

**Meijer, Inc. and Local 951, United Food and Commercial Workers International Union, AFL-CIO.** Case 7-CA-35282

July 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND BROWNING

On February 1, 1995, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

We adopt the judge's finding, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) of the Act by prohibiting employees from wearing union pins in customer areas of its retail store in Traverse City, Michigan, and by threatening to discharge employees if they persisted in wearing the pins.

In its exceptions, the Respondent submits that under the Sixth Circuit's decisions in *Burger King*<sup>2</sup> and *United Parcel Service*,<sup>3</sup> it has established "special circumstances" that would support its ban on the wearing of union pins in its Traverse City store. The Respondent contends that the ban is necessary to make its employees "uniformly recognizable as representatives of the Company and as sources of information and service" to customers, and to meet the customers' expectations of neatness and cleanliness. For the reasons set forth below, we find that even under the Sixth Circuit's analysis, the Respondent's ban on union pins here violates Section 8(a)(1) of the Act.

It is well established that an employee has the protected right to wear union insignia while at work. *Re-*

*public Aviation*, 324 U.S. 793, 801-803 (1945). An employer can restrict employees from wearing union pins during working time only if it demonstrates "special circumstances" justifying the prohibition. *United Parcel Service*, supra at 597. One such "special circumstance" is when the display of union insignia may "unreasonably interfere with a public image which the employer has established, as part of its business plan, through appearance rules for its employees." 312 NLRB at 597. The Board has consistently held, however, that customer exposure to union insignia alone is not a special circumstance allowing an employer to prohibit display of union insignia by employees. Id.

The Sixth Circuit has found that "special circumstances" exist to justify the prohibition of union buttons when an employer enforces a policy in a consistent and nondiscriminatory manner. In *Burger King*, supra, a union had been engaged in an organizing drive when employees began to wear union pins on their uniforms. The employer asked the employees to remove the pins. The court noted that in the employer's attempt to project a clean, professional image to the public, it "consistently enforced its policy against wearing unauthorized buttons in a nondiscriminatory manner." The court found it significant that the employer's ban on unauthorized pins was consistently enforced prior to the employees' union activities, and the policy was not created in response to union activities. 725 F.2d at 1055.

In applying this analysis to the facts here, we conclude that the Respondent has not shown that its policy prohibiting the wearing of unauthorized buttons was enforced in a consistent and nondiscriminatory manner. The Respondent has a companywide policy, referred to in its handbook, that specifically authorizes the wearing of "approved Local Union buttons." Employees at the Respondent's 53 unionized stores in the State of Michigan wear identical union pins on their uniforms without threat of discipline. The Respondent has offered no evidence that the union pins worn in the unionized stores in any way interfere with the image that the Respondent wishes to convey to the public, or that the wearing of pins has impaired the employees' ability to serve customers.

The Respondent asserts, however, that it is not required to apply this policy to its Traverse City store because that store is not unionized. The Respondent's assertion that it may discriminate against the employees in the Traverse City store based solely on the fact that they are not represented by a union is misplaced. The Board and courts have never found employees' status with regard to union representation to constitute a "special circumstance" justifying the ban on the display of union insignia.

Further, the manner in which the Respondent dealt with employees wearing union pins, as opposed to em-

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

The judge found that the Respondent violated Sec. 8(a)(1) by prohibiting employees Tony Zeits and Betty Bogin from talking about the Union while at work. The record does not support the finding that this statement was made to Bogin. This factual error does not affect the recommended Order, which is supported by the judge's finding that the Respondent prohibited Zeits from talking about the Union.

<sup>2</sup>*Burger King v. NLRB*, 725 F.2d 1053 (6th Cir. 1984), denying enf. in relevant part of 265 NLRB 1507 (1982).

<sup>3</sup>*United Parcel Service v. NLRB*, 41 F.3d 1068 (6th Cir. 1994), denying enf. of 312 NLRB 596 (1993).

ployees wearing other “unauthorized pins,” evidences discriminatory enforcement. Soon after employees began to wear union pins in the Traverse City store, the Respondent issued a detailed memorandum to its managers explaining how they should deal with employees wearing union pins. The memorandum requires that the managers instruct employees to remove the union pins and, if the employees refuse, to tell them that they are insubordinate and could be sent home. The memorandum also requires the managers to report each “contact” to Store Director Kollar. No such requirements were announced with regard to employees who wore holiday pins, photo pins, and other unauthorized pins on their uniforms. In addition, employees who wore union pins were threatened with termination and issued written warnings for doing so, whereas employees who wore other unauthorized pins were not.

This case is also distinguishable from *United Parcel Service*. There, the court held that the employer maintained a consistent effort to project an image of cleanliness, uniformity and efficiency, and found no evidence that the employer condoned or permitted any uniform accessories, pins, or other insignia that it did not authorize. Significantly, the court also found that the union had waived the employees’ right to wear unauthorized union pins because the contract contained a clause allowing the employer to establish dress codes for the employees represented by the union. Here, the Respondent selectively enforced its companywide policy permitting the wearing of union pins and, unlike in *United Parcel Service*, the employees’ right to wear such pins has not been waived through collective bargaining.

