Starwood Hotels & Resorts Worldwide, Inc., d/b/a W San Diego *and* Hotel Employees and Restaurant Employees International Union, Local 30, CLC.[1]
Case 21–CA–36384

September 29, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 21, 2005, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief. The Respondent filed an answering brief to the General Counsel's cross-exceptions and a reply to the General Counsel's answering brief. The General Counsel filed a reply to the Respondent's answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt her recommended Order as modified and set forth in full below.[3]

A majority of the Board (Chairman Battista and Member Schaumber, Member Liebman dissenting) agrees with the judge, for the reasons set forth in her decision, that the Respondent did not violate Section 8(a)(1) of the Act when it prohibited an employee from wearing a union button in public areas of the Respondent's hotel. A different majority (Member Liebman and Member Schaumber, Chairman Battista dissenting) further agrees that the Respondent did violate Section 8(a)(1) by prohibiting the same employee from wearing the button in nonpublic areas. A unanimous Board reverses the judge's finding, however, that the Respondent violated Section 8(a)(1) by prohibiting another employee from wearing union stickers in the hotel kitchen, a nonpublic area.

A. The Prohibition on Union Buttons in Public and Nonpublic Areas

The Respondent operates a 250-room hotel in downtown San Diego. The Respondent recognized the Union in 2003, pursuant to a card-check agreement. At the time of the hearing in this case, the parties had negotiated, but not yet executed, a collective-bargaining agreement.

The Respondent markets itself as providing an alternate hotel experience referred to as "Wonderland" where guests can fulfill their "fantasies and desires" and get "whatever [they] want whenever [they] want it." In furtherance of the hotel's hoped-for ambience, the Respondent commissions special uniforms for its public-contact employees in order to achieve a trendy, distinct, and chic look.[4] As part of their uniform, employees must wear a small (1/2 inch) "W" pin on the upper left chest. The Respondent's attire policy prohibits all other uniform adornments, including sweatbands, scarves worn as belts, and professional association pins.

The Respondent encourages employees to "express themselves" in a manner consistent with the trendy atmosphere. The Respondent also encourages employees to interact with guests on a personal level, and requires employees to introduce themselves by name to each guest. In its training program for new employees, the Respondent teaches: "Every interaction with our guests must be Genuine, Authentic, Comfortable, Engaging, Conversational, with Personality, Fun."

In-room delivery (IRD) servers deliver food orders from the kitchen to guest rooms. The IRD server uniform is a black T-shirt, black slacks, and a black apron. When delivering an order, the IRD servers start in the hotel kitchen (a nonpublic area), take a service elevator to the guest's floor,[5] deliver the order to the guest's room, and return to either the hotel kitchen or another nonpublic area to await the next order. The IRD servers' contact with the public varies widely on a daily basis. IRD server Sergio Gonzalez testified that there were nights where he had delivered only one order and had seen only one guest. On the other hand, there were also nights where he had delivered as many as 50 orders to as many guests. Gonzalez has no contact with the public,

[1] We have amended the caption to reflect the disaffiliation of HERE from the AFL–CIO effective September 14, 2005.

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

In addition, the Respondent contends that the judge's findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contention is without merit. We also affirm the judge's denial of the Respondent's request that the judge disqualify herself.

[3] We shall modify the judge's recommended Order to reflect our findings.

[4] During the first 11 months of 2004, the Respondent spent $28,000 to purchase new uniforms and $60,000 to clean uniforms. The Respondent's 2005 budget includes $100,000 to replace all existing uniforms. The list price of the in-room dining server uniform T-shirt is $28.49.

[5] If the service elevators are unavailable, the IRD servers must get permission to use the guest elevators. Use of the guest elevators occurs on only 20 to 25 percent of deliveries.

other than during food deliveries. Gonzalez also testified, and the judge found, that only 30–40 percent of his time (less than a majority) is spent in contact with the public.

Gonzalez regularly worked the night shift. At approximately midnight on July 10, 2004,[6] Gonzalez put on a button distributed by the Union.[7] The button was 2 inches square. It contained the wording: "JUSTICE NOW! JUSTICIA AHORA! H.E.R.E. LOCAL 30" in blue or red letters on a yellow background. At about 3 a.m., while Gonzalez was on a meal break in a nonpublic area, Supervisor John Baker ordered Gonzalez to remove the button. After a brief discussion, Gonzalez removed the button.

It is well established that employees have a statutorily-protected right to wear union insignia. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *USF Red Star, Inc*., 339 NLRB 389, 391 (2003). An employer may lawfully restrict the wearing of union insignia where "special circumstances" justify the restriction. *Pathmark Stores, Inc*., 342 NLRB 378, 379 (2004); *Albis Plastics*, 335 NLRB 923, 924 (2001). Special circumstances justify restrictions on union insignia or 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, or when necessary to maintain decorum and discipline among employees." *Komatsu America Corp.,* 342 NLRB 649, 650 (2004). The employer bears the burden of proving such special circumstances. *Pathmark Stores*, *Inc.,* supra; *Inland Counties Legal Services*, 317 NLRB 941, 942 (1995).

