

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**WORLD COLOR (USA) CORP., A
WHOLLY-OWNED SUBSIDIARY OF
QUAD-GRAPHICS, INC.,**

and

Case Nos. 32-CA-062242
32-CA-063140

**GRAPHIC COMMUNICATIONS
CONFERENCE OF THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 715-C**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

On July 31, 2013, Administrative Law Judge William Nelson Cates, herein called the Judge, issued his decision in the above case.¹ In his decision the Judge correctly found that Respondent violated Section 8(a)(1) of the Act by maintaining in effect at its Fernley, Nevada facility a rule and safety policy statement in its “Employee Guidelines for U.S. Employees” which states “... baseball caps are prohibited except for Quad/Graphics baseball caps worn with the bill facing forward...” and, by telling employee John “Joey” Vollene that he was being reassigned from one press machine to another because of his protected concerted social media activities that included critical remarks about Respondent and comments supportive of the

¹ References to the record are as follows: ALJD for the Decision of the Judge; Resp. Ex. Br. for Respondent’s Exceptions Brief; Tr. for Transcript; GC Ex. for General Counsel Exhibits; Jt. Ex. for Joint Exhibits.

Union. Respondent has filed exceptions to these matters and a brief in support of its exceptions. Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, the undersigned hereby files this answering brief to Respondent's exceptions and supporting brief.

I. Respondent's Exceptions Concerning the Hat Policy

Respondent's arguments in support of its exceptions on this matter involve two general claims. First, Respondent argues that the Judge erred when he found the rule and safety policy statement (the hat policy) in its "Employee Guidelines for U.S. Employees" (Employee Guidelines) to be "separate and distinct" from its uniform policy. Alternatively, Respondent posits that even if the Judge's determination that the hat policy is separate and distinct from the uniform policy, it still remains part of the company's dress code and the Judge applied incorrect legal standards to conclude that the hat policy violated the Act. Respondent also excepts the Judge's remedial order requiring it to cease and desist from enforcing the discriminatory hat policy and rescind it from the company's Employee Guidelines.

In support of its claim that the Judge erroneously found that hat and uniform policies to be separate and distinct, Respondent argues that the Judge failed to provide "reasonable context" to the rule before concluding that the hat policy was not part of the uniform policy.²

² Respondent cites *Aroostook County Regional Ophthalmology v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996) and *Meijer, Inc.*, 318 NLRB 50 (1995) in support of its proposition that the Judge failed to provide "reasonable context" and improperly concluded that the hat policy is not part of the uniform policy. Both cases are distinguishable from the instant facts. First, Respondent mistakenly implies that in *Aroostook* the Circuit Court was referring to two provisions that were seventeen pages apart, and did not reference each other when it held that a rule was "entirely reasonable when read in context with the accompanying provision." 81 F. 3d at 214. The Circuit Court, in fact, was addressing only one of the two rules at issue in the case, a two-sentence rule that appeared in its entirety on page 97 of that employer's manual when it held that the "requirement [was] entirely reasonable when read in context with the accompanying provision," namely, the prior sentence.

In *Meijer*, the Board upheld the judge's finding that the respondent in that case had failed to establish "special circumstances" that would support its ban on the wearing of union pins at one of its stores. 318 NLRB at 50. The judge found that the employer could prohibit employees who worked in customer areas of the store from wearing

Respondent's argument fails for several reasons. First, Respondent simply cannot refute the fact that the two policies are presented in its Employee Guidelines as two separate and distinct policies. Respondent's hat policy is set forth on page 17 of the Employee Guidelines, within item 24 of the "Corporate Safety Program" under Section 3 of the document which is titled "Protecting Our Employees and Our Facilities." (Jt. Ex. 2) By contrast, its uniform policy appears on page 12 of the Employee Guidelines, under the title "Uniforms" within Section 2 of the document, "Quad/Graphics' Expectations." (*Id.*) Neither policy references the other in any way.