Based on the above, we conclude that under the Sixth Circuit’s *Burger King* and *United Parcel Service* decisions, the Respondent has not demonstrated special circumstances sufficient to justify its prohibition of the union pins, and therefore its conduct violates Section 8(a)(1) of the Act.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Meijer, Inc., Traverse City, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Joseph Canfield, Esq.*, for the General Counsel.  
*Jeffrey S. Rueble, Esq.*, for the Respondent.  
*John Schlinker, Esq.*, for the Union.

#### DECISION

##### STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Traverse City and Grand Rapids, Michigan, on August 30 and 31 and October 12, 1994, based on a

charge filed by Local 951, United Food and Commercial Workers International Union, AFL–CIO (the Union) on December 6, 1993, and a complaint issued by the Regional Director for Region 7 of the National Labor Relations Board (the Board) on January 19, 1994, as amended at hearing. The complaint alleges that Meijer, Inc. (the Respondent), violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act), by disparately and discriminatorily enforcing its dress code and no-solicitation/no-distribution rules. Respondent’s timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties,<sup>1</sup> I make the following

#### FINDINGS OF FACT

##### I. THE EMPLOYER’S BUSINESS AND THE UNION’S LABOR ORGANIZATION STATUS

###### Preliminary Conclusions of Law

The Respondent, a corporation, engages in the retail sale of groceries, household appliances, clothing, and other consumer hard and soft goods, with stores located in Michigan, Indiana, and Ohio.

Jurisdiction and labor organization status are not in dispute. The complaint alleges, the Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. Background

Respondent operates about 85 retail stores in Michigan, Ohio, and Indiana. The Union represents the employees in 54 lower Michigan stores and in the stores in Ohio. The employees are unrepresented in the Indiana stores and in the Traverse City store where this dispute arose. The Union has been conducting an organizational campaign at the Traverse City store since 1992.

Respondent’s stores are large facilities, divided between groceries and general merchandise. The noncustomer areas include back areas for receiving, storage, and preparation of merchandise, offices, and a breakroom for the employees. The customer areas include the sales floor, a cafeteria open to the public, and the front or service area with cash register lanes. They are open 24 hours a day. The Traverse City store occupies about 188,000 square feet, carries about 150,000 different items, employs over 540 associates<sup>2</sup> and more than 40 managers. The largest number of associates and managers work about equally divided between the first and second

<sup>1</sup>After the initial briefs were filed and the time for the filing of briefs had expired, Respondent submitted a copy of a recent appellate court decision, with a short memorandum about its significance. Counsel for the General Counsel has moved to strike the argument portion of this submission. As the rules do not provide for supplemental or reply briefs, General Counsel’s motion is granted.

<sup>2</sup>In Respondent’s vernacular, employees are “associates,” some supervisors or managers are “team leaders” and customers are “guests.”

shifts (7 a.m. to 3 p.m. and 3 p.m. to 10 p.m.). The third shift, where the emphasis is on maintenance and stocking, is staffed with 3 managers, including the night store director, and 20 to 30 associates.

#### B. Dress Code and Uniform Rule Enforcement

##### 1. The rules

Respondent's Policy & Procedure Statement, No. 183, "Proper Dress and Grooming," (Jt. Exh. 1)<sup>3</sup> provides as follows:

Associates who meet the customer must be uniformly recognizable as representatives of the Company, and as sources of information and service. Our appearance is particularly important. Uniforms and personal clothing must be neat and clean. Store associates are required to follow the Uniform and Dress Standards shown in this procedure. Name badges must be worn by associates working in the Store.

Special Company buttons, approved Local Union buttons, and current Company service pins may be worn on the uniform.

The policy statement goes on to define the personal clothing that may be worn with the required vests and smocks. Required are neat and clean white shirts or blouses, conservative ties for the men, conservatively colored slacks, jeans, pants, and skirts and, for employees who work outside, clean coats in good repair. It states: "Coats, shirts or blouses with lettering should be avoided." Caps must be worn by those employees who work with exposed food. Jewelry is permitted so long as it does not pose a danger to employees working with machinery.

Policy No. 183 also specifies that the store director may set additional dress and grooming standards or grant exceptions to them to meet specific circumstances and conditions.

The Associate Handbook (Jt. Exh. 1), issued to new employees, essentially incorporates policy no. 183. They also receive a checklist that includes the dress and grooming code.

Tom Kollar became store director of the Traverse City store in October 1992, after serving as a store director in Holland, Michigan, a unionized store. He was aware of the ongoing organizational campaign at Traverse City when he arrived. Upon his arrival, he made notes of things he wanted to do or change. Based on his observations that the uniforms were sloppy and shopworn and that employees were wearing various unapproved pins and buttons, he included "Groom and Dress memo" on that list. At this point, the Union had not begun distributing its pins, jackets, or hats and Kollar had not seen any union jewelry or clothing worn in the store.

Kollar conducted a meeting of his management staff on October 12, 1992, where he distributed his dress code and grooming memo (Jt. Exh. 3). It referred his subordinates to the policy statement and directed its immediate implementation. That memo went on to reiterate what clothing was per-

mitted or required and how that clothing was to be maintained and worn. Specifically, it provided, *inter alia*:

4) Name badges, company approved buttons, United Way pins, and service recognition pins are the only items that are allowed on vests and smocks. *All others are to be removed.*

Managers were to discuss the dress code with all of the employees and to monitor compliance in the future. They complied with that directive.

