

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 4900,

Charging Party,

vs.

INDIANA BELL TELEPHONE COMPANY,
INC.,

Charged Party.

Case No. 25-CA-218494

RESPONDENT INDIANA BELL TELEPHONE COMPANY, INC.'S BRIEF

IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW

JUDGE'S DECISION

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I. INTRODUCTION

Pursuant to the National Labor Relations Board's Rules and Regulations, including Section 102.46 thereof, Respondent Indiana Bell Telephone Company, Inc. ("Indiana Bell," "Employer," or "Respondent") submits this Brief in Support of its Exceptions to the Decision of the Administrative Law Judge ("ALJ") dated September 17, 2019 ("Decision").¹

Indiana Bell seeks review of the ALJ's conclusion that Respondent's Personal Appearance standards for its Premises Technicians ("Prem Techs") violates Section 8(a)(1) of the Act. The Employer has enforced these longstanding standards since 2009 to ensure that the Respondent maintains a brand of professionalism instantly recognizable to its customers, a consideration that continues to be important to Respondent in a competitive environment. The Employer does not prohibit Prem Techs from showing their support for the union by wearing pro-union clothing items. In fact, the Employer allows Prem Techs to wear AT&T-branded items that include the Communications Workers of America, AFL-CIO ("CWA") logo. The Personal Appearance standards are not overbroad, and thus, the standards do not violate the Act.

Indiana Bell also seeks review of the ALJ's ruling that the Charging Party, CWA Local 4900 ("Local 4900") did not waive its right to bargain over the Prem Techs' right to wear union insignia. The parties' collective bargaining agreement ("CBA") expressly permits the Employer to implement its own dress code, which Respondent has done since 2009 by maintaining Premises Technician Guidelines, which include the Personal Appearance standards for Prem Techs, which restrict Prem Techs from wearing union insignia over their branded apparel. It is undisputed that Respondent has repeatedly provided the CWA with notice and an opportunity to bargain each time

¹ References to the ALJ's Decision will be referred to as ("Dec. ____"). References to the hearing transcript will hereinafter be designated as ("Tr. ____"). References to General Counsel's exhibits will hereinafter be designated as ("G.C. Exh. ____"). References to Indiana Bell's exhibits will hereinafter be designated as ("R. Exh. ____").

the Employer updated or revised the Premises Technician Guidelines since 2009. Each time that the Employer provided the Union with notice and an opportunity to bargain, the Union did not seek to bargain over the Guidelines and the Personal Appearance standards within them. Consequently, CWA waived its right to bargain over the Prem Techs' right to wear union insignia.

Indiana Bell also seeks review of the ALJ's finding that Respondent discriminatorily enforced the Personal Appearance standards. The record reflects that Indiana Bell consistently enforced the standards since 2009. The ALJ relied on vague, general, and conclusory testimony to arrive at his mistaken conclusion regarding purported disparate enforcement. In any event, even accepting the evidence on which the ALJ relied to make his determination, the evidence is not sufficient as a matter of law to negate the Employer's right to enforce its standards.

Indiana Bell also seeks review of the ALJ's finding that the Employer only began enforcing its Personal Appearance standards against Prem Techs in response to CWA Local 4900's efforts to mobilize its members in support of CWA's bargaining efforts in 2018. The record demonstrates that the Employer steadfastly enforced the standards since 2009 and that mobilization efforts in 2018 did not trigger implementation of the standards.

Finally, Indiana Bell seeks review of the ALJ's refusal to give preclusive effect to *Wisconsin Bell, Inc. v. CWA, Local 4622*, Case 18-CA-147635, 2016 NLRB LEXIS 506 (2016), a prior case in which the exact same issue regarding the enforceability of Respondent's Personal Appearance standards for Prem Techs was litigated and resolved through the Board's processes. The General Counsel was a party to the *Wisconsin Bell* case, and Local 4900's interests were represented in those proceedings. The General Counsel had a full and fair opportunity to litigate this same issue, and an administrative law judge made a decision on the legal merits of the issue after a full hearing and complete briefing by the General Counsel. Thus, the General Counsel

should have been collaterally estopped from pursuing the present charge.

For these and the other reasons set forth below and in the accompanying Exceptions, the Board should reverse the ALJ's Decision.

II. FACTS

A. The Parties.

For years, CWA has been the collective bargaining representative for bargaining unit employees in the Employer's Indiana operations. (Tr. 28:24-29:1.) During that time, the Company, and its affiliated entities, have been parties to a series of collective bargaining agreements with CWA.² At the time of the hearing in this matter, the most current collective bargaining agreement ("CBA") had been in effect from April 12, 2015 until April 14, 2018. (G.C. Exh. 2.) The previous CBA was effective April 8, 2012 to April 11, 2015. (G.C. Exh. 3.) CWA operates through administrative arms known as districts. (Tr. 38:20-39:5.) Within each district are individual locals, also units of CWA. (*Id.*) CWA District 4 encompasses Wisconsin, Illinois, Indiana, Michigan, and Ohio, and the CBA covers bargaining unit employees working in that "Midwest" region. (Tr. 39:8-9, 91:13-15, 92:10-13.) CWA District 4 negotiates the CBA with Respondent on behalf of CWA's members and local districts. (Tr. 44:8-11, 91:25-92:9.)

CWA Local 4900 represents Respondent's employees in Indiana. (Tr. 32:10-16; G.C. Exh. 2 at p. 93.) It represents a wide variety of Indiana Bell employees, including Customer Service Specialists (often referred to as "Core Techs"), Construction & Engineering Technicians, Marketing Support Specialists, Technical Associates, Dispatchers, Maintenance Administrators,

² As referenced on page 1 of General Counsel Exhibit 2, the "Employer" signatories to the Agreement are AT&T Teleholdings, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, The Ohio Bell Telephone Company, Wisconsin Bell, Inc., Michigan Bell Telephone Company, AT&T Services, Inc., and Ameritech Services, Inc. (hereinafter, collectively referred to as "Company" or "AT&T Midwest").

and Prem Techs. (Tr. 92:14-93:6.) Prem Techs install and repair “U-Verse” services, i.e., television content, high-speed internet service, and voice service over the internet protocol (“IP”) network infrastructure. (Tr. 86:4-6, 92:22-24.)

Prem Techs work inside a customer’s home for a substantial amount of time and interact directly with the customer during that experience. (Tr. 103:3-8, 123:4-20, 124:6-8). Prem Techs perform virtually all of their work at customers’ homes. (*Id.*)

B. Respondent’s Personal Appearance Standards For Prem Techs.

1. Prem Tech Guidelines.

Respondent first promulgated written “Premises Technician Guidelines” in 2009, setting forth the governing work rules and other mandatory conditions of employment for Prem Techs. (Tr. 29:16-18; R. Exh. 4(c).) The Prem Tech Guidelines contain detailed work rules covering nearly every aspect of Prem Techs’ employment, including starting and ending the work day, breaks and meal periods, time reporting, use of company vehicles and equipment, and overtime. (*Id.*) The Prem Tech Guidelines do *not* apply to Respondent’s other technicians. (Tr. 37:17-23, 49:10-21, 98:2-24; G.C. Exh. 2 at p. 212; G.C. Exh. 6 at p. 14.) As discussed below, Respondent implemented revised versions of the Prem Tech Guidelines in 2010, 2011, 2013, and 2016.

The Prem Tech Guidelines include mandatory “Personal Appearance” standards for Prem Techs, which Respondent has the contractual right and discretion to implement under Section 5.01 of the Prem Tech Memorandum of Agreement, which is set forth in Appendix F of the parties’ CBA. (G.C. Exh. 2 at p. 217; G.C. Exh. 6 at p. 14.) Compliance with these Branded Apparel Program (“BAP”) Personal Appearance standards is a mandatory term of employment for Prem Techs in Indiana. (Tr. 37:17-23.)

