

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE SOUTHERN NEW ENGLAND
TELEPHONE COMPANY d/b/a AT&T
CONNECTICUT, A WHOLLY OWNED
SUBSIDIARY OF AT&T

Case No. 34-CA-12451

and

COMMUNICATION WORKERS OF
AMERICA

REPLY BRIEF OF THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY
IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

The General Counsel's office declined to file an answering brief to Respondent's Exceptions to the decision of the Administrative Law Judge. Neither the General Counsel's office nor the Union filed Cross-Exceptions. Pursuant to Section 102.46 of the Board's Regulations, this reply brief is limited to matters raised by the Union in its answering brief.

II. ARGUMENT

A. SNET was not required to "wait and see" or conduct a poll about whether customers would react negatively to the shirts.

The Union claims SNET's concerns about the INMATE shirts were "purely speculative" and suggests SNET should have (1) allowed technicians to wear the shirts until a customer complained or prohibited a technician wearing the shirt from entering their home **and** (2) polled its customers to determine how they would react to the shirt.

An employer "should not be required to wait until it receives complaints or suffers a decline in business to prove special circumstances" that would justify prohibiting union insignia. Davison-Paxon Co. v. NLRB, 462 F.2d 364 (5th Cir. 1972) (refusing to enforce order based upon finding that employer unlawfully prohibited employees from wearing pro-union buttons the size of a Kennedy half dollar) (quoting NLRB v. Harrah's Club, 337 F.2d 177, 180 (9th Cir. 1964)). See also Nordstrom, Inc., 264 NLRB 698, 701 fn. 12 (1982) (acknowledging that an employer may take appropriate preemptive steps to protect its business).

The proof adduced by SNET was no different in kind from the employer's reasonable beliefs about the negative impact that insignia would have on relationships with customers that were sufficient to prove special circumstances in Pathmark Stores,

342 NLRB 378 (2004), and Midstate Telephone Corp. v. NLRB, 706 F.2d 401 (2d Cir. 1983). Evidence of complaints from customers was not mentioned in those cases, and neither employer was required to present the insignia to customers in a poll to ascertain their reactions. Similarly, in Pathmark Stores:

The General Counsel ... argues that the [employer] failed to substantiate its claims that the “Don’t Cheat About the Meat!” slogan actually threatened its customers relationships. ... We do not find the absence of such evidence significant, though, given our finding that the slogan **reasonably threatened** to create concern among the Respondent’s customers about being cheated, raising the genuine possibility of harm to the customer relationship.

supra at 379 (emphasis added). See also Midstate Telephone, supra at 402 (Second Circuit refused to enforce order that permitted employees to wear shirts bearing the words, “I survived the Midstate Strike of 1971 – 75 – 79,” written in typeface that was cracked in three places because the employer had “a legitimate concern that the T-shirts **might** improperly suggest to the public that the Company was in some way coming apart”) (emphasis added).¹

SNET was reasonably concerned that the INMATE shirts threatened to alarm customers who would answer a knock on the door and find someone there wearing a shirt with the one word INMATE on the front. The Company was concerned that, if worn in direct customer contact situations, the shirts would harm SNET’s image and

¹ In other situations where the Board has found that an employer lawfully prohibited the wearing of certain insignia, there was nothing in the decision to suggest that customer complaints preceded the prohibition. See Bell-Atlantic-Pennsylvania, Inc., 339 NLRB No. 139 (2003) (no evidence that customers complained about the “Road Kill” shirts); Noah’s New York Bagels, Inc., 324 NLRB 266 (1997) (no evidence that customers complained about “If its not Union, its not Kosher” shirts); Southwestern Bell Telephone Co., 200 NLRB 667 (1972) (no evidence that customers complained about shirts bearing the phrase “Ma Bell is a Cheap Mother”). Moreover, the Board did not require the employers in these decisions to ascertain customer opinions before banning the shirts.

reputation, interfere with installation and repair operations and foster harmful rumors about the Company. These concerns are no different in kind or basis from those of the employers in Pathmark Stores and Midstate Telephone, who were concerned that customers would believe that they were being cheated or that the company was in some way coming apart. The employers in those cases were not required to present evidence of customer complaints in advance of the prohibition of the insignia in question.

B. SNET's witnesses presented sufficient evidence of "special circumstances" and the ALJ erred in drawing an adverse inference against SNET.

