The Southern New England Telephone Company d/b/a AT&T Connecticut, a wholly owned subsidiary of AT&T *and* Communication Workers of America. Case 34–CA–12451

March 24, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

On June 18, 2010, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

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, to modify his remedy,[2] and to adopt the recommended Order as modified and set forth in full below.[3]

The judge found that the Respondent violated Section 8(a)(1) of the Act by prohibiting employees from wearing the so-called "Prisoner" shirt in support of the Union during collective bargaining, and by threatening and suspending employees who refused to comply.[4] In adopting those findings, we agree with the judge's conclusion that the Respondent failed to demonstrate "special circumstances" justifying the prohibition of that shirt.

Contrary to the Respondent and our dissenting colleague, we agree with the judge that the "Prisoner" shirt was not reasonably likely, under the circumstances, to cause fear or alarm among the Respondent's customers. Compare *Pathmark Stores*, 342 NLRB 378, 379 (2004) (finding special circumstances established where T-shirt slogan—"Don't Cheat About the Meat!"—"reasonably threatened to create concern among [grocery store employer's] customers about being cheated, raising the genuine possibility of harm to the customer relationship").[5] The shirt itself would not have been reasonably mistaken for prison garb. It was mostly a plain white T-shirt, with "Inmate #" in relatively small print on the upper-left front. On the back of the shirt, two sets of vertical stripes appeared, with "Prisoner of AT$T" in between. "AT$T" was approximately twice the size of the word "Prisoner."

Additional facts further weigh against a "special circumstances" finding. AT&T technicians come to customers' homes in response to appointments made by the customers themselves. They telephone the customer before arriving to verify the appointment. They wear identification cards on lanyards around their necks or attached to their belts. The AT&T truck they have driven to the customer's home will be parked nearby. Even if a customer would not immediately realize that the shirt was connected to an ongoing labor dispute, the totality of the circumstances would make it clear that the technician was one of the Respondent's employees and not a convict. And contrary to the dissent, that the Respondent did not otherwise extensively interfere with employees' right to support the Union adds nothing to its "special circumstances" defense with respect to this T-shirt.

In rejecting the Respondent's "special circumstances" defense, however, we do not rely on the adverse inference drawn by the judge from the absence of testimony by the managers who decided to impose the prohibition. Nor do we rely on the judge's finding that the Respondent could not establish special circumstances absent that testimony, or on the judge's discussion of what that testimony "would likely establish." Instead, we agree with the judge that the evidence the Respondent did present was insufficient to meet its burden.[6]

[1] Member Pearce is recused and did not participate in the consideration of this case.

[2] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's recommended remedy by requiring that backpay shall be paid with interest compounded on a daily basis.

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. We shall substitute a new notice to conform to the modified Order.

[4] There are no exceptions to the judge's findings that the Respondent also violated the Act by its actions with respect to the "HAVOC" and "Scab" shirts worn by employees.

[5] Our dissenting colleague finds special circumstances established based on the possibility of customers' "subjective, even irrational, reaction" to the T-shirt. Even assuming that an unreasonable reaction to the T-shirt could properly be considered, consistent with *Pathmark,* supra, we decline to do so because there is no evidence that the Respondent reasonably anticipated such a reaction.

[6] The judge stated that he was not finding that the Respondent discriminatorily banned prounion shirts, and thus observed that motive is not at issue here. We agree with that observation. See *Boise Cascade Corp.*, 300 NLRB 80, 82 (1990). Accordingly, we do not pass on his finding that the Respondent also violated Sec. 8(a)(3) by its actions, which finding would not materially affect the remedies ordered below in any event.

ORDER

The National Labor Relations Board orders that the Respondent, The Southern New England Telephone Company d/b/a AT&T Connecticut, a wholly owned subsidiary of AT&T, New Haven, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Ordering or instructing its employees to remove or not to wear the "HAVOC," "Scab," or "Prisoner" T-shirts.

(b) Threatening its employees with suspension or any other discipline if they continue to wear the "HAVOC," "Scab," or "Prisoner" T-shirts.

(c) Suspending or otherwise disciplining its employees because they wore the "HAVOC," "Scab," or "Prisoner" T-shirts.

(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) Make whole the 183 employees whom it suspended on August 12 and September 8, 2009, for any loss of earnings and other benefits suffered as a result of the unlawful suspension. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension of the 183 employees, and within 3 days thereafter, notify them in writing that this has been done and that the suspensions will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Bristol, Connecticut facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 12, 2009.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 34 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 24, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

Imagine that you are a customer of AT&T Connecticut awaiting a service call. The doorbell rings. You open it, and the first thing you see is someone wearing a T-shirt bearing only "INMATE #" on its front. Would you hesitate to let that person in your home, particularly if you lived in a state where there had been a highly publicized and horrific home invasion and murder? What would you think about a company that permitted its technicians to wear such shirts when making home service calls? Even if you knew about an ongoing labor dispute at AT&T, why would your initial thought when opening the door to your home be "Oh, of course, this person is simply an AT&T technician exercising a right to express his view about that labor dispute"?

Contrary to the judge and my colleagues, I do not think the Board needs to go so far in assuring the statutory

[7] 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."

rights of employees to engage in protected concerted activities as to find that the Respondent violated Section 8(a)(1) by prohibiting customer-facing employees from wearing the "Prisoner" T-shirt at issue in this case. I would find that the Respondent proved that "special circumstances" justified its selective prohibition on the wearing of these shirts, while generally permitting displays of union affiliation and support.[1] In my view, the judge and majority have failed to give sufficient weight to the potential for employees wearing these shirts to frighten customers in their own homes and thereby to cause substantial damage to the Respondent's reputation.

It is well established that, although employees have a protected right under Section 7 of the Act to wear union insignia while working, an employer may limit this activity if it establishes "special circumstances" that justify the limitation imposed. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). The burden is appropriately a heavy one.[2] However, the Board has found "special circumstances" where union apparel may exacerbate employee dissension or unreasonably interfere with a public image,[3] and where an employer has a legitimate interest in preserving customer relationships or the employee-management relationship.[4]

In this case, the only identification of any kind appearing on the front of the "Prisoner" shirt was "INMATE #," printed on the top left side of the front of the "Prisoner" shirt. This is what customers opening their doors would first see. There was no reference on the shirt front to AT&T, to the Union, or to a labor dispute. On the back of the shirt, there were two sets of vertical stripes with the words "Prisoner of AT$T" between them. Again, there was no reference to the Union or a labor dispute. The Respondent was concerned about the visceral impact of the "Prisoner" shirts on its customers. This concern was heightened by the fact that employees wearing these shirts worked in Connecticut, where there continued to be substantial pretrial publicity about a horrific 2007 home invasion by two convicted felons on parole that resulted in the deaths of a mother and her two children.

In light of this unique situation, I would find that the potential for the "Prisoner" shirt to alarm customers and thereby damage the Respondent's reputation was sufficient to justify its regulation.[5] Cf. *Southwestern Bell Telephone Co.*, 200 NLRB 667, 669–670 (1972) (permitting employer to ban sweatshirt criticizing the employer in an obscene manner); *Komatsu America Corp.*, 342 NLRB 649 (2004) (finding that union shirt's reference to ethnic prejudices was inflammatory and sufficiently offensive and provocative to justify its regulation). The legitimacy of the special circumstances supporting this selective ban is underscored by the facts that (with the limited exception previously noted) the Respondent did not otherwise interfere with employees' rights to support the Union during the labor dispute; and it only prohibited employees from wearing the "Prisoner" shirts in the presence of customers, otherwise allowing employees to wear them at the Respondent's facility. Further, to the extent that the Respondent permitted customer-facing employees to wear arguably obscene or sexually suggestive T-shirts unrelated to protected union activities, this only demonstrates the high degree of tolerance exercised by the Respondent before it found it necessary to act in protection of its customers and its own reputation.

Based on the foregoing, I would find that the Respondent did not violate Section 8(a)(1) by prohibiting customer-facing employees from wearing the "Prisoner" shirt. I would reverse the judge and dismiss the complaint allegation on this issue.

Dated, Washington, D.C. March 24, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

[1] The only other exception to the practice of permitting the wearing of union insignia was the short-lived attempt to prohibit the employees from wearing "HAVOC" and "Scab" T-shirts. The Respondent concedes this was unlawful.

[2] I join my colleagues in rejecting the judge's findings that the Respondent could not meet this burden through the testimony of witnesses other than those who made the decision to ban the shirts.

[3] *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982).

[4] See *Pathmark Stores*, 342 NLRB 378, 379 (2004) (employer had legitimate interest in protecting its "customer relationship" where "Don't Cheat About the Meat!" slogan would reasonably threaten to create concern among respondent's customers about being cheated); *Noah's New York Bagels, Inc.*, 324 NLRB 266, 275 (1997) (ban on T-shirt mocking the employer's Kosher policy justified).

[5] The majority emphasizes that the technicians would be responding to appointments made with the customers, would have parked their trucks nearby, and would also be wearing lanyards with their AT&T identification tags, or they would be wearing these tags on their belts. In my view, none of these factors outweighs the Respondent's reasonable concern that a customer's subjective, even irrational, reaction when opening the door would be that the person standing there was not the expected service technician, or that the customer would be upset with AT&T upon subsequently discovering that the person wearing the "Prisoner" shirt was an actual employee of that company.

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT order or instruct you to remove or not to wear the "HAVOC," "Scab," or "Prisoner" T-shirts.

WE WILL NOT threaten you with suspension or any other discipline if you continue to wear the "HAVOC," "Scab," or "Prisoner" T-shirts.