The Personal Appearance standards allow Respondent to create a brand of professionalism instantly recognizable to customers, a consideration that continues to be important to Respondent

in a competitive environment. (Tr. 103:3-8.) Respondent offers a wide variety of branded apparel to its Prem Techs, including items that have the CWA's logo on it, which the Employer permits the Prem Techs to wear in the presence of customers. (Tr. 70:14-21, 88:22-89:19; G.C. Exh. 14.) The Employer provides the branded apparel to the Prem Techs without any charge to the employees. (Tr. 70:8-13.)

The Personal Appearance standards set forth in the Prem Tech Guidelines, published in 2009, codified Respondent's BAP appearance standards for Prem Techs, in which Respondent prohibited Prem Techs from altering their branded apparel. (Tr. 103:9-13, 104:9-13, 104:17-21.) The BAP Personal Appearance standards set forth in Section 14 of the Prem Tech Guidelines state not only that BAP participation is mandatory for Prem Techs, but that Prem Techs may not alter the required branded apparel in any way:

14.1. The intent of the Branded Apparel Program (BAP) and the requirements of an employee's personal appearance is to ensure that AT&T employees project and deliver a professional, business-like image to our customers and community.

14.2. U-verse BAP is mandatory for all Premises & Wire Technicians on work time. No other shirt, hat or jacket will be worn without management approval. Shirts must be tucked into the technician's pants/shorts at all times. Technicians must wear a belt, threaded through the pant/short belt loops. Pants/shorts must be worn around the waist with no undergarments showing.

14.3. The branded apparel may not be altered in any way.³

14.13. Technicians must be ready for work at the start of their work day. This includes wearing the proper BAP attire. If the clothing or boots are deemed inappropriate, the technician will be sent home

³ In prior editions of the Prem Tech Guidelines, this section provided, "The branded apparel may not be altered in any way which includes adding buttons, pins, stickers, writing etc." (R. Exh. 1, Section 13.3 at p. 11; R. Exh. 4(b) at Section 13.3 of R. Exh. 17 within R. Exh. 4(b); R. Exh. 4(b) at Section 13.3 of R. Exh. 18 within R. Exh. 4; R. Ex. 4(c) at Section 13.3 within G.C. Exh. 5 of R. Ex. 4(c).)

unpaid. This will be considered an unexcused absence until the technician returns to work in the proper attire. (G.C. Exh. 6 at pp. 14-15.)

These same material terms of the Personal Appearance standards (Sections 14.1-14.3 and 14.13) have been included in substantially the same form in every prior version of the Prem Tech Guidelines.⁴ (R. Exh. 1, pp. 11-12; R. Exh. 4(b), pp. 10-11 of R. Exh. 17 within R. Exh. 4(b); R. Exh. 4(b), pp. 10-11 of R. Exh. 18 within R. Exh. 4(b); R. Ex. 4(c), p. 10 of G.C. Exh. 5 within R. Exh. 4(c).)

The Prem Tech Guidelines only apply to Prem Techs. They do not apply to other Indiana Bell technicians, nor have they ever applied to any other Indiana Bell technicians. (Tr. 37:17-23, 47:11-17, 49:10-21, 99:2-24; G.C. Exh. 2 at p. 212; G.C. Exh. 6 at p. 14.) Except where special circumstances apply, it is undisputed that Respondent has never had the contractual right or authority to implement mandatory appearance standards or a dress code for any Indiana Bell technicians other than the Prem Techs.

2. CWA's Waiver of Bargaining Over the Prem Tech Guidelines.

Since implementing the written Prem Tech Guidelines in 2009, Respondent consistently provided CWA District 4 advance notice and an opportunity to bargain over the guidelines. AT&T Midwest's former Director of Labor Relations, Bill Helwig (now retired), testified in a prior proceeding before the NLRB involving Wisconsin Bell and CWA District 4, that he followed the same procedures relative to implementing the Prem Tech Guidelines for all of Respondent's Prem

⁴ Each version of the Prem Tech Guidelines carries a "Revision Date" on the cover. The Revision Date reflects the date that the Prem Tech Guidelines were drafted by the business unit, before being sent to CWA for review (and potential bargaining), as described in further detail *infra*. (R. Exh. 4(a) at 1007:15-1008:6.) The Revision Date does not reflect the date that the Guidelines were actually rolled out to the field for training or implemented for Prem Techs. (R. Exh. 4(a) at 1008:4-6.) Rather, the roll-out to the field occurred after the Union first had a chance to review the Guidelines and request bargaining. (R. Exh. 4(a) at 1005:20-1007:1.)

Techs covered by its applicable CBA within CWA District 4 in 2009, 2010, 2011, and 2013 that he followed with respect to countless other policies applicable to CWA-represented employees.⁵ (R. Exh. 4(a) at 989:22-993:24, 1004:5-1006:13; Tr. 99:9-99:7.)

Helwig explained he followed a standard practice with respect to business unit roll-out of various policies, such as attendance policies, technician guidelines, motor vehicle guidelines, etc. Helwig's customary practice was to work with the subject business unit and the Human Resources department to develop the applicable policy or guidelines. (R. Exh. 4(a) at 988:16-993:21.) He would also review the policy point-by-point to ensure there was no conflict with the CBA or applicable law. (R. Exh. 4(a) at 988:16-989:6.) Once the draft policy was complete, Helwig would send the policy to the responsible CWA representative. (R. Exh. 4(a) at 989:22-991:18, 993:9-21.) If the CWA official did not respond within a few weeks, Helwig would call him to follow up. (R. Exh. 4(a) at 991:24-992:10.) Once he confirmed CWA did not want to discuss the policy, Helwig notified field management they could begin the roll-out and to train affected employees on the new policy at issue. (R. Exh. 4(a) at 997:13-998:25.)

Helwig explained that the Company was always willing to bargain over such policies, but that, as a standard practice, CWA never requested bargaining. The General Counsel did not rebut Helwig's testimony that the CWA representatives routinely expressed to him that CWA was not willing to bargain over any policy that involved discipline, because they believed such bargaining could hurt them in the grievance process. (R. Exh. 4(a) at 993:22-994:17.)

Helwig followed this same procedure relative to the first written Prem Tech Guidelines issued in 2009. Helwig first worked with U-Verse Vice President Derrick Hamilton and Human

⁵ As explained above, Wisconsin Bell is Indiana Bell's sister company and is subject to the same CBA with CWA. (Tr. 39:8-9, 44:8-11, 91:13-15, 91:25-92:13; G.C. Exh. 2.)

Resources to develop the guidelines. (R. Exh. 4(a) at 1001:19-1003:17.) He then reviewed the guidelines and ensured they were not in conflict with the CBA or applicable law. (R. Exh. 4(a) at 1003:18-1004:4.) After completing that process, Helwig sent the guidelines to Jerry Schaeff of CWA District 4 for review and provided an opportunity for CWA to request bargaining if desired. (R. Exh. 4(a) at 1005:5-1006:24.) If he did not hear from Schaeff within a few weeks, Helwig would have made a follow-up call. Because CWA did not request to bargain over the Prem Tech Guidelines, Helwig subsequently notified management in the field to begin implementing and training Prem Techs on the Prem Tech Guidelines. (R. Exh. 4(a) at 1005:24-1006:13.)

Helwig followed a similar process for the 2010, 2011, and 2013 revisions of the Prem Tech Guidelines. (R. Exh. 4(a) at 1004:5-1005:23.) On March 16, 2011, Helwig sent an email to CWA District 4 official Ron Honse, which included as attachments the draft 2011 Prem Tech Guidelines and a document showing the significant changes from the 2010 version. Helwig's cover email stated:

Attached are the revised Prem Tech guidelines for [2011.] I have also attached a document showing the significant changes from 2010.

Please let me know if you have any questions or want to discuss.
(R. Exh. 4(b), R. Exh. 21 within R. Exh. 4(b); R. Exh. 4(a) at 1008:15-1009:10.)

The Company was willing to bargain over the Prem Tech Guidelines, but Honse never requested bargaining. (R. Exh. 4(a) at 1009:11-19.)