The Union claims the ALJ correctly held that the burden of proving special circumstances to justify restricting Union apparel "simply cannot be met by testimony of two witnesses, who were not directly involved in the decision" (ALJ 16, L. 24-25). The Union's argument is unconvincing.² John Nasznic had first-hand knowledge of the technician jobs and their customer interactions, having worked as a technician himself and having supervised technicians and construction workers in the field. His testimony about the likely effect of the INMATE shirts on customers in real situations was not speculative but based on a solid foundation of direct experience. Mr. Nasznic was designated **the** front-line supervisor for SNET on the INMATE shirt issue and served in

² The Union argues that "general testimony about the reasons for banning union apparel" is insufficient to establish "special circumstances," relying on Albertson's Inc., 351 NLRB 254, 257 (2007). However, the analysis in Albertson's has no application here. In that decision the issue was whether the employer could prohibit certain insignia merely because the employees were in customer-facing positions. The employer attempted to prove special circumstances with isolated testimony that the employer wanted its employees "to have a clean, uniform business appearance so that they're easily identified." Id. The Board recognized in Albertson's that "it is well established that a company's status as a retail employer does not, **standing alone**, constitute a special circumstance justifying the proscription of union insignia." Id. (emphasis added). This is not a case where the employer claimed special circumstances based solely on its status as a retail employer. SNET provided ample evidence to support its reasonable and justifiable concerns about the impact the shirts would have on its business and its customer relationships.

the critical role of communicating to managers the decision to restrict the INMATE shirts in customer-facing situations, and of answering their questions. His role in this communication process gave him first hand knowledge of what the decision was, where it came from and how it was administered.

Edgardo Saavedra was the highest level manager in Connecticut for the largest group of customer-facing employees. He had intimate first-hand knowledge of the economic, technological and competitive pressures that motivated SNET's decision, and of the critical role of customer service in his group's success or failure. His insights into how group psychology and group dynamics of customers could be affected by the INMATE shirts explained important underlying reasons SNET was concerned about the shirts. Mr. Nasznic's and Mr. Saavedra's first-hand knowledge and undisputed testimony was credible and provided ample evidence in support of the reason for SNET's position on the ban.

Neither the General Counsel nor the Union presented any witness from the Installation & Repair Technician (IRT) job title. The evidence showed, however, that it is IRTs who perform most installation and repair services in the homes of residential customers (Tr. 275 – 277), and that it was IRTs who constituted the majority of those disciplined for refusing to change the INMATE shirts (RX 25, 26, 27, 28; Tr. 361 – 366). Mr. Nasznic, who had served as an IRT and as a supervisor of IRTs, and Mr. Saavedra, who headed the Company division that deployed IRTs in the field, were in fact the only witnesses whose testimony was based upon direct, personal knowledge of the IRT job and of the nature of the IRTs' daily contacts with residential customers.

The Union also argues the ALJ “properly drew an adverse inference regarding SNET’s motive for banning the prisoner shirts” merely because SNET “failed to call the decisions [sic] makers as witnesses” (Union Br. at 5). Relying on Douglas Aircraft Co., 308 NLRB 1217 (1992), the Union claims there is “well established Board law supporting such an inference.” The Union’s reliance on that decision is misplaced. In Douglas Aircraft, the question was whether the employer violated Section 8(a)(3) of the Act. The ALJ noted that “[i]nasmuch as an ‘employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions’ . . . its failure to call those officials to provide firsthand accounts of their purported actions and motives ‘permits an adverse inference **as to motivation.**’” (emphasis added). In that case, and other decisions where adverse inferences were found to be appropriate, motive was at issue.³ In the present case, the ALJ recognized without any party taking exception that “motive is not the issue . . . ” (ALJ 22, L. 16-17). Thus, Douglas Aircraft does not support drawing an adverse inference against SNET for its failure to call additional witnesses to testify about the reasons for the partial prohibition of the INMATE shirts.

³ As discussed in SNET’s initial brief, all the cases on which the ALJ relied in drawing his adverse inference involved the employer’s intent or motive as a central factor in the case, whereas the ALJ here acknowledged that intent was not a determinative factor, or even at issue, in this case. See Government Employees (IBPO), 327 NLRB 676, 699 (1999) (concluding that an adverse inference was proper because the employer failed to present the individual who decided that discharge was appropriate); DMI Distribution Co., 334 NLRB 409, 413 (2001) (adverse inference appropriate in determining whether an employer met its burden of rebutting the General Counsel’s *prima facie* case under Wright Line); American Petrofina Co., 247 NLRB 183, 191 (1980) (adverse inference appropriate in determining whether an employer’s termination decision was motivated by protected concerted activities where the employer failed to present two witnesses with the most knowledge about the conduct for which the discriminatee was discharged); Dorn Transportation Co., 168 NLRB 457, 460 (1980) (in determining whether an employer unlawfully discharged an employee in violation of Section 8(a)(3) of the Act, the ALJ noted: “In a case where motivation must be inferred the failure of Dorn to testify [about his motive] is damaging beyond repair”).

C. The ALJ's adverse inference was inappropriate because the only "decision" meeting in evidence was an attorney-client conference.

Exception 8 asserts that the ALJ erred by drawing an adverse inference about the Company's presumed motive for prohibiting employees from wearing the INMATE shirts in customer contact positions based upon the Company's failure to present testimony about a meeting with in-house counsel that was subject to the attorney-client privilege. In footnote 2 of its brief the Union claims Exception 8 "is not addressed herein" but then argues (1) that the Company's argument in Exception 8 "was not previously raised by the Employer nor contemplated by the ALJ," (2) that "at no time was the privilege invoked by a witness" and (3) the "legal requirements for such an Exception do not apply" (Union Br. at 5).