WE WILL NOT suspend or otherwise discipline you if you wear the "HAVOC," "Scab," or "Prisoner" T-shirts.

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

WE WILL make whole the 183 employees who were unlawfully suspended by us for any loss of earnings and other benefits resulting from their suspension, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the suspensions of the 183 employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the suspensions will not be used against them in any way.

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY D/B/A AT&T CONNECTICUT, A WHOLLY OWNED SUBSIDIARY OF AT&T

Ashok Bodke, Esq., for the General Counsel.
George O'Brien, Esq. (Littler Mendelson PC), and *David Vegliante, Esq*., for the Respondent.
Gabrielle Semel, Esq. and *Josh Pomeranz, Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed by the Communication Workers of America (the Union or Charging Party), in Case 34–CA–12451, the Director for Region 34 issued a complaint and notice of hearing on November 30, 2009,[1] alleging that The Southern New England Telephone Company d/b/a AT&T Connecticut, a wholly owned subsidiary of AT&T (the Respondent or AT&T), violated Sections 8(a)(1) and (3) of the Act.

The trial with respect to the allegations in said complaint was held before me in Hartford, Connecticut, on February 3 and 4, 2010. Briefs have been filed and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I note the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a corporation with an office and place of business in New Haven, Connecticut, as well as numerous other locations throughout the state of Connecticut, where it is engaged in the business of providing telecommunication services. During the 12-month period ending in October 31, 2009, Respondent derived gross revenues in excess of $100,000 and received at its New Haven facility goods valued in excess of $5000 from points located outside the State of Connecticut.

It is also admitted, and I so find, that Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted, and I so find, that the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Union has represented employees of Respondent in a unit of employees employed in the State of Connecticut in various classifications. The unit consists of approximately 3800 employees. Approximately 1000 of these employees are customer-facing employees, i.e. they interact directly with customers at their homes or at businesses or while the employees are performing repairs on Respondent's equipment, such as poles, wires, or other items in the street.

The last collective-bargaining agreement between the parties expired on April 4. Negotiations for a new contract began in February, and no agreement has been reached.

III. THE UNION'S PUBLIC CAMPAIGN

The Union was dissatisfied with the progress of negotiations and felt that Respondent was taking a "hard line in these negotiations." The Union also believed that Respondent was "mistreating its employees."

Therefore, the Union decided to organize a number of "mobilization" activities to notify the public of how the Union believed that Respondent was mistreating its employees and hindering negotiations, and to let Respondent know that the Union had the support of its employees.

The mobilization campaign consisted of a number of events, including rallies,[2] handing out stickers and leaflets, television ads, as well as having employees wear T-shirts with different messages appearing on them at various events, such as football

[1] All dates hereafter are in 2009, unless otherwise indicated.

[2] At one of these rallies, the Union was able to obtain the presence of the Secretary of State and the Attorney General of Connecticut. During the rally, the Union accused Respondent of being a difficult employer, stifling employees' free speech, and ignoring the grievance procedure.

games, tennis events, press conferences, American Idol tryouts, and a Rockettes baseball game. Employees also engaged in various acts of concerted conduct at Respondent's facilities during 2009. Some of these activities included: employees wearing red shirts on Tuesdays and Thursdays; flying red and black balloons; baggies hung on cubicles with peanuts in them and fliers attached saying, "We Are Working for Peanuts," "AT&T is Offering Us Peanuts," or "Working for Peanuts"; employees standing up on the hour wearing union T-shirts to show solidarity; passing out bubble gum with fliers reading "AT&T Proposals Blow"; employees having tattoos on their wrists stating "Will Strike if Provoked, CWA Local 1298"; distributing fliers stating "CWA Local 1298 Willing to Walk for Healthcare"; an activity characterized as "Shake, Rattle and Roll" day, where employees would put pennies in empty bottles and stand at their desks and shake the bottles; and distribute leaflets saying "CWA Local 1298 Shake, Rattle or Walk, No Contract, No Peace."

It is undisputed that no employees were disciplined for engaging in any of the above concerted activities, and that Respondent did not tell any of its employees not to engage in such conduct.

IV. THE HAVOC AND SCAB SHIRTS

As part of the above described mobilization campaign, the Union distributed several T-shirts to its members. One of the shirts on the front reads "Stewards Army CWA Local 1298" and on the back are the letters "H.A.V.O.C.," plus the wording, "Mobilization Across the Nation." The letters HAVOC stand for "Have A Voice Over the Contract." Another such shirt has the CWA logo on the front and on the back includes the words "Scabs Will Pay" with a skull and cross bones in between the words "Scabs" and "Will Pay." Employees wore these T-shirts both inside the facilities and while dealing face to face with customers without any problems from management until September 17, 2009.

On that date, employee Richard Lorenzo was wearing the HAVOC shirt and Steve Simon was wearing the Scab shirt. They were working together and were at Respondent's North Franklin facility. They were at the facility to pickup some equipment before going out on their job of turning-up TV service. They were approached by John Buxton, a supervisor of management construction, but who is not a direct supervisor of either Lorenzo or Simon.

Buxton informed Lorenzo and Simon that he found their T-shirts to be offensive and told them to change their shirts. They informed Buxton that they did not have any shirts with them to change into. Buxton then ordered the employees to leave the facility until he communicated with their direct supervisor. Sometime later in the morning, the employees spoke to LeeAnn Gamache, their supervisor, on the phone. She informed them that they must remove the shirts and go home to change shirts on their own time. She stated that the shirts were inappropriate. Both employees told Gamache that they had worn these shirts in the past and there had been no problem with any supervisors. Indeed, both Simon and Lorenzo had worn these shirts on numerous occasions over the past year, and were seen by numerous supervisors without any indication from such supervisors that the shirts were inappropriate or offensive. Gamache responded that since Buxton had found the shirts to be "offensive," then employees must remove them or be suspended for 3 days. Both Simon and Lorenzo decided to go home and use 4 hours of vacation time. Subsequently, grievances were filed by both employees concerning the incident.

The first step of the grievance involved a meeting with Gamache, Simon, and Lorenzo. The employees complained about being sent home on September 17 since they had worn these shirts in the past, and further that Gamache had not even seen the shirts that they were wearing. Gamache replied that Buxton had seen the shirts and found them offensive and that her boss Mike Imbroglio had actually made the decision to require the employees to change their shirts or face suspensions. Therefore, Gamache stated that she could not reverse the decision and grant the employees the 4 hours time lost that they were seeking.

The next step in the grievance procedure was a meeting on January 12, 2010. Present was Simon, Lorenzo, Dave Beaudet, and Harold Russo, union stewards, Gamache and Imbroglio. The grievants and the Union argued that the punishment was unfair since the employees were never told previously that they could not wear the shirts, and there was nothing offensive about the shirts. Initially, Imbroglio insisted that the shirts were "inappropriate attire," but made no response to the employees' argument that they had worn the shirts before without being told that they were inappropriate or offensive. After some back and forth, Imbroglio said that since the employees had worked for Respondent for many years, rather than waste time, money and effort over 4 hours, Respondent would agree to give the employee back their 4 hours. The grievance was settled on that basis, and a written settlement was signed by Imbroglio and Beaudet on January 12, 2010. Imbroglio did not inform the employees or the Union that Respondent had changed its position that the shirts were offensive or inappropriate. Nor did Imbroglio say anything about whether or not the employees could wear these shirts in the future.

In fact, both Simon and Lorenzo continued to wear the T-shirts on several occasions subsequent to January 2010 without any problems from supervisors.

However, a few days after being told to remove the shirts in September, Simon participated in a conference call with Gamache and other employees. Gamache instructed the employees that employees would not be allowed to wear the HAVOC shirts, the Scab shirts, or the Prisoner shirts.[3] Gamache added that if employees wear such shirts, they would be required to go home on their own time, change the shirts, or face a 3-day suspension.

Additionally, in December 2009, there was a meeting of union officials and representatives of Respondent. Present was Charles Borchert, union business agent, Buxton and Edgardo Saavedra, Respondent's director of core installation and maintenance. Respondent's representatives were showing a PowerPoint presentation about Respondent's "code of conduct" and "team expectations." Borchert, upon seeing certain portions of the presentation, asked Buxton if that meant that "we can't

[3] The Prisoner shirt will be discussed below.

wear 'HAVOC' or 'Scab' t-shirts." Buxton responded "Yes, you cannot wear those shirts." Saavedra added that "until the Board charges are over that they couldn't wear the shirts."[4]

V. THE PRISONER SHIRTS

In early August, the Union's mobilization committee designed T-shirts, hereinafter referred to as the "prisoner shirt," to be distributed to and worn by employees. These shirts were white with black lettering. On the front of the shirt was the word "INMATE" # with a black box underneath it. On the back of the shirt, there were some vertical stripes and bars surrounding the following words: PRISONER OF AT$T. The purpose of the shirts, according to union witnesses, Bill Henderson, union president, and Borchert was to protest the employees' treatment by Respondent, to prove to Respondent that the employees felt that way and to hope that members of the public might be sympathetic to the employees and to ask Respondent why they are mistreating its employees.

When designing the shirt, initially it had prison stripes on it like an old-fashioned prisoner uniform. The union representatives decided that it "looked too realistic" and that they "toned it down" so as not to make it look like a real prisoner shirt.