Likewise, in the most recent revisions published in 2013, Helwig sent the revised guidelines to Curt Hess, the newly-appointed CWA representative who then had responsibility for the U-verse organization. (R. Exh. 4(c), G.C. Exh. 58 within R. Exh. 4(c); R. Exh. 4(a) at 1009:20-1010:19; Tr. 107:22-109:1.) Attached to Helwig's June 20, 2013 email to Hess were a copy of the 2013 Prem Tech Guidelines and a document summarizing changes from the 2011 version.

Consistent with his customary practice, Helwig's cover email specifically invited Hess to "Let me know if you have any questions or want to discuss." (R. Exh. 4(c); G.C. Exh. 58 within R. Exh. 4(c).) When no one from the CWA requested bargaining over the Prem Tech Guidelines, Helwig instructed management to roll out the revised guidelines to the field. (R. Exh. 4(a) at 1011:5-19.)

In 2016, Helwig's successor, Steve Hansen, followed the same practice prior to Respondent's implementation of the 2016 Prem Tech Guidelines.⁶ Specifically, on April 8, 2016, Hansen sent an email to Ron Gay of CWA District 4 attaching a copy of the latest Prem Tech Guidelines and inviting Gay to speak with him if Gay had any questions or concerns about the updated Guidelines. (Tr. 95:3-22, 97:5-12; R. Exh. 2.) In the email, Hansen advised Gay that Respondent aimed to advise the Prem Techs of the latest version of the Prem Tech Guidelines the following week. (*Id.*)

Just hours after receiving Hansen's email, Gay replied to Hansen by writing, "Thanks Steve. I'll look over and call with any questions." (Tr. 96:3-4, 96:13-97:20; R. Exh. 3.) However, neither Gay nor any CWA representative ever further communicated with Hansen regarding the 2016 Prem Tech Guidelines or shared any questions or concerns regarding the updated Guidelines. (Tr. 97:21-98:6.)

CWA's failure to request bargaining over the Prem Tech Guidelines on any occasion stands in stark contrast to its conduct relative to an event occurring in 2012. At that time, Respondent proposed in bargaining to place a cap on the number of paid sick days for bargaining unit employees. In response, Schaeff made a request to bargain over a single uniform attendance policy for all Midwest bargaining unit employees (because they previously were subject to different

⁶ It is undisputed that Hansen's practice is always to provide CWA District 4 with as much lead time as possible regarding the potential implementation of a new policy so as to allow CWA District 4 notice and an opportunity to bargain. (Tr. 92:20-93:15.)

policies in different business units). The parties eventually bargained an agreement for one attendance policy for the entire bargaining unit, in exchange for caps on the number of unpaid sick days. (R. Exh. 4(a) 993:22-997:12.)

C. Respondent's Uniform Enforcement Of Its Prem Tech Personal Appearance Standards.

The record demonstrates Respondent's consistent and uniform enforcement of the Prem Tech Personal Appearance standards. Respondent's witnesses provided consistent and corroborative testimony that management expects compliance with the Personal Appearance standards and consistently enforces the standards through formal and informal methods. Moreover, the parties' email communications confirm that Respondent consistently enforced its BAP Personal Appearance standards. (G.C Exh. 7; G.C. Exh. 8; G.C. Exh. 9; G.C. Exh. 10.) The General Counsel's evidence of alleged "lax enforcement" was sparse and anecdotal at best.⁷

1. Angie Bickel's Testimony.

Angie Bickel has been an Area Manager for Respondent since 2007. (Tr. 102:1-17.) Since 2009, she has been based out of Indiana Bell's Hanna Garage in Indianapolis. (Tr. 102:9-10.)

Bickel credibly testified that since 2007 Respondent has had its Personal Appearance standards for Prem Techs that are now codified in the Prem Tech Guidelines. (Tr. 103:9-13.) She is not aware of any single occasion in which Respondent deviated from the Personal Appearance standards by allowing a Prem Tech to wear union insignia over his or her branded apparel. (Tr. 103:17-104:21.)

⁷ As evidence of alleged "lax enforcement," the General Counsel presented witnesses who were Customer Service Specialists (often referred to as Core Techs), not Prem Techs. Those Core Tech witnesses testified to seeing employees wearing non-branded apparel on sporadic occasions and primarily while in a garage or working outside. The paucity of that evidence is actually probative of Respondent's consistent enforcement of its Prem Tech Personal Appearance standards.

2. Joe St. Claire's Testimony.

Joe St. Claire has served as Respondent's Manager, Network Services in the Company's Internet and Entertainment Field Services ("IEFS") since 2014. (Tr. 85:8-14.) He supervises Prem Techs at the Hanna Garage. (Tr. 86:1-3.)

In his tenure, St. Claire recalls only a single incident in which a Prem Tech attempted to wear union insignia over branded apparel. (Tr. 86:7-10.) On that occasion, a Prem Tech at the Hanna Garage wore a red CWA button on his shirt. St. Claire asked the Prem Tech to remove the button, but the Prem Tech initially did not acknowledge the request. He asked the Prem Tech again to remove the button, at which point the Prem Tech stated that he would not do so. St. Claire then told the Prem Tech that if he refused to remove the button, the Employer would consider his act to constitute insubordination, which could potentially lead to discipline. The Prem Tech stated he needed to speak with his Local 4900 representative, Danny Collum. St. Claire replied that he was welcome to do so, but he would need to remove the CWA button in the meantime. The Prem Tech then removed the button and St. Claire released him from the Garage to perform his duties. (Tr. 86:13-87:12.)

St. Claire directed the Prem Tech in this instance to remove the CWA button, which the Prem Tech placed over his Company-issued shirt, because wearing the button over the shirt violated the appearance standards set forth in the Prem Tech Guidelines. (Tr. 87:13-21.)

III. LAW AND ARGUMENT

The Board should overturn the ALJ's Decision. The ALJ improperly concluded that the Prem Tech Personal Appearance Standards are overbroad and, therefore, in violation of the Act.

The ALJ also erroneously concluded that the Union did not waive its right to bargain over the Prem Techs' right to wear union insignia. The ALJ concedes that the Company provided CWA with notice and an opportunity to bargain and that the Union did not request bargaining. However,

the ALJ incorrectly determined that the 2016 Personal Appearance standards did not permit Indiana Bell to prohibit Prem Techs from wearing union buttons over their Company-branded apparel. The language of the 2016 Personal Appearance standards makes it abundantly clear that Prem Techs may not alter their branded apparel in any way, which includes wearing union insignia over their branded apparel.

Furthermore, the ALJ erred by concluding that Indiana Bell discriminatorily enforced the BAP Personal Appearance standards and only chose to implement or enforce the standards after CWA Local 4900 commenced bargaining mobilization efforts in 2018. The record does not support either of those conclusions.

Finally, the ALJ erred by not giving the *Wisconsin Bell* decision preclusive effect. The *Wisconsin Bell* case involved the same issues and essentially the same parties. An administrative law judge issued a ruling on the merits after a full and fair hearing. The ALJ improperly cast aside this prior ruling and effectively reversed the *Wisconsin Bell* outcome.

For these reasons, as explained in detail below, Indiana Bell's exceptions should be granted and the ALJ's decision overturned.

A. Standard of Review.

The Board reviews the ALJ's findings of fact *de novo*. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 544-45 (1950), *enfd*, 188 F.2d 362 (3d Cir. 1951). While the Board generally affords some deference to credibility determinations based on the demeanor of the witnesses, even those determinations cannot be rubber-stamped. *Permaneer Corporation*, 214 NLRB 367, 369 (1974) (an ALJ "cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word 'demeanor'"). The Board must review the record in its entirety and determine whether the clear preponderance of all the relevant evidence supports the ALJ's credibility determinations. *Standard Dry Wall Products, Inc.*, 91

NLRB at 545. When it does not, the Board must reverse those findings. *Id.*

B. The ALJ Erred By Concluding That The Prem Techs' Personal Appearance Standards Violate The Act. (Exception Nos. 11-12, 24-29.)

The ALJ erroneously concluded that the Prem Tech Personal Appearance standards violate Section 8(a)(1) of the Act.

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under [Section 7]” of the Act. 29 U.S.C. § 158(a)(1). Section 7 provides that employees have the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157.