The judge found that the Respondent proved special circumstances—interference with the Respondent's public image—justifying the no-button order while Gonzalez was in public areas where he would come in contact with guests. The judge further found that these special circumstances did not apply while Gonzalez was in nonpublic areas where he would not come in contact with guests. The judge emphasized that Gonzalez spent the majority of his work time in nonpublic areas. The judge further explained that the Respondent had issued the no-button order while Gonzalez was in a nonpublic area, and that the Respondent's no-button order was not limited to public areas. The judge accordingly found that the order was lawful with regard to times Gonzalez was in public areas and unlawful with regard to times Gonzalez was in nonpublic areas. The judge's findings are fully supported by the record evidence.

[6] All dates are 2004, unless otherwise noted.

[7] The record does not show the Union's purpose in distributing the button.

Chairman Battista and Member Schaumber agree with the judge regarding the display of the button in public areas. The union button would have interfered with the Respondent's use of a particular IRD server uniform (professionally-designed all-black shirt, slacks, and apron) to create a special atmosphere for hotel customers. The Respondent therefore could lawfully prohibit the button with regard to the time that Gonzalez was in public areas.

United Parcel Service,[8] cited by our dissenting colleague, does not warrant a different result. In that case, the Board found that the employer violated the Act by prohibiting employees from displaying a union insignia pin. The Board found that the employer's desire to present to the public an image of a neatly uniformed driver was not a special circumstance that justified the prohibition of wearing such a pin. The *United Parcel* union pin, however, was significantly smaller (dime-sized) and its message less controversial (abbreviated union name and logo) than the union button here (2-inch square button stating "Justice Now! Justicia Ahora!"). Accordingly, the *United Parcel* union pin was less likely to interfere with the employer's effort to create a particular public image than the union button here. Furthermore, the *United Parcel* employer allowed other uniform adornments, including adornments unrelated to the employer's business, while the Respondent here allowed only one uniform adornment—a small "W" pin that the Respondent required employees to wear. That pin related directly to the employer's business, and was consistent with the special atmosphere the Respondent sought to create.

Accordingly, we find that the Respondent has met its burden of demonstrating that a special circumstance existed justifying its prohibition on wearing the pin in public areas of the hotel.[9]

[8] 312 NLRB 596 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994).

[9] Member Liebman disagrees with her colleagues' adoption of the judge's finding that the Respondent established "special circumstances" justifying its ban on wearing union buttons in public areas. The Respondent asserts that it has attempted to create a "wonderland" ambiance for its customers, that the chic look of its employees' uniforms is a key component of that ambiance, and that wearing union buttons on employee uniforms would significantly interfere with its efforts to create that ambiance. The Board has held that it will find "special circumstances" justifying a ban on union insignia where the employer has demonstrated that the display of insignia may unreasonably interfere with the 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). The Board has also held, however, that customer exposure to union insignia, standing alone, does not constitute "special circumstances" simply because of concerns regarding the creation of controversy. *Floridan Hotel of Tampa, Inc.*, 137 NLRB 1484 (1962), enfd. as modified on other grounds 318 F.2d 545 (5th Cir. 1963). Further, the Board has held that the wearing of a

Member Liebman and Member Schaumber also agree, contrary to Chairman Battista, that the prohibition was unlawful when Gonzalez was in nonpublic areas.

There is no dispute that the Respondent's order to Gonzalez to remove the union button was not limited to times when Gonzalez was in areas of the hotel frequented by guests. Rather, it was a general prohibition encompassing the large blocks of time Gonzalez spent in nonpublic areas of the hotel, including his 3 a.m. meal break in a back office.[10] Simply stated, when Gonzalez was in nonpublic areas, hotel guests would not see him. The union button worn by Gonzalez while he was in nonpublic areas of the hotel accordingly could not—and did not—interfere with the unique atmosphere that the Respondent sought to create for hotel guests. Indeed, the judge found that IRD servers spend the majority of their worktime—60 to 70 percent—in nonpublic areas of the hotel, where they come in contact only with other hotel employees. We have carefully reviewed the record evidence, and it fully supports the judge's finding.[11] In these circumstances, the judge properly found that the Respondent had failed to establish special circumstances justifying its prohibition, in nonpublic areas of the hotel, on employees' statutorily protected right to wear union insignia.

The Respondent's principal contention is that it would be impractical for the Respondent to allow Gonzalez to wear the union button in nonpublic areas while prohibiting the button in public areas. However, the Respondent introduced no actual record evidence to support this assertion of impracticality. Nor do we believe that the Respondent has demonstrated even a reasonable concern that would justify a property-wide ban on the wearing of union insignia. First, as the dissent appears to acknowledge, simply removing a button—without any other alteration in employee uniform or appearance required—does not seem to present a barrier of impracticality. Indeed, in *Casa San Miguel, Inc.*, 320 NLRB 534, 540 (1995), the case principally relied upon by the dissent, the judge, whose decision the Board adopted, specifically distinguished between buttons attached to uniforms and emblems printed on to them, explaining:

> Unlike those situations, however, when an employee *attaches* something to the employee's work uniform, such as a union button . . . the Union's insignia and message involved in this case was a part of the uniform and could not be removed. It is not practical or possible for an employee when in nonpatient care areas to wear a uniform with a printed prounion emblem and message on the front, and then to change out of that uniform each time the employee enters a patient care area. [Emphasis in original.]

Moreover, the Board recently reiterated that the mere hypothetical impracticality of detaching a removable union insignia when moving between areas did not justify a blanket, property-wide prohibition.[12] Respondent has made no showing to demonstrate that a different result should obtain here.