The union representatives testified that they did not discuss whether the shirts might lead customers to believe that the employees were actually prisoners or that customers might be afraid to let the employees in, or if they were wearing these shirts the customers would be frightened. The union witnesses point out that employees are required to display identification badges on a lanyard or on their belt, and there would be a company truck parked in the vicinity. Further, when technicians come to homes, an appointment has been made and the technicians call the customer to confirm that the technician would be visiting the home or the business. According to Borchert, in view of the above facts, "You'd have to be an idiot to think that there was a prisoner at your front door."

Additionally, the shirt did not contain the name of the Union on it. According to Borchert and Henderson, this omission was not intentional but an oversight. In this connection, the evidence discloses that these shirts were worn by union members from August on, at numerous events and union demonstrations where the public was present, including a tennis tournament in New Haven, on a night when Respondent was a corporate sponsor. At this event, as well as others, such as minor league baseball games and University of Connecticut sports events, employees and union officials wore these shirts. Frequently, these events would engender local TV coverage, and Union President Henderson appeared several times on TV and in newspapers wearing the prisoner shirt, and complaining how employees were treated by Respondent.

The Union distributed 4000 of the prisoner shirts, and decided that employees would wear them at work on August 12.

On that day, John Vaitkus, who works out of Respondent's central office in Torrington, Connecticut, wore the prisoner t-shirt. Vaitkus, who is chief steward, does not interact with the public in his position, nor is the public allowed into the facility where he works. His supervisor, Gerald Bell, saw the shirt, chuckled, but said nothing to Vaitkus about the shirt. Vaitkus wore the shirt that day at the garage without incident. Later, during that day, Vaitkus went to the Waterbury garage on union business. The public is not permitted to enter this facility. Vaitkus met with Mario Padres, the union steward at that facility, and Supervisor Ron Ashe. Ashe told Vaitkus that he didn't like the shirt and found it offensive and derogatory towards the corporation. Ashe then said "I would like you to . . . " and Vaitkus interrupted Ashe before he completed saying what he would like Vaitkus to do. Vaitkus said to Ashe that there was nothing wrong with the shirt, and he was not removing it. Vaitkus did not remove the shirt and continued to wear it for the rest of the day. He was not disciplined by Respondent for wearing the shirt on August 12.

John Micelli is a cable repair technician working out of the Norwalk garage. He spends from 15 to 20 percent of his time inside customer's homes. Micelli wore the prisoner shirt on August 12. Micelli was in a group of 4 other employees, who were wearing the shirts, when they were approached by supervisor Mike Kerner. Kerner told the group that he did not know if it was appropriate for employees to wear the shirts and that employees should probably change them. None of the employees responded and none of them removed their shirts. Kerner instructed the employees to pickup their jobs and go to work, and they did so.

At 9:15 a.m., as Micelli was on his way to his first job, he received a call from Supervisor Robert Blackwell. Blackwell asked Micelli if he was wearing the prisoner shirt. Micelli answered yes. Blackwell told Micelli to remove the shirt or go home on his own time and change shirts. Micelli replied that he wasn't going to do that. Blackwell ordered Micelli to return to the garage and that he was going to be suspended. Micelli asked Blackwell why he could not wear the shirt. Blackwell replied that it was "offensive." Micelli returned to the garage as instructed. Blackwell informed Micelli, as well as several other employees present, who also had worn the shirts that day and had refused to remove them, that he (Blackwell) had been instructed to suspend the employees for the day and to send them home because the T-shirts were "offensive."

Micelli received a letter from Respondent the next day. The suspension letter recounts Micelli's refusal to remove the shirt deemed by Respondent not to be appropriate "for an AT&T employee to be wearing at a customer's premise." The reason for the action was stated to be "insubordination."

Micelli has not worn the prisoner shirt since that day.

A total of 20 employees, including Micelli, were suspended for insubordination on August 12 for their failure to remove the prisoner T-shirts despite being ordered to do so by Respondent's supervisors.

Stephen Simon wore the prisoner shirt on August 12 along with half a dozen other employees at the New London garage. He wore the shirt while at the facility, where he was engaged in day-long training. Simon received a phone call from his supervisor, Chris Ainley, in the late morning or early afternoon. Ainley asked Simon if he was wearing the prisoner shirt, and if so, he should remove it. Simon responded that he was wearing

[4] The Board charges were filed in September and the compliant issued on November 30. The complaint alleges unlawful conduct by Respondent concerning the HAVOC and Scab shirts, as well as the "Prisoner Shirts" to be discussed infra.

the shirt, but he had it on over another shirt and that he would remove the prisoner shirt. Simon removed the shirt as instructed and has not worn that shirt since August 12.

A day or 2 later, Simon and Lorenzo participated in a conference call with Gamache, along with several other technicians. Gamache told the employees that they could no longer wear the prisoner shirt, and would be subject to discipline if they did. She added that Respondent considers the shirt inappropriate. Simon asked for a definition of inappropriate. Gamache replied that she would get back to employees on that issue. She never did so.

Mark Fauxbel is a technician working out of the Willimantic, Connecticut garage. He also spends 10 to 20 percent of time in face to face contact with customers. Fauxbel wore the prisoner shirt on August 12. His supervisor was on vacation on that date. When Fauxbel arrived at his first job, he removed the prisoner shirt because at the job that he was doing, he "was going to get really dirty." While on this job, he received a voicemail from Linette Valentine, a supervisor, who was filling in for Fauxbel's supervisor. The voicemail stated that some employees had worn the prisoner T-shirt on that day and had been disciplined. The voicemail added that if anyone was wearing the prisoner T-shirt, they needed to take it off.

Later in the day, Fauxbel telephoned Valentine in his capacity as chief steward. Valentine informed him that the shirt did not reflect the company's image real well, and the supervisors had been informed to tell everybody to take the shirts off.

Subsequently, on the same day, Fauxbel received a voicemail from Buxton. This voicemail stated that employees should not be wearing the prisoner shirts because it was against the code of business conduct. The voicemail continued that if anyone was caught wearing the shirt, they would be sent home. If employees refused to take the shirts off, they would be suspended.

Fauxbel did not put the shirt back on that day, and wore it on only one other occasion at work on September 10. On that day, he was at the garage for a safety meeting. His supervisor told Fauxbel to remove it before he went out on a job. Fauxbel had worn another shirt under the prisoner shirt anticipating the directive, so he removed the shirt before leaving the garage. Fauxbel was not disciplined for wearing the shirt on August 12 or September 10.

On September 8, Vaitkus wore the prisoner shirt at work, and was not disciplined or spoken to about it by any supervisor on that day. On that same day, however, a large number of employees wore the prisoner T-shirts. During that day, employees were instructed to remove the shirts or face suspension. Approximately 163 employees refused to remove the shirts and were suspended for 1 day.

On September 10 or 11, Vaitkus was informed by his supervisor, Gerald Bell, that he (Bell) had received an email from Labor Relations stating that no employee should be wearing the prisoner T-shirt when they were on the clock, and if they did wear the shirt, they would be suspended for 3 days.

In fact, the email, which was sent by Debbie MacDonald, the director of labor relations, to various supervisors on September 8, refers only to "customer facing employees," and states that employees who refused to remove "inappropriate attire" "were suspended for one day" and that "based on today's impact to customer service, the length of suspension for a first occurrence of refusal to remove inappropriate attire will be increased to three days. The Union has been notified of the change, which will take place effective September 9, 2009. Employees who repeat occurrences will be subject to more serious discipline up to and including dismissal."

Also, on September 8, Kevin Zupkus, vice president of labor relations, sent the following email to Dennis Trainor, executive vice president of the Union: "I just left you a message on your cell phone. . . This message is to inform you that the discipline the company will impose will be changed to a 3-day suspension for future occurrences of refusing to remove inappropriate attire. Repeated occurrence will lead to increased discipline up to and including dismissal. As I mentioned this was necessitated by the adverse customer impact of today's events."

After receiving a copy of the above cited email from Zupkus to Trainor, Henderson discussed the issue briefly with Zupkus at a bargaining session. Henderson told Zupkus that he thought it was unfair for Respondent to discipline employees who work on the outside for wearing the prisoner shirts but not those who wear it inside. Zupkus responded that he stood by Respondent's position that there would be a 3-day suspension for wearing the shirt for "refusing to wear appropriate attire." Zupkus did not explain to Henderson the reason for its distinction between inside and outside employees. Nor did Zupkus explain why it viewed the prisoner T-shirts to be "inappropriate attire."

Respondent presented two witnesses concerning Respondent's decision to ban the prisoner T-shirts (for customer facing employees), and its general policy concerning appropriate attire. John Nasznic is employed as the lead labor manager in the labor relations department. He has been employed by Respondent for 23 years, including various bargaining unit and supervisory positions. He has been employed in the labor relations department since 2001. The director of the labor relations department is as reflected above Debbie MacDonald. Other labor relations officials included Kevin Zupkus, vice president, Bob McCorkle, and Kathleen Larson.

Nasznic testified that Respondent's technicians are divided into two groups. The Consumer Group, headed by Edgardo Saavedra, includes installation repair technicians and cable repair network delivery technicians. These employees install and repair customer lines at residences and businesses. The other group is the Construction Group, headed by John Amdrasik, which comprises network deployment technicians, who set poles, hang cables, and work in manholes. Both groups of employees were classified under the network services umbrella. These groups are the only "customer facing" employees and who were the ones disciplined for wearing the prisoner shirts. Other employees, who were not customer facing, such as employees at call centers and other internal building operations were allowed to, and did wear the prisoner T-shirts without being disciplined or told not to wear these shirts by supervisors.