Subject to certain limitations, an employee’s Section 7 rights include the right to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802-03 (1945). However, balanced against an employee’s Section 7 rights to wear union insignia is the “equally undisputed right of employers to maintain discipline in their establishments.” *Id.* at 798. Accordingly, an employee’s right to wear union insignia is not absolute. An employer may lawfully restrict an employee’s right to wear union insignia where there are “special circumstances.” *Republic Aviation*, 324 U.S. at 802-03.

Special circumstances are established when union insignia would unreasonably interfere with a public image that an employer has established, as part of its business plan, through appearance rules for its employees. *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), *enfd.* 99 Fed. Appx. 233 (D.C. Cir. 2004) (citing *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982)). Here, Respondent’s Prem Tech BAP Personal Appearance standards are justified by the Company’s desire to create a brand of professionalism instantly recognizable to its customers, a consideration that continues to be important to Respondent in a competitive environment. (Tr.

103:3-8.) Respondent's need to create a positive customer experience is also reflected in the BAP personal appearance standards contained in the Prem Tech Guidelines:

The intent of the Branded Apparel Program (BAP) and the requirements of an employee's personal appearance is to ensure that AT&T employees project and deliver a professional, business-like image to our customers and community. (G.C. Exh. 6 at p. 14.)

Besides simply mandating that Prem Techs wear branded apparel, the BAP personal appearance standards also contain detailed rules for all aspects of a Prem Tech's appearance. The BAP appearance standards within the Prem Tech Guidelines require, among other things, that Prem Techs be well-groomed, not have any exposed tattoos or skin branding, wear their identification badge at all times, and even wear blue disposable shoe covers while working in a customer's residence, the critical time in which a Prem Tech can create or destroy a customer's positive impression of Respondent. (G.C. Exh. 6 at p. 14.) All of these rules are designed to enhance the customer experience and project a positive public image of Respondent to its customers, which, in turn, gives Respondent the competitive advantage central to its business plan.

Respondent does not restrict all forms of union insignia. In fact, it offers BAP that includes the CWA logo without any cost to the employees, which employees are free to wear on the job. (Tr. 70:8-21, 88:22-89:19; G.C. Exh. 14.) Under these circumstances, any adverse impact that the Prem Tech appearances standards has on NLRA-protected conduct is outweighed by legitimate business justifications. *See Boeing Co.*, 365 NLRB No. 154, slip op. at pp. 4, 15 (December 14, 2017).

For these reasons, the ALJ erred by concluding that the BAP Personal Appearance standards violated the Act.

C. The ALJ Erred By Concluding That The Union Did Not Waive Its Right To Bargain Over The Prem Techs' Right To Wear Union Insignia. (Exception Nos. 1-10, 14-29.)

The ALJ also erred in concluding that the Union did not waive its right to bargain over the Prem Techs' right to wear union insignia. The ALJ failed to apply the appropriate waiver standard in light of the Board's recent ruling in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019). In doing so, the ALJ incorrectly determined that neither the CBA nor the 2016 Personal Appearance standards sufficiently waived any Union objection to the Employer's rule restricting Prem Techs from wearing union insignia over branded apparel during work time. Moreover, the ALJ erroneously concluded that the parties' conduct since April 2016, when the Employer implemented the updated Prem Tech Guidelines, did not support a finding of waiver.

1. The ALJ Applied The Incorrect Waiver Standard. (Exception Nos. 14-15.)

In reaching his conclusion that the Employer failed to establish waiver, the ALJ relied upon the notion that the Union's waiver needed to be "clear and unmistakable." (Dec. 8:37-39.) He expressly refused to apply the "contract coverage standard" set forth by the Board in *MV Transportation*, 368 NLRB No. 66, because the "contract coverage" standard purportedly applies only to "pending unilateral-change cases where the determination of whether the employer violated Section 8(a)(5) turns on whether contractual language granted the employer the right to make the change in dispute." (Dec. 8:39 at fn. 22.)

In *MV Transportation*, the Board abandoned its "clear and unmistakable" waiver standard for determining whether a collective bargaining agreement grants an employer the right to take certain actions. *MV Transportation*, 368 NLRB No. 66, slip op. at 1, 9-11. Pursuant to the "contract coverage" standard, the Board examines the plain language of the collective bargaining agreement to determine whether the action taken by an employer was within the "compass or scope

of contractual language granting the employer the right to act unilaterally.” *Id.* at 2. As explained by the Board, if a contract “contains a provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones,” an employer does not violate the Act by “unilaterally implementing new attendance or safety rules or by revising existing disciplinary or off-duty-access policies.” *Id.* According to the Board, in both instances, the employer makes changes within the compass or scope of a contract provision authorizing the employer the right to act without any additional bargaining. *Id.*

Following *MV Transportation*, the Board will only apply the “clear and unmistakable” waiver standard only in circumstances where a collective bargaining agreement does not cover the employer’s contested act and the act, itself, materially and substantially changes a term or condition of employment constituting a mandatory subject of bargaining. *Id.* Accordingly, pursuant to the “contract coverage” test, “the Board will first review the plain language of the parties’ collective bargaining agreement, applying ordinary principles of contract interpretation, and then, if it is determined that the disputed act does *not* come within the compass or scope of a contract provision that grants the employer the right to act unilaterally, the analysis is one of waiver.” *Id.* (emphasis in original.)

The ALJ ruled that the holding in *MV Transportation* is “specifically limited” to “pending unilateral-change cases where the determination of whether the employer violated Section 8(a)(5) turns on whether contractual language granted the employer the right to make the change in dispute.” (Dec. 8:39, n. 22.) However, the Board’s directive in *MV Transportation* is not as limited as the ALJ determined it to be in this case. The Board did not prohibit the application of the contract coverage standard in waiver cases similar to the current dispute. *MV Transportation*, 368 NLRB No. 66, slip op. at 2. In its analysis in *MV Transportation*, the Board distinguished the

dispute at issue in that case involving an alleged unlawful unilateral change with the dispute at issue in the *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), a Supreme Court decision holding that a union may waive a statutory right only if the waiver is clear and unmistakable. As the Board explained in *MV Transportation*, the waiver defense in *Metropolitan Edison* did not involve the interpretation of collectively bargained language. In approving the “clear and unmistakable” waiver standard, the Supreme Court “had no opportunity to consider the circuit court decisions that inform [the *MV Transportation*] decision . . . , all of which postdated *Metropolitan Edison*.” *MV Transportation*, 368 NLRB No. 66, slip op. at 10.

The circuit court decisions discussed in *MV Transportation* articulate in significant detail the pitfalls of the “clear and unmistakable” waiver standard. Specifically, the D.C. Circuit concluded that the standard “is, in practice, impossible to meet.” *Department of Navy v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992). The *MV Transportation* decision correctly explained “clear and unmistakable waiver results in perpetual bargaining at the expense of contractual stability and repose. It does so because the level of specificity demanded under the standard requires ‘near super-natural prescience for the parties to have foreseen . . . what . . . issues would arise.’” *MV Transportation*, 368 NLRB No. 66, slip op. at 5 (emphasis in original). Furthermore, as the Board demonstrated, the clear and unmistakable standard “undermines collective bargaining by discouraging parties from trying to negotiate comprehensive labor contracts in the first place.” *Id.* (emphasis in original.) Thus, the Board adopted the D.C. Circuit’s “contract coverage” standard. *Id.* at 5-6 citing *IRS v. FLRA*, 963 F.2d 429, 440 (D.C. Cir. 1992); *Department of Justice v. FLRA*, 875 F.3d 667, 674 (D.C. Cir. 2017); *NLRB v. Postal Service*, 8 F.3d 832, 838 (D.C. Cir. 1993).

The ALJ should have applied the “contract coverage” waiver standard in this case. Here, unlike *Metropolitan Edison*, the parties negotiated Section 5.01 of Appendix F to the CBA, which

expressly vests the Employer with the right to “at its discretion, implement appearance standards and/or a dress code consistent with State and Federal laws.” (G.C. Exh. 2 at p. 217.) Section 5.01 of Appendix F also provides that the Company “may change the standards and code at its discretion.” (*Id.*) Because the parties specifically negotiated a provision in their CBA granting the Employer the right to implement its own appearance standards unilaterally, the present dispute, like *MV Transportation*, is readily distinguishable from *Metropolitan Edison*.