Kollar's October 12, 1992 dress code and grooming memo was reissued on April 8, 1993, when there was a change in the colors of the vests and smocks. At this point in time, the employees had not yet begun to wear pins or clothing with union logos while in the store.

##### 2. Enforcement in regard to union insignia

In the summer of 1993,<sup>4</sup> several male employees began to wear caps and/or jackets with union logos while at work. John Duhaime, a member of the organizing committee, wore such a jacket in about July, while working on the third shift. Dave Karafa, night store director, ordered him to remove that jacket and then provided him with an acceptable substitute. He was in the cooler, a noncustomer area where company-supplied freezer jackets were normally worn, when that order was given; however, his testimony indicates that he had also worn it on the sales floor. Karafa, in ordering Duhaime to remove the union jacket, did not distinguish between wearing it in the back and wearing it on the sales floor.<sup>5</sup>

In August, Duhaime wore a blue and white baseball-type cap embossed on the front with the Union's logo (G.C. Exh. 5), while he worked on the sales floor. He was engaged in duties requiring that he wear a hat. After about 4 hours, his manager, Michael Esch, directed him to remove it as it was not issued by the Company. Esch persisted in his order notwithstanding Duhaime's protest that it did not differ from the vendor-provided hats other employees wore and Duhaime complied. Tony Zeits, who wore a cap with the union logo on the sales floor on July 17, had similarly been asked to remove it, by Tom Sokolowski.

In about late September, the members of the Union's organizing committee began to wear union distributed pins while at work. Those pins (G.C. Exh. 2) were about 1 x 1/2 inches in size, with blue and red lettering on a white background, bordered in gold. They bore the words, "Union Yes" with a checkmark in a box suggestive of a ballot, and, in smaller letters set into the letter "O" in "Union" identified the Union as "UFCW 951." Like the jackets, they were intended to show support for the Union and identify those to whom others could go for information.

In late September, one of the managers informed Kollar that he had observed an employee wearing a "Union Yes" button. Initially, Kollar directed him to just wait and take no action while he, Kollar, sought clarification from the personnel department. On October 5, he issued an e-mail message (Jt. Exh. 6) to all of the managers. It stated: "We will not

<sup>3</sup> Hereinafter, the joint exhibits will be identified as Jt. Exh., the General Counsel's Exhibits as G.C. Exh., and the Respondent's Exhibits as R. Exh.

<sup>4</sup> All dates hereinafter are 1993 unless otherwise specified.

<sup>5</sup> Karafa did not recall whether his conversation with Duhaime took place on or off the sales floor but acknowledged that he would have given the same order regardless of where he saw the union jacket being worn. I credit Duhaime's more complete recollection.

allow the wearing of union pins . . . on the clock and on the sales floor.” They were prohibited from being worn on either the provided uniforms or on the employees’ personal clothing. That memo directed the supervisors to ask employees, “politely and nicely,” to remove them, and to warn those employees that refusal to comply would be insubordination that could cause them to “be sent home.” It further directed the supervisors, in emphatic terms, to report each contact to Kollar. The memo concluded by reiterating that if the buttons were being worn both on the clock and on the salesfloor, “then the button must come off.”

On October 8, prompted by the appearance of the Union Yes pins, Respondent posted a notice (Jt. Exh. 5) by the timeclock. It reiterated the general dress code standards and stated:

Recently a number of questions have been asked regarding the Company’s dress code policy. Specifically, the questions have focused on what types of pins may be worn.

. . . .  
In keeping with the purpose of [the dress code] policy, we do not allow the wearing of any buttons or insignias on clothing, unless approved by the Company. This applies when the associate is wearing the Meijer uniform and in an area open to our customers, such as the sales floor, customer service areas, the cafeteria and parking lot.

At about this same time that this latter memo was posted, Kollar and other supervisors began to direct employees who were displaying the union pin on the sales floor to remove them. Some employees were wearing them on the smocks and vests; Betty Bogin wore hers on the collar of her turtle-neck sweater. She pointed that out, with no different result, to the manager who directed her to remove that pin. Some employees protested that they had a right, constitutional or otherwise, to wear the pins. Those who asked what ramifications would follow from a refusal to comply were threatened with suspensions for insubordination.<sup>6</sup>

### C. No-Solicitation/No-Distribution Rules

#### 1. The rules

The Associate Handbook (Jt. Exh. 1) provides, under “Solicitation and Distribution of Literature,” as follows:

In the interest of the efficiency, convenience and the continued good will of our customers, and for the protection of our associates, solicitation for any purpose by any associate is not allowed during actual working time of the associate being solicited or the associate doing the soliciting. This rule does not apply to break periods, meal periods or any other specified period during the work day when both the soliciting and solicited associate are not properly engaged in performing their work tasks.

<sup>6</sup>Although the exact wording of these conversations may be somewhat disputed, the essential facts are not. The conversations took place in a number of different departments and involved at least six employees and five managers.

