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 REPLY TO CHARGING PARTY'S ANSWERING BRIEF

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I. INTRODUCTION

For the reasons asserted in its Exceptions and Brief in Support thereof filed by Respondent Indiana Bell Telephone Company, Inc. ("Indiana Bell," "Employer," or "Respondent") on October 15, 2019, Indiana Bell requests that the National Labor Relations Board reverse the decision of Administrative Law Judge Michael A. Rosas ("ALJ") dated September 17, 2019. The Answering Brief submitted by Communications Workers of America, Local 4900 ("Local 4900") raises no legal or factual arguments not already comprehensively addressed in Respondent's Brief in Support of Exceptions. However, Local 4900's Answering Brief distorts the facts of this case and relevant legal principles applied in numerous Board decisions. For the reasons set forth in Indiana Bell's Exceptions and Brief in Support thereof, the Board should reverse the ALJ's decision.

II. LEGAL ANALYSIS

A. The Prem Techs' Personal Appearance Standards Do Not Violate The Act.

As explained in the Company's Opening Brief, the Prem Tech Personal Appearance Standards do not violate Section 8(a)(1) of the Act. Employers may lawfully prohibit union insignia when such 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)). It is undisputed that the Employer implemented its Prem Tech Personal Appearance standards to create a unique brand of professionalism that is immediately perceivable to its customers, which is a critical value to Respondent because it operates in a competitive environment. (Tr. 103:3-8.) Nevertheless, Local 4900 and the ALJ contend that this rationale is "inherently contradictory" because the Company

offers Prem Techs branded apparel that includes the CWA logo. (Tr. 70:14-21, 88:22-89:19; G.C. Exh. 14.)

The mere fact that Respondent offers such branded apparel with the CWA logo in no way undermines the Company's basis for ensuring that its Prem Techs comply with the Employer's desired image when interfacing with the public. Here, there is no dispute that the Employer at all material times reserved the negotiated contractual right to implement appearance standards "at its discretion." (G.C. Exh. 2 at p. 217; G.C. Exh. 3.) Pursuant to that right, the Employer instituted the BAP Personal Appearance Standards, which expressly articulates the Company's intent "to ensure that AT&T employees project and deliver a professional, business-like image to our customers and community" (Section 14.1); confirms that Prem Techs are required to wear BAP (Section 14.2); and restricts Prem Techs from altering branded apparel (Section 14.3). (G.C. Exh. 6 at pp. 14-15.)

Because the Company reserved the right under the CBA and the Personal Appearance Standards to provide the branded apparel at its discretion, it necessarily had the exclusive and unfettered right to design the branded apparel. Just because the Employer provides some branded apparel that recognizes the existing relationship between CWA and AT&T does not undermine the Employer's basis for seeking to ensure that its employees are dressed professionally in a manner consistent with the Company's desired image. The Company's decision to include the CWA logo on some of its branded apparel does not and cannot constitute a waiver of the Employer's right to enforce its contractual right and negotiated Personal Appearance Standards. Thus, the ALJ's conclusion that the Employer's stated basis for the Personal Appearance is contradicted by its issuance of certain branded apparel with the CWA logo makes no sense.

B. Respondent Implemented And Enforced The Personal Appearance Standards Long Before April 16, 2018.

Local 4900 mistakenly contends that the record evidence is "replete with evidence that the Respondent *only* enforced the Policy on April 16, 2018, as a means to quell the Union's Section 7 mobilization activities in the context of bargaining." As explained in Respondent's Brief in Support of Exceptions, the Employer implemented the Personal Appearance Standards in 2009 and issued updated versions of the Prem Tech Guidelines, including the Personal Appearance Standards, in 2010, 2011, 2013, and 2016. (*See* pp. 30-32 of Respondent's Exceptions Brief.)

As Angie Bickel testified, the Employer consistently enforced the Personal Appearance Standards. (Tr. 103:17-104:21.) Bickel was unaware of a single instance (other than the incident with the Prem Tech with the surname of Terry) in which Indiana Bell permitted a Prem Tech to wear union insignia over his or her branded apparel during work time.