Nor are we persuaded by our dissenting colleague's suggestion, which was not argued by the Respondent, that enforcement of a rule prohibiting button use only in public areas would be unduly burdensome. The Respondent maintains a panoply of rules applicable to its employees' interactions with guests, many of which occur in situations where management is unlikely to be present. We see no reason why enforcement of a rule on buttons would be more burdensome for the Respondent than enforcement of its other policies governing interaction with hotel guests. Accordingly, we find that the Respondent violated Section 8(a)(1) by prohibiting Gonzalez from wearing the union button in nonpublic areas of the hotel.[13]

B. The Prohibition on Union Stickers in the Kitchen

Katie Grebow worked as a cook in the hotel kitchen. Grebow, like the other kitchen employees, wore a stan-

union pin free of offensive messages and language does not in any meaningful way interfere with the employer's effort to create the desired image of neatly uniformed employees. *United Parcel Service*, supra, 312 NLRB at 597. Here, the Respondent has submitted no evidence demonstrating that the Union's 2-inch square button (which merely bore the Union's name, logo and the words "Justice Now! Justicia Ahora!") would detract in any significant way from the Respondent's efforts to create a "wonderland" atmosphere. Thus, even assuming that the Respondent's interest in creating such an atmosphere could be sufficiently important to justify a ban on union insignia, the Respondent has failed to carry its burden of demonstrating that the employees' wearing of the Union's button on their uniforms in public areas could so interfere with the creation of that atmosphere as to warrant the Respondent's ban. Member Liebman would therefore find that the ban violated Sec. 8(a)(1).

[10] Gonzalez is stationed in the nonpublic "backstage" area of the hotel when he is not making food deliveries.

[11] The dissent does not dispute the judge's finding that the IRD servers spend a majority of their time in nonpublic areas. Rather, the dissent asserts that IRD servers "appear" to spend "substantial" time in public areas.

[12] *Enloe Medical Center*, 345 NLRB 874, 876 (2005) ("That employees might find it cumbersome to remove and later put back on their badges when moving in and out of patient care areas—and might ultimately find it impractical to do so—does not justify the Respondent's effectively deciding this for them by flatly prohibiting employees from wearing the union badges in both patient-care and non-patient-care areas. . . .").

[13] We do not consider fulfillment of the Board's statutory duty to adjudicate and remedy unfair labor practices, in this case by engaging in the balancing of interests dictated by Board precedent, to be "federal micro-management," as asserted by the dissent.

dard food preparation uniform, including a white shirt with buttonless pockets on the chest and sleeve. While at work one morning in late June or early July, Grebow placed three identical union stickers on her shirt.[14] The stickers were printed on address label stock. She also placed stickers on the clothing of other kitchen employees. Later that morning, Executive Chef Matthew Herter observed that several kitchen employees were wearing stickers and that one sticker was peeling off an employee's shirt. When Herter questioned an employee about the stickers, the employee referred Herter to Grebow. Herter, Human Resources Manager Lauren Giberti, and another Respondent official confronted Grebow. They told Grebow that the stickers violated the Respondent's attire policy[15] and that she had to remove the stickers. After a 10-minute discussion, Grebow removed the stickers. Later that day, Grebow had a 30-minute discussion regarding the sticker prohibition with Giberti and Human Resources Director May Weimer. Weimer asserted that the Respondent's attire policy prohibited the stickers and Grebow asserted that she had a right to wear the stickers.

The judge rejected the Respondent's contention that health concerns—the danger that the stickers would fall into the food or onto food preparation surfaces—constituted special circumstances justifying the sticker prohibition. In support of this conclusion, the judge noted that the Respondent had not introduced governmental regulations addressing stickers on clothing, that the Respondent allowed kitchen employees to keep personal items (including cigarettes) in unbuttoned shirt pockets, and that the Respondent officials mentioned only its attire policy, not health concerns, when they ordered Grebow to remove the stickers. The judge accordingly found that the sticker prohibition violated Section 8(a)(1).

Contrary to the judge, we find that the Respondent lawfully prohibited Grebow's wearing of a union sticker in the kitchen area. Health and safety concerns may constitute special circumstances justifying restrictions on employees' right to wear union insignia. See *Albis Plastics*, supra, 335 NLRB at 924. Chef Herter's uncontradicted testimony establishes that foreign objects in food preparation areas pose risks of contamination. The union stickers were loosely attached to the employees' clothing. They were held in place only by the adhesive customarily used on the back of address labels to affix the labels to an envelope. At least one sticker was already starting to peel off after only a few hours. This evidence therefore shows that the stickers posed a real danger of falling off and thereby presented a contamination risk. Accordingly, the danger that the loosely-attached stickers would fall into the food or onto food preparation surfaces constitutes special circumstances justifying the sticker prohibition.

The evidence further shows that the Respondent's kitchen is subject to State and County health regulations and that these regulations prohibit employee actions that may result in contamination of food or food preparation surfaces. To enforce these regulations, the County conducts unannounced quarterly health inspections, during which health inspectors may assess points for the presence of debris in the kitchen. While the Respondent did not introduce governmental regulations specifically addressing stickers on clothing, this does not alter the fact that foreign objects in food preparation areas pose a contamination risk for which the Respondent is held responsible. And although the Respondent allowed kitchen employees to keep personal items, including cigarettes, in unbuttoned shirt pockets, these items were inside the pockets and therefore the Respondent could reasonably make the judgment that these objects were less likely to fall into the food than the stickers that were loosely attached to the outside of the employees' clothing.