As was the case in *MV Transportation*, the application of the “clear and unmistakable” waiver standard in this case undermines the parties’ agreement (as well as the BAP Appearance Standards, which the Company implemented pursuant to the terms of Section 5.01 of Appendix F) and deprives the Employer of the benefit of its bargain – the right to implement appearance standards that are consistent with State and Federal laws. As such, the ALJ’s application of the “clear and unmistakable” waiver standard was improper in this case.

2. Regardless Of Which Waiver Standard Applies, The ALJ Erred In Concluding That The Union Did Not Waive Its Right To Bargain Over The Prem Techs’ Right To Wear Union Insignia. (Exception Nos. 1-10, 16-23.)

As explained above, the ALJ should have applied the “contract coverage” standard rather than the “clear and unmistakable” standard. However, even assuming, *arguendo*, the “clear and unmistakable” waiver standard applies, the Employer met its burden to establish that the Union waived its right to bargain. The Union’s repetitive, clear and unmistakable waiver of its right to bargain over Prem Techs’ right to wear union insignia provides an independent defense to Respondent’s ban on Prem Techs wearing CWA insignia over their branded apparel. The Union’s failure to request bargaining over the Prem Tech Guidelines in 2009, 2010, 2011, 2013, and 2016 constitutes an enforceable waiver through its conduct. Given the Employer’s undisputed

contractual right to implement appearance standards “at its discretion,”⁸ the Union’s repeated failure to request to bargain over the specific rules prohibiting the wearing of union insignia reflects its agreement to allow the Employer to place restrictions on union insignia worn by Prem Techs.

a. As The ALJ Concluded, The Employer Provided The Union With Notice And An Opportunity To Bargain Over The BAP Appearance Standards On Multiple Occasions.

Waiver can occur by “express provision in a collective-bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two.” *Northwest Airport Inn*, 350 NLRB 690, 693 (2013), *citing American Diamond Tool*, 306 NLRB 570 (1992).

Besides a contractual waiver, the Board will also find that a union waived its right to bargain over a subject based on the union’s conduct. In order to satisfy the Board’s standard for waiver by conduct, an employer must provide a timely and meaningful opportunity to bargain. *Taft Coal Sales & Associates, Inc.*, 360 NLRB 96, 100 (2014). A timely notice is one that is given far enough in advance to allow a reasonable opportunity to bargain. *Id.* If the employer merely informs the union of the upcoming changes with no real intent to bargain, or the employer gives a union an untimely notice, the employer has not met the Board’s standard. *Id.* Once a union receives notice of an employer’s intent to change a condition of employment, it must request that the employer bargain over the matter. *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982).

⁸ Section 5.01 of the Prem Tech Memorandum of Agreement, which is set forth in Appendix F of the parties’ CBA, expressly provides, “The Company may, at its discretion, implement appearance standards and/or a dress code consistent with State and Federal laws. The Company may change the standards and code at its discretion.” (G.C. Exh. 2 at p. 217.) The same terms were included in the parties’ predecessor CBAs. (G.C. Exh. 3.)

It is well established that “where an employer gives a union advance notice of an intention to make a change in a term or condition of employment, the Union must make a reasonably timely demand for bargaining over the matter to avoid a finding of waiver or acquiescence.” *Reynolds Metal Co.*, 310 NLRB 995, 1000 (1993). For example, in *WPIX, Inc.*, 299 NLRB 525 (1990), the employer planned to change the reimbursement rate it paid employees for mileage. The employer did not notify the union of the change, but the union became aware of it when a union representative noticed an interoffice memorandum detailing the change. *Id.* at 525. The Board held that the union waived its right to bargain over the change because the union had actual notice of the change a week prior to its implementation but did not request bargaining. *Id.* at 526. *See also Ohio Edison Co.*, 362 NLRB 777, 788-89 (2015) (employer provided a meaningful opportunity to bargain when it announced its intention to change its service recognition policy three months before implementation and told the union if it had any questions or concerns to contact the employer, and subsequently reminded the union of the upcoming change two additional times before implementation, and where there was no evidence a union request to bargain would have been futile).

Here, the Union’s continual failure to request bargaining constitutes a clear and unmistakable waiver of that right – and five waivers at that. Indeed, the ALJ acknowledged that the Union did not request to bargain over the Prem Tech Guidelines when first issued in 2009, nor when revised in 2010, 2011, 2013 and 2016, despite having an opportunity to do so. (Dec. 9:37-10:6.)

Before Respondent’s U-verse field operations first issued the Prem Tech Guidelines in 2009, Labor Relations Director Bill Helwig, following his customary practice, provided advance

notice and a copy of the guidelines to the CWA and the opportunity to bargain over the guidelines. The Union did not request bargaining.

Helwig and his successor, Steve Hansen, followed the same practice with each subsequent revision of the Prem Tech Guidelines; they provided their counterparts at CWA advance notice and a copy of the revised guidelines, as well as opportunity to bargain. (R. Exh. 4(a) at 1004:5-1011:12; E. Exh. 4(b); R. Exh. 21 within R. Exh. 4(b)); R. Exh. 4(c); G.C. Exh. 58 within R. Exh. 4(c).) When no CWA official requested bargaining, Helwig and Hansen instructed management to roll out the revised guidelines to the field and to begin training. (R. Exh. 4(a) at 1011:5-16; Tr. 101:5-12.)

Under governing case law, the employer has no affirmative duty to offer or to “invite” a union to bargain. The law requires only that the employer provide timely notice and have a real intent to bargain. The following undisputed facts conclusively prove Respondent’s willingness and intent to bargain over the Prem Tech Guidelines during all relevant times:

- Helwig’s and Hansen’s testimony that the Company was at all times willing to bargain over the Prem Tech Guidelines was not challenged on cross-examination and not refuted by any witness.
- It is undisputed that in 2009, 2010, 2011 and 2013, Helwig provided CWA with sufficient advance notice and a meaningful opportunity to bargain over the proposed Prem Tech Guidelines before they were implemented.
- Helwig followed his same customary practices relative to the Prem Tech Guidelines that he had followed with some twenty other Company policies.
- It is undisputed that in 2016, Hansen provided CWA sufficient advance notice and a meaningful opportunity to bargain over the proposed Prem Tech Guidelines before they were implemented.
- Hansen followed his same customary practices relative to the Prem Tech Guidelines that he had followed with other Company policies.
- The General Counsel did not refute – and could not refute – Hansen’s and Helwig’s testimony that the CWA never requested to bargain over the Prem Tech Guidelines.

- The General Counsel did not refute Helwig’s testimony that CWA’s expressed position was an unwillingness to bargain over any policy that involved discipline, out of concern doing so could hurt them in the grievance process.
- CWA’s failure to request bargaining over the Prem Tech Guidelines contrasts with its conduct in 2012, when it requested bargaining over a common attendance policy.

Given these undisputed facts, the CWA’s conscious decision *not* to request bargaining over the Prem Tech Guidelines demonstrates a waiver of the right to bargain over Prem Techs’ right to wear union insignia – regardless of whether the Board applies the “contract coverage” or “clear and unmistakable” waiver standard.

The Union had timely notice Respondent was going to implement Prem Tech Guidelines in 2009, 2010, 2011, and 2013 – which clearly prohibited Prem Techs from altering branded apparel by adding “buttons, pins, stickers, writing, etc.” With clear notice over several years that Prem Techs could not wear union insignia on their branded apparel, the Union did nothing about it. Because Respondent possessed the clear contractual right to implement the Appearance Standards “at its discretion,” the Union’s failure to ever request to bargain over the specific rule prohibiting employees from wearing union insignia constitutes waiver of such right to bargain over restrictions on union insignia worn by Prem Techs.

b. The ALJ Erroneously Concluded That The Language Of The 2016 Prem Tech Guidelines Did Not Support A Waiver Of Prem Techs’ Right To Wear Union Buttons.