Respondent also argues that hats are like vests or sweaters as they pertain to the uniform policy – "just one of several 'optional' items of attire." (Resp. Ex. Br. 13) However, Respondent fails to mention that the "optional" items such as vests and sweaters are listed *within* the "Uniforms" section of the Employer Guidelines and that the listed items do not include hats. (Jt. Ex. 2) Additionally, the printed materials that Respondent utilized to promulgate its new hat and uniform policies among the Fernley employees demonstrate how the policies are separate and distinct. In the document titled "Employee Q&A about Uniforms and PPE" which was prepared by Respondent at the corporate level and distributed to Fernley employees, Respondent stated that the uniform for production employees consists only of "supplied navy blue pants or shorts and a navy blue shirt... [with] the option of purchasing shirts or jackets." (Jt. Ex. 5) In the same document, Respondent includes the hat policy in the "Personal Protective Equipment"

union hats and jackets. *Id.* at 57. In the instant matter, however, the Judge found that "the record does not establish any employee interaction with customers... and the Company failed to show that baseball caps, with union insignia, worn by employees, would detract from its employee presentation desires or objectives." (ALJD 11) Additionally, recent Board law has established that the mere fact that an employer has a dress code and that its employees come into regular contact with customers does not establish special circumstances that warrant depriving employees of their right to wear union related insignia at work. *P.S.K. Supermarkets, Inc.*, 349 NLRB 34, 35 (2007).

section, specifically as part of the “safety precautions” to be followed on the production floor. (Jt. Ex. 5) As the Judge correctly found, “if the hat policy was just to make the optional hat color coordinated with the uniforms then the hat policy would have been made part of the dress code and placed with the dress code in the ‘Employee Guidelines for U.S. Employees.’” (ALJD 10)

Additionally, contrary to Respondent’s assertions, Counsel for the Acting General Counsel did not stipulate that Respondent’s hat policy was intended to be part of the uniform policy. In fact, Respondent’s blatantly mischaracterizes the record, as Counsel for Acting General Counsel did not stipulate that “the HR policy was to bring the hat policy in line esthetically and color purposes and for those matters that would make it, for a lack of a better way, appealing to the eye. That it’s all navy blue slacks, navy blue button up shirt and a navy blue baseball hat.” (Resp. Ex. Br. 13; Tr. 237) Instead, Counsel for the General Counsel and Respondent’s counsel merely stipulated that the uniform policy, as contained in the Employee Guidelines, has been Respondent’s uniform policy at all applicable times therein. (Tr. 237-238)

In support of the General Counsel’s assertion that the hat policy is not part of the uniform policy, the record reflects – and the Judge concluded -- that the hat policy was not created to address a single desire for uniformity of look amongst Respondent’s employees. Instead the hat policy was formulated by the safety, security and human resource departments with emphasis on safety concerns such as securing an employee’s hair safely to the person’s head, as well as, security concerns regarding gang insignia and symbolism, specifically the color of the hats and direction of the bills. (Tr. 205-207; ALJD 10) Not only did Respondent’s Vice President of Human Resources Nancy Ott testify that the hat policy was placed in the safety section of the Employee Guidelines because that is where “it made sense,” she stated that when “discussing the policy... safety [was] a number one priority for us,” and consequently, the policy was “best

placed” in that section. (Tr. 209:20-210:5, 220:19-21) There is simply no evidence in the record that could serve to support Respondent’s argument in this regard.

Respondent alternatively proposes that even if the hat policy is separate and distinct from the uniform policy, it does not bear the burden of proving “special circumstances” that would permit it to restrict its employees Section 7 rights to display union insignia.³ Although Respondent argues that this is not a union insignia case but instead a “dress code” case, the Judge correctly found that “the Company’s hat policy forbids or prohibits employees from displaying union logos, or for that matter other protected messages, on their hats, if they chose to wear hats, thereby restricting employees from engaging in activity protected by the Act.” (ALJD 10) Respondent excepts to the Judge’s conclusion, asserting that it established its hat policy because of safety concerns, security concerns related to gang activity and a desire by the human resources department to have the hat policy be aligned with its uniform from a presentation standpoint. (ALJD 10-11; Tr. 204-207) However, the Judge correctly found that the hats that Respondent provides to employees did not have any safety features nor were they manufactured with any special requirements related to safety. (ALJD 10) The Judge also found that Respondent failed to present any evidence that employee use of union logo baseball hats would likely jeopardize employees’ safety, as there was no evidence that such a hat would not secure employees’ hair to their heads to prevent it from being caught in high speed presses. (*Id.*) The Judge correctly found no evidence of gang activity or gang symbolism concerns at the Fernley facility and even

³ This argument is clearly a shifting defense as in its September 2011 position statement, Respondent’s counsel did understand that it had to provide a legitimate business purpose, a special circumstance, to justify the prohibition of hats other than Respondent’s hats. (Tr. 31; GC Ex. 5) Board law is well-established that shifting defenses is evidence of a discriminatory motive. *Taft Broadcasting Co.*, 238 NLRB 588, 589 (1978); *Sound One Corp.*, 317 NLRB 854, 858 (1995) (When an employer vacillates in offering a rational and consistent account of its actions an inference may be drawn that the real reason for its conduct is not among those asserted).