Furthermore, as demonstrated in Indiana Bell's Brief in support of its Exceptions, there is no credible evidence supporting the ALJ's conclusion that the Company gave Prem Techs permission to wear union insignia during work time during purported mobilization efforts in 2009, 2012, and 2015. Neither the General Counsel nor Local 4900 called a single Prem Tech to testify to support their allegation that Indiana Bell allowed Prem Techs to wear CWA buttons or insignia over their branded apparel.

Moreover, the notion that Respondent only enforced the BAP Personal Appearance Standards in reaction to mobilization efforts in 2018 is nonsensical and not supported by the record.[1] The Company invested significant time and resources to drafting the Prem Tech

[1] Local 4900 claims that the record demonstrates that in early 2018, Prem Techs wore and displayed CWA buttons as part of the mobilization efforts. As explained in Respondent's Brief in Support of its Exceptions, there is no credible record evidence demonstrating that Indiana Bell or its supervisors permitted or were aware of Prem Techs wearing union insignia over their branded

Guidelines and the Personal Appearance Standards therein. It did this on multiple occasions – in 2009, 2010, 2011, 2013, and in 2016. Each time, the Employer provided CWA District 4 with notice and an opportunity to bargain over the Prem Tech Guidelines, which CWA District 4 elected not to do. It would make no sense for Respondent to expend such resources for Personal Appearance Standards that it had no intention of enforcing.

As explained in Indiana Bell's Exceptions Brief, the record evidence does not support the ALJ's conclusion that the Employer enforced the BAP Personal Appearance Standards to restrain Prem Techs' protected activity.

C. The Union Waived Its Right To Bargain Over The BAP Personal Appearance Standards.

1. The Contract Coverage Standard Applies.

The Board's recent decision in *MV Transportation*, 368 NLRB No. 66 (2019) provides that the Board will 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.*, slip op. at 2. In this case, there can be no reasonable dispute that the CBA expressly permitted Indiana Bell to implement and enforce its BAP Personal Appearance Standards, as set forth in the Prem Tech Guidelines, which the Employer implemented after giving the Union notice and an opportunity to bargain over the Guidelines, which CWA District 4 declined to do.

Local 4900 nevertheless contends that *MV Transportation* is inapplicable because the clear and unmistakable standard set forth in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)

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apparel in 2018 – or at any time since the Company implemented the Personal Appearance Standards.

applies. However, as explained in Indiana Bell's Exceptions Brief, *Metropolitan Edison* is distinguishable from the present case because, unlike the dispute at issue in this dispute, the parties in *Metropolitan Edison* did not enter into any collectively bargained agreement regarding the statutory rights at issue. Indeed, as the Board in *MV Transportation* explained, in approving the "clear and unmistakable" waiver standard in the *Metropolitan Edison* case, 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.

For these reasons, the Board should apply the contract coverage standard in this case.

2. Irrespective Of Whatever Waiver Standard Applies, Local 4900 Waived Its Right To Bargain Over The Prem Techs' Right To Wear Union Insignia.

The Union claims that the language in the CBA and the BAP Personal Appearance Standards does not suffice to constitute a waiver of the Prem Techs' right to wear union insignia. This contention is incorrect.

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. Where contract language expressly addresses an employer's right to implement a rule or policy unilaterally, the waiver is clear and unmistakable. *Provena Hospitals*, 350 NLRB 808, 815 (2007) (lawful implementation of attendance rules where contract permitted employer "to change ... reporting practices and procedures and/or introduce new or improved ones," "to make and enforce rules of conduct," and ". . . to suspend, discipline and discharge employees"); *Allison Corp.*, 330 NLRB 1363, 1364-65 (2000) (language giving 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) (language permitting employer to pay additional wages clearly and unmistakably waived union's right to bargain over attendance-bonus plan).

Moreover, Section 14.3 of the April 2016 BAP Personal Appearance standards, which the Company lawfully implemented for the reasons explained in the Exceptions Brief, expressly states, "The branded apparel may not be altered in any way." (G.C. Exh. 6 at p. 14 (emphasis added).) This all-encompassing and broad language can in no way be construed to invite or permit Prem Techs to wear anything over the branded apparel the Company provides to them.