We also disagree with the judge's reliance on the fact that the Respondent's officials cited only the attire policy, and not the food contamination risk, when they ordered Grebow to remove the stickers. If the General Counsel were alleging a motive-based violation, then this silence regarding the asserted contamination risk (when explaining the sticker prohibition to Grebow) could be evidence of unlawful motive and pretext. However, the allegation here is that the prohibition was unlawful because its adverse impact on Grebow's statutory rights outweighed the legitimate management concerns it served. Accordingly, the Board here conducts a balancing-of-interests analysis, not a motive analysis. See *Produce Warehouse of Coram, Inc.,* 329 NLRB 915, 917–918 (1999) (Board applies special-circumstances balancing-of-interests analysis separate from motive analysis in evaluating lawfulness of union insignia prohibition). All of the legitimate management concerns served by the prohibition, not just those cited to Grebow, are relevant to the balancing-of-interests analysis.[16] Therefore we

[14] The stickers were 2-1/2 inches by 1 inch and said, "Justice Now! Justicia Ahora!" in black letters on a white background.

[15] The Respondent's attire policy prohibited employees from wearing any uniform adornments except a small Respondent-issued "W" pin. It is particularly noteworthy that kitchen employees were not allowed to wear even the "W" pin due to the Respondent's health and safety concern that the pin might fall into the food.

[16] The Respondent's failure to cite the contamination risk to Grebow as a reason for the prohibition does not compel us to conclude that there was no risk or that it was not of concern to the Respondent. As ex-

find that the Respondent satisfied its burden of demonstrating special circumstances justifying its sticker prohibition as applied to kitchen employees and that the Respondent did not violate Section 8(a)(1) by ordering Grebow to remove the union stickers. We shall accordingly dismiss this allegation.[17]

ORDER

The National Labor Relations Board orders that the Respondent, Starwood Hotels & Resorts Worldwide, Inc., d/b/a W San Diego, San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from wearing union insignia showing support for Hotel Employees and Restaurant Employees International Union, Local 30, CLC or any other labor organization, except for kitchen employees wearing union insignia posing health or safety concerns, at times when employees will not come in contact with or be observed by guests of Respondent.

(b) 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) Within 14 days after service by the Region, post at its hotel in San Diego, California, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 21, 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 the facility at any time since July 11, 2004.

(b) Within 21 days after service by the Region, file with the Regional Director 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

CHAIRMAN BATTISTA, dissenting in part.

I find, in agreement with Member Schaumber, that the Respondent demonstrated special circumstances justifying its order prohibiting IRD server Sergio Gonzalez from wearing the union button in public areas of the hotel. In making this finding, I emphasize the button's conspicuous appearance—that is, its relatively large size (2 inches square) and bright coloring (red and blue printing on a yellow background). See *United Parcel Service,* 195 NLRB 441 (1972) (prohibition of 2-1/2 inch diameter white button with red lettering lawful); *Con-Way Central Express,* 333 NLRB 1073 (2001) (prohibition of 2-1/4 inch diameter "day-glow" button with black lettering lawful). I also find, in agreement with my colleagues, that the Respondent demonstrated special circumstances justifying its order prohibiting cook Katie Grebow from wearing the loosely-attached union stickers in the kitchen.

Contrary to my colleagues, however, I find that the Respondent demonstrated special circumstances—the impracticality of requiring Gonzalez to remove the union button each time he entered a public area—justifying its order prohibiting Gonzalez from wearing the button in public and nonpublic areas.

Gonzalez delivers food orders to guests' rooms up to 50 times per shift. He sometimes uses a guest elevator and always travels through public hallways on his way to and from a guest room. When one multiplies this public area usage by a factor of up to 50 for each 8-hour shift, there would appear to be substantial time spent in public areas.[1]

---

plained above, the evidence supports the conclusion that loosely-attached stickers on kitchen employees' clothing pose a contamination risk.

[17] Member Liebman joins her colleagues in dismissing this allegation. In doing so, she emphasizes that, although the issue is a close one, she agrees with her colleagues that the Respondent's stated safety concerns were not a mere pretext designed to camouflage a discriminatory ban on union insignia. Compare *E & L Transport Co.*, 331 NLRB 640 (2000) ("special circumstance" defense was an after-the-fact attempt to disguise respondent's discriminatory motive for promulgating rule). She further emphasizes that the balance between the employees' statutory right to wear union insignia and the Respondent's legitimate safety concerns over food contamination could well have tipped in favor of the employees' statutory right if the union insignia involved did not consist of a sticker that could readily peel off and fall unnoticed into food being prepared, but instead was one that presented a lower risk of food contamination, such as an insignia carried on a lanyard or a union button that could be securely affixed to an employee's clothing.

[18] 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."