In addition, distribution of literature of any kind by any associate or other individual organization, club or cause is not allowed in customer service areas, sales or shopping areas of any facility during those hours when the facility is open for business.

Other than as limited by the foregoing, employees are permitted to freely converse among themselves while working. They may discuss sports, social events, and other activities without limitation on permissible subjects.

#### 2. Enforcement of the no-solicitation/no-distribution rules

On October 13, Tony Zeits was working in the back preparation area with two other associates. While all of them were working, he asked what they knew about the Union and explained why he thought representation would benefit them. He had authorization cards and he discussed their signing of those cards. He did not, however, actually give either of them a card until they were on a break. One employee signed a card at that time.

Zeits’ activities were observed by John Felon, a journeyman meat cutter who had been put in charge of the department by the supervisor, Dale Senn. When Senn returned from his vacation, about October 19, Felon reported that he had “had some difficulty with [Zeits] . . . .” Senn was told that Felon had repeatedly asked Zeits not to engage in solicitations on the sales floor and had been ignored.

Senn spoke with Zeits and wrote out a short statement which Zeits signed, acknowledging that he understood it. In that statement, Zeits admitted that he had been observed soliciting two other employees in the meat department, that he had been asked by Felon to do so on his own time, that he had disregarded Felon’s directions “and proceeded to solicit the signing of Union organizing cards.” When questioned by Senn, Zeits acknowledged soliciting “Union organizing cards . . . while on the time clock . . . .” Felon reminded Zeits that such conduct was a violation of the no-solicitation/no-distribution policy. He was given another copy of that policy and was warned that future occurrences would “not be tolerated and will be disciplined up to and including termination.” In the course of their conversation, Zeits asked Senn what he could talk about in the back room. He was told that he could talk about anything, such as baseball and parties, except the Union. The writeup was placed in his personnel file, where, he was told, it would remain for 6 months “if he didn’t talk about the Union any more.”<sup>7</sup>

Respondent requires that its cashiers have pens but does not provide them. Employees supply their own. In mid-November, Betty Bogin, a cashier and member of the Union’s organizing committee, placed ballpoint pens at the other cashiers’ registers. Those pens (G.C. Exh. 3) had been provided to her by the Union and bore the Union’s name, telephone number, address, and logo. In leaving the pens, she merely stated, “Here is a pen to get you through the night.”

<sup>7</sup>The statement that Zeits signed for Senn admits that he “solicited Union organizing cards . . . while he was on the time clock” and “in the meat department.” His conduct was solicitation whether or not he actually handed cards to the other employees and, as he was on-the-clock when he did it, it is immaterial whether he was on the sales floor, as Senn testified he was told, or in the back, as Zeits claimed. See *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

On November 23, Kollar called Bogin into his office; another manager was there as a witness. Bogin asked if anything was wrong. Kollar said that there was something that they needed to talk about, something "rather serious." He had learned that she had passed out these pens. This, he said, was a "very very serious violation of the Distribution and Solicitation [rule], of which [she] had been apprised some months before, and we needed to be talking about it."<sup>8</sup>

Bogin told Kollar that she could not believe that he had called her in for distributing these pens and disputed that they were literature. She denied that she had been soliciting her fellow associates and pointed out that she had taken nothing from them. He asked her to write out a statement of what had occurred. She refused and he wrote one out. He asked her to sign it; she refused. She questioned why he was harassing her and pointed out that there were all sorts of solicitations taking place in the store. She mentioned such things as Girl Scout cookies, Avon products, sports pools, and gifts for other employees. She did not recall his response.

About 10 days later, Bogin was called back into Kollar's office. She was shown and asked to sign an associate interview report purporting to describe the meeting of November 23. That report stated:

We will take this time to provide Betty with another copy of the Meijer Solicitation Policy (Associate Handbook pages 35 & 36). We will advise Betty that distribution of ink pens and other printed material is considered a violation of the company's Solicitation Policy, which includes distribution of literature, and will not be tolerated. We consider her actions of 11/16/93 as violation of the company's solicitation policy. Lastly, Betty must understand that further disregard [sic] for and violation of the Meijer solicitation policy will subject her to further discipline up to an [sic] including termination. This is Betty's second specific warning regarding [sic] violation of the solicitation policy. Another violation will not be tolerated.

#### *D. Allegedly Disparate Treatment*

##### *1. Hats and jackets*

Meijer associates who handle open food products, those employed in the meat and produce departments, are required to wear hats as hair restraints. The employer provides either plain baseball-type caps or similarly styled caps that are supplied to it by vendors. The vendor caps are in various colors and bear the vendors' names and/or logos. During a promotion, either the plain cap or the vendor cap is worn by everyone in the department. At the end of a promotion, the vendor caps are no longer worn; they are replaced by either the plain caps or the caps of another vendor.

Similarly, in some stores located near a college or university campus, back-to-school promotions have been held wherein everyone wears hats bearing the school's name, colors, logo, or slogan. Again, such hats are only worn for the duration of the promotion.

<sup>8</sup>In May 1992, she had been reprimanded for passing out authorization cards while on the clock. That reprimand is not in issue here.