Nasznic testified further that the network service group, which generally refers to employees, who face the public, is subject to the "Network Services Team Expectations." This document is reviewed with employees when they are hired and is updated yearly. Employees are expected to review the up-

dated document yearly. The introduction section of this document provides that one of its goals is to "maintain a strong, positive corporate image." Under the professionalism expectations, there is a section on appearance, which reads as follows:

> Present a professional appearance at all times. Employees must be neat and well groomed. Appearance should be appropriate for the environment in which the employee works, in keeping with the job assignment, and consistent with what is acceptable for employees in other similar type business establishments. Also, dress and grooming should at all times be consistent with sound safety practices applicable to each job. To achieve a professional appearance, here are *some examples of the basic expectations*:
>
> 1) Good personal grooming—includes clean shaven every day. Beards, mustaches and hair should be maintained consistent with what is acceptable for employees in other similar type business establishments.
>
> 2) Clothing which is in good condition, clean, and safe for work the employee is performing.
>
> 3) No clothing with printing and logos that are unprofessional or will jeopardize our Company's reputation.
>
> 4) No clothing or hats which have the logo of a retail competitor on them.
>
> 5) No muscle or tank top shirts or other types of clothing which are not appropriate for the environment in which the employee works or which create a potential safety hazard.
>
> 6) No jewelry, body piercing or visible body markings which may be offensive to customers.

Nasznic testified that the technician in the field is the "first line of interface with the customer" and the "face of the company."

On August 12, Nasznic testified that he first became aware of the prisoner shirt when he received calls from Robert Secondi, an area manager at New Haven Gateway. Secondi informed Nasznic that technicians were wearing T-shirts with the word "inmate" on the front and on the back it said "Prisoner of AT$T." Secondi told Naszmic that he felt that employees should not be allowed to leave the garage with these shirts on because of the "public image" of the company. Secondi added that he was concerned that customers at houses might be "put in fear" by the words "inmate" and "prisoner" on the shirt and might not let the technician in. Secondi did not tell Nasznic nor did Nasznic ask whether any technicians had gone to a job wearing these shirts.

Nasznic told Secondi to hold off taking any action and not to say anything about the shirts until he hears from Nasznic. Nasznic then spoke to MacDonald, who was at the time in a meeting with other labor relation officials, Zupkus, McCorkle, Larson, plus David Vegliante in house counsel. MacDonald and the group were aware of the issue, as other managers had made calls similar to that of Secondi. Nasznic reported what Secondi had said and expressed his own views to MacDonald and to the group that he felt the shirts were inappropriate, would create a poor customer image for the company, and would create a little bit of nervousness or fear by the customer. He also discussed the insubordination issue as well as what action should be taken. Thus, he mentioned a "no win" situation in that if Respondent suspended employees for insubordination if they refused to take off the shirts, that would result in missed commitments and possible overtime. Nasznic could not recall what was said by the other members of the group or by MacDonald, other than that no one there said that they felt the shirts were appropriate to be worn. Nasznic left the meeting and would return to report additional calls from supervisors requesting guidance or what to do regarding the shirts. During these reports by Nasznic, he would be "in and out" of the meeting, and he admitted that he did not recall what if anything was said by the participants in the meeting as to why they felt the shirts were inappropriate.

Shortly before 9 a.m., MacDonald informed Nasznic that a decision had been made that employees in customer facing positions would not be allowed to wear the shirts. They were to be given the option of changing the shirt, turning it inside out, going home on their time to change and return to work, or if they refuse, they would be guilty of insubordination and suspended for a day.

Nasznic testified that another concern that he had about the shirts was that he feared that customers might believe that Respondent hired prison inmates or have a work release type of program. However, he did not express this concern to MacDonald or to the group of labor relations officials discussing the issue.

After Respondent's decision was made and communicated to managers and to the Union, Nasznic received a call from Kitty Caulkins, manager of the engineering department, which are not customer facing employees. Caulkins told Nasznic that employees in her department were wearing the T-shirts. She was concerned about it and wanted to take some action. Nasznic instructed Caulkins not to take any action since Respondent's position was that only employees in customer facing positions would be prohibited from wearing the shirts.

On September 8, employees wore the prisoner T-shirts on a larger scale. On this date, when Nasznic received calls from managers, the decision had already been made on August 12, so the same action was taken and communicated to the supervisors. As related above, Respondent communicated to the Union and to managers, later on that day, that any future insubordination with regard to the prisoner T-shirts for customer facing employees would result in a 3-day suspension.

Nasznic also testified that at one point, employee John Collins, who worked in a central office and noncustomer facing position, was docked 1½ hours for wearing the prisoner T-shirt. However, this decision, by the supervisor involved, was overturned at a step one grievance by Area Manager Dick Murchison.

Borchert testified that he spoke to Ray Kurmen, a splicer who worked at the Meriden garage. Kurmen informed Borchert that he had been allowed to leave the garage on August 12 wearing the prisoner T-shirt, and that he wore it all day and that his manager had seen him wearing the shirt. Borchert also testified that several other technicians from the Hartford and Meriden garages told him that they also had worn the shirts all day, and that managers had seen them wearing the shirts. Addition-

ally, Coffin informed Borchert that technicians from the Danbury, Waterbury, Stratford, and Norwack garages had told Coffin that they had also been allowed to leave the garage wearing the prisoner shirts.

Additionally, Pat Telesco, a staff representative for the Union, had several conversations with Zupkus concerning the prisoner shirts. Telesco asked why Respondent had disciplined employees for wearing these shirts. Zupkus replied to Telesco, "You're ruining AT&T's image."

Saavedra, the director of core installation and Repair for Connecticut, was Respondent's other witness. He is a long-time employee of Respondent, and in his current position he is in charge of the technicians, who have the most face to face contact with customers.[5] Saavedra testified that Respondent tries to protect its "very powerful brand name" and that it is always trying to "preserve that image."

On August 12, Saavedra was on vacation in Puerto Rico. However, sometime in the early morning, he received a call from Rich Kreuzer, a supervisor, who was filling in for Saavedra while the latter was on vacation. Kreuzer informed Saavedra that some technicians were wearing shirts that had the word "INMATE" on the front with a box underneath and on the back stripes with the words "AT&T with a dollar sign." Saavedra said to Kreuzer here "is my two cents" if anybody asks. Saavedra told Kreuzer that in his opinion the technicians "can't be allowed to go out with these shirts to the public." Saavedra explained to Kreuzer that he was concerned about the image of a customer opening a door and seeing the shirt with the words inmate on it. Saavedra added "I don't want to take any chance of having a situation where, like, you could get a little old lady…or a single parent with a child in a house, a little old lady, whether its one or ten people reacting to this, and I just don't want to take a chance of something like that hit the news. I was concerned about the potential impact."

Saavedra continued as follows:

> "I mean, you know, I—I always think about – but that's the scenario, that's the first thing that just came to my mind, you know, is the customer going to say, you know, "Is this a unique program that the Company has? That—you know, we get all kinds of programs involved in the community that we're hiring, you know, literally excons to work in the Company.
>
> I mean, people don't know, people are not aware of the Union/Management relations going on and—and can't believe, you know, perceive what anyone opening a door is going to say do but you got to—you got to try to do your best to protect that image and protect our revenue base, you know. Losing one customer would be bad enough but then the word starts getting out and a lot of customers don't—may not tell you nothing but they'll talk to their neighbors and next thing you know and they start building an aura around what the Company may or may not be doing when they don't have the facts. So that's the kind of stuff that I was thinking about when I was giving some feedback to Kreuzer."

[5] He is in charge of approximately 850 technicians.

Kreuzer told Saavedra that he escalated the issue to Saavedra's boss,[6] Cindy Buxton, and to "Labor." Saavedra said to Kreuzer that he (Kreuzer) understood Saavedra's position, and to let him know what happens. Kreuzer did not testify, and there is no record evidence as to whether Kreuzer relayed Saavedra's concerns or position about the shirts to Buxton or to anyone else.

According to Saavedra, Kreuzer did not inform him nor did he ask whether any technicians had gone out wearing the shirts on that day. When Saavedra returned from vacation, he found out from Kreuzer, as well as from seeing emails, Respondent's decision concerning the shirts, and the fact that some technicians were suspended for insubordination. He also had a conversation with Buxton, who by that time had been sent an actual shirt by Kreuzer. Buxton told Saavedra that "We can't allow this type of stuff" and that the shirts were "inappropriate." According to Saavedra, since Buxton is the "big boss," she should have ultimately made the decision on this issue or at least been consulted about it by Labor Relations and other representatives of Respondent.

Saavedra also testified that he was concerned about the Cheshire issue, referring to a home invasion case in Cheshire when several people were murdered during a home invasion, and that was in the news at the time. Saavedra believed that in view of that issue "You never know, why risk it . . . why take a chance." He did not testify that he expressed that concern to Kreuzer in this discussion on August 12.

Saavedra also admitted that the ongoing labor negotiations between Respondent and the Union was commonly known to the public, and that anyone who reads the newspaper or watches TV in Connecticut would have been aware prior to August 12 of the labor dispute between the Union and Respondent "with all of the events going on."

Saavedra also admitted that Respondent received no complaints from any customers concerning the wearing of the prisoner shirts at any time.

Finally, Saavedra testified that grievances were filed by the Union concerning both the August and September suspensions, and that the parties agreed to stay the grievances pending resolution of the Board trial.

VI. RESPONDENT'S PRACTICE WITH REGARD TO OTHER SHIRTS

Employees Simon, Micelli, and Fauxbel testified that they had worn T-shirts on numerous occasions with what one could consider questionable or offensive content, had been seen by supervisors wearing such shirts and had received no adverse comments about their shirts or any instructions by supervisors to remove them.