Nevertheless, Local 4900 tepidly argues that the Union's decision not to request bargaining regarding the Company's proposed April 2016 Prem Tech Guidelines did not constitute a waiver. In doing so, the Union contends – without any record support whatsoever – that "the Union reasonably believed the amendments to the Policy, which deleted exemplars, including buttons, would have no preclusive effect on Premises Technicians' statutorily protected right to don union insignia." Not a single witness at the hearing testified that anyone expressly interpreted the amendments in that manner, let alone any representatives of Local 4900.

Local 4900 contends that its alleged purchase and distribution of buttons demonstrates that the Union construed the changes in the Personal Appearance Standards to permit Prem Techs to wear union buttons on work time. However, there is no evidence to support this record. In its Answering Brief, the Union cites Pages 122-124 of the hearing transcript to prove its point. However, the testimony cited by Local 4900 on those pages refers to purported efforts by the Union to purchase and disseminate CWA buttons in 2009 – long before the 2016 Personal Appearance Standards. In that testimony, Preston Dorfmeyer of CWA Local 4900 merely

represented that in 2009, he distributed buttons to all employees in the bargaining unit, including Prem Techs, who comprised merely a fraction of the bargaining unit.[2] (Tr. 122:21-123:3.)

D. Local 4900's Arguments Against Collateral Estoppel Are Unavailing.

Seeking to dodge the binding impact of the decision in *Wisconsin Bell, Inc.,* 2016 NLRB LEXIS 506 (2016), Local 4900 contends Respondent failed to establish that it is a party in privity with Wisconsin Bell or that CWA Local 4900 and CWA Local 4622 are parties in privity. This argument is without merit. Indiana Bell is not merely a sister company and co-party to the CBA. Each version of the Prem Tech Guidelines was presented on behalf of all AT&T Midwest companies – including Indiana Bell and Wisconsin Bell – to CWA District 4, which represented, among other CWA local unions, Local 4900 and Local 4622. There were no separate and distinct discussions with the CWA over the Personal Appearance Standards involving Indiana Bell, but not Wisconsin Bell – or *vice versa*. Similarly, there were no separate and distinct discussions with CWA over the Personal Appearance Standards that involved Local 4900, but not Local 4622 – or *vice versa*. (*See* Exceptions Brief, pp. 3, 6-10.) As such, Local 4900's claim that the parties in the two cases are not in privity is baseless.

Moreover, Local 4900 misstates and confuses the basis for the decision in *Wisconsin Bell*. Local 4900 contends that *Wisconsin Bell* is distinguishable because the buttons at issue included a message Wisconsin Bell contended was vulgar and Wisconsin Bell sought to preclude Prem Techs and employees in other classifications from wearing those buttons. Those factors were entirely irrelevant to Judge Muhl's determination that CWA waived the right to bargain over the Personal Appearance Standards. As explained by Judge Muhl, in his own words:

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[2] Dorfmeyer claimed that he saw Prem Techs in 2009 wearing buttons as they left Respondent's yard during work time. While he speculated that supervisors must have seen Prem Techs wearing buttons during work time, he did not receive any acknowledgement from supervisors that those supervisors were aware that Prem Techs were wearing buttons. (Tr. 131:2-9.)

> 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 (emphasis added).

Therefore, Local 4900's contention that the facts on which Judge Muhl relied to reach his waiver determination in *Wisconsin Bell* are distinguishable from the present dispute is false. For the reasons set forth in Indiana Bell's Exceptions Brief, the ALJ erred by failing to apply the collateral estoppel doctrine.

III. CONCLUSION

For all of the above reasons and the reasons asserted in Respondent's Brief in Support of Exceptions, the ALJ's findings and conclusions are without merit and must be reversed, and the Complaint dismissed in its entirety.

Dated: November 26, 2019

Respectfully submitted,

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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 November 26, 2019, I served the within document(s):

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