On occasion, employees have worn hats other than those supplied to them by the Employer. John Duhaime has seen several other employees wearing hats with college or NASA logos. In only one instance, which had occurred off the sales floor, was he able to say that a manager saw what he had seen.

There is no evidence that any employees were permitted to wear embossed jackets in the store while on the sales floor. Some employees have worn their own jackets, with lettering on them, while working in the back areas, including the coolers, which are not areas into which customers are invited. One employee was observed by Dave Karafa while wearing a brown, heavy duty work coat with a manufacturer's logo when that employee was working on a cooler out on the sales floor. He was told to put on the Meijer-provided freezer jacket.

Meijer does not provide hats and coats to the baggers and maintenance workers whose duties take them on to the parking lots. Those employees are permitted to wear their own hats and jackets while outdoors in inclement weather; they remove them upon entering the store. Although the dress code discourages lettering from the jackets and hats worn on the parking lots, employees have been seen to wear outerwear with school names and other logos. One employee even wore a jacket embossed with the name of another food retailer.

##### *2. Pins*

In addition to the name tags that Meijer requires each associate to wear, it also issues other pins to honor service or promote products or concepts. Thus, some employees have been seen to wear United Way pins issued by the Employer. United Way is a charity that the Employer supports with payroll deductions. Other employees have been issued and wear pins with the lettering "TAC." These pins, slightly larger than the Union Yes pins, signify "Terrific Attitude Counts." Few customers, and not all of the employees, are aware of its meaning. For a period of time, Meijer also issued "smiley face" pins to cashiers as part of a promotion to encourage faster service; it was tied in with a poster or banner. After the promotion was concluded, employees were directed to remove those pins. The Employer has also issued "Team 33" pins and pins in the shape of skeleton keys to signify "key" employees.

In the stores covered by the union contract, the employees are permitted to wear union-provided pins. Some of those pins proclaim the Active Ballot Club with the letters "ABC," indicating political action, or identify the wearer as a union steward. The wearing of such union-oriented insignia has come about by practice. It results from the Union prevailing on grievances over employer restrictions on the display of such insignia. Notwithstanding the statement in Policy No. 183 permitting "approved local Union buttons," such buttons and pins apparently have not been worn in Meijer's other nonunion stores. There is no evidence that the issue ever arose in those stores.

There is considerable evidence of employees wearing unauthorized pins on their smocks and their personal attire. Those pins have included photo pins with pictures of children, Christmas-related pins in the shape of Christmas trees, Santa Claus, or teddy bears in Christmas attire, and various other shapes.

At least since Kollar came into the Traverse City store, management has made an effort to prohibit the wearing of unauthorized pins. Several employees acknowledged that there was more latitude before Kollar arrived. Mary Sullivan recalled that management held a meeting after his arrival wherein new standards were discussed and a direction was given that unauthorized pins be removed from the smocks. This same employee was told, in December 1993, however, that while she could not wear her Santa Claus pin on her smock, she could wear it on the collar of her blouse. That is where she wore it for at least the remainder of the day. It is likely that this was observed by some managers as they passed her lane several times a day and were sometimes called to her register.

Another employee, Jon Knowles, wore several organization or product buttons for a long time before Kollar took over the store. After Kollar became store director, he was asked to remove them. Once since then, shortly before this hearing, when he again had worn a pin for several days, he was asked to remove it. Other employees have been asked to remove "Gay rights" and "Right to Life" buttons as well as those that were entirely noncontroversial.

Several employees have observed other employees wearing unauthorized pins, particularly around Christmas time. Such observations were common and were made in areas frequented by managers. Few employees could say, however, that they saw managers actually observe the pins.<sup>9</sup> Some employees, however, were seen to wear their pins throughout the course of a day, in areas like the cafeteria that had its own supervisor and was frequented by other managers during the day.

Bogin, who was ordered to remove the Union Yes pin from the collar of her turtleneck sweater, regularly wore a necklace from which hung a symbol of her religious affiliation. That pendant was generally visible and was not considered objectionable. When ordered to remove the Union Yes pin, she pointed out that if she had worn the symbol of her faith on her collar, no such order would have issued. Her argument was not disputed but was unavailing. Line Manager Dale Senn wears a tie tack at work that has his first name spelled out in gold letters. It is about the size of the Union Yes button. Both he and Kollar acknowledged that if a button or tack has lettering on it, it would not qualify as jewelry. He has never been told to remove that tie tack.

Kollar has approached the wearing of unauthorized pins, other than the Union Yes pin, in an admittedly low key, "ad hoc" basis. He has asked employees to remove them but has issued no reprimands to those who had failed to comply. Except when the union-oriented pins were first noticed, he posted no notices to the employees. Neither did he direct his management staff to report the names of those wearing other types of unauthorized pins.

### 3. Solicitations and distributions

As discussed above, the cashiers need pens for their daily work and they are required to provide their own. Employees bring in pens from home, swap pens among themselves, and accept pens from their customers. Many of those pens bear

<sup>9</sup>Duhaime saw an employee wearing such a pin while talking to two managers off of the sales floor.

the names, addresses, and logos of business organizations; some have even advertised Meijer's competitors.