Notwithstanding his finding that the Union waived any right to object to the Company’s implementation of the 2016 Prem Tech Guidelines, the ALJ erroneously concluded that the CBA language, including the BAP Appearance Standards set forth in the 2016 Prem Tech Guidelines, did not support a waiver. (Dec. 10:8-16.)

The CBA language at issue is sufficient to meet the “clear and unmistakable” standard, let alone the “contract coverage” standard. Section 5.01 of Appendix F to the CBA explicitly states,

as it has for years, that:

The Company may, at its discretion, implement appearance standards and/or a dress code consistent with State and Federal laws. The Company may change the standards and code at its discretion. (G.C. Exh. 2 at p. 217; G.C. Exh. 3; G.C. Exh. 4; R. Exh. 4(a) at 1011:20-1014:12; Tr. 104:4-12.)

Pursuant to its contractual right to implement appearance standards, Respondent promulgated Prem Tech Guidelines in 2009, including the BAP Personal Appearance standards applicable to Prem Techs. Prior to 2016, the BAP Personal Appearance standards specifically provided that “branded apparel may not be altered in any way which includes adding buttons, pins, stickers, writing etc.” (R. Exh. 1, Section 13.3 at p. 11; R. Exh. 4(b) at Section 13.3 of R. Exh. 17 within R. Exh. 4(b); R. Exh. 4(b) at Section 13.3 of R. Exh. 18 within R. Exh. 4; R. Ex. 4(c) at Section 13.3 within G.C. Exh. 5 of R. Ex. 4(c).)

The 2016 BAP Personal Appearance standards were effectively identical. The only change in the relevant language is that the Personal Appearance standards no longer expressly included an illustrative example that re-confirmed that Prem Techs may not add buttons, stickers, pins, or writing to their branded apparel. Section 14.3 of the April 2016 BAP Personal Appearance standards expressly states, “**The branded apparel may not be altered in any way.**” (G.C. Exh. 6 at p. 14 (emphasis added).) This language is clear and unambiguous. It provides no exception to the clear rule that Prem Techs may not alter their branded apparel in any way. As such, the language in the Prem Tech Guidelines cannot reasonably be construed to permit Prem Techs to alter their branded apparel with union insignia.

Indeed, CWA Local 4900 recognized this to be the case. Not one of the four witnesses called by the General Counsel at the hearing, all of whom are Indiana Bell employees and representatives of CWA Local 4900, testified that any of them understood the change in the language in the BAP Personal Appearance standards in the 2016 Prem Tech Guidelines to permit

Prem Techs to wear union insignia over their branded apparel.

Where, as here, contract language expressly addresses an employer's right to make a decision unilaterally, the waiver is clear and unmistakable. *Allison Corp.*, 330 NLRB 1363, 1364-65 (2000) (language giving the company "the exclusive right to manage the business and operation of its facilities" was a clear and unmistakable waiver); *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989) (contract language permitting employer to pay additional wages clearly and unmistakably waived union's right to bargain about attendance-bonus plan).

As in *Allison Corp.* and *Johnson-Bateman Co.*, Section 5.01 of Appendix F to the CBA expressly grants the Employer the right, at its discretion, to implement mandatory appearance standards for Prem Techs. Given that Section 5.01's plain language has been in effect for years without substantive change, the Union clearly and unmistakably waived any right to claim the BAP Personal Appearance standards the Employer has the unilateral right to create are unlawful. The ALJ's contrary conclusion is erroneous.

The ALJ also stated that the parties' conduct since April 2016 did not support a waiver of Prem Techs' right to wear union buttons. (Dec. 10:8-9.) This finding is erroneous as there is no evidence demonstrating that at any time after implementing the April 2016 Prem Tech Guidelines, the Employer in any way created any exception to the BAP Personal Appearance standards. Beyond that, there is no evidence that shows that Indiana Bell otherwise allowed Prem Techs to wear union insignia of any kind over their branded apparel during work time or in the presence of customers.

c. The ALJ Erred By Finding That The Employer Discriminatorily Enforced The BAP Appearance Standards.

The ALJ erroneously concluded that even if the Union waived its right to bargain over the 2016 Prem Tech Guidelines, Indiana Bell disparately enforced the 2016 Prem Tech Guidelines

and thus, the Company waived the right to enforce the BAP Personal Appearance standards. (Dec. 10:20-11:15.) The evidence at the hearing did not support the ALJ's conclusion. The record reflects that Indiana Bell enforced the Prem Techs' BAP Personal Appearance standards consistently for several years. Indeed, the record reflects that Indiana Bell has enforced the Prem Tech Personal Appearance standards consistently for several years.

(1) The Record Evidence Shows Consistent Enforcement.

Indiana Bell Area Manager Angie Bickel credibly testified that since 2007 the Employer maintained the Personal Appearance standards for Prem Techs, which the Prem Tech Guidelines codified in 2009. (Tr. 103:9-13.) Bickel was unaware of any occasion in which Indiana Bell stopped enforcing the Personal Appearance standards by allowing a Prem Tech to wear union insignia over his or her branded apparel.⁹ (Tr. 103:17-104:21.)

Similarly, Joe St. Claire, Indiana Bell's Manager, Network Services, testified that he recalled only one single occasion in which a Prem Tech attempted to wear a union button over the

⁹ The ALJ wrote in his decision, "Angela Bickel, the Company's area manager, observed the rule being enforced "in 2012 or earlier" when "technicians would attempt to wear a t-shirt over their uniforms" but did not mention buttons. (Dec. 5, n. 13.) The ALJ's statement distorts or overlooks critical aspects of Bickel's testimony. Specifically, the ALJ ignored the following testimony from Bickel:

Q To your knowledge, since you've been area manager, has the company ever permitted a premises technician to wear union insignia over their branded apparel?

A No.

...

Q To your knowledge since 2007, has the company ever permitted any premises technicians within your area to wear union insignia over their branded apparel?

A No. (Tr. 104:9-21.)

The ALJ's summary of the extent of Bickel's testimony is plainly incorrect.

Employer's branded apparel. (Tr. 86:7-10.) St. Claire immediately directed the Prem Tech to remove the button and continued to insist that the Prem Tech do so after the employee initially refused to honor the request. (Tr. 86:13-87:21.) Neither the General Counsel nor the Union presented any evidence indicating that St. Claire permitted Prem Techs to wear union insignia over their branded apparel during work time or in the presence of customers.

(2) The Record Does Not Support The ALJ's Finding Of Discriminatory Enforcement.

In his Decision, the ALJ concluded that Prem Techs "wore [union] buttons frequently throughout bargaining sessions in 2009, 2012, and 2015, within sight of supervisors and without restraint." (Dec. 10:44-45.) The record does not support the ALJ's conclusion. The ALJ improperly and erroneously construed vague, unsubstantiated, and general Core Tech testimony regarding "employees" wearing buttons in support of the Union during bargaining in 2009, 2012, and 2015 to constitute clear evidence that Prem Techs regularly wore union insignia during work time with the Company's knowledge and permission.¹⁰

It is important to note that neither the General Counsel nor the Union called a single Prem Tech as a witness to testify at the hearing. Instead, the General Counsel relied on the testimony of four Core Techs who were not at all subject to the Prem Tech Guidelines – Tim Strong, Larry Robbins, Danny Collum, and Preston Dorfmeier. (Tr. 27:6-9, 47:9-17, 53:9-13, 121:17-18.) Not one of these four witnesses testified that Indiana Bell knowingly permitted Prem Techs to wear union insignia over their branded apparel at any point since Respondent implemented the Prem Tech BAP Personal Appearance Standards.

¹⁰ As explained above, Prem Techs constitute a fraction of the bargaining unit. The bargaining unit is comprised of employees in a wide variety of positions, including Core Techs, Construction & Engineering Technicians, Marketing Support Specialists, Technical Associates, Dispatchers, Maintenance Administrators, and Prem Techs. (Tr. 92:14-93:6.)

