alleging violations of Section 8(a)(1) of the Act because Respondent prohibited the wearing of an IBT pin on employee uniforms and issued a warning to Job Steward Michael Brewer for wearing an IBT pin.

Respondent's answer to the complaint, duly filed, denies the commission of any unfair labor practices.

The parties were afforded an opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of hearing, briefs have been received from the parties.

On the entire record, and based on my observation of the demeanor of the witnesses, and in consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with a place of business in Memphis, Tennessee, where it is engaged in small package

distribution. During the previous 12-month period, Respondent, in the course and conduct of its business, derived gross revenues in excess of \$50,000 for the transportation of products, goods, and materials in interstate commerce as a common carrier operating between and among the various States of the United States. By virtue of its operations described above, Respondent functions as an essential link in the transportation of products, goods, and materials in interstate commerce.

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

The Union and Respondent have a collective-bargaining agreement which expires July 31, 1993. Employees covered under this agreement are feeder/drivers and package drivers, as well as other employees. Feeder drivers drive tractor-trailers from one company destination or hub to another. They also function as city pickup drivers (CPU), picking up full customer trailers and leaving empty trailers. Some CPU drivers also pick up packages at customer warehouses. Package drivers deliver packages to customers daily. Feeder drivers come in contact with the public at restaurants and rest stops and meet customers at their place of business. Package drivers meet customers constantly. There are 130 feeder drivers, 170 package drivers, and 17 CPU drivers. The Memphis hub has a total of 1000 employees.

The latest collective-bargaining agreement contains an article covering uniforms, which reads in part:

The employer agrees that if any employee is required to wear any kind of uniform as a condition of his/her continued employment, such uniform, except shirts, shall be furnished and maintained by the employer, free of charge.

Each seniority employee shall be entitled to a maximum of ten shirts, five of which shall be winter shirts and five of which shall be summer shirts. When a shirt becomes worn, it will be turned in and replaced by a new shirt.

These shirts will be maintained by the employee.

The employer has the right to establish and maintain reasonable standards concerning personal grooming and appearance and the wearing of uniforms and accessories.

The collective-bargaining agreement also allows job stewards or designated alternates to wear steward's badges while on the Employer's premises. The collective-bargaining agreement also contains an extensive grievance procedure with binding arbitration.

For at least 20 years, the Respondent has maintained uniform standards which apply to feeder/drivers and package drivers who are the only employees required to wear uniforms. These written personal appearance guidelines are signed by all employees wearing uniforms and reads as follows:

The complete uniform is to be worn while on duty. Uniforms are to be changed prior to starting work and

after completing work each day. Only designated uniform items approved by UPS are acceptable.

With the exception of shirts (which may be worn to and from work for the purpose of employee laundering), the uniform is not to be worn off UPS premises while off duty, or for personal use. Lockers are provided for the storage of uniform items while off duty.

Shoes should be black or dark brown, of polishable leather. They are to be sturdy, slip resistant and maintained in a clean and polished condition.

Undergarments that are visible shall be white or brown and should not extend beyond the sleeves of the shirt.

These standards were established, according to West Tennessee Labor Relations Manager Charles Coleman, to give the public the image of neat drivers and clean trucks, "and reputation was our driver and our package car and feeder." According to Coleman, "our appearance standards allow us to make deliveries, go to doctor's offices, go into nurses' offices, make a lot of deliveries in direct contact with the public that other companies are not able to do that, and that's been built around our public image, our business like clean, uniformed drivers."

Mike Brewer, a chief job steward and feeder driver, attended the Teamsters convention in Orlando, Florida, in June 1991. While there, he purchased 50 IBT pins, which are five-eighths of an inch across and three-sixteenths of an inch in length. When he returned from the convention at the end of June, he distributed these pins to the feeder drivers who were loyal union members and supporters and as a token of appreciation for supporting his attendance at the convention. Feeder drivers McDonald, Dees, Rogers, and Carl Johnson began wearing the pins on the left collar of their company uniform.

