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**Pathmark Stores, Inc. and Local 342-50, United Food and Commercial Workers Union, AFL-CIO.**  
Case 29-CA-24285

June 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On August 21, 2002, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent 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, and conclusions, except as modified herein, and his recommended Order.<sup>1</sup>

I. INTRODUCTION

This case arises from the Respondent's decision to prohibit its meat, seafood, and deli department employees from wearing certain union insignia while working in customer service areas of the Respondent's grocery stores, and the further decision to suspend five employees who refused to remove the insignia prior to commencing work in these areas. The complaint alleges that the Respondent's actions violated Section 8(a)(1) and (3) of the Act. The judge dismissed the allegations. We agree with his dismissal, for the reasons below.

II. THE FACTS

The Respondent operates grocery stores in and around the New York metropolitan area. The Union represents a

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<sup>1</sup> The General Counsel and the Charging Party have excepted to the judge's reliance on certain adverse decisions of the United States Courts of Appeals, instead of the underlying decisions of the Board. "It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise . . . [I]t remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved." *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963), *enfd.* in part 331 F.2d 176 (8th Cir. 1964) (quoting *Insurance Agents' International Union, AFL-CIO*, 119 NLRB 768, 773 (1957)). However, we have considered those underlying Board decisions and, for reasons discussed herein, find them distinguishable.

unit of the Respondent's meat, seafood, and deli employees. The parties have had a longstanding collective-bargaining relationship.

The present dispute arose in about October 1999, when the Union learned during negotiations for a successor collective-bargaining agreement that the Respondent was stocking the meat departments in its stores with substantial quantities of case-ready or "prepackaged" meat. Historically, the unit employees had cut the Respondent's meats fresh in the stores. The Respondent's decision to sell large quantities of prepackaged meat reduced the unit employees' working hours as well as the hiring of new unit employees.

To address these adverse effects, the Union filed grievances and initiated a "Freshness Campaign." The Freshness Campaign was designed to inform the public that not all of the meat sold by the Respondent was cut fresh and packaged by the unit employees. Outside the Respondent's stores, the Union distributed to the Respondent's customers handbills that truthfully explained this circumstance, identified certain meats the Union knew had been prepackaged, and encouraged consumers to ask unit employees which meats they had cut fresh. The Union emphasized the latter question because the Respondent did not label the prepackaged meat in any way that would distinguish it from fresh-cut meat.

The Union also distributed, and the unit employees wore, buttons bearing similar messages. One such button read, "Member of UFCW Local 342-50, Ask me Which Products Were *Cut Fresh Today!*" Unit employees wore these buttons throughout 2000 and 2001 in and around the meat-cutting areas of the Respondent's stores. These areas were visible to customers through plate-glass windows.

The Respondent did not attempt to prevent the Union from distributing the handbills and buttons. Nor did the Respondent attempt to prevent employees from wearing the buttons during their working time in the stores.

The parties' dispute over the Respondent's sale of prepackaged meat continued into the spring of 2001. In May, the Union held a rally at which it distributed to employees T-shirts bearing the message "Local 342-50 says: Don't Cheat About the Meat!" and hats bearing the slogan "Don't Cheat About the Meat!" The Union believed the Respondent was cheating its customers by allowing them to observe unit employees cutting meat products, thereby creating the impression that all the Respondent's meat was cut fresh, and then selling prepackaged meat that was not labeled as such. The rally and the nature of the Union's dispute with the Respondent were well publicized in major television and print media in New York City. There is no evidence that the Respon-

dent sought to discipline employees based on their display of the T-shirts and hats at the rally or at any other location away from the workplace.

In the days immediately following the rally, five unit employees arrived at work wearing the slogan-bearing T-shirts and hats. Although the Respondent had no policy on uniforms and had permitted employees to wear other union insignia, the Respondent threatened all five employees with suspension if they did not remove these particular T-shirts and hats before starting work. The Respondent believed that the “Don’t Cheat About the Meat!” slogan depicted it as dishonest and could damage its relationship with its customers, by encouraging customers to think—aside from the Union’s criticisms of the sale of prepackaged meat—that the Respondent was somehow cheating them in connection with its meat products.