Ott acknowledged not knowing where the Company had such problems. (*Id.*) Lastly, the Judge properly found the record void of any interaction between employees and customers that would support Respondent's desire to have uniformity of appearance amongst its employees. (ALJD 11) Consequently, the Judge reached the undisputable conclusion that Respondent failed to present any evidence of special circumstances that would allow it to limit or prohibit employees from displaying union insignia on their hats. (*Id.*)

Contrary to its further assertion on exceptions, Respondent's continued insistence that there is no actual evidence of discriminatory application of the hat policy at the Fernley facility is irrelevant, as Board law clearly establishes that an overly broad policy, such as the hat policy in this case, is unlawful, even absent any evidence of enforcement. In such cases, respondent is still responsible for the maintenance of the policy, and Board law is clear that the "mere maintenance" of overly broad rules is unlawful because such rules tend to chill employees' exercise of their protected rights. *Beverly Health and Rehabilitation Services, Inc.* 332 NLRB 347, 349 (2000). *See NLRB v. Vanguard Tours*, 981 F. 2d 62, 67 (2d Cir. 1992), citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 fn. 10 (1945) (evidence of enforcement of the rule is not required to find a violation of the Act because the mere maintenance of an overly broad rule tends to inhibit or threaten employees who desire to engage in legally protected activity but refrain from doing so rather than risk discipline).

Finally, Respondent excepts to Judge Cates' remedy which requires it to cease the maintenance and enforcement of the hat policy, to rescind it and to notify its employees of such actions. Counsel for the Acting General Counsel maintains, as it did at trial, that the adequate remedy in this matter is a remedial order requiring Respondent to rescind the hat policy at its

Fernley, Nevada facility, inform the employees at the Fernley facility of the rescission of such policy, and post a notice at its Fernley facility notifying employees of these actions.⁴

II. Respondent's Exceptions Concerning the Unlawful Statement Made to Employee Vollene

Respondent makes two general arguments in support of its exceptions concerning the Judge's finding that Shift Supervisor Randy Bingham violated Section 8(a)(1) of the Act when he told Lead Press Operator John Vollene that he was being reassigned from one press machine to another because of Vollene's protected concerted social media activities on Facebook which included critical remarks about Respondent and comments supportive of the Union. First, Respondent claims that the General Counsel failed to meet its burden to prove that Vollene engaged in protected concerted activity and, the Judge erred in failing to find that the General Counsel had not met this element of a prima facie case. Respondent goes on to argue that the Judge failed to consider the "totality of circumstances," including Vollene and Bingham's personal friendship, before finding that Bingham's statement violated the Act.

Respondent's erroneous claim that there was no showing of Vollene's protected concerted activity in the record ignores the fact that Vollene testified that he participated in Facebook discussions on which he made comments about the Union and which were critical of Respondent. (Tr. 50-53) Moreover, even Respondent witness Bingham admitted that he saw Vollene's statements about the Respondent in Facebook posts and comments, and he was aware that Vollene criticized the Respondent on Facebook. (Tr. 181, 183) Thus, based on this essentially undisputed evidence, the Judge correctly found that Bingham "certainly knew about

⁴ To the extent that the Judge's remedial order is ambiguous or implies that the remedy applies to all of the Respondent's facilities, the General Counsel position is that the remedy should be applied only at Respondent's Fernley facility.

Vollene's critical Facebook postings related to the Company," when he made the unlawful statement to Vollene about his reassignment to a different printing press due to his Facebook activities.⁵ (ALJD 6:7, 20-25) As such, Respondent's exception on this point lack support in the record and should be rejected by the Board.