These shirts include the following language: "Support Your Local Hookers" (employee Simon wore 25 times in the last 3 years in presence of supervisors Tom Beebe and Bill Lechner); "The Liver is Evil and Must be Destroyed" (worn 50 times by Simon in the last five years, seen by Beebe and other supervisors, such as Chris Mordecai and Bob Pia); "It's All about the

[6] Buxton's title is not clear from the record. However, it is clear that she is stationed in Detroit and that the high-level officials of Respondent report to her.

Booty" (worn by Micelli countless times since 2006); "Your IQ Came Back Negative" (worn over 20 times by Micelli); "I'm Not Drunk. I'm just a Race Fan" (worn by Fauxbel about 40 times); "If I Want Your Opinion I'll Take the Tape Off Your Mouth" (Fauxbel wore shirt 10–15 times, seen by supervisor Ed Miller, who chuckled but did not ask Fauxbel to remove it) "Out of Beer, Life is Crap" (also worn by Fauxbel 5 or 6 times in presence of Miller).

These employees testified that not only were they not spoken to by supervisors about these shirts, but that they were not told anything by supervisors about attire in general, other than to be neat and clean and not wear clothing with sexual innuendos (Simon), not to wear shorts and to wear long-sleeve shirts while climbing poles (Micelli).

Nasznic testified that he was not aware of any employee being disciplined for inappropriate attire other than the employees at issue here. During the 10 years that he has been in labor relations, he could not recall any employee being disciplined for wearing an inappropriate shirt. Nasznic did recall an incident "a few years ago" where a manager informed him that he had seen an employee wearing what the manager considered to be a "vulgar" T-shirt at a job site.[7] The supervisor told the employee to turn the shirt inside out and the employee complied with the supervisor's instruction. Thus, the employee was not disciplined. Nasznic also recalled that he discussed the appropriateness of attire with an employee in around the year 2000. At that time, he spoke to employees about torn or dirty pants, wearing pants too low, or wearing "do rags." He informed the employee to remove the "do rags" and he complied.

Saavedra testified that he attended training sessions with managers where the subject of appropriate attire was discussed. He recalled that examples of attire that would be offensive to customers were mentioned, such as earrings, tongue rings, and T-shirts.

Saavedra was shown several of the shirts worn by employees and discussed above, such as the "Out of Beer, Life is Crap" shirt. Saavedra testified that he considered that shirt to be inappropriate and if he saw it, he would have counseled the technician and/or the supervisor about wearing such a shirt. Saavedra recalled one prior incident where an employee was suspended for failing to remove a tongue earring, and another, where an employee was advised to and did remove a hoop earring after Saavedra complained to the technician's supervisor about it.

VII. ANALYSIS AND CONCLUSIONS

It is undisputed and well settled that employees have a protected right to make known their concerns and grievances pertaining to the employment relationship, which includes the wearing of union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945); *Komatsu America Corp.*, 342 NLRB 649, 650 (2004).

However, it is equally well settled that these Section 7 rights may give way when "special circumstances" override the employees' Section 7 rights and legitimatize the regulation of such apparel. *Komatsu America*, supra; *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), enfd. 99 Fed Appx. 233 (DC Cir. 2004). The Board has found special circumstances justifying proscription of union insignia when their display may jeopardize employee safety, damage machinery or product, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established as part of its business through appearance rules of its employees, or when necessary to maintain decorum and discipline among employees. *Komatsu America*, supra; *Nordstrom Inc.*, 264 NLRB 698, 700 (1982); *Southwestern Bell*, 200 NLRB 667, 669–670 (1972) (permitting employers to ban sweatshirt criticizing the employer in an obscene manner).

In assessing whether "special circumstances" has been established by an employer sufficient to permit the regulation of the particular attire, it is clear that employee contact with customers does, not standing alone, justify an employer prohibiting the wearing of union insignia. *Nordstrom*, supra at 700; *Virginia Electric & Power Co.*, 260 NLRB 408 (1982); *Floridan Hotel of Tampa*, 137 NLRB 1484, 1490 (1961), enfd. as modified on other grounds 318 F.2d 545 (5th Cir. 1963). However, contact with customers is a relevant factor to be weighed in balancing the potentially conflicting interests of an employee's right to display union insignia and an employer's right to limit or prohibit such display. *Nordstrom*, supra; *Pathmark Stores Inc.*, 342 NLRB 378, 379–381 (2004) (Board finds special circumstances established by concluding that message on shirts of "Don't Cheat About the Meat" reasonably could lead employer's customers to believe that employer was "cheating" its customers).

I have found above that Respondent, by Buxton and then by Gamache, ordered Simon and Lorenzo to remove the HAVOC and Scab t-shirts that they were wearing or go home on their own time to change. They refused and took 4 hours of vacation time.

It is unnecessary to analyze under "special circumstances" principles Respondent's conduct with regard to Simon and Lorenzo and the HAVOC and Scab T-shirts. Respondent concedes, as it should, that its action violated the rights of Lorenzo and Simon to wear these shirts. However, Respondent argues that Buxton's actions regarding these employees "were not authorized by the Company and did not coincide with the policy that the Company adopted concerning the inmate shirts or the practice it had consistently followed of accepting union insignia and mobilization in the work place."

Respondent also points out that the employees were made whole for their loss of 4 hours of vacation time during the grievance procedure. Therefore, Respondent contends that its conduct in this regard is "too isolated and de minimis to warrant the issuance of a remedial order." I disagree.

Respondent's contention that Buxton's conduct with regard to Simon and Lorenzo "was not authorized by" Respondent is simply not consistent with the facts in the record. These facts establish that Respondent's actions with respect to these employees were authorized by and consistent with Respondent's position at that time. Buxton initially informed the employees that he felt that the HAVOC and Scab shirts were "offensive," and that they should not leave the facility until they heard from their supervisor. In fact, their supervisor, Gamache, communicated to the employees the decision made by her supervisor, Imbroglio, that the shirts were "inappropriate." It was a deci-

[7] The shirt read "Fuck Milk."

sion of Imbroglio through Gamache that the employees must remove the shirts, go home on their own time and change, or face a 3-day suspension.

Further, this decision by Imbroglio is consistent with the email sent by MacDonald to various supervisors and labor relations officials on September 8. While the memo was issued on the day of the banning of the prisoner shirts, the memo made no references to which shirts were subject to bans in the future. The memo referred only to "inappropriate attire" without specifying which shirts would be considered "inappropriate attire." Thus, it appears that Imbroglio, Buxton, and Gamache interpreted "inappropriate attire" as including the HAVOC and Scab shirts, a position that Respondent has never expressly disavowed except in this proceeding.

Notably, Gamache in a conference call with employees several days later reaffirmed Respondent's position that HAVOC and Scab shirts are included as "inappropriate attire," and that employees could face a 3-day suspension if they wear such shirts in the future and refuse to remove them.[8]

Furthermore, in December, union representative Borchert was told by both Buxton and Saavedra that the HAVOC and Scab shirts cannot be worn until the Board charges are resolved.[9]

Respondent's reliance on the fact that the employees were given back the 4 hours time that they lost as a result of the grievance procedure is misplaced.

During both the first and second steps of the grievance procedure, Respondent continued to assert by Gamache and Imbroglio its position that the shirts were offensive and/or inappropriate and that Respondent was within its rights to ban them. Finally, at the second step after some back and forth discussion, Imbroglio relented and stated that since the employees had worked for Respondent for many years rather than waste time, money, and effort, Respondent would agree to give the employees back their 4 hours. Significantly, Imbroglio did not change or disavow Respondent's position or Imbroglio's own statement that the shirts were offensive or inappropriate. Nor did he inform the employees that they could wear the shirts again without facing further discipline. Also, Respondent never informed the employees or the Union that employees are permitted to wear the HAVOC or Scab T-shirts.

In these circumstances, Respondent has fallen far short of meeting its burden under *Passavant Memorial Hospital*, 237 NLRB 138 (1978), of establishing an effective repudiation of its conduct. The grievance resolution was not timely, *Douglas Division, Scott & Fetzer Co.*, 228 NLRB 1016, 1029 (1977), did not admit wrongdoing *Passavant*, supra at 139, did not inform any of its employees that they could wear the t-shirts involved, *Boise Cascade Corp.*, 300 NLRB 80, 83 (1990), and did not assure its employees that in the future that Respondent would not interfere with the exercise of their Section 7 rights. *Boise Cascade*, supra; *Passavant*, supra; *Harrah's Club*, 150 NLRB 1702, 1717 (1965).

It is therefore not appropriate to dismiss these allegations on the grounds that they are "de minimis." *Regency at the Rodeway Inn*, 255 NLRB 961, 962 (1981) (single interrogation of one employee not "de minimis"), particularly where as here the *unlawful* prohibition was communicated to the Union as well as to employees other than Simon and Lorenzo in Gamache's conference call.

Accordingly, I conclude that Respondent by ordering the employees to remove the HAVOC and Scab shirts, and threatening them with suspension if they did not comply or go home and change on their own time and forcing them to take 4 hours of vacation time have violated Sections 8(a)(1) and (3) of the Act. *Golub Corp.*, 338 NLRB 515, 516 (2002); *Boise Cascade*, supra; *Caterpillar Inc.*, 322 NLRB 690, 693 (1996); *Mid-State Telephone Corp.*, 262 NLRB 1291, 1292 (1982), enfd. denied 706 F.2d 401, 403–404 (2d Cir. 1983); *Southern California Edison Co.*, 274 NLRB 1121 fn. 2, 1123–1125 (1985); *Eckerd's Market*, 183 NLRB 337, 338 (1970).