All five employees refused to remove the T-shirts and hats prior to commencing work. Consequently, the Respondent suspended each employee for several days.

### III. ANALYSIS

Although employees are presumptively entitled under Section 7 to wear union insignia or attire during their working time, an employer may limit this activity if it establishes “special circumstances” justifying the limitations imposed. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). In this retail setting, given the particular slogan involved and its reasonably likely effect on customers, we agree that the Respondent established that its legitimate interest in protecting its customer relationship outweighed any legitimate interest of employees in wearing the “Don’t Cheat About the Meat!” T-shirts and hats during their working time.<sup>2</sup> Compare, *Noah’s New York Bagels, Inc.*, 324 NLRB 266, 275 (1997) (finding that employer established special circumstances justifying ban on its delivery drivers wearing, during their working time, a T-shirt mocking the employer’s Kosher policy).

As the judge found, the Union’s slogan was prominently displayed on the T-shirts and hats, and easily could have been read by customers shopping in the Re-

<sup>2</sup> We assume, for purposes of this case, that the Union’s slogan was protected. See, e.g., *Reynolds Electrical & Engineering Co.*, 292 NLRB 947 fn. 1 and 951–952 (1989); compare, *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting)*, 346 U.S. 464 (1953). Therefore we find it unnecessary to pass on any suggestion to the contrary in the judge’s decision. We disavow the judge’s characterization of the Union’s slogan as a “calculated, nasty, mean spirited appeal by the Union to customers not to buy Respondent’s meat.” There is no evidence that the Union acted with malice or out of ill will toward the Respondent. Indeed, as noted above, the record indicates that, on the whole, the parties have enjoyed a longstanding, productive relationship.

spondent’s meat department.<sup>3</sup> Moreover, we agree with the judge that the slogan was ambiguous and that it was reasonable for the Respondent to expect that the slogan likely could lead the Respondent’s customers to believe that, aside from the issue of prepackaging, the Respondent was cheating them in some way with respect to the meat offered for sale.<sup>4</sup> The General Counsel contends that, in the context of the Union’s publicity campaign, the Respondent’s customers might have understood the “Don’t Cheat About the Meat!” slogan as referring to the dispute with the Union over the sale of prepackaged meat. Such an interpretation arguably would not have posed the same threat to the customer relationship. But in striking a balance between the parties’ competing interests, we find that the Respondent’s concerns are appropriately gauged on the basis of the more adverse, but reasonable, construction of the ambiguous slogan. Cf. *Honda of America Mfg., Inc.*, 334 NLRB 746, 748 fn. 6 (2001) (employee bound by offensive interpretation of his language, where that interpretation was reasonable in circumstances, albeit unintended).

The General Counsel, joined by the Charging Party, nevertheless argues that the Respondent failed to substantiate its claim that the “Don’t Cheat About the Meat!” slogan actually threatened its customer relationships. They observe, correctly, that the Respondent presented no evidence that customers decided not to buy the Respondent’s meat because of the slogan. We do not find the absence of such evidence significant, though, given our finding that the slogan reasonably threatened to create concern among the Respondent’s customers about

<sup>3</sup> The General Counsel’s reliance on the Board’s decisions in *Escanaba Paper Co.*, 314 NLRB 732 (1994), enf. 73 F.3d 74 (6th Cir. 1996); *Midstate Telephone Corp.*, 262 NLRB 1291 (1982), enf. denied 706 F.2d 401 (2d Cir. 1983); *Borman’s, Inc.*, 254 NLRB 1023 (1981), enf. denied 676 F.2d 1138 (6th Cir. 1982); and *Caterpillar Tractor Co.*, 113 NLRB 553 (1955), enf. denied 230 F.2d 357 (7th Cir. 1956), is misplaced. Each of those decisions involve facts distinguishable from those in this case.