Meijer's employees also engage in other solicitations and distributions within the store. Girl Scout cookies and similar products for other charitable organizations have been ordered, delivered, and paid for both on and off the clock and on and off the sales floor. Until her child left the Girl Scouts 2 years ago, Bogin sold and delivered them to both employees and supervisors when one or both of the buyer and seller were on the clock. She even used the store's package checking system to distribute the cookies. Employees have collected funds for gifts for each other and for supervisors on the register lanes and in the offices. Birthday cards have commonly been passed down the lanes for others to sign while they were at work; invitations to parties have been similarly passed down the lanes.

Kollar denied witnessing any of the above activities and no employees claimed to the contrary. Similarly, Tom Sokolowski, a supervisor at Traverse City until the end of 1993, denied seeing any of the foregoing activities since Kollar arrived. He has removed invitations posted by the timeclock when he saw them.

Dale Senn has seen money collected for gifts, generally in the hallways, breakroom, or the secretaries' office. He has not asked whether the solicitors were on the clock but assumed that, if the solicitation took place in the breakroom, that the employees involved were not. When the secretary was involved in the solicitation, he has assumed that she was on the clock. He did not ask her because he considered it "no big deal." Senn has seen birthday cards and invitations passed around in the store; he has signed an employee's birthday card while at the front of the store.

Dave Karafa has seen employees solicit for civic and charitable organizations, usually in the breakroom but sometimes on the sales floor. When it occurred on the sales floor, he would allow it, depending on what it was. He allowed employees to hand out and sign such things as birthday cards.

In addition to the charitable or social solicitations, Meijer's employees have conducted and participated in football pools and fantasy football. Although Tony Zeits never saw managers participate in these activities while either they or the employees were on the clock, he has observed managers participating in discussions of these activities while working.

One employee has conducted a superbowl pool in each of the last several years, preparing cards with 100 boxes on a numbered grid, to correspond with the scores in each quarter. Employees and managers (including Coleman and Karafa) have selected their boxes on this grid and put their money into the pool right at the employee's lane. In January 1994, however, when Kollar was solicited to participate in the pool, he claimed that he "was shocked" by its impropriety. He ordered the solicitor to put the grid away. He did not determine whether that employee was on the clock and he did not issue any warnings. That employee had no prior warnings for soliciting and Kollar's approach was to counsel the employee and explain the standards. Kollar has issued only the most casual of instructions, to some but not all of his supervisory staff, to stop the pools if they saw them.

## Analysis

A. *Union Insignia*

The Board has spoken repeatedly concerning the protected right of employees to wear union insignia while at work. Most recently, in *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994), it stated:

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), enf. mem. 511 F.2d 527 (6th Cir. 1975).

Special circumstances may be sufficient to permit a bar on the wearing of such insignia. Such circumstances include situations when the wearing of such insignia might "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." However, "[c]ustomer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia by employees." *United Parcel Service*, supra, citing *Nordstrom, Inc.*, 264 NLRB 698, 700-702 (1982). See also *Burger King Corp.*, 265 NLRB 1507 (1982), enf. denied 725 F.2d 1053 (6th Cir. 1984), when, as here, the insignia were worn in the context of an ongoing organizational campaign.

The union pins that the employees sought to wear in this case are similar in size and design to those displayed by the employees in *Nordstrom*, *Burger King*, and *United Parcel Service*. Like those pins, they were small, neat, and not provocative. Respondent has shown no special circumstances, as those circumstances are defined by the Board, that would support its ban on the wearing of union insignia in the Traverse City store. Respondent contends that uniformity and neatness requires compliance with its prohibition. That contention is undercut by the fact that the identical buttons are worn with corporate approval and apparently without untoward incident or impairment of service in a majority of its stores. It is further undercut by the fact that Respondent permits or encourages its employees to wear a variety of authorized pins and badges. These pins, the meanings of which are not always readily apparent to either the customers or the employees, includes the "TAC" and smiley face pins. They are at least as inconsistent with Respondent's claimed justification for its policy as the union insignia would be.

Less weight may be accorded to the contention that Respondent disparately condoned the wearing of other unauthorized pins while forbidding the union insignia. The record establishes that even prior to the appearance of the Union Yes pins, Kollar had issued memoranda to his management staff requiring the removal of all unauthorized pins and buttons. Thereafter, there was enforcement, albeit not always effective, of that rule. Employees were usually, but not always, told to remove holiday and other pins, particularly those that carried a message that might be controversial. As the Board noted in *Hertz Rent-A-Car*, 305 NLRB 487, 488 (1991),

Member Devaney dissenting, "occasional lapses in an otherwise consistent application of a detailed uniform policy do not persuade us that there was inconsistent and discriminatory enforcement." That there were numerous observations of employees wearing unauthorized pins suggests lax enforcement but, in the absence of more evidence that such conduct was observed by management, does not establish it.

I do note, however, differences in the manner Respondent approached the union insignia from that accorded other unauthorized pins. Some weight must be given to the fact that Mary Sullivan was told that, while she could not wear a Santa Clause pin on her smock, she could wear it on the collar of her blouse. Bogin had been expressly told, in October, that she could not wear the union pin on either her smock or on the collar of her turtleneck sweater. Noted, too, was the tie tack that Dale Senn wore while at work, spelling out his name. It was acknowledged that a pin with lettering or words on it would not qualify as permissible jewelry.