[1] The majority finds that Gonzalez spent "only 30–40 percent of his time . . . in contact with the public," and that IRD servers spent "60 to 70 percent [of their time] in nonpublic areas of the hotel." However,

Further, irrespective of the relative time spent in public and nonpublic areas, my colleagues' result requires the Respondent to have a policy under which this employee takes the pin on and off, depending on where he is at any given moment. That is, the moment that he enters the nonpublic areas, the pin goes on, and the moment he leaves, the pin goes off. In order to ensure that Gonzalez adhered to this "on-again, off-again" regimen, the Respondent would have to virtually follow him around. The burden on the Respondent is obviously a substantial one. I would not require such federal micro-management of this Respondent's business.[2]

For these reasons, I find that the Respondent's legitimate and substantial business interests outweigh Gonzalez' asserted right to wear the button in nonpublic areas. See *Casa San Miguel, Inc*., 320 NLRB 534, 540 (1995) (impracticality of requiring employees to replace union-emblem smocks with plain smocks when entering patient care areas constituted special circumstances justifying prohibiting union-emblem smocks in all areas).[3]

My colleagues rely on *Enloe Medical Center*, 345 NLRB 874 (2005), where an employee would have to take off a badge clipped to a lanyard when he/she entered a patient-care area. The Board found that this process was not so cumbersome for an employee as to justify the employer's broad prohibition. I assume arguendo that the action in the instant case (taking off a pin) is not cumbersome for the employee. However, the difficulty here is for the Respondent. As noted, the Respondent, in order to enforce its rule, would have to follow the employee into guest rooms in order to assure that the pin is taken off. By contrast, the employer in *Enloe* merely had to observe the employee in patient-care areas, i.e., places where supervisory personnel are likely to be. I submit that the burden of impracticality is far greater here than in *Enloe*. In any event, the test is whether the Respondent's concerns about impracticality are reasonable. I would find they are.

the 30-40 percent figure includes only the time that Gonzalez is actually in the guest rooms. It does not include the time that he is in public hallways and elevators while traveling to and from the guest rooms. Since guests can be encountered in these areas, I believe that the prohibition on button-wearing can lawfully extend to these areas.

The majority also implies that Gonzalez routinely spent "large blocks of time" in nonpublic areas. However, the evidence shows only the number of food orders that Gonzalez delivered each shift (from 1 to 50). Accordingly, the evidence suggests that Gonzalez only occasionally spent an extended uninterrupted block of time in nonpublic areas.

[2] The majority asserts that the Respondent did not argue that enforcement of the rule would be unduly burdensome. However, the Respondent, in pressing its contention regarding impracticality, references the difficulties it would encounter in "manag[ing] the foreseeable problem of the [employee] who 'thought' no guests would be around" and the Respondent's "concern that [an employee] . . . is likely, on occasion, to forget to remove the [union] insignia before returning from [a nonpublic area]."

[3] *Casa San Miguel* does not support my colleagues' position here. That case holds that there is *no violation* where the union insignia is part of the employee's uniform. At most, the case *suggests* that there would be a violation if the union insignia were an easily detached union button. However, even that suggestion does not dictate the result here, where the employee would have to take the button on and off up to 50 times per shift.

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 prohibit employees from wearing union insignia showing support for Hotel Employees and Restaurant Employees International Union, Local 30, CLC or any other union, except for kitchen employees wearing union insignia posing health or safety concerns, at times when employees will not come in contact with or be observed by hotel guests.

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

STARWOOD HOTELS & RESORTS WORLDWIDE, INC., D/B/A W SAN DIEGO

Steve L. Hernandez and *Robert MacKay, Esqs.,* for the General Counsel.

Matthew T. Wakefield and *Sabrina A. Beldner, Esqs. (Ballard, Rosenberg, Golper, & Savitt, LLP),* of Universal City, California, for the Respondent.

Joseph L. Bagby, Organizer, of San Diego, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in San Diego, California, on December 7, 2004[1] upon a complaint and notice of hearing issued August 19, by the Re-

[1] All dates herein are 2004, unless otherwise specified.

gional Director for Region 21 of the National Labor Relations Board based upon charges filed by the Hotel Employees and Restaurant Employees International Union, Local 30, AFL–CIO, CLC (the Union). The complaint alleges Starwood Hotels & Resorts Worldwide, Inc., d/b/a W San Diego (Respondent) violated Section 8(a)(1) of the National Labor Relations Act by instructing employees to remove union stickers and buttons from their work uniforms.[2] Respondent essentially denied all allegations of unlawful conduct.

I. JURISDICTION

At all relevant times, Respondent, a Maryland corporation, with a facility located in San Diego, California, has been engaged in the operation of a hotel providing food and lodging (the hotel). During a representative 12-month period ending August 3, Respondent derived gross revenues in excess of $500,000 and purchased and received at the hotel goods valued in excess of $50,000, which originated from points outside the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

The Union is a labor organization within the meaning of Section 2(5) of the Act. Respondent recognized the Union following an authorization-card check in July 2003, and the parties entered into negotiations. At the time of the hearing, the parties had reached tentative agreement on a collective-bargaining agreement covering the hotel's service, housekeeping, room service, and banquet personnel.

On the entire record,[4] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Employer and the Petitioner, I make the following

II. FINDINGS OF FACTS

A. The Hotel's Designed Ambience

The hotel's dining and social areas include one restaurant, "Rice," the "Magnet Lounge," and the "Beach Bar," located on the hotel's roof. The hotel provides convention space and offers in-room dining services (room service) to its guests 24 hours a day. Respondent attempts to create a unique atmosphere at the hotel. To that end, Respondent refers to its lobby as its "living room," a place where coffee and cocktails may be obtained, its guest services as "whatever whenever,"[5] its employees as "talent" or "cast members," their supervisors as "talent coaches," and the hotel experience as "wonderland." Respondent encourages employees to create "an emotional attachment" for guests, to move from "never say no to let me work the magic," to look for opportunities to "grant wishes," and to vary guest approaches. In creating its "wonderland" ambience, the hotel utilizes scent and color sensory stimulations and assures guests that it "want[s] your W experience to be filled with wonder . . . [a] dream come true." Respondent cautions employees that "[e]very interaction with our guests must be: Genuine, Authentic, Comfortable, Engaging, Conversational, with Personality, Fun." In furtherance of the hotel's hoped-for wonderland, whatever-whenever experience, Respondent commissions special uniforms or "costumes" to achieve a trendy, distinct, and chic look.