In *Escanaba Paper*, supra, the employer prohibited its employees from wearing pins and T-shirts it deemed disrespectful but, among other things, in that case, unlike here, the employees had virtually no contact with the public. In *Midstate Telephone*, supra, the employees wore T-shirts depicting the employer’s logo as cracked and stating, “I survived the Midstate Strike of 1971–75–79.” In *Borman’s*, supra, the employees wore T-shirts with the slogan, “I’m tired of bustin’ my ass.” In *Caterpillar Tractor*, supra, the employees wore a button bearing the slogan, “DON’T BE A SCAB!” In those cases, unlike here, the t-shirt or button slogans made no negative reference or allusion to the company’s sales practices, as the “Don’t Cheat About the Meat!” slogan here suggests.

<sup>4</sup> By way of contrast, the Union distributed another button—which read “Member of UFCW Local 342-50, Ask me Which Products Were Cut Fresh Today”—that was much clearer in communicating the Union’s message that some of the Respondent’s meat products were not cut fresh in the stores.

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being cheated, raising the genuine possibility of harm to the customer relationship. See *Nordstrom, Inc.*, 264 NLRB 698, 701 fn. 12 (1982) (acknowledging that an employer may take appropriate preemptive steps to protect its business).<sup>5</sup>

For all of these reasons, we find that the Respondent satisfied its burden of establishing “special circumstances” to justify its decision to prohibit unit employees from wearing the “Don’t Cheat About the Meat!” T-shirts and hats during their working time in the Respondent’s grocery stores. We therefore find that the Respondent did not violate the Act by imposing this prohibition or by suspending the five employees who refused to comply with it. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 30, 2004

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Amy J. Gladstone, Esq.* and *Tara A. O’Rourke, Esq.*, for the General Counsel.

*Marvin M. Goldstein, Esq.* and *Elana Gilard, Esq.* (*Proskauer Rose, LLP*), for the Respondent.

*Marc A. Stefan, Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on May 14, 2002, in Brooklyn, New York.

On June 8, 2001, unfair labor practice charges were filed by Local 342-50 United Food and Commercial Workers Union AFL-CIO (the Union) against Pathmark Stores, Inc. (Respondent) alleging violations of Section 8(a)(1) and (3) of the Act. On February 27, 2002, a complaint issued alleging the violations charged.

<sup>5</sup> This is not a case, then, in which an employer’s claim of disruption is based on the contention that customers might simply be displeased by or opposed to protected union activity. Compare, *Howard Johnson Motor Lodge*, 261 NLRB 866, 868 fn. 6 (1982), *enfd.* 702 F.2d 1 (1st Cir. 1983).

Based upon the entire record herein, including my observation of the demeanor of witnesses, and briefs filed by counsel for the General Counsel, counsel for the Union, and counsel for Respondent, I make the following findings of fact and conclusions of law.

At all material times, Respondent, a domestic corporation, with its principal office and place of business located in Carteret, New Jersey, has been engaged in the operation of retail grocery stores throughout the United States, including stores located in Shirley, New York (the Shirley facility); Forest Avenue, Staten Island, New York (the Forest Avenue facility); Amboy Road, Staten Island, New York (the Amboy Road facility); Ozone Park, New York (the Ozone Park facility); and Richmond Avenue, Staten Island, New York (the Richmond Avenue facility).

During the past year, which period is representative of the Respondent’s operations in general, in the course and conduct of its business operations, Respondent derived gross revenues in excess of \$500,000. During the same period, in the course and conduct of its business operations, Respondent purchased and received at its various grocery stores, goods and products valued in excess of \$5000 directly from points located outside the State of New York.

It is admitted, and I conclude that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I conclude that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

There is no real dispute as to the essential facts of this case.

The Union and Respondent have had a collective-bargaining relationship for approximately 35 to 40 years. The collective-bargaining unit of Respondent’s meat, seafood, and deli department employees represented by the Union consists of approximately 375 full-time and between 950 and 1200 part-time employees.

In around October or November 1999, during contract negotiations for the current collective-bargaining agreement between the Union and Respondent, the Union discovered that Respondent was shipping prepackaged meat into its stores. Prepackaged meat is meat Respondent purchases from an outside distributor that is already sliced and packaged when it arrives in Respondent’s stores. The evidence established that with the influx of prepackaged meat, the scheduled working hours for unit employees decreases as well as the hiring of new unit employees. As a result of these effects on the terms and conditions of employment of the unit employees, on November 30, 1999, the Union filed its first grievance concerning prepackaged meat.