The ALJ based his adverse inference on the Company's failure to present testimony by labor relations officials who the ALJ concluded were the "decision makers" concerning the partial ban on the INMATE shirts. The source of the ALJ's list of "decision makers" (ALJ 15, L. 48-51), which included SNET's counsel David Vegliante, was a meeting with counsel that was referred to in Mr. Nasznic's testimony at Tr. 434 and in Attorney Vegliante's statement to the ALJ at Tr. 419. Thus the ALJ was fully aware that the meeting included legal counsel. The possibility that the ALJ might make an adverse inference based on failure to present testimony about that meeting was not raised by the ALJ or any party during the hearing, nor was such an inference argued for by the General Counsel. The Company clearly pointed out the attorney-client issue at the hearing by means of Attorney Vegliante's statement on the record. The ALJ's failure to take this into account is a reason why Exception 8 should be sustained, not

why it should be ignored.

Exception 8 asserts that the adverse inference was erroneous because it was based on notion that the Company should have presented testimony about the contents of the meeting with counsel. Witnesses did not invoke the attorney-client privilege because none was asked to testify about the privileged communications at that meeting. It is unclear what the Union's statement that "the legal requirements for such an Exception do not apply" is intended to mean. There is evidence that Company labor relations officials met with their legal counsel to discuss what action to take concerning the INMATE shirts. In Taylor Instrument Companies, 169 NLRB 162 (1968), the Board found that no adverse inference should be based on a witness's refusal to testify about a communication protected by the attorney-client privilege. Here the same principle should apply to the absence of testimony about the meeting with counsel. If any inference logically follows from evidence of the meeting with counsel, it is that the Company sought to comply with legal requirements, not break them. The inference made by the ALJ against the Company was erroneous.

D. The ALJ failed to give adequate consideration to the absence of the Union's logo or any reference to a labor dispute.

The Union claims it was "undisputed that the wearing of the prisoner shirts was a concerted display of a union related message" and that "the shirt would not mislead viewers as to its meaning."⁴ This assertion rests on speculation that customers would

⁴ The Union also argues that SNET's concerns were unreasonable because it requires technicians to wear "name badges; reflective vests; hard hats," its vehicles bear SNET's logo, and technicians were required to call the customer before arriving at their home. However, Mr. Saavedra testified that when he visits garages, technicians tell him they generally do not wear hard hats when going to a customer's home because it makes them feel "kind of dorky" so that "most of them probably would not" (Tr. 473-474) and that a technician's truck is not always parked within view of the door where the technician approaches the customer, and in any event would not remove the problem that the shirts presented (Tr.

have understood the vague and ambiguous message on the INMATE shirts because “the labor dispute was well publicized” and “the Union raised public awareness about the contract fight with [SNET].”⁵ The Union’s position is not supported by record evidence and is contrary to existing Board authority.

As discussed in the Company’s earlier brief, the ALJ erred by failing to consider the significance of the Union’s failure to place its name or any reference to a labor dispute on the INMATE shirts. The omission meant that a customer facing the shirt had no frame of reference for interpreting it in a non-threatening way. The absence of the Union name made it much more likely that some customers would be alarmed by the shirts and react negatively. Despite this, the Union continues to argue that “customers would likely be aware that the shirts were related to the labor dispute between the Union and Respondent” because of “press and television reports” as well as “union events” (ALJ 17, L. 5-7). The press and television reports referred to were not introduced in evidence, and the Union identified no evidence concerning them in its brief. The bare-bones testimony of Union witnesses that there had been such reports did not establish that customers would be sufficiently aware of the labor-management situation so that there would be no danger of their being alarmed by having someone labeled an INMATE at their door. In Pathmark Stores, 342 NLRB at 379, the Board rejected a

474). He also did not believe that a technician’s ID, on a lanyard or otherwise, would cure the risks associated with the inmate shirts (Tr. 475). This is especially true given that photographs of technicians wearing the shirts depict them wearing their identification in a way that might not be visible to customers. Regardless, some customers might be alerted by such signs not to be alarmed some of the time, but the one constant in the equation would be the INMATE shirt. If employees are permitted to wear them to the door of every residence they visit, some customers will be alarmed – and one is too many.

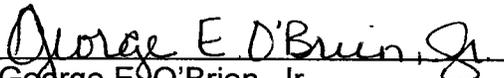
⁵ It is remarkable that both the Union and the ALJ fault SNET for “speculating” that customers would be concerned about the INMATE shirts, while proceeding themselves to base a conclusion on speculation that customers would be fully aware of such background.

claim that widespread publicity about the labor dispute provided context that clarified the ambiguous message on the union's T-shirts and hats.

III. CONCLUSION

The Board should correct the ALJ's errors by holding that in these special and narrow circumstances, the rights of SNET and its customers outweighed the rights of employees to wear the INMATE shirts in customer-facing positions. SNET acted reasonably and within its rights when it permitted the shirts to be worn in offices, call centers, engineering departments and garages, but prohibited them from being worn on customers' front porches, in customers' homes, at customers' businesses and in other places of direct customer contact. The decision should be reversed to the extent it concluded otherwise.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by e-mail and by first class mail to all counsel of record on this 12th day of August 2010, as follows:

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