The hotel provides uniforms or "costumes" for about 240 of its 280 employees (human resources and administrative personnel do not wear uniforms). In 2004, the costumes consisted primarily of black or charcoal-colored clothing without nametags or embellishment except for a small (approximately 5/8 by 1/2 inch) silver-colored "W" worn on the upper left of the uniform.[6] Respondent has a significant, ongoing concern regarding the uniforms and has projected a $100,000 capital expenditure for redesigned uniforms in 2005, in order to stay abreast of clothing trends.

Respondent's employee handbook in effect at times relevant to this matter reads, in pertinent part:

> APPEARANCE
>
> All Starwood Cast Members are expected to take pride and care in their personal appearance, dress, and grooming. This is essential for presenting a professional image at all times.
>
> In this connection, Starwood has established a uniform and professional standard of appearance for all Cast Members in all Starwood locations. The following summarizes our Company's policy on appearance. Cast Members should review the policy and become familiar with its requirements.
>
> The image of a W Cast Member is smart, confident and stylish. Our look is a step ahead in keeping with the sense of style reflected in the design of our hotels. As an ambassador of our hotel, you are expected to take pride and care in your personal appearance. You are an important element in creating the unique atmosphere that our hotels are known for. Always present a professional look and avoid the extreme.
>
> . . . .
>
> Wear minimal amounts of jewelry—no more than two simple rings per hand. Two earrings are allowed in each ear for men and women. If second earrings are worn, they should be small studs. Dangling earrings should also be

[2] At the hearing, I granted the General Counsel's motions to withdraw complaint allegations 6(a) and (b) and to amend complaint par. 5 to reflect corrected names and/or titles as follows:

Maryann Weimer	Human Resources Director
Lauren Giberti	Human Resources Manager
Matthew Herter	Executive Chef
John Baker	Whatever Whenever Supervisor
Rachel Moniz	Whatever Whenever Manager

[3] Where not otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

[4] Respondent's unopposed posthearing motion to correct the transcript is granted. The motion and corrections are received as ALJ Exh. 1.

[5] The Hotel's guest service department is called the "whatever whenever" department and is responsible for satisfying guest needs and wishes. It prides itself on meeting unusual demands, on one occasion obtaining the loan of a specialty guitar for a guest.

[6] Kitchen employees wear standard "culinary" clothing and are not furnished with a "W" pin for sanitary considerations, to avoid anything dropping into the food.

no longer than an inch. Visible body piercing and tattoos are not appropriate.[7]

. . . .

At W Hotels, we do not believe in nametags. You will be presented with a W lapel pin that is part of your attire. You must wear it at all times. Since your name will not be pinned to your attire, you must always introduce yourself to each of your guests. No other buttons, pins or decorations aside from the W lapel pin are permitted, unless approved by the General Manager.

. . . .

We have taken great care to select attire that reflects the style of our hotels. Wear your attire with pride. . . . If you do not wear hotel issued attire, but wear your own professional clothing, make certain that [it is] complementary in style, color and fabric. "Simplicity" is best. Casual attire is not permitted. If part of your attire becomes damaged, notify your manager immediately.[8]

B. Prohibition of Union Buttons

In the summer of 2004, Sergio Gonzalez (Gonzalez) worked in the hotel's whatever whenever department as an in-room dining server, taking guest food orders by telephone and delivering them from the kitchen to guest room. As an in-room server, Gonzalez was stationed in "backstage" areas of the hotel, including the kitchen and in-room dining office. In delivering food, the in-room servers utilize employee elevators (lifts). If the employee lifts are unavailable, the in-room dining servers can get permission to use the public lifts (occurring 20–25 percent of the time.) The majority of the time, in-room dining servers come in contact with hotel guests and/or the public only when conveying food orders from employee lifts to guest rooms. Depending on the volume of orders, an in-room dining server may encounter 1 to 50 guests per shift. About 30–40 percent of an in-room dining server's work time is spent in contact with the public.

In July, the Union distributed buttons to unit employees. Measuring about 2 inches square, the yellow plastic-laminated buttons (union buttons) bore the Union's name and logo and the words, "JUSTICE NOW! JUSTICIA AHORA!" At about midnight on July 11, during his 10 p.m. to 6:30 a.m. shift, Gonzalez pinned a union button on the left upper chest area of his "costume," as did his coworker Oscar Arroyo (Arroyo.)

At about 3 a.m. on July 11, Supervisor John Baker (Baker) spoke to Gonzalez, as Gonzalez was at a phone station during his lunchbreak in the whatever whenever office. Arroyo sat within hearing distance behind a partition. Baker asked Gonzalez, "Am I going to have to ask you to take that thing off," referring to the union button Gonzalez wore.

Gonzalez replied that if Baker were "asking," then Gonzalez declined to remove the button as he had a right to wear it, but if Baker were "telling" him to remove it, he would do so. After varied repetitions of the initial exchange, Baker told Gonzalez to take the union button off. Gonzalez complied and later suggested to Arroyo that he do likewise.

