Bell-Atlantic-Pennsylvania, Inc. *and* Communications Workers of America, Local 13000. Cases 4–CA–23255 and 4–CA–23418

August 21, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

On charges filed by the Union on November 7, 1994, and January 13, 1995, the General Counsel of the National Labor Relations Board issued a consolidated complaint and notice of hearing on December 1, 1998, alleging that the Respondent violated Section 8(a)(1) and (3) of the Act by promulgating a rule prohibiting employees who had visible contact with customers from wearing "Road Kill" shirts containing insignia (described below) and by suspending employees for wearing these shirts. The Respondent filed a timely answer denying the commission of any unfair labor practices.

On July 28, 1999, the General Counsel, the Respondent, and the Charging Party filed with the Board a motion to transfer proceeding to the Board and stipulation of issue and facts. The parties agreed that the charges, the consolidated complaint, answer, and the stipulation, including attached appendices, exhibits, and evidence shall constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties waived a hearing, the making of findings of fact, conclusions of law, and the issuance of a decision by an administrative law judge. On July 18, 2000, the Board issued an order approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel, the Charging Party, and the Respondent filed briefs, the Charging Party filed an answering brief, and the General Counsel and the Respondent filed reply briefs.

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

On the entire record in this case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is in the business of providing telecommunications services. The consolidated complaints alleges, and the Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The consolidated complaint alleges, the Respondent admits, and we find that the Charging Party, Communications Workers of America, Local 13000 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

The issues here are whether an arbitration award pertaining to the conduct at issue is palpably wrong and repugnant to the purposes and policies of the Act and whether the Respondent's ban on the wearing of the "Road Kill" T-shirt by certain employees, and resulting discipline of employees for wearing the shirt, violated Section 8(a)(1) and (3) of the Act.

A. Facts

In August 1994, the Respondent announced to its employees a plan for a major reduction in force of 4200 employees and 1400 management personnel to be completed in 1997. Thereafter, in response to these plans for the contracting out of unit work and the layoff of employees, the Union undertook a mobilization effort to educate its membership regarding the Respondent's downsizing plans. The purpose of this effort was to promote unit solidarity based on the theme of job security. To that end, the Union produced and distributed to unit employees 13,000 T-shirts pertaining to the downsizing plan, described below, and known as the "Road Kill" T-shirt. With the exception of the Road Kill T-shirt, the Respondent has historically permitted all of its employees represented by the Union to wear red union-sponsored T-shirts displaying the Union's logo.

In late September or early October 1994, the Respondent became aware that union-represented employees were, or would be, wearing the Road Kill T-shirt while on the job. Thereafter, the Respondent sought the Union's assistance in assuring that employees with customer contact did not wear the T-shirt while working. The Union declined to do so. The Respondent's prohibition against wearing the Road Kill shirt by customer contact employees was enforced by some, but not all, of the Respondent's management personnel.

As part of its mobilization against the Respondent's downsizing plans, the Union declared November 23, 1994, to be "Road Kill Day." The Union asked all 13,000 unit employees to wear the Road Kill T-shirt to work that day. The Respondent prohibited the open wearing of the shirt by customer contact employees during working time and directed that they remove, cover up, or reverse the shirt. The Respondent permitted employees who worked inside company facilities and had no direct contact with customers to wear the Road Kill shirt. About 750 customer contact employees refused to comply with the directive. These employees were sent home and suspended for 1 day without pay, which was docked from their Thanksgiving holiday pay.

The Road Kill T-shirt, red and white in color, contains the words "Info Superhighway" in large letters over a cartoon-type image of a squashed rodent-like animal lying in a pool of blood in the middle of a road. The squashed carcass is labeled "Bell Atlantic employees" and is described at the bottom of the shirt as "Road Kill." The shirt also depicts an overpass in which trucks labeled as "Bell Atlantic" and "AT&T" pass above the Road Kill scene.

The Respondent's definition of customer contact employees includes unit employees whose duties bring them into visible contact with actual or potential customers during working time. These employees include service technicians, systems technicians, splicing technicians, and outside plant technicians (linemen). Within these classifications are employees who, in addition to working on customers' premises, also work at times on telephone poles, along the roadside, and in manholes.

The Respondent maintains appearance standards for its employees. Although employees do not wear uniforms and may wear T-shirts during working time, the Respondent's apparel standards direct supervisors to be aware of "disruptive appearance" by employees, including whether an employee's appearance "reflect(s) negatively on our corporate image." Employees are not permitted to wear any garment that has "offensive lettering, words or pictures."