Although the grievance was eventually settled and withdrawn, the labor dispute over prepackaged meat continued. Respondent continued to bring vast amounts of prepackaged meats into its stores. The Union continued to file numerous grievances over the subject and to date many of those grievances are still pending.

Throughout the year 2000, until February 2001, the Union regularly distributed handbills outside of Respondent’s stores. The purpose of the handbills was to communicate to the public

that not all of the meat sold by Respondent was freshly cut and packaged by the unit butchers and wrappers employed by Respondent. Additionally, during the same period, the Union distributed buttons to Respondent's unit employees proclaiming: "Member of UFCW Local 342-50, Ask me Which Products Were *Cut Fresh Today!*" The entire bargaining unit wore these buttons throughout the years 2000 and 2001 and many employees still wear these buttons today.

The Union ceased all handbilling concerning prepackaged meat in February 2001, as per a settlement agreement entered into between the Union and Respondent dated February 8, 2001 (the February 8 Agreement). However, despite the parties' entrance into the February 8 Agreement, the dispute over Respondent's introduction of prepackaged meat continued. In this regard, in around the end of March 2001, without the contractually required notice to the Union, Respondent announced to its employees its intention to ship in large volumes of prepackaged pork into its stores and, consequently, to cease having the unit butchers cut certain types of pork, which was customarily cut by these butchers. As the result of this new influx of prepackaged meat, unit employees began to lose overtime work and their Sunday hours.

To protest its ongoing dispute with Respondent over Respondent's introduction of prepackaged meat, the Union planned a rally for Memorial Day weekend, May 30, 2001. Around 300–400 union members and representatives attended the rally, which took place off of the parking lot of Respondent's store located on Richmond Avenue in Staten Island, and lasted from around 11 a.m. to 1 p.m. At the rally, the Union distributed T-shirts bearing the message, "Local 342-50 says: Don't Cheat About the Meat!" and hats and leaflets stating, "Don't Cheat About the Meat!" After the rally, the Union distributed extra T-shirts and hats to union members who visited its offices. The rally was well publicized, with television coverage of it appearing on the Channel 5 News and in articles the next day in both the *New York Times* and *The Staten Island Advance*.

All of Respondent's meat departments are equipped with windows enabling customers to observe unit employees cutting and wrapping meat. Therefore, the Union believed Respondent was deceiving the general public into thinking that the prepackaged meat that they were buying, which was not specifically identified as such, was freshly cut and packaged by unit employees. The Union contended, the catch-phrase "Local 342-50 Says: Don't Cheat About the Meat!" was aimed at persuading Respondent to distinguish which of its meat products were prepackaged, and which were freshly cut and packaged by unit employees in Respondent's meat departments. The Union felt strongly that Respondent had a responsibility to notify its customers which product were which. The Union contends the slogan was directed at Respondent's actions and had no intention to disparage the prepackaged meat products. The slogan was not intended to attack the safety of the prepackaged meat products nor was it intended to suggest that the meat was dangerous in any way.

In the days immediately following the May 30, 2001 rally, five employees arrived ready to work their respective shifts at Respondent's Shirley, Forest Avenue, Ozone Park, Richmond

Avenue, and Amboy Road stores. Upon their arrival, each of the five employees was clad in both T-shirts and hats which stated, "Local 342-50 says: Don't Cheat About the Meat!" Agents of Respondent threatened each of the five employees with suspension if they did not remove these shirts and hats. The slogans on these shirts and hats were in bold letters, which would be easily readable by customers in the store. When these employees were told by their supervisor to remove their shirts and hats before they commenced work in the retail selling area of the store they refused. Respondent then suspended these employees for several days.

#### Analysis and Conclusion

Respondent contends that at the time of the suspensions of the employees set forth in the complaint, there was no labor dispute as defined in Section 2(9) of the Act. The definition of a "labor dispute" is broad, and includes "any controversy concerning terms, tenure, or conditions of employment." See *Emarco Inc.*, 284 NLRB 832 (1987); *Brownsville Garment Co.*, 298 NLRB 507, 508 at fn. 4 (1990); *Compuware Corp.*, 320 NLRB 101 (1995).