C. Prohibition of Union Stickers

The hotel's kitchen personnel work in an enclosed area separate from any guest or public hotel sections and do not have contact with guests or public. Each of the hotel's food handlers must possess a "food handler's card" issued by San Diego County after the handler has taken a food handling class and passed related testing. Hotel food services are subject to quarterly inspections by San Diego County Department of Health. Cooks wear uniforms consisting of checkered or black "chef" pants and white long-sleeved shirts and head coverings, e.g., hair nets, bandannas, baseball caps. Kitchen workers occasionally keep paper slips, pens, pencils, or cigarette packs in their open shirt pockets (located on the left chest and upper left arm area), and they may wear earrings. Necklaces may also be worn but must be tucked within the shirt. Wearing rings or Respondent's distinctive "W" pin is not permitted for health reasons, as they might fall into the food. There is no evidence of any specific sanitation rule that would cover the stickers at issue herein.

One day in late June or early July, hotel cook, Katie Grebow (Grebow) affixed three address-label sized stickers bearing the black-bolded words, "Justice Now! Justicia Ahora!" (union stickers) to her uniform shirt.[9] She affixed similar union stickers to fellow kitchen workers' hats, shirts, or backs. At midmorning, Matthew Herter (Herter), executive chef and Grebow's supervisor, removed union stickers from the backs of two cooks' clothing. When he asked one of them where the stickers had come from, he was directed to Grebow. Observing that Grebow wore several stickers, Herter contacted human resources "to get clarification of whether or not it was appropriate to wear stickers that had not been issued by the hotel."

A short time later, Lauren Giberti (Giberti), human resources manager came to the kitchen. After she and Herter were joined by Terry Buchholz, food and beverage director, they told Grebow she had to remove her union stickers as wearing them violated Respondent's attire policy. They said nothing about sanitation concerns to Grebow or other kitchen employees, citing only the hotel's uniform policy. According to Herter, although sticker wearing could compromise the hotel's compliance with San Diego County's sanitation laws, he did not mention his concern because he was following Respondent's clothing guidelines. According to Giberti, she said nothing about health concerns because the sanitation issue was "pretty obvious," and Respondent wanted to keep its attire policy consistent. Grebow protested but complied and did not again affix union stickers to her uniform.

Later, Grebow told Maryann Weimer (Weimer), Respondent's human resources director, and Giberti that she did not understand why she had to remove the union stickers. Weimer explained Respondent's appearance policy but said nothing about health or sanitation concerns.

[7] In spite of this latter restriction, the Hotel encourages its talent to express themselves in synchrony with guests who may have "piercings or tattoos or what not."

[8] Paragraphs relating to personal hygiene, footwear, hair, facial hair, and hats are not quoted.

[9] Each sticker measured 2 and 5/8 by 1 inches and had been printed by the Union on address-label stock.

III. DISCUSSION

Employees have a right under Section 7 of the Act to wear and display union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). Absent "special circumstances," the promulgation or enforcement of a rule prohibiting the wearing of such insignia violates Section 8(a)(1) of the Act. The General Counsel need not show that Respondent's insignia prohibition was unlawfully motivated; "rather, the test is whether an employer's conduct reasonably tends to interfere with the free exercise of employee rights under the Act." *St. Luke's Hospital*, 314 NLRB 434 fn. 4 (1994). The burden of establishing the existence of special circumstances rests with the employer. *Pathmark Stores*, 342 NLRB 378, 379 (2004). The special circumstances exception is narrow and "a rule that curtails an employee's right to wear union insignia at work is presumptively invalid." *E & L Transport Co.*, 331 NLRB 640 fn. 3 (2000). However, "'[t]he 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)." *Smithfield Packing Co.,* 344 NLRB 1 5 fn 20 (2004); *Bell-Atlantic-Pennsylvania, Inc.*, 339 NLRB 1084, 1086 (2003).

Here, Respondent has prohibited the wearing of certain union insignia by two groups of employees: (1) in-room dining servers and (2) kitchen personnel. In each instance, Respondent contends that special circumstances exist to justify its prohibitions. As to the in-room dining servers, Respondent argues those employees' display of union insignia unreasonably interferes with its carefully crafted public image and business plan, which includes precise appearance rules.[10] As to the kitchen personnel, Respondent asserts that sanitation rules proscribe placing stickers on clothing. There is no evidence Respondent possessed any discriminatory intent in applying its attire rules.[11]

The Board has said, "An employer's concern about the 'public image' presented by the apparel of its employees is . . . a legitimate component of the 'special circumstances' standard." *Bell-Atlantic-Pennsylvania, Inc.*, supra. With regard to Respondent's prohibiting the in-room servers from wearing union buttons in public or guest areas, including while traversing public hallways leading to guest rooms and presenting food to guests in their rooms, Respondent has presented sufficient evidence of special circumstances to justify its prohibition. Respondent's nondiscriminatory attempt to create an illusory, otherworld setting and escapist atmosphere in the hotel constitutes a valid business effort to compete successfully with other hotels. While the union buttons are not intrinsically offensive and while Respondent's analogy of the buttons to "graffiti on the Mona Lisa," is hyperbolic, the buttons are obtrusive in size and color, particularly when contrasted to the "W" pin, the only insignia Respondent permitted its employees to wear. Consequently, insofar as Respondent's restriction against union buttons applied to situations where employees might come in contact with or be observed by guests, it is lawful.[12] However, Respondent's prohibition herein went beyond that lawfully narrow scope.