The Union grieved the November 23, 1994 suspensions. In May 1998, an arbitration panel, headed by an impartial arbitrator, upheld the suspensions and denied the grievance. The impartial arbitrator found that the Respondent's prohibition of the Road Kill T-shirt was in furtherance of its desire to maintain its public image and that the Respondent's reputation in the community was an essential asset for the fulfillment of the installation and maintenance aspects of its business mission. The arbitrator found that the Respondent reasonably could believe that observing the shirt would unsettle the public despite the absence of explicit disparagement of the Respondent's products or service. He found that although there was no evidence of any customer complaints precipitated by the scattered wearing of the shirts preceding November 23, the mass exposure of the Road Kill shirts to potentially thousands of customers on November 23 posed a different level of potential adverse reaction to the Respondent's public image.

B. Contentions of the Parties

The General Counsel and the Charging Party Union contend that the arbitration award is repugnant to the Act. They contend that wearing of the Road Kill T-shirts was protected activity under the Act and that the Respondent did not show special circumstances sufficient to overcome the protected nature of the activity. They further contend that the award is repugnant because it permits the Respondent to discipline employees for exercising their protected rights. The Respondent contends that deferral to the award is appropriate because the General Counsel did not meet the high standard of demonstrating that the award is "palpably wrong" under the Act. The Respondent contends that the arbitrator appropriately found that the suspensions were in furtherance of the Respondent's legitimate interest in maintaining and protecting its image and reputation and, therefore, warrants deferral.

C. Discussion

We find it appropriate to defer to the arbitration award.

Under *Olin Corp*., 268 NLRB 573 (1984), the Board will defer to an arbitrator's award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, the arbitrator has adequately considered the unfair labor practice issue, and the decision of the arbitrator is not clearly repugnant to the Act. We find that the award is not repugnant. In deferring to the arbitration award, we do not reach the question of whether we would necessarily reach the same result as the arbitrator.

As the *Olin* Board held, to warrant deferral, an arbitrator's award need not be totally consistent with Board precedent. Rather, the Board will decline to defer only if the award is not susceptible to an interpretation consistent with the Act. The party seeking to have the Board reject deferral bears the burden to show that the *Olin* standards have not been met. (268 NLRB at 574.)

Here, the General Counsel and the Charging Party Union have failed to meet this burden. At its core, this case concerns an employer's interest in maintaining its "public image" through the application of appearance standards for employees when they are performing their work tasks in public during working time. As noted, the Respondent maintains appearance standards prohibiting "disruptive appearance." While permitting employees to wear a wide range of apparel, the Respondent considers disruptive an appearance that "reflect(s) negatively on our corporate image" and mandates that "no garment should have offensive lettering, words or pictures."

The Board has a long history of considering issues posed when employees seek to make a statement concerning their working conditions through the wearing of personal apparel and come into conflict with an employer seeking to regulate the wearing of such apparel through

the application of legitimate personal appearance standards.[1]

On the one hand, employees have a protected right under Section 7 of the Act to make known their concerns and grievances pertaining to the employment relation and, therefore, to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). Here, the Road Kill shirt communicated legitimate employees' concerns about their working conditions and, therefore, wearing the shirts was protected activity under Section 7. On the other hand, a Section 7 right may give way on occasion when "special circumstances" override the Section 7 interest and legitimize the regulation or prohibition of such apparel. *Evergreen Nursing Home*, 198 NLRB 775, 778–779 (1972). The Board has found special circumstances justifying proscription of union insignia and apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees. *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982).

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.

Thus, in *United Parcel Service*, 195 NLRB 441 (1972), the Board found that an employer could prohibit the wearing of a 2-1/2-inch conspicuous button worn on a uniform, but in *United Parcel Service*, 312 NLRB 596 (1993), the Board found that an employer could not prohibit the wearing of a small inconspicuous pin on a uniform. In *Evergreen Nursing Home*, supra, the Board found that an employer could prohibit the wearing of a conspicuous bright-yellow 2-1/4-inch button worn by nurses in patient-care areas, but in *St. Luke's Hospital*, 314 NLRB 434 (1994), the Board found that an employer could not prohibit the wearing of a 2-1/4-inch button with conspicuous white and black lettering in light of other patient-care circumstances. In *Noah's New York Bagels*, 324 NLRB 266, 275 (1997), the Board found that an employer could prohibit a phrase (added to company T-shirt) stating, "If it's not Union, it's not Kosher," but in *Escabana Paper Co.*, 314 NLRB 732 (1994), enfd. sub nom. *NLRB v. Mead Corp.*, 73 F.3d 74 (6th Cir. 1996), the Board found that an employer could not prohibit buttons stating "Just Say NO-Mead" and "Hey Mead-Flex this." In *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972), the Board found that an employer could prohibit a shirt stating, "Ma Bell is a Cheap Mother" but in *Borman's Inc.*, 254 NLRB 1023 (1981), enf. denied 676 F.2d 1138 (6th Cir. 1982), the Board found that an employer could not prohibit a shirt stating, "I'm tired of bustin' my ass" alongside company name.