In support of its second argument, that the Judge failed to consider the "totality of circumstances" before finding Bingham's statement unlawful, Respondent merely persists in raising the same discredited arguments it raised during trial that already were considered and rejected by the Judge in his decision. (ALJD 6:13-18) First, Respondent raises the matter of Vollene's job reassignment and Press Manager Koch's involvement in Vollene's reassignment. However, as the Judge correctly determined, the matter of the job reassignment is not in issue here. (ALJD 3:34-35) Rather, the issue is whether Koch made the patently coercive statement. Additionally, Respondent erroneously asserts that the Judge ignored the fact that Supervisor Bingham and Vollene had a friendly relationship. To the contrary, the Judge, in fact, determined that Bingham and Vollene have been friends for the period of time that Bingham supervised Vollene at the Fernley facility and beyond, and he considered this fact when evaluating the totality of the circumstances. (ALJD 4:7-10, 6:13-18, 20-33) With this understanding in mind, the Judge nevertheless properly concluded that Bingham's statement violated the Act. (*Id.*) This conclusion is full in accord with Board law.⁶ Accordingly,

⁵ Furthermore, the Board has found that even in cases where employees have been found not to engage in protected concerted activity, the fact that the employer had, rendered the employer's actions against the employee while under that belief, to be unlawful. *See Parexel International* 356 NLRB No. 82 at 6 (2011) (an adverse action taken against an employee based on the employer's belief that the employee engaged in protected concerted activity is unlawful even if the belief was mistaken and the employee did not in fact engage in such activity).

⁶ The Board has found that a supervisor's personal friendship with an employee to whom she makes coercive or threatening statements does not cure the unlawfulness of such statements. *Isaacson-Carrico Mfg.* 200 NLRB 788, 788 (1972) "Interrogation is no less coercive merely because it comes from a friend." (*Id.*) In circumstances where an employee would naturally conclude that a friendly supervisor, "as a member of management, was conveying a

Respondent's exceptions and supporting arguments here are entirely without merit and should be summarily rejected.⁷

III. Summary

In summary and conclusion, Respondent's exceptions and supporting arguments are without merit and should be rejected in their entirety.

DATED AT Oakland, California this 19th day of September, 2013.

Respectfully submitted,



Yaromil Ralph
Counsel for the Acting General Counsel
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

message from his management superiors," the Board has found such statements to violate Section 8(a)(1) of the Act. *See J.T. Slocomb Co.*, 314 NLRB 231, 231 (1994). Here, Bingham's statement to Vollene that his transfer to Press four was because "they," referring to management, knew about his Facebook activity, indicated to Vollene that Bingham was conveying management's unfavorable impression about Vollene's Facebook comments. Vollene's realization that he was facing an adverse employment action as a result of Bingham's statement confirms this fact.

⁷ Because a number of Respondent's exceptions are so lacking in legal and factual basis, the General Counsel abstained from unnecessary analysis to counter Respondent's frivolous arguments. For example, Respondent argues in its seventh exception that Bingham's statement cannot violate Section 8(a)(1) absent any evidence that the statement had a coercive effect on any other employee. However, the Board has long established that 8(a)(1) statements are subject to an objective standard that analyzes whether the remark tends to interfere with the free exercise of employee rights, thus there is no need for the General Counsel to prove that Vollene or any other employee was subjectively coerced by Bingham's statement. *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), *enfd.* 134 F.3d 1307 (7th Cir. 1998); *Concepts and Designs*, 318 NLRB 948, 954 (1995).

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**WORLD COLOR (USA) CORP.,
a wholly-owned subsidiary of
QUAD GRAPHICS, INC.**

and

**GRAPHIC COMMUNICATIONS CONFERENCE
OF THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 715-C**

**Case(s) 32-CA-062242
32-CA-063140**

Date: September 19, 2013

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Jason Kearnaghan, Esq.
Sheppard Mullin Richter & Hampton LLP
333 S Hope St., 43rd Floor
Los Angeles, CA 90071-1409
VIA E-MAIL:
jkearnaghan@sheppardmullin.com

Ron Holland, Esq.
Sheppard, Mullin, Richter & Hampton LLP
4 Embarcadero Center, 17th Floor
San Francisco, CA 94111
VIA E-MAIL:
rholland@sheppardmullin.com

Anton G. Hajjar, Attorney At Law
O' Donnell, Schwartz & Anderson, PC
1300 L Street NW, Ste 1200
Washington, DC 20005-4184
VIA E-MAIL:
ahajjar@odsalaw.com

Office of the Executive Secretary
1099 14th Street, N.W.
Washington, DC 20005
VIA E-FILE

September 19, 2013

Date

Frances Hayden, Designated Agent of NLRB

Name

Signature