Respondent's in-room service employees worked in nonpublic areas of the hotel 60–70 percent of their work hours, during which time they came in contact only with other hotel personnel. Respondent's blanket direction to Gonzalez to remove his union button was made while he was on break in a nonpublic area. Respondent did not qualify its restriction on union buttons or limit the restriction to times when the in-room servers were in public areas of the hotel. The General Counsel argues that even if Respondent met its burden of showing special circumstances sufficient to justify a button ban while employees were in the presence of guests, the application of its prohibition is overly broad when extended to periods where employees are not in contact with guests and thereby infringes on protected rights.

Respondent presented no evidence of special circumstances to justify a prohibition against employees wearing union buttons in nonpublic work areas but asserts, in its posthearing brief, "It is only where there is disparate or inconsistent application of an appearance policy to items bearing a union message that the Board concludes that the employer's prohibition was unlawful under the Act." Such is an inaccurate summation of Board law. Rather, employees have a protected Section 7 right to wear union insignia while at work, irrespective of disparate or inconsistent rules or union animus, and interference with that right is presumptively unlawful. *E & L Transport Co.*, supra. The right may "give way on occasion when 'special circumstances' override the Section 7 interest and legitimize the regulation or prohibition of such apparel." *Bell-Atlantic-Pennsylvania, Inc.*, supra at 1086. The General Counsel need not, as Respondent suggests, allege or prove "disparate application or lax enforcement of the hotel's rule prohibiting buttons, pins, or any other costume adornment." Rather, Respondent, having prohibited protected activity, must prove its prohibition is justified by special circumstances. Respondent has not met its burden as to periods when its in-room service employees are not in contact with the public. See *USF Red Star,* 339 NLRB 389, 391 (2003). I find Respondent violated Section 8(a)(1) of

[10] See *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994).

[11] Counsel for the General Counsel argues that Respondent's insignia prohibition was discriminatory because Respondent permitted employees to express themselves by sporting long hair, tattoos, and facial piercings, while banning costume add-ons. I find that the two areas of personal presentation are not clearly analogous and that Respondent could plausibly consider the former to enhance its image and the latter to detract from it. Under its master ambience plan, Respondent may reasonably encourage its employees to display varied and contemporary personal appearances while, at the same time, regimenting their costumes without thereby disfavoring union insignia over other insignia. I find Respondent's approach to employee presentation is without discriminatory taint.

[12] *Meijer, Inc.,* 318 NLRB 50 (1995), relied on by the General Counsel is distinguishable. Unlike the instant situation, *Meijer* did not involve "consistent and nondiscriminatory" enforcement of a button prohibition as *Meijer*-proscribed union buttons only in nonunionized stores.

the Act, as alleged in the complaint, by Baker's overly-broad instruction to Gonzalez to remove a union button from his uniform.

With regard to Respondent's prohibition on kitchen workers wearing union stickers, Respondent has not met its burden of showing that special circumstances justified the restriction. Although Respondent contends health and sanitation concerns dictate the prohibition, the evidence is insufficient to support that argument. Respondent presented general evidence of San Diego County health regulations and recurrent inspections, but Respondent provided no evidence of any health or sanitation regulations that applied to stickers on clothing. Respondent also presented no evidence as to why stickers were any more likely to pose a danger of food contamination than the paper slips, cigarettes, pens, and pencils Respondent permitted food handlers to keep in their unbuttoned shirt pockets.

While I do not minimize Respondent's valid concern with health and sanitation issues, it is clear Respondent did not consider such issues to be a significant factor in forbidding union stickers on kitchen uniforms. When Herter saw kitchen workers wearing stickers, he contacted human resources "to get clarification of whether or not it was appropriate to wear stickers *that had not been issued by the hotel*." (Emphasis added.) The plain inference to be drawn from his testimony is that Herter's concern was not with stickers on kitchen clothing per se but with unauthorized stickers, an issue wholly unrelated to sanitation. There is no evidence Herter mentioned health or sanitation concerns to human resources personnel when he sought guidance, and neither he nor any other supervisor mentioned sanitation concerns to any employee. Had sanitation been a significant concern, it is improbable that Respondent would have focused exclusively on its clothing guidelines, as it did in explaining the restriction to Grebow. Respondent's post-hearing explanation that the sanitation motive behind its restriction "should have been plainly obvious to Ms. Grebow" and did not need explication is not persuasive. Respondent has not, therefore, met its burden of showing special circumstances in its restriction of union sticker wear among kitchen personnel.

Accordingly, I find Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint, when in early July, Herter and Giberti informed Grebow she could not wear union stickers on her uniform and directed her to remove them.[13]

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act in late June or early July 2004, by prohibiting its kitchen employees from wearing union stickers on their uniforms.
4. Respondent violated Section 8(a)(1) of the Act on July 10, 2004, by prohibiting its in-room dining employees from wearing union buttons at times when they would not come in contact with or be observed by guests or public.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

[13] Herter's removing union stickers from other kitchen workers' clothing also interfered with employees' Sec. 7 rights. However, as that conduct was not specifically alleged in the complaint, and as the remedy herein encompasses such conduct, I make no specific findings relative thereto.