All of these cases turned on fine distinctions based on a balancing of respective statutory interests and on unique factual circumstances. In the present case, 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. In the end, the arbitrator found that the wearing of the "Road Kill" T-shirts, depicting employees as squashed and lying in a pool of blood, was disruptive to the Employer's public image interests.

Although the arbitrator did not expressly apply the Board's "special circumstances" standard, it is clear that he undertook a balancing of the respective statutory interests. More particularly, the arbitrator found that

> This determination requires balancing the Union's rights, guaranteed by law, to engage in protected concerted activity in order to improve the bargaining unit's terms and conditions of employment against the company's legitimate business interests in maintaining good customer relations and effectuating the public's confidence in the competence and integrity of its employees, especially those employees who provide on-site service at the customer's residence or business. Given the evidence in the instant case, the Company's determination that exposing customers to the T-shirt's message would adversely affect the Company's legitimate business interests, as narrowly confined to on-premises visits, was neither arbitrary nor improper.

[1] As stated above, the arbitrator's award need not be totally consistent with Board precedent to warrant deferral. Rather, it must not be repugnant to the Act. But consideration of Board precedent may well be relevant to the issue of repugnance and it is in that spirit that we set out the discussion of Board precedent below. In a similar vein, the Board stated, in a case cited by our concurring colleague (*Motor Convoy*, 303 NLRB 135, 136–137 (1991)):

> assuming arguendo that the [arbitration] panel used a standard different from the statutory standard, that difference is not necessarily sufficient to establish that the award is repugnant. As noted supra, this difference in standards is *relevant* to the issue of repugnance. The issue is whether this difference is *dispositive* of the issue of repugnance. [Emphases in original.]

Although perhaps a case can be made that the T-shirt in question here is not as disruptive to the Respondent's public image interests as was the "Cheap Mother" message to the employer in *Southwestern Bell Telephone*, supra, or perhaps not as disruptive as was the "no-kosher" message to the employer's public image interests in *Noah's New York Bagels*, supra, we cannot say that under our decisional precedent the arbitrator here was "palpably wrong" in striking the balance of interests as he did.

Further, even in cases where the Board has found that Section 7 interests of employees should prevail, the Board has found it noteworthy that the apparel worn by customer contact employees during working time was "free of any provocative message or language." *United Parcel Service*, supra, 312 NLRB at 597. A T-shirt depicting employees as a squashed carcass lying in a pool of blood, as here, can plausibly be viewed as provocative in character, as the arbitrator found.[2] The General Counsel and the Charging Party contend that deferral is inappropriate here under *Mobil Oil Exploration & Producing*, 325 NLRB 176 (1997), enfd. 200 F.3d 230 (5th Cir. 1999). There, however, in the contrast to the present case, the balance of statutory interests called for nondeferral because, as the court of appeals noted, the employer's proferred confidentiality interest was "empty" and could not outweigh the employee's Section 7 interest under Board precedent. 200 F.3d at 235. Here, the employer's interest in its public image is substantial and the arbitrator's decision is susceptible to an interpretation consistent with the Act.

In short, we find that although the Road Kill shirt was protected under Section 7, it was not repugnant or "palpably wrong" for the arbitrator to find that employees' Section 7 interests may give way to the Respondent's legitimate interests in protecting its public image under the circumstances of this case. Accordingly, it is appropriate to defer to the award.[3]

Finally, we recognize that the arbitrator distinguished between onsite employees who worked in residences and businesses, on the one hand, and "outside" employees who worked in street manholes, along the roadside, and on telephone poles. As to the latter, the arbitrator found that the ban on Road Kill shirts would be reasonable only if there was a significant possibility that these employees might be assigned where they could come in close enough contact with customers so that the shirts could be deciphered, which the arbitrator found was remote. The arbitrator found that the Road Kill phrase could be read from a distance of 10 feet or less. He also found that it was impractical for the Respondent, for purposes of the ban on Road Kill shirts, to differentiate among customer contact employees on the basis of their assignments for the day. As to these outside employees, the arbitrator denied the grievance on the basis that they were, in any event, "insubordinate" in refusing to cover or remove the Road Kill shirts when in close contact with the public.