I also note that Kollar issued generalized memoranda to the managers regarding the dress code but did not make any special effort to enforce the rules regarding to the various Christmas pins, a recurring problem. When the union insignia began to appear, however, he issued a very explicit memo to the managers. It instructed them, in detailed terms, in how to deal with employees wearing the union insignia and it required that each contact be reported to Kollar. No such requirement was made with regard to employees flouting its rule with other pins and insignia. Kollar also issued a separate memo to the employees, at the same time as this memo to the supervisors, which, while not mentioning the union insignia, was admittedly spurred by the appearance of such insignia.<sup>10</sup>

I am compelled to follow Board precedent unless and until that precedent is reversed by the Supreme Court, notwithstanding contrary appellate court decisions in the circuit in which the unfair labor practice occurred.<sup>11</sup> Accordingly, I find no special circumstances justifying Respondent's prohibition on the wearing of discrete union insignia. I also find some evidence of disparate and discriminatory treatment accorded the union insignia. I therefore conclude that Respondent's prohibition of these small union pins and its threats to suspend or discharge employees for insubordination if they persisted in wearing them are violative of Section 8(a)(1).<sup>12</sup>

Even under the standards applied by the Sixth Circuit Court of Appeals in *United Parcel Service* and *Burger King*, supra, a finding of violation is warranted as those situations are distinguishable from the instant case. As noted above, Respondent did not uniformly bar the wearing of union in-

<sup>10</sup> Respondent has not contended that the language of its dress code policy, permitting a store director to set additional standards or grant exceptions, would legitimize a discriminatory rule adopted by an individual store director.

<sup>11</sup> *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). As the Board pointed out in *United Parcel Service*, supra at fn. 6, "the venue provisions of Sec. 10(f) of the Act are such that [its] Order in this case may be subject to review in other circuits."

<sup>12</sup> The complaint alleged that Respondent had threatened to discharge employees while some of the evidence indicated that the threatened discipline was suspension for insubordination. This is a distinction without a meaningful difference. I note that at least one employee (Wisnaewski) was threatened with discharge and that the Associate Handbook states that insubordination may result in termination.

signia, as those employers did. It approved and allowed such insignia to be worn in the majority of its stores. It offered its policy, which provided that a neat and uniform appearance was required so that its employees would be recognizable as representatives of the Company and as sources of service and information, as the justification for the prohibition. It did not, however, point to any diminution of the effectiveness of those employees who wore the union insignia in other stores.

*United Parcel Service* is further distinguishable in that the employer's right to selectively ban some insignia, while authorizing others, existed in the context of a collective-bargaining agreement. The court noted that that agreement contained no limitation on the employer's right to set appearance and uniform standards. There was no such agreement in Traverse City such as would have given the Union a role in questioning application of the Employer's dress code. To the extent that the Union was involved in this issue at Respondent's other stores, it had secured the Employer's agreement to the wearing of the same and other similar union insignia on a companywide basis.

Similarly, the court's decision in *Burger King* may be further distinguished from the instant case. Respondent's practice permitted the wearing of approved pins and religious medallions and pendants. In contrast, it appears that the *Burger King* management prohibited the wearing of all pins, including those of a religious nature, except for approved name tags and buttons. There was no evidence that *Burger King* authorized the wearing of any button or pins beyond the name tags.

The wearing of hats and coats bearing the Union's name and/or logo, I believe, stands on different footing. The logo or name on these items of clothing are larger and more obtrusive than the neat and discrete union pins. Except for baggers and maintenance workers while they are out on the parking lot, Respondent prohibits the wearing of personal hats and coats in the customer areas of the store.<sup>13</sup> In those in-store areas where hats and coats are required, they are part of the established uniform and Respondent provides them. Sometimes, it provides hats, which are supplied to it by vendors, in the vendor's colors and with the vendor's name and/or logo. When it does so, it is part of a promotion, conducted for a limited period of time, and the hats are worn by all of the employees in the department. They become part of the uniform and maintain Respondent's desired uniformity. I find no violative conduct in maintenance and enforcement of Respondent's policy with respect to the wearing of hats and jackets with union identification in customer areas of the store, other than the parking lots.

In the one instance involving a jacket with union insignia, however, the supervisor's order was given when the employee was wearing it in a noncustomer area. Notwithstanding that the employee's duties took him on to the sales floor, nothing was said about where he could wear his jacket. Rather, a blanket directive was given (and the supervisor admitted in his testimony that he would have given the same order

<sup>13</sup> Respondent acknowledged that baggers and maintenance personnel wore personal jackets while working outside. In its brief, it asserted that they wore, or would be permitted to wear, jackets or hats with the Union's logo while on the parking lot. This assertion appears to conflict with the express prohibitions of the October 8 memo.

without regard to where he saw the jacket being worn). Clearly an employer may not (absent evidence of likely disruptions or endangerment) prohibit the wearing of union insignia in areas not involving customer contact. I therefore find Karafa's order violative of Section 8(a)(1).