Respondent does not dispute that a "labor dispute" within the meaning of Section 2(9) of the Act existed in connection with the dispute concerning prepackaged veal during the period of the year 2000, but contends that the labor dispute ended on February 8, 2001, when Respondent agreed not to sell prepackaged veal. However, less than a month later, in March, Respondent began to sell large quantities of prepackaged pork and the Union proceeded to resume its protest against prepackaged meat. This is evidenced by the May 30 rally in Respondent's parking lot at a Staten Island store. At this rally, "Don't Cheat The Meat" hats, T-shirts and leaflets were distributed to anyone attending the rally. Moreover, television and the *New York Times* covered the rally. At best, a short hiatus of less than a month took place. The labor dispute really never stopped. I make no distinction between prepackaged veal and pork; both products are meat products, except that pork is not kosher. Accordingly, I reject Respondent's contention, and conclude that the labor dispute was continuous from at least 2000 to date.

Under Section 7 of the Act, employees have the right to engage in activity for their "mutual aid or protection," including communicating about their terms and conditions of employment. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

However, the law is equally well settled that there is no absolute right for union members to wear union insignia, or other union-sponsored attire, in the workplace under Section 7 of the Act. Rather, there must be a balance between the Union's right to self-organize and the employer's right to maintain discipline. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945); *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (1994). Indeed, both the Board and courts have consistently recognized an employer's right to ban the wearing of union-issued insignia, materials, or attire where an employer can establish the existence of "special circumstances" such as preventing alienation of customers. See *Burger King v. NLRB*, 725 F.2d 1053, 1055 (6th Cir. 1984); *United Parcel Service*, supra (holding that special circumstances may be present if an employee shows that union insignia "may reasonably interfere with the public image which

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interfere with the public image which the employer has established as part of its business plan through appearance rules for its employees”). *NLRB v. Harrah’s Club*, 337 F.2d 177 (9th Cir. 1964).

The decisions set forth by the Board and the courts analyze both the content and the context of the slogan, and have held that where the message is objectionable, an employer may lawfully prohibit the display of the attire. See, e.g., *Noah’s New York Bagels, Inc.*, 324 NLRB 266 (1997) (employer permitted to ban employee from wearing T-shirts bearing slogan “If its not Union, its not Kosher,” because the message of the T-shirt mocked employer’s Kosher policy); *Southwestern Bell Telephone Co.*, 200 NLRB 667, 669–670 (1972) (employer permitted to ban use of the “provocative slogan” “Ma Bell is a Cheap Mother” due to the “controversial nature of the language used and its admitted susceptibility of derisive and profane construction); *Borman’s Inc. v. NLRB*, 676 F.2d 1138 (6th Cir. 1982) (circuit reversed a Board determination, and found that the employer permitted to ban employees from wearing T-shirts bearing the slogan “I’m tired of bustin’ my ass.” The employer perceived the slogan as unfair and inaccurate, and susceptible to an improper inference by outsiders). *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357, 358–359 (7th Cir. 1956) (court refused to enforce an Order of the Board which permitted employees to wear buttons with the slogan “Don’t Be A Scab.” Court held that “[I]t is proper to forbid the wearing of slogan buttons in a Union’s campaign in order to restrict the activities which disrupt, or tend to disrupt production and to break down employee discipline”). Moreover, in *Midstate Telephone Corp. v. NLRB*, 706 F.2d 401, 402 (1983), the Second Circuit refused to enforce an Order of the Board which permitted employees to wear T-shirts bearing the words “I survived the *Midstate* Strike of 1971–75–79,” written in type-face that was cracked in three places. Since the slogan was found to denigrate the public utility’s image, the court held that the employer could ban the wearing of the T-shirts. *Id.* at 404. The court stated: “This public utility which constantly deals with the public, had a legitimate concern that the T-shirts might improperly suggest to the public that the Company was in some way coming apart.”

In the instant case the caps and shirts worn by the employees prominently displayed the “Cheat the Meat” logo were worn during working hours and easily read by customers.