With respect to the outside employees, we defer to the arbitrator's denial of the grievance, but we do so solely on the basis of the arbitrator's finding that it was impractical for the Respondent to differentiate, for purposes of the Road Kill shirt ban, among customer contact employees based on their assignments. The parties stipulated here that all "customer contact" employees, as defined by the Respondent, included employees whose duties brought them into visible contact with actual or potential customers during their working time and that these stipulated classifications included those employees working on telephone poles, along the roadside, and in manholes. Accordingly, it is appropriate to treat all customer contact employees identically for purposes of balancing their respective statutory interests. We, therefore, defer to the arbitration award denying the grievance as to all customer contact employees, and we shall dismiss the complaint in its entirety.[4]

[2] The arbitrator did not find that the Road Kill shirt disparaged the Respondent's product under the "disloyalty" standards of *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953).

[3] The General Counsel and the Union contend that the arbitrator acquiesced to the Respondent's subjective determination concerning its "public image" interests and did not apply an objective standard as required under Board precedent. In *BellSouth Telecommunications*, 335 NLRB 1066 (2001), however, the Board found that the beneficial objectives sought through an apparel policy that conveyed to customers a cooperative labor-management partnership were legitimate and "plausible." In the absence of evidence suggesting that the factual premises underlying the policy were mistaken, the Board emphasized that it was "not inclined . . . to engage in speculation" about the asserted response of the employer's customer base. *BellSouth*, supra at 1070 fn. 6.

[4] Member Liebman joins in deferring to the arbitration award insofar as it covers employees who worked in customer homes and businesses. However, to the extent that the award covers customer contact employees who worked exclusively on roadways, in manholes, and on telephone poles, and not also in customer homes and businesses, she would not defer. As to these "outside" employees, Member Liebman finds that the Sec. 7 interests of these employees must prevail because of the limited ability of the public to decipher the message on the Road Kill shirt. In this regard, Member Liebman notes that in weighing "special circumstances" in the balance of statutory interests, it is crucial whether or not customer contact employees work in visible range of the customer public. Here, it appears that some of the outside employees may not work in visible range of customers. Therefore, to the extent that any "outside" employees were not in the visible range of customers throughout their working time, she would not defer to that portion of the award.

ORDER

The complaint is dismissed.

MEMBER SCHAUMBER concurring.

The threshold issue here is whether to defer to an arbitrator's award denying a grievance over the Respondent's discipline of customer contact employees for wearing the "Road Kill" T-shirt. I join my colleagues in deferring to the arbitrator's award, and, thus, do not reach the issue of whether the discipline violates Section 8(a)(3) and (1) of the Act.

Well-settled Board policy favors deferral and holds that the party arguing against deferral bears a heavy burden. *Olin Corp.*, 286 NLRB 573 (1984). In determining if deferral is appropriate, the Board evaluates only whether the *Olin* standards have been met. Under *Olin*, the Board will defer to an arbitrator's award even if it is not totally consistent with Board precedent, as long as the award is not repugnant to the Act. Consistent therewith, deferral is appropriate even where the arbitrator may have used a different standard or reached a different result than the Board itself would have reached. See, e.g., *Motor Convoy*, 303 NLRB 135, 136–137 (1991).[1] *Doerfer Engineering*, 315 NLRB 1137, 1138–1139 (1994), revd. on other grounds 79 F.3d 101 (8th Cir. 1996).

I agree with my colleagues that the General Counsel and the Charging Party did not meet their burden here of showing that the award is repugnant to the Act. The arbitrator considered Board precedent in finding that the wearing of the T-shirts was disruptive of the Employer's legitimate interest in providing service without making its customers and the public uncomfortable. This finding clearly is not inconsistent with Board precedent, and, since the arbitrator is not required to consult Board law in reaching his decision, I would subject it to no further analysis. Doing otherwise may be misleading.

As to the employees who work outside, the parties themselves stipulated, and the arbitrator found, that these employees have contact with customers and the public. As Member Acosta, I would, therefore, not differentiate among customer contact employees and will treat the arbitrator's award finding a legitimate interest in banning the T-shirts as applying to all.

In sum, I defer to the arbitrator's award denying the grievance and dismiss the complaint in its entirety.

[1] I agree with my colleagues that this case, like many others, supports the proposition that the difference in standards is relevant to the issue of repugnance. *Motor Convey* does not, however, support the majority's approach of subjecting the challenged employer action to extensive independent analysis under the Board's standard.