#### B. *Solicitation and Distribution*

Respondent maintains a facially valid no-solicitation/no-distribution rule. Zeits, I have found, violated that rule by soliciting employees to sign authorization cards while both he and they were working. To the extent that the discipline assessed to him was for this conduct it does not violate the Act unless the rule was applied in a discriminatory fashion to union activity. *Eaton Corp.*, 302 NLRB 410, 413 (1991). General Counsel further contends that Senn illegally enforced the no-solicitation rule by prohibiting an employee from merely talking about the Union. Senn's statements regarding to what Zeits could talk about and when the reprimand would be removed from his file establishes this violation. A rule that prohibits employees from talking about a union that does not extend to all nonwork subjects is invalid and unlawful. "Where an employer forbids employees to discuss unionization on worktime but permits discussion of other subjects unrelated to work [as here] the disparate rule is itself unlawful." *Jennie-O Foods*, 301 NLRB 305, 316 (1991). I note that, while no separate violation is alleged, Bogin was similarly told that she could not discuss the Union while at work.

I am satisfied that, with the exception of union-related conduct, Respondent has, at best, been lax in the enforcement of its no-solicitation/no-distribution rule. Girl Scout cookies and similar civic and charitable fund raisers are sold and/or purchased and distributed in the store, openly by employees who are on the clock. Birthday cards are passed around for signing with management's tacit approval. Invitations are distributed on the lanes and funds are collected for gifts for employees and supervisors in work areas. Football pools are conducted, openly and with the participation of supervisors.

In the context of such lax enforcement of its no-solicitation/no-distribution rule with respect to matters other than union activity, Respondent cannot validly enforce those rules against employees engaged in union solicitations or distributions. I therefore find that its discipline of Anthony Zeits for soliciting union authorizations, as well as its enforcement of the no-solicitation rule so as to prohibit employees from talking about unions, violates Section 8(a)(3) and (1) of the Act. *Action Auto Stores*, 298 NLRB 875 (1990).

The foregoing applies with equal force to the warning given to Betty Bogin for distributing union literature in the form of pens bearing the Union's name and address. Assuming that this could be deemed a distribution of literature,<sup>14</sup> the rule was clearly applied disparately as to such conduct. Respondent provides no pens to its cashiers but expects those employees to provide them. They bring in their own pens or secure them from other employees and from customers. The pens they use bear all sorts of names and logos, even those of competing retailers. There is, quite clearly, no prohibition on employees giving one another pens even when those pens

<sup>14</sup> See *Visador Co.*, 303 NLRB 1039 fn. 2 (1991), in which the judge made such a finding, to which no exceptions were filed.

bear messages or advertising. To prohibit Bogin from passing out these pens and to discipline her for doing so, is violative of Section 8(a)(3) and (1) and I so find.

#### CONCLUSIONS OF LAW

1. By disparately enforcing its dress code and no-solicitation/no-distribution rules so as to discriminatorily prohibit union activity, and by threatening to enforce those rules with suspensions and terminations, 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.

2. By issuing warnings to Anthony Zeits and Betty Bogin for violation of its disparately enforced no-solicitation/no-distribution rules, the Respondent has discriminated against them because of their union activity and has violated Section 8(a)(3) and (1) of the Act.

#### REMEDY

Having found that the Respondent has engaged in 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.

Having found that Respondent discriminated against Anthony Zeits and Betty Bogin by issuing warnings to them, I shall recommend that those warnings be rescinded, that all reference to them be removed from Respondent's files and that the employees be notified in writing that this has been done and that the warnings will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>15</sup>

#### ORDER

The Respondent, Meijer, Inc., Traverse City, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disparately enforcing its dress code and no-solicitation/no-distribution rules so as to discriminatorily prohibit union activity.

(b) Threatening to suspend or discharge employees who talk about the Union or who violate its disparately enforced dress code and no-solicitation/no-distribution rules.

(c) Issuing warnings to its employees for violation of its disparately enforced no-solicitation/no-distribution rules.

(d) 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 that October 5, 1993 directive prohibiting the wearing of union pins while employees are on-the-clock or are working on the sales floor.

(b) Rescind the warnings issued to Anthony Zeits and Betty Bogin for violating its no-solicitation/no-distribution rules, remove all reference to those warnings from Respond-

ent's files, and notify the employees in writing that this has been done and that the warnings will not be used against them in any way.

(c) Post at its facility in Traverse City, Michigan, copies of the attached notice marked "Appendix."<sup>16</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, 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.

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

<sup>16</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT disparately enforce our dress code and no-solicitation/no-distribution rules so as to discriminatorily prohibit union activity.

WE WILL NOT threaten to suspend or discharge employees who talk about the Union or who violate our disparately enforced dress code and no-solicitation/no-distribution rules.

WE WILL NOT issue warnings to our employees for violation of our disparately enforced no-solicitation/no-distribution rules.

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

WE WILL rescind the warnings issued to Anthony Zeits and Betty Bogin for violating our no-solicitation rules and WE WILL remove all reference to those warnings from our files and notify the employees in writing that this has been done and that the warnings will not be used against them in any way.

<sup>15</sup>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.

WE WILL rescind that October 5, 1993 directive prohibiting the wearing of union pins while employees are on-the-clock or are working on the sales floor.

MEIJER, INC.