Strong testified that he observed “employees” wearing CWA buttons while the parties were engaged in contract negotiations in 2012 and 2015.¹¹ (Tr. 31:2-31:3, 34:23-35:3.) He could only recall two occasions in 2012 in which he saw employees wearing such buttons while servicing a customer off-site. (Tr. 32:17-33:13.) However, he admitted that in neither instance was a manager present who could personally observe that an employee was wearing a CWA button while off-site, during work time, and servicing a customer. (Tr. 33:14-20.) He could not recall a single incident in 2015 in which he saw an employee wear a CWA button away from their garage, or a single occasion in which a manager observed an employee wearing a CWA button during work time in 2015. (Tr. 35:23-36:5.) Nevertheless, the ALJ relied on this testimony to conclude that Prem Techs wore union buttons in garages and while leaving for service calls in 2009, 2012, and 2015 without any restraint by Company supervisors. (Dec. 5 at n. 13, 10:44-45.) Strong’s testimony and the record evidence do not support the ALJ’s conclusion.

Robbins testified that he first became aware in March 2018 that the BAP Personal Appearance standards prohibited Prem Techs from wearing CWA buttons during work time. (Tr. 50:8-51:8; G.C. Exh. 10.) He further testified that he received an email from Grace Biehl of the Employer’s labor relations team on March 15, 2018 confirming that the Company did not permit Prem Techs to wear union buttons outside of Company facilities during work time. (*Id.*) At the hearing, Robbins provided the following testimony as to subsequent developments:

¹¹ During the second day of the hearing in this matter and during his “rebuttal” testimony, Strong added to his testimony by claiming that CWA Local 4900 distributed CWA buttons to employees in the bargaining unit, including Prem Techs, as part of the Local’s mobilization efforts in 2009. (Tr. 117:17-118:19.) Strong’s testimony about this incident lacked credibility as he was given the opportunity to share this information during the first day of hearing in response to a direct question regarding the issue, but he did not testify about anything on the first day of his testimony regarding 2009. (Tr. 31:2-31:3, 118:25-120:6.) In any event, he did not identify a single occasion in which a single Prem Tech wore any union insignia over branded apparel during work time, away from the facility and/or in the presence of a customer.

Q Okay. After your email communication with Ms. Biehl, did the union continue its mobilization efforts by wearing buttons?

A Yes. (Tr. 51:9-12.)

The ALJ somehow concluded from this testimony that Prem Techs continued to wear union buttons without incident for about one month until the above-referenced incident involving St. Claire. (Dec. 5:21-22, n. 18.) Robbins's testimony does not support the ALJ's overreaching conclusion. In fact, Robbins did not identify a single instance in which he recalled a Prem Tech wearing a CWA button. As such, the ALJ's summary regarding Robbins's testimony does not align with the record.

Collum testified that he observed "employees" wearing CWA buttons during bargaining mobilization efforts in 2015. (Tr. 55:10-23.) The ALJ construed this vague and innocuous testimony to leap to the unsupported conclusion that Prem Techs wore union buttons in garages and while leaving for service calls in 2015 without any restraint by Company supervisors. (Dec. 5 at n. 13.) Collum also testified that he disseminated CWA buttons and lanyards in 2018 and that "employees" wore these union buttons and lanyards over their branded apparel in 2018.¹² (Tr. 56:2-58:3.) However, Collum did not identify a single incident at any time in which he specifically observed a Prem Tech leaving the garage during work time wearing union insignia over branded apparel. The record does not support the ALJ's conclusion from Collum's testimony that the Employer knowingly permitted Prem Techs to wear union insignia over their branded apparel in 2015 and 2018.

Dorfmeier testified that in 2009, he observed Prem Techs wearing CWA buttons in the

¹² Collum also noted that some "employees" wore hats that had both the AT&T and CWA logos on them while at work. (Tr. 58:10-59:17; G.C. Exh. 14.) However, it is undisputed that those hats are AT&T branded apparel, and thus, the Company distributed those hats to Prem Techs who wished to wear them and could do so pursuant to the Personal Appearance Standards. (Tr. 69:1-20, 87:22-88:19; G.C. Exh. 14.)

garage before leaving to service customers off-site. (Tr. 124:2-11.) He testified that unidentified Indiana Bell managers were present at the garage while the unidentified Prem Techs wore such buttons. (*Id.*) However, he did not state whether any manager actually saw and permitted a Prem Tech to leave a garage back in 2009 and service customers while wearing CWA buttons. Indeed, he could not identify a single manager who confirmed seeing a single Prem Tech leaving the garage or servicing a customer wearing a CWA button. (Tr. 131:2-9.) Notwithstanding the bareness and vagueness of Dorfmeier's testimony, the ALJ concluded that the Employer expressly permitted Prem Techs to wear union buttons "throughout bargaining sessions" in 2009. Such vague evidence, lacking meaningful foundation, regarding events that occurred nine years prior to the events at issue (and seven years prior to the implementation of the 2016 BAP Personal Appearance standards) cannot possibly establish discriminatory enforcement of the standards.

Even assuming that the Board determines that the ALJ's factual findings regarding certain Indiana Bell Prem Techs wearing union buttons prior to April 2018 are not erroneous, the record evidence is nevertheless insufficient to establish discriminatory enforcement. In *Hertz Corp.*, 305 NLRB 487 (1991) (on remand from Sixth Circuit, *NLRB v. Hertz Corp.*, 920 F.2d 933 (6th Cir. 1990)), an administrative law judge found that an employer disparately enforced its dress code policy when it asked union stewards to remove union pins, because there was evidence employees had worn a Christmas pin, a St. Patrick pin, and green shamrock stickers. *Id.* at 487. The Board reversed, holding the record showed "the Respondent took concrete steps to enforce its dress code," including specific examples of managers instructing employees to remove pins that violated the dress code." *Id.*

Importantly, the Board explained "[w]e are persuaded that the occasional lapses in enforcement cited by the judge show only that the Respondent had problems in attempting to carry

out its uniform policy effectively. Yet these occasional lapses in an otherwise consistent application of a detailed uniform policy do not persuade us that there was inconsistent and discriminatory enforcement.” *Id.* at 488. See also *Kendall Co.*, 267 NLRB 963, 965 (1983) (“After finding special circumstances to exist and that “[Respondent] acted accordingly, it is immaterial that he failed to so act on all occasions... Respondent’s inefficiency on some occasions does not warrant a finding that occasions of efficiency amount to unfair labor practices even if some restriction of employee rights to propagandize is involved.” (quoting *Hanes Hosiery, Inc.*, 219 NLRB 338, 347 (1975))).

Here, the scant, vague, and unsubstantiated record evidence of alleged lax enforcement does not render the Employer’s BAP Personal Appearance standards for Prem Techs null and void. As the Board demonstrated in *Hertz* and *Kendall*, enforcement of a lawfully-implemented work rules does not depend on a perfect record of enforcement of appearance standards. For these reasons, the ALJ’s determination that Indiana Bell forfeited its right to enforce its Prem Tech Personal Appearance standards should be overturned.

(3) The Record Evidence Does Not Support The ALJ’s Conclusion That The Employer Enforced The 2016 BAP Appearance Standards To Restrain Unit Employees’ Protected Activity.

The ALJ further erred by concluding that Indiana Bell only began enforcing the BAP Personal Appearance standards as an “opening salvo” in response to the Union mobilizing its members for 2016 contract negotiations. (Dec. 5:10-17, 10:25-27, 10:44-11:15.) The record evidence does not support this conclusion.

The ALJ apparently based his mistaken conclusion upon the erroneous finding that Indiana Bell only began enforcing the Personal Appearance standards in 2018 due to its alleged displeasure with the Union’s bargaining mobilization efforts. However, as explained above, the unrebutted

testimony of Bickel and St. Claire demonstrates that the Employer consistently applied its rule prohibiting Prem Techs from wearing union insignia over the Company's branded apparel since 2007. Neither the General Counsel nor the Union presented any testimony or evidence that directly rebutted Bickel's and St. Claire's testimony. Moreover, as explained above, the record evidence and the vague, general, and conclusory testimony of Strong, Robbins, Collum, and Dorfmeier do not support the ALJ's conclusion that the Employer permitted Prem Techs to wear union buttons during work time outside of the facility.