Turning to Respondent's conduct with respect to the "prisoner" shirts, it is undisputed that on August 12 and September 8, Respondent ordered employees to remove or change these shirts and that it issued a 1-day suspension to a number of employees, who refused Respondent's instructions in this regard.

As detailed above, the employees involved in wearing these shirts were engaged in protected concerted activities. Thus, there is a presumption that Respondent cannot lawfully ban the wearing of such shirts unless Respondent establishes the existence of "special circumstances" sufficient to permit Respondent to forbid its employees from wearing such shirts. *Pathmark Stores*, supra.

Respondent does not contest the above findings or statement of the law, but argues that it has met its burden of establishing "special circumstances" by the testimony of Nasznic and Saavedra. According to Respondent, this testimony is sufficient to prove that Respondent banned the prisoner shirts because it believed that the shirts disparaged its public image, would create nervousness and fear by the customers so that they might be reluctant to let the technician into their homes and/or would lead customers to believe that Respondent employs prisoners on a work release program.

However, the record reveals a critical defect in Respondent's attempt to meet its burden of proof by the testimony of these witnesses. The facts establish that neither Nasznic nor Saavedra had any first-hand knowledge of why Respondent decided to ban these shirts. Their testimony establishes only their opinions as to why they believed the shirts were inappropriate. There is no evidence in the record that any of the reasons expressed by Saavedra or Nasznic were relied upon by Respondent when it made its decision to ban the wearing of these shirts. Saavedra was on vacation at the time that Respondent made its decision in August. Although Saavedra did express his views to Kreuzer, who was filling in for Saavedra, there is not a scintilla of evidence that these views were communicated to the decision makers.[10]

[8] I note again that Gamache's statement to employees is consistent with the September 8 email from MacDonald to Respondent's officials.

[9] The complaint alleging this conduct to be unlawful was issued on November 30.

[10] Kreuzer did not testify nor did the "decision makers" as detailed below.

While Nasznic was at work at the time of the decision, his role in this regard was limited. He did express his views to MacDonald and the other individuals involved in the decision,[11] but there is no evidence that any of these individuals even considered, much less relied on the concerns expressed by Saavedra or Nasznic in deciding to ban the shirts.

In similar circumstances, the Board has frequently drawn an adverse inference from a respondent's failure to call as witnesses the decision makers, particularly in cases such as here, where the Respondent is attempting to meet its burden of proof by presenting witnesses, who did not have first-hand knowledge of the facts. *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999) (failure to call decision maker gives rise to adverse inference, where respondent had burden under *Wright Line* to establish reasonable belief that discriminatee committed fraud); *DMI Distribution Co.*, 334 NLRB 409, 413 (2001) (adverse inference appropriate where respondent failed to call supervisor with first-hand knowledge of alleged misconduct of discriminatee); *Douglas Aircraft*, 308 NLRB 1217, 1221 fn. 1 (1992) (failure to call officials of respondent to provide first-hand account of their purported actions and motives permits an adverse inference as to its motivation); *American Petrofina Co.*, 247 NLRB 183, 191 (1980) (unexplained failure to call witnesses with first-hand knowledge of alleged wrongdoing by discriminate leads to adverse inference that if called to testify, they would not have corroborated testimony of other witnesses of employer); *Dorn Transportation Co.*, 168 NLRB 457, 460 (1967) (failure of the decision maker to testify "is damaging beyond repair") This decision was enforced by the Second Circuit, 405 F.2d 706 at 713 (2nd Cir. 1969), where the Court concluded that "Dorn's attitude was critical on the question of the motivation of the discharge and the failure to call him as a witness on the issue of what the thought of Rogers' loyalty and attitude towards his work permits an adverse inference," citing the Supreme Court's decision in *Interstate Circuit v. United States*, 306 U.S. 208, 59 S.Ct. 467 at 474 (1939), where the Court observed that "the production of weak evidence when strong is available can lead to the conclusion that the strong would have been adverse."

Here, Respondent failed to call any of the five or six "decision makers"[12] or individuals, who had "first-hand knowledge" of the reasons for Respondent's decision to ban the prisoner shirts. Respondent offered no reason why it did not call any of these witnesses, who are apparently all still employed by Respondent. I find this omission to be inexplicable and consistent with the precedent cited above leads to an adverse inference, which I find it appropriate to draw that their testimony would not have supported the testimony of Saavedra and Nasznic as to Respondent's reasons for prohibiting the wearing of the shirts.

Rather, I conclude that such testimony would likely establish that Respondent banned these shirts because it believed that they disparaged Respondent by implying that it mistreated its employees, and that it did not want its customers to be exposed to this kind of an accusation, which does not establish "special circumstances" but rather amounts to the prohibition of typical protected conduct. *Borman's Inc.*, 254 NLRB 1023, 1024–1025 (1981), enfd. denied 676 F.2d 1138 (6th Cir. 1982) (shirt reading "I'm tired of bustin' my ass" found by judge and Board to convey to outsiders that employees of the company believed the "place really stinks").

Even apart from the adverse inference rule, Respondent is obligated to meet its burden of establishing "special circumstances" sufficient to overcome the presumption that the prisoner shirts are protected. That burden is a substantial one[13] and simply cannot be met by testimony of two witnesses, who were not directly involved in the decision. See *Albertson's Inc.*, 351 NLRB 254, 256–257 (2007) (generalized testimony of labor relations counsel insufficient to establish "special circumstance" justifying the proscription of union insignia). See also *Boise Cascade*, *Co.*, 300 NLRB 80, 81 (1990) (no evidence that decision maker relied on certain evidence before imposing ban on union insignia).

Therefore, I conclude for these reasons alone that Respondent has fallen short of meeting its burden of proof that "special circumstances" existed permitting it to ban the employees' exercise of protected concerted activity. I need go no further to find, which I do, that Respondent has violated Section 8(a)(1) and (3) of the Act by ordering its employees to remove the prisoner shirts on August 12 and September 8, by threatening them with suspension if they did not comply and by suspending those employees, who failed to comply with Respondent's unlawful instruction. *Golub Corp.*, supra; *Boise Cascade*, supra; *Caterpillar Inc.*, supra; *Southern California Edison*, supra.

However, in the event that I am reversed as to my conclusions detailed above, it is appropriate for me to assess whether Respondent has met its burden of establishing "special circumstances" assuming that the testimony of Nasznic and Saavedra is deemed sufficient to establish Respondent's reasons for banning the shirts.

Respondent makes a number of contentions and arguments in support of its assertion that it has established "special circumstances" sufficient to ban the prisoner T-shirts. It argues initially that the shirts make no reference to the Union, which Respondent claims militates against finding that the wearing of these shirts deserves the protection of the Act. I do not agree.

The evidence establishes that management and supervisory personnel were clearly aware that the shirts were union-sponsored and related to the labor dispute between Respondent and the Union, and Respondent does not contend otherwise. Further, press and television reports, as well as other union events, demonstrate that customers would likely be aware that the shirts were related to the labor dispute between the Union and Respondent. *Government Employees*, 278 NLRB 378, 385 (1986) (armband reading "hostage/striker" held to be protected

[11] Kevin Zupkus, Bob McCorkle, Kathleen Larson, and David Vegliante. It also appears that Cindy Buxton, who is stationed in Detroit and is in charge of Respondent's operations in Connecticut, either was directly involved in the discussion or approved of the decision made by labor relations to ban the shirts.

[12] As noted above, it is unclear whether Buxton made the decision or merely approved the recommendations made by MacDonald and the other labor relations representatives.

[13] *Escanaba Paper Co.*, 314 NLRB 732, 733 fn.4 (1994), enfd. 73 F.3d 74 (6th Cir. 1995).

and related to message of "solidarity" with union, even in absence of any union insignia or reference to union); *Southern California Edison*, supra, 274 NLRB at 1123–1124 (button reading "stick your retro," protected notwithstanding absence of union identification). See also *Southwestern Bell Telephone*, 200 NLRB 667, 669 (1972) (in assessing the lawfulness of a ban on employees wearing certain shirts, it is immaterial that the shirts did not name the union since employees may act concertedly for their mutual aid or protection independently and without a union).

I therefore place little or no significance on the failure of the prisoner shirts to mention the name of the Union.

Respondent also places significant reliance on the existence of Respondent's "Team Expectations" concerning the "corporate image" that a technician is expected to present to the public. The expectations of professionalism include that no clothing be worn with printing and logos that are "unprofessional or will jeopardize the Company's reputation." It also adds that their appearance "should be appropriate for the environment in which the employee works."

Respondent cites *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084 (2003), and argues that the facts here are nearly identical. Thus, the employees there, as here, were not required to wear uniforms but the employer "maintained appearance standards" for its employees, supervisors were directed to be aware of "disruptive appearance" by employees, including whether an employee's appearance "reflects negatively on our corporate image" and employees are not permitted to wear any garment that has "offensive lettering, words or pictures."

The Board in evaluating an arbitrator's award that sustained suspensions of employees, who refused to remove a particular t-shirt, discussed the "special circumstances" standard. It observed as follows:

> An employer's concern about the "public image" presented by the apparel of its employees is, therefore, a legitimate component of the "special circumstances" standard. And, when determining whether an employer's proscription of statutorily protected union apparel or insignia unreasonably interferes with employees' Section 7 interests under our decisional case law, there are few bright-line rules for purposes of determining whether an arbitration decision is "palpably wrong" under our precedent." Id at 1086

The Board then reviewed a number of cases[14] assessing the existence of special circumstances, which reached different conclusions albeit involving somewhat similar factual situations. The Board then commented that "all of these cases turn on fine distinctions of respective statutory interests and on unique factual circumstances." Id.