After McDonald, Rogers, and Johnson had worn the pins for several days, they were instructed to remove them by Feeder Manager Art Shumway because the pins were not part of their uniform. They complied with the instruction but informed Mike Brewer, who confronted Shumway, on July 11, 1991. Shumway ordered Brewer to remove the unauthorized pin and Brewer refused. Shumway made a note of the conversation and put it in Brewer's personnel file.

On July 12, 1991, UPS Feeder Division Manager Gary Adkins issued the following notice to all feeder/drivers:

I've inquired about the IBT that some of the drivers have been wearing.

You can not wear these pins according to Article 4 of the Contract. Job stewards, or designated alternates, shall be allowed to wear an identifying steward's badge, provided by the union, at all times while on the employer's premises.

At the present time only the steward's badge may be worn on the uniform and while on duty on UPS premises.

So please do not wear these pins.

Brewer continued to wear the pin and, on July 15, 1991, Brewer, Feeder Managers Gary Adkins and Carl McVey, and Job Steward Mark Dees held a meeting. It was agreed by the parties that if Brewer was issued a written notice for wearing an unauthorized pin, Brewer would arrange to have all the other feeder/drivers remove their pins.

On July 17, 1991, Gary Adkins issued to Brewer a written warning notice under article 49 of the collective-bargaining agreement for not being in compliance with UPS appearance standards.

Brewer admits that he didn't file a grievance under the contract because he didn't feel it was a grievable matter. He felt "it" was not covered in the contract although he admitted that the contract gives UPS the right to set uniform standards.

The evidence disclosed that UPS has issued or authorized the wearing of safe driving pins, Desert Storm pins, United Way pins, and 1-million mile Mack truck pins. Mark Dees testified that he saw two employees wearing "Jesus Saves" pins on their uniforms but doesn't know whether management ever noticed them. Respondent's supervisors testified that they never noticed these pins.

Analysis and Conclusions

Many cases in this area have to do with union organizing campaigns where an employee's right to wear union buttons and insignia are protected. *Burger King*, 265 NLRB 1507 (1982). In *Hertz Rent-A-Car*, 305 NLRB 487 (1991), the issue presented in that case was whether an employee could wear a union steward pin in the face of a consistent and non-discriminatory employer policy that employees wear only authorized uniforms where employees restricted by the policy have contact with the public. The Board found no violation in that case because all the criteria were met including consistent and nondiscriminatory enforcement.

The case at issue does not rise to the level of either the *Burger King* or *Hertz* cases, for several reasons. It should first be noted that Respondent and the Union have had a long and apparently amicable collective-bargaining relationship. Moreover, Respondent has a strict dress code for the package and feeder drivers, which is sanctioned by the contract and which is consistently enforced in a nondiscriminatory manner. Furthermore, Respondent permits job stewards to wear steward's pins when on Respondent's property.

With this as background, the undisputed evidence indicates that Brewer wanted employees to wear an IBT pin for his own personal reasons, i.e., as a token of appreciation for supporting his attendance at the IBT convention. A reading of the contract, in conjunction with the personal appearance guidelines and in consideration of the fact that both applied to package drivers as well as feeder drivers who wear identical uniforms, makes the separation of the two categories of drivers impossible. Therefore, a finding of a violation would, in effect, grant permission to all uniform drivers to wear unauthorized union insignia.

What this comes down to is balancing the hardship to employees prohibited from wearing the IBT pin against the hardship to the Respondent if it is allowed. Under the circumstances of this case, I can find no particular hardship to the few employees if they are prohibited from wearing a pin which was distributed to employees for personal reasons, having very little to do with union support or mutual aid and protection. On the other hand, finding a violation would not only interfere with the contract rights of the parties but also jeopardizes Respondent's dress code, which has been a cornerstone of its business of longstanding duration.

At most, a grievance should have been filed over Respondent's action. Accordingly, because finding a violation

would not effectuate the purposes and policies of the Act, I recommend dismissing these allegations.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in any violations of Section 8(a)(1) of the Act.

[Recommended Order omitted from publication.]