As set forth above, throughout the year 2000 and until February 2001, the Union wore buttons during working hours which said: “Members of UFCW Local 342-50, Ask Me Which Products Were Cut Fresh Today!” Respondent took no action to prevent the wearing of such buttons. In fact some of the employees continue to wear such buttons to date. The Union could have chosen a different logo, which set forth their dispute without denigrating Respondent, to its customers, but instead deliberately chose a logo, which I conclude, severely denigrates all Respondent stores in the eyes of its customers. The word “cheat” as defined in the dictionary means, among other things: “To practice fraud or deceit.” “To defraud, swindle.” “To violate rules and regulations.” This is nasty stuff. Moreover, it’s ambiguous. It could mean that Respondent is putting the wrong weight on the label, using stale or tainted meat, substituting horsemeat for beef, or other dishonest or fraudulent prac-

tice. I conclude this was a calculated, nasty, mean spirited appeal by the Union to customers not to buy Respondent’s meat by employees wearing the offensive buttons and shirts, during working hours, getting paid, and in the presence of customers. I further conclude that the special circumstances required to ban the wearing of such apparel clearly exist. *Republic Aviation; Burger King*, supra, and *Midstate*, supra.

Counsel for the General Counsel cites among other cases *United States Postal Service*, 241 NLRB 389 (1979), and *New York University Medical Center*, 261 NLRB 822 (1982), which she contends establish that similar slogans were found by the Board to be protected concerted activities. However, in both cases the slogans did not involve customers on a selling floor, the public, or the services delivered by the employers.

In *United States Postal*, supra, a postal employee who was a union steward wrote in the union’s newsletter an article referring to management supervisors as “flunkies” and referring to a supervisor as an “a-hole.” The only reason set forth for the steward’s suspension was his “Disrespectful Attitude towards Postal Supervision.”

In *New York University*, supra, during a national union convention, a group of dissident employees ran a separate slate of candidates. In this connection two union employees distributed to other employee’s leaflets, which stated:

Join the Committee Against Racism. Vote Slate 2, The Anti-Racist Slate . . . [T]he NYU bosses have turned their security guards into a fascist Gestapo illegally searching workers and firing them.

Moreover, the Judge specifically found that: “The leaflets do not attack or disparage the services that Respondent delivers viz, health care services.”

Counsel for the General Counsel also cites *Escabana Paper Company*, 314 NLRB 732 (1994), enf. 73 F.3d 74 (6th Cir. 1996). In connection with how the Board defines “special Circumstances” under *Republic*, supra. In *Escabana*, the Board rejected the employers’ argument that the sight of pins and T-shirts with slogans (e.g., “Hey Med-Flex This!”, “No Scab”, and “Remember ‘89”) distributed to some visitors to the plant, discouraged participation in the a flex training program, caused a hostile atmosphere and vandalism in the plant. However, the Board found specifically that the employees had virtually no contact with the general public and little contact with the Respondent’s customers and suppliers. 314 NLRB 732. Moreover, the Board specifically distinguished *Escabana* from *Midstate*, supra at 733 fn. 7, wherein it stated:

262 NLRB 1291 (1982), enf. denied 706 F.2d 401 (2<sup>nd</sup> Cir. 1983). We note that the court’s reversal of the Board’s finding that the buttons were protected was based on facts distinguishable from those in the instant case. In *Midstate*, the court found that the employees had significant contact with the public and that, although the logos were not disparaging in the usual sense, “this public utility, which constantly dealt with the public, had a legitimate concern that the T-shirts might improperly suggest to the public that the Company was in some way coming apart.” [706 F.2d at 404.]

Accordingly, I find that Respondent has established the existence of special circumstances that remove the offensive slogans from protected concerted activity. *Burger King*, supra, *United Parcel*, supra, and *Midstate*, supra.

The courts and the Board have held that where the employees conduct exceeds the bounds of legitimate campaign propaganda, or is so disrespectful to the employer so as to impair discipline, the offending employees may be suspended or dis-

charged. *Southwestern Bell*, supra, *Caterpillar Tractor*, supra, and *Harrah's Club*, supra. Accordingly, I conclude that Respondent's suspensions in the instant case do not violate Section 8(a)(1) and (3) of the Act as alleged, and recommend that the complaint be dismissed in its entirety.

Dated, Washington, D.C. August 21, 2002