The Board concluded that "the arbitrator balanced the respondent's legitimate interests in promoting appearance standards in support of its public image against the employees' legitimate interests in making known their sentiments about their working conditions and promoting solidarity among employees." Thus, although the arbitrator did not expressly use the "special circumstances" analysis required by the Board, according to the Board, he implicitly did so, and his decision was "not palpably wrong" or "repugnant" to the Act. The Board therefore deferred to the arbitrator's award and dismissed the complaint.

While I agree with Respondent that there are some factual similarities between *Bell-Atlantic-Pennsylvania*, supra and the facts here,[15] there are also several significant distinctions, which in my view render Respondent's reliance on *Bell-Atlantic-Pennsylvania* to be misplaced.

First and foremost, *Bell-Atlantic-Pennsylvania* does not represent a finding by the Board that "special circumstances" justifying the employer's ban on the shirts were present. Rather, it found only that the arbitrator's decision was not "palpably wrong" or "repugnant" to the Act, or put another way was "susceptible to an interpretation" consistent with the Act. Id. at 1087, *Motor Convoy Inc.*, 303 NLRB 135, 136–137 (1991).[16] Indeed, an award can meet that standard and still be deferred to, even if the award is not totally consistent with Board precedent. *Motor Convoy*, supra at 137; *Dennison National Co.*, 296 NLRB 169, 170 (1989); *United States Postal Service*, 275 NLRB 430, 433 (1985). Accordingly, *Bell-Atlantic-Pennsylvania*, supra cannot be construed as significant precedent for concluding that the Board would or should find, as here, where there is no arbitration award to evaluate that "special circumstances" have been established.[17]

Further, there are several important factual differences between *Bell-Atlantic Pennsylvania* and the instant case. There, it was undisputed that the employer maintained the appearance standards as specified in its employment documents. Here, in contrast, the evidence is disputed and reveals several instances where clearly more "offensive" shirts[18] than the shirts banned were permitted to be worn on numerous occasions without any comment or criticism from supervisors. The vague and unpersuasive testimony of Nasznic and Saavedra as to Respondent's alleged enforcement of its policies is far from sufficient to meet Respondent's burden of proof that it has uniformly enforced its policies. I note that I do not and have not found that Respondent discriminatorily enforced its uniform policies based on union considerations. Indeed, the record reveals undisputed evidence that Respondent has permitted numerous kinds of

[14] *United Parcel Service*, 195 NLRB 441 (1972); *United Parcel Service*, 312 NLRB 596 (1993); *St. Luke's Hospital*, 314 NLRB 434 (1994); *Noah's New York Bagels*, 324 NLRB 266, 275 (1997); *Escanaba Paper*, supra; *Southwestern Bell*, supra; *Borman's*, supra.

[15] Similar written policies with regard to appearance standards, as well as the fact that employees did not wear uniforms, plus the fact that both Respondent and the employer in *Bell-Atlantic-Pennsylvania* applied the ban only to "customer contact employees."

[16] The Board specifically observed that in deferring to the award "we do not reach the question of whether we would necessarily reach the same result as the arbitrator." 339 NLRB at 1085.

[17] I note in this regard that the Board emphasized this fact and implicitly indicated that it would likely rule differently if the case has been presented for ordinary review, absent an arbitral award. 339 NLRB at 1087, where it observed that the shirts in question was not as disruptive to the employer's public image as in the cases of *Southwestern Bell Telephone*, supra and *Noah's New York Bagels*, supra.

[18] For example, shirts reading "Out of beer, life is crap," "I'm not drunk, I'm just a race fan," "The liver is evil, it must be punished" and "Support your local hookers."

union activities, including the wearing of the prisoner shirts inside its facilities, as well as permitting other union shirts to be worn by technicians involved in customer facing positions.

However, I find that Respondent's assertion that it was attempting to apply its uniformly enforced appearance policies by banning the prisoner shirts has not been established, and that it is Respondent's burden to do so as part of its burden to establish the existence of "special circumstances."

Further, while I agree with Respondent that *Bell-Atlantic-Pennsylvania* does make clear that an employer's concerns about the "public image" of its employees' apparel can be a legitimate component of the "special circumstances" standard, these concerns still must be reasonable. The Board implicitly found such concerns to be reasonable there because the "road kill" shirts depicting "employees as a squashed carcass lying in a pool of blood can be viewed as unsettling to the public and was disruptive of the employer's public image interests." Id. at 1085.

The facts here do not come close to the facts in *Bell-Atlantic-Pennsylvania vis-a-vis* the wording on the shirts. There is no depiction of employees as squashed carcasses lying in a pool of blood or any similar such depiction than can reasonably be construed as disrupting Respondent's public image.

Respondent also cites *Pathmark Stores*, supra, where the Board found that shirts reading "Don't cheat about the meat" could be prohibited since the shirts "reasonably threatened to create concern among the Respondent's customers about being cheated, raising the genuine possibility of harm to the customer relationship." 342 NLRB at 379

Before evaluating whether *Pathmark Stores* is supportive of Respondent's position, it is useful to examine other precedent, where special circumstances have been found to exist.

The Board has found "special circumstances," where the message on the apparel worn by the employees was vulgar or obscene, *Leiser Construction LLC*, 349 NRLB 413, 415 (2007) (hardhat sticker depicting someone or something urinating on a rat that was designated "non-union"); *Southwestern Bell*, supra, 200 NLRB at 670–671 (sweatshirt stating "Ma Bell is a cheap Mother," found by judge, affirmed by Board, to be offensive, vulgar and profane); where banning the union insignia is necessary based on safety considerations, *Albis Plastics*, 335 NLRB 923, 924–925 (2001) (unauthorized stickers on hard hats could interfere with visibility); union insignia that may "exacerbate employee dissension," *Komatsu America*, supra, 342 NLRB at 650 (T-shirt with inflammatory comparison of Japanese employer's outsourcing plans to 1941 sneak attack on Pearl Harbor); Accord, *Southwestern Bell*, supra; union insignia that disparages or mocks the employer product, *Pathmark Stores*, supra (T-shirt reading "Don't cheat about the Meat," found to reasonably convey to customers that employer cheating them with respect to meat offered for sale, raising the "genuine possibility of harm to the customer relationship"); *Noah's New York Bagels*, supra at 275 (lawful to prohibit T-shirt stating "If it's not union, its not kosher," since it mocked employer's kosher policy); or if the apparel unreasonably interferes with a public image that the employer has established, *Komatsu America*, supra; *Bell-Atlantic*, supra; *Evergreen Nursing Home*, 198 NLRB 775, 778–779 (1972) (ban on large, conspicuous bright yellow button detracts from dignity of all white uniform worn by nurses); *United Parcel Service*, supra, 195 NLRB at 441 (ban on conscious button supporting candidate in intra-union elections, justified because it interfered with projected public image of uniformed drivers).[19]

An examination of this and other precedent leads me to conclude, which I do, that Respondent has failed to establish its defense of "special circumstances."

The message on the shirts is undisputedly not obscene or vulgar, do not impinge on safety concerns, do not disparage Respondent's product or business and does not create employee dissension.

Respondent places its primary reliance on its assertion that the shirts "unreasonably interfere with the public image" that Respondent has established *Komatsu America*, supra at 649. Indeed, most of the cases finding the existence of "special circumstances" based upon this theory involve uniformed employees, *United Parcel*, supra, 195 NLRB at 441; *Evergreen Nursing*, supra at 778–779; or where the employer has established the existence of clearly defined appearance standards, *Bell-Atlantic-Pennsylvania*, supra at 1085. Here, the employees do not wear uniforms, and as I have observed above, Respondent has not established the existence of clearly defined appearance standards.[20]

Thus, Respondent's defense comes down to its assertion that Respondent had a reasonable belief that its public image would likely be damaged by the wearing of the prisoner shirts in customer facing situations. *Pathmark Stores*, supra; *Bell-Atlantic-Pennsylvania*, supra. I find that Respondent has fallen far short of meeting its burden of establishing that contention.

I conclude that Respondent's evidence on this issue does not meet its burden of showing by "substantial evidence" that the shirts reasonably would damage its business. *Inland Counties Legal Services*, 317 NLRB 941 (1995); *Virginia Electrical & Power Co.*, 260 NLRB 408, 409 (1982). The evidence presented by Respondent consists of unwarranted and unsubstantiated speculation by Saavedra and Nasznic that the shirts might cause customers to believe that the technicians were actual prisoners or that Respondent had a work release program where it employed prisoners. Such testimony does not suffice to meet Respondent's burden of adducing substantial evidence necessary to establish "special circumstances." *Inland Counties Legal Services*, supra (speculation that union button might make a negative impression on clients insufficient to meet burden; the mere possibility of such offense does not outweigh the employees' right to wear such items). *Escanaba Paper Source*, supra, 314 NLRB at 733 (mere possibility that messages might make a negative impression on customers and suppliers does not out-

[19] But see *United Parcel Service*, 312 NLRB 596, 597–598 (1993), where the Board distinguished prior *United Parcel* case cited above, finding that smaller pin did not interfere with uniformed drivers desired image.