The ALJ also based his conclusion on his mistaken finding that St. Claire purportedly told Collum that he directed a Prem Tech to remove a union button on April 16, 2018 only "at the direction of the Company's labor relations team." (Dec. 10:45-47.) There is no basis for the ALJ's finding and conclusion. Collum merely testified that during a grievance meeting relating to the incident at issue, St. Claire told Collum that "basically labor" told him that the BAP Personal Appearance standards required St. Claire to order Prem Techs to remove union insignia that they wore over the Company's branded apparel. (Tr. 65:18-67:3.) The ALJ construed that testimony to mean that on April 16, the Employer's labor relations team directed supervisors to enforce the rule. (Dec. 10:25-27.) The record evidence does not support the ALJ's overreaching finding. Even accepting, *arguendo*, that Collum's hearsay testimony regarding what St. Claire said in this grievance should be credited, Collum did not represent that St. Claire told him *when* the Employer's labor relations team allegedly told St. Claire to "begin" enforcing the BAP Personal Appearance standards. Similarly, Collum did not represent that St. Claire told him why the Employer's labor relations group told him that he should "start" enforcing the standards. There is absolutely no record evidence that supports the ALJ's conclusion that on April 16, 2018, the Employer's labor relations team first started directing the Employer's supervisors to enforce the

Prem Tech BAP Personal Appearance standards – notwithstanding the fact that it is undisputed that the Company had those standards in place for several years.¹³

For these reasons, the ALJ’s determination that Indiana Bell began enforcing its Prem Tech Personal Appearance standards in 2018 only in response to CWA Local 4900’s bargaining mobilization efforts is erroneous.

**D. The ALJ Erred By Failing To Apply The Collateral Estoppel Doctrine.
(Exception Nos. 13, 24-29.)**

The ALJ erred by refusing to give collateral estoppel effect to *Wisconsin Bell, Inc. v. CWA, Local 4622*, Case 18-CA-147635, 2016 NLRB LEXIS 506 (2016), a prior case in which the exact same issue regarding the enforceability of the Company’s Personal Appearance standards was litigated and resolved through the Board’s processes.

In the *Wisconsin Bell* case, a 2016 decision, Administrative Law Judge Charles Muhl decided the precise issue under consideration in the Employer’s favor. The Board subsequently adopted Judge Muhl’s decision, and therefore, his decision is dispositive of the present dispute. *See Wisconsin Bell, Inc.*, 2016 NLRB LEXIS 621 (NLRB). In *Wisconsin Bell*, Judge Muhl held that Indiana Bell’s sister company and co-party to the CBA, Wisconsin Bell, did not violate Section 8(a)(1) by enforcing the 2013 Prem Tech Guidelines to prohibit Prem Techs from wearing union buttons. Judge Muhl explicitly held that:

¹³ The ALJ’s finding that the Company’s labor relations team instructed supervisors to begin enforcing the Personal Appearance standards on April 16, 2018 is especially curious. The ALJ acknowledged and credited Robbins’s testimony that the Company instructed Prem Techs in March 2018 that they could not wear union insignia over their branded apparel and that Bickel and Grace Biehl, a Labor Relations Manager, confirmed to Robbins the Company’s view that wearing union buttons over branded apparel constituted a violation of the Personal Appearance standards. (Dec. 5:15-22.) The ALJ also determined that Prem Techs continued to wear buttons for approximately one more month, notwithstanding the Company’s directives. (Dec. (5:21-22.) However, as explained above, the record evidence does not support the ALJ’s finding that supervisors knowingly permitted Prem Techs to wear union buttons during work time in the presence of customers at any time since 2009.

the Union, by its conduct, waived the right to bargain over the Respondent's decision to implement and maintain the ban on premises technicians wearing any buttons. Thus, the Respondent lawfully enforced the button prohibition against premises technicians in November 2014 and May 2015. *Wisconsin Bell*, 2016 NLRB LEXIS 506 at *3.

Judge Muhl arrived at this conclusion after five days of hearing, and his “observation of the demeanor of witnesses and after considering the briefs filed by the General Counsel and the Respondent....” *Id.*

Notably, in reaching this decision, Judge Muhl held that:

the Respondent provided the Union with the prem tech guidelines containing the button ban no less than 4 times over the course of 5 years. The Respondent also invited the Union to discuss any concerns it had. The Union's repeated silence in response is a clear and unmistakable acquiescence to the guidelines' implementation and maintenance. The Board's waiver by inaction doctrine would have little remaining application were it found not to apply in these circumstances. *Id.* at *59-60.

Against this backdrop, the ALJ should have dismissed the charge. Judge Muhl previously decided, in an opinion that was adopted by the Board, that the Company has the lawful right to enforce its prohibition against Prem Techs altering their branded apparel. As such, the parties in this case are re-litigating an issue that was already decided in *Wisconsin Bell*. Finding merit to Local 4900's Complaint renders Judge Muhl's and the Board's prior decisions meaningless. Permitting CWA Local 4900 or any other Local in CWA District 4 to proceed with such allegations, notwithstanding the *Wisconsin Bell* decision, puts Respondent and its affiliated entities in the untenable position of having to continually re-litigate an issue that has already been decided.

Situations like this are precisely why the Board adopted the collateral estoppel doctrine, which provides that “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Evans Sheet Metal*, 337 NLRB 1200, 1220 (2002)

(quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). Collateral estoppel applies if: (1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question. *Id.*

Here, all of the requirements for application of the collateral estoppel doctrine are met. First, the issue of whether Respondent has the right to prohibit Prem Techs from altering their branded apparel by wearing buttons or other union insignia has been decided, in a final judgment on the merits, by Judge Muhl and adopted by the Board. Second, the party against whom the bar is being asserted, the General Counsel, was a party to the prior case. Local 4900 is also in privity to CWA Local 4622, the Local at issue in *Wisconsin Bell*, as both are Locals within CWA District 4, which is the exclusive bargaining representative for employees in both Locals. See *Evans Sheet Metal*, 337 NLRB at 1205 (privity means that the relationship between the two parties “is sufficiently close so as to bind them both to an initial determination, at which only one of them was present”). Finally, the General Counsel had a full and fair opportunity to litigate whether the Company has the right to prohibit Prem Techs from altering their branded apparel by wearing union insignia, given that *Wisconsin Bell* was decided after a full hearing and complete briefing by the General Counsel.

Consequently, the collateral estoppel doctrine applies in this case, as this precise issue was litigated, and decided, in *Wisconsin Bell*. As the Supreme Court held in *Montana v. United States*, 440 U.S. 147, 153-154 (1979), the collateral estoppel doctrine is a “fundamental precept of common-law adjudication” because “[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation

attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.”

For these reasons, the ALJ erred by refusing to defer to the *Wisconsin Bell* decision.

IV. CONCLUSION

For the foregoing reasons and based on the record evidence, Indiana Bell respectfully requests that the Board reject those portions of the ALJ’s Decision excepted to by the Employer.

The Union’s charge must be dismissed.

Dated: October 15, 2019

Respectfully submitted,

MICHAEL G. PEDHIRNEY
LITTLER MENDELSON, P.C.

By  _____
MICHAEL G. PEDHIRNEY

Attorneys for Respondent
INDIANA BELL TELEPHONE COMPANY,
INC.

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler Mendelson, P.C., 333 Bush Street, 34th Floor, San Francisco, California 94104. On October 15, 2019, I served the within document(s):

RESPONDENT INDIANA BELL TELEPHONE COMPANY, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

- by facsimile transmission at or about _____ on that date. This document was transmitted by using a facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number 415.399.8490. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.
- by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope(s) with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California, addressed as set forth below.
- by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.
- by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.
- Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) as set forth below on the date referenced above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is chgoodman@littler.com.

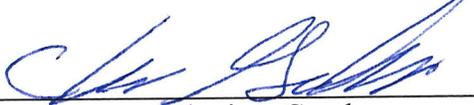
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it

would be deposited with the U.S. Postal Service or, if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct. Executed on October 15, 2019, at San Francisco, California.



Charisse Goodman