[20] *Flamingo Hilton Laughlin*, 330 NLRB 287, 292 (1999) (employer has not established longstanding policy regarding appearance rules and insufficient evidence adduced regarding implementation of rules in a consistent manner); *Raley's Inc.*, 311 NLRB 1244, 1250–1251 (1993) (insufficient evidence of rigorous enforcement of appearance standards).

weigh the employees' Section 7 right to wear the item); *Boise Cascade*, supra, 300 NLRB at 82 (general speculation or conclusory evidence insufficient to establish special circumstances); *Government Employees*, supra, 278 NLRB at 385 (generalizations and conclusions that there existed a possibility that armbands would cause confrontations insufficient to meet burden of showing special circumstances); *Midstate Telephone*, supra, 262 NLRB at 1292 (although message on shirts may have displeased management, that does not establish special circumstances); *Eckerd's Market Inc.*, 183 NLRB 337, 338 (1970) (vague general evidence presented by Respondent not substantial enough to establish "special circumstances").

Not only is Respondent's evidence speculative and conclusionary and devoid of any factual support,[21] but in fact other record evidence tends to dispel Respondent's purported fears. Thus, the record is undisputed that technicians when they arrive at a customers home had come based on an appointment made by the customer, and that the technician would call to confirm the appointment. Further, the technicians would be wearing an identification badge when he or she comes to the door. Moreover, Respondent has adduced no evidence of what kind of uniform is worn by prisoners in Connecticut or any neighboring state, or that these uniforms have the words "inmate" or "prisoner" appearing thereon.

In these circumstances, I do not find that Respondent has established that it had a reasonable belief that customers would be likely to confuse the technicians wearing the shirts with real prisoners.

I also find it unreasonable to conclude that customers would believe that Respondent had a work release program, where it actually employed prisoners. I find it improbable and in fact preposterous to believe that if Respondent had such a program that they would advertise it by placing the words "inmate" and "prisoner" on the shirts.

As I have detailed above, Respondent's reliance on *Bell-Atlantic-Pennsylvania*, supra and *Pathmark Stores* is misplaced, in that those cases, as well as other precedent cited above, where "special circumstances" were found, are inapposite. Rather, substantial Board precedent supports my conclusion that Respondent has not demonstrated the existence of "special circumstances" sufficient to outweigh the employees' Section 7 rights to wear the prisoner shirts. Indeed, a number of these cases reveal that union insignia far more provocative, vulgar, or offensive than the shirts here were found not to establish "special circumstances" sufficient to proscribe Section 7 conduct. *Caterpillar*, supra at 693 (T-shirts reading "Permanently replace Fites"[22] and button reading "Happiness is waking up in the morning and finding Dan Fites' picture on a milk carton" and a caricature of Fites. Held to be fair comment of employees' position in the labor dispute and "no showing that potential customers would be offended"); *Escanaba Paper*, supra at 732–735 (buttons reading "Hey Mead – Flex this" and hats and shirts reading "No Scab"); *Borman's*, supra at 1024–1025 (shirts reading "I'm tired of bustin' my ass"); *Government Employees*, supra at 385 (armband reading "hostage/striker"); *Southern California Edison*, supra at 1124 (button reading "Stick your retro"); *Midstate Telephone*, supra at 1292 (shirt depicting logo of company as cracked and displaying words "I survived the Midstate strike of 1971–1975–1979").[23]

Furthermore, as I have observed above, the pleasure or displeasure of an employer's customer does not determine the lawfulness of banning employee display of insignia. *Inland Counties*, supra at 941; *Howard Johnson Motor Lodge*, 261 NLRB 866, 868 fn. 6 (1982). Additionally, a desire of an employer to reduce controversy among customers is insufficient to establish special circumstances, *Nordstrom Inc.*, 264 NLRB 698, 701–702 (1982).

Respondent also relies on the facts that it has allowed other types of union shirts and insignias to be worn inside and outside the plant. While these facts are supportive of Respondent's position (*Leiser Construction*, supra at 415; *Komatsu America*, supra at 650), they are not sufficient by themselves to establish "special circumstances." I do not find here that Respondent discriminatorily applied its policy regarding shirts simply because it contained a prounion message. Rather, the allegation, which I find meritorious, is that its decision to ban these shirts is unlawful because it interferes with protected Section 7 rights, and that Respondent has not met its burden of overcoming the presumption that this conduct cannot be prohibited, absent the existence of "special circumstances." Thus, motive is not the issue here, *McDonald's Drive-In Restaurant*, 204 NLRB 299, 310 (1973), and although I am finding that Respondent's conduct violates Section 8(a)(3) of the Act, it is a derative finding of the 8(a)(1) violation since union activities are involved, but does not include a finding that Respondent intended to discriminate based on union activities or conduct.[24]

In fact, my conclusion here is simply that Respondent decided to ban this particular exercise of protected conduct because it felt that this shirt went too far in that the Union attempted to communicate to customers that Respondent mistreated its employees. While Respondent may have believed that some of its customers should not be exposed to this kind of

[21] Respondent points to evidence from Saavedra's testimony that at "around" the time of the incidents, there was "in the news" a story of a home invasion in Cheshire, Connecticut, resulting in the murder of several individuals. However, I find it unreasonable to believe that customers would be likely to connect that event with the shirts. Further, Nasznic made no mention of the issue. Thus, there is no record evidence that the decision makers were told about this alleged concern by any management official, much less that it was part of Respondent's decision to ban the shirts.

[22] Fites was the CEO of the employer.

[23] I recognize that both *Midstate Telephone*, supra and *Borman's*, supra were reversed by Circuit Courts. However, I am bound by the Board decisions in these cases. Moreover, the facts in these cases are distinguishable. In *Midstate*, the Court simply disagreed with the Board and held that the depiction of the cracked logo might improperly suggest to the public that the employer is coming apart. No such finding is possible here. In *Borman's*, the Court reversed primarily on the grounds that the conduct was isolated. No such finding is possible here. See *Southern California Edison*, supra at fn. 2, distinguishing *Midstate* and *Borman's* on these bases.

[24] See *Caterpillar*, supra at 693; *Southern California Edison*, supra at 1125; *Midstate Telephone*, supra, 262 NLRB at 1292; *Eckerd's Market*, supra, 183 NLRB at 338 for cases finding violations of Sec. 8(a)(3) of the Act in similar circumstances.

message, this fear is not sufficient to establish special circumstances since it is similar to messages that the Board has found could not be banned. *Borman's*, supra; *Caterpillar*, supra; *Southern California Edison*, supra.

Accordingly, based upon the foregoing analysis and authorities, I conclude that Respondent by prohibiting its employees from wearing the prisoner shirts, threatening them with discipline for wearing the shirts, and by disciplining employees for wearing these shirts, has violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The 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. By ordering and instructing its employees to remove and not to wear the "HAVOC," "Scab," and "Prisoner" T-shirts, threatening its employees with suspension or other discipline if they continued to wear these shirts, and by suspending its employees because they wore these shirts, Respondent has violated Section 8(a)(1) of the Act.

4. By suspending and otherwise disciplining its employees because they wore the "HAVOC," "Scab," and "Prisoner" T-shirts, Respondent has violated Section 8(a)(3) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act.

Respondent shall make whole the 183 employees that it suspended on August 12 and September 8 for the unlawful discrimination against them, plus interest as computed in *F. W. Woolworth*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, The Southern New England Telephone Company d/b/a AT&T Connecticut, a wholly owned subsidiary of AT&T, New Haven, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Ordering or instructing its employees to remove or not to wear the "HAVOC," "Scab," or "Prisoner" T-shirts, or not to engage in any other protected concerted activities.

(b) Threatening its employees with suspension or any other discipline if they continue to wear the "HAVOC," "Scab," or "Prisoner" T-shirts or if they engage in any other protected concerted activity.

(c) Suspending or otherwise disciplining its employee because they engaged in wearing the "HAVOC," "Scab," or "Prisoner" T-shirts, or because they engaged in other protected concerted activities, including activities in support of the Communication Workers of America.

(d) In any like or related manner, interfering with, restraining, or coercing employee 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 and purposes of the Act.

(a) Make whole the 183 employees whom it suspended on August 12 and September 8, 2009, for any loss of earnings suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this order remove from its files any references to the suspension of the 183 employees, and within 3 days thereafter notify them in writing that this has been done and that evidence of these suspensions will not be used as a basis for any future action against them.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its New Haven, Connecticut facility and at all its facilities located in the state of Connecticut, where bargaining unit employees work, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 12, 2009.

Dated, Washington, D.C., June 18, 2010.

[25] 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.

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT order or instruct our employees to remove or not to wear the "HAVOC," "Scab," or "Prisoner" T-shirts, or not to engage in any other protected concerted activities.

WE WILL NOT threaten our employees with suspension or any other discipline if they continue to wear the "HAVOC," "Scab," or "Prisoner" T-shirts, or if they engage in any other protected concerted activities.

WE WILL NOT suspend or otherwise discipline our employees because they wear the "HAVOC," "Scab," or "Prisoner" T-shirts, or because they engage in any other protected concerted activities, including activities in support of the Communication Workers of America.

WE WILL make whole the 183 employees, who were unlawfully suspended by us, for any loss of earnings suffered as a result of the discrimination against them, plus interest.

WE WILL within 14 days from the date of this order remove from our files any references to the suspensions of the 183 employees, and WE WILL within 3 days thereafter notify them in writing that this has been done and that evidence of these suspensions will not be used as a basis for any future action against them.

THE SOUTHERN NEW ENGLAND TELEPHONE CO. D/B/A AT&T CONNECTICUT