

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, DC

THE OHIO BELL TELEPHONE COMPANY

and

Case 09-CA-233901

RICHARD WHITMER, an Individual

Zuzana Murarova, Esq.,
for the General Counsel.
Steven J. Sferra, Esq.; Jeffrey A. Seidle, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on July 23, 2019. Rick Whitmer (“the Charging Party/Whitmer”), filed the initial charge in case 09-CA-233901 on January 10, 2019¹, and the first amended charge was filed on March 8, 2019. On March 26, 2019, the second amended charge was filed. The Acting Regional Director for Region 9 of the National Labor Relations Board (“NLRB/the Board”) issued the complaint and notice of hearing against the Ohio Bell Telephone Company (“the Respondent”) on April 8, 2019.² The Respondent filed a timely answer denying all material allegations.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (“NLRA/the Act”) when about on or about September 25 and 28, and October 5, 8, 11, 12, and 16, the Respondent issued attendance occurrences and placed attendance punctuality discussion documents in several employees’ files and, or issued written warnings to several employees because they engaged in concerted protected activities.

¹ All dates hereinafter are in 2018, unless otherwise indicated.

² Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh.” for General Counsel’s exhibit; “R. Exh.” for Respondent’s exhibit; “CP Exh.” for Charging Party’s exhibits; “GC Br.” for General Counsel’s brief; “R. Br.” for Respondent’s brief; and “CP Br.” for Charging Party’s brief.

5 In the posthearing brief filed on September 9, 2019, counsel for the General Counsel noted that the complaint inadvertently failed to specify that “employee Anthony Donnelly (“Donnelly”) received discipline for briefly wearing his street clothes to complain about the condition of his company-issued uniforms on about October 12, 2018 in violation of Section 8(a)(1) and (3) of the Act.” (GC Br. 20.) The Respondent did not file an objection. Based on the General Counsel’s argument and the evidence, I will permit the amendment because it is sufficiently related to existing allegations, has been fully litigated, and the Respondent would suffer no undue prejudice.

10 On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

15 FINDINGS OF FACT

I. JURISDICTION

20 The Respondent, a corporation headquartered in Cleveland, Ohio, provides telecommunications services to customers throughout Indiana, Michigan, Ohio, Wisconsin and a portion of Illinois.³ During the calendar year ending March 1, 2019, the Respondent in conducting its operations provided services valued in excess of \$50,000 for enterprises within the State of Ohio which are directly engaged in interstate commerce. The Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

25 II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent’s Operation

30 The Respondent, a subsidiary of AT&T, provides television, internet, and phone services to businesses and residential customers in the five-state Midwest region of Ohio, Indiana, Michigan, Wisconsin, and parts of Illinois. (Tr. 9–10.) Among other locations, the Respondent has offices and places of business in Columbus and Dublin, Ohio. Andy Bentz (“Bentz”) was the Director Internet and Entertainment Field Service (“IEFS”) for Ohio. During the period at issue, Shawn Jenkins (“Jenkins”) was the area manager network services, technology operations IEFS. Since March 2014, Stephen Hansen (“Hansen”) has been the director of labor relations. His supervisor, Randy White (“White”), is the vice president of labor relations for the Midwest states.

40 In late 2006, the Respondent launched U-Verse, “a terrestrial, i.e., underground service that provides IP-based video, television content, high speed internet and voice service to residential homes via the IP network. In January 2007, Respondent began to hire premises technicians in the Columbus area to install and repair U-Verse services to customers’ homes.” (Tr. 10–11.) The

³ During the hearing, the parties interchangeably used the names “Ohio Bell” and “AT&T” to refer to the Respondent.

premise technicians (“prem techs”) are assigned to various garages throughout the state, including the facilities at issue, the Respondent’s Ternstedt garage (“Ternstedt”) in Columbus, Ohio and the Dublin garage (“Dublin”) in Dublin, Ohio. At the beginning of their work day, the prem techs come to the garages to get their AT&T vans and tools, meet with supervisors if needed, and leave for a day in the field completing work for customers.⁴ During the period at issue, Scott Jones (“Jones”) and Corey Peters (“Peters”) were supervisors at Ternstedt. Ed Griffin (“Griffin”) and Renee Matney (“Matney”) supervised the Dublin location.⁵ Jones, Peters, Griffin and Matney each supervise between 12 to 20 prem techs.

The Communications Workers of America, Local 4320 (“the Local”) is a subdivision of the Communications Workers of America, International Union, AFL–CIO (“CWA”). The CWA has at all material times been the exclusive bargaining representative of the “bargaining unit employees who work in the company’s operations throughout the traditional five state Midwest region of Indiana, Michigan, Ohio, Wisconsin, and a small portion of Illinois.” (Tr. 9–10.) The parties have entered into successive collective-bargaining agreements (“CBA”), the most recent agreement was effective April 12, 2015 through April 14, 2018. “[E]ffective June 14, 2006, and the result of the negotiations conducted during May 2006, Respondent and other affiliated entities executed a memorandum of agreement with CWA, known as the premise technician agreement identified as Appendix F to the part[ies]’ CBA, setting forth the wages and terms and conditions of employment for the newly created job title of premises technician.” (Tr. 10.) After the expiration of the most recent CBA, the bargaining unit members began working without a contract. Consequently, the parties engaged in negotiations throughout 2018.

Since fall 2013, the Charging Party has been employed as a prem tech at Ternstedt; and continued to work there until the spring of 2019, when he went on leave for a medical condition. At all relevant times, Jones was Whitmer’s supervisor.

B. The Respondent’s Dress Code Policy

The Premises & Wire Technician Guidelines (“the Guidelines”) govern workplace expectations for prem techs and wire technicians; and was last updated in April 2016. The Guidelines were in effect during the period at issue. Included in the Guidelines is a section setting forth the terms of the mandatory Branded Apparel Program (“BAP”) for prem techs and other employees. According to the Guidelines, the BAP is “to ensure that AT&T technicians project and deliver a professional, business-like image to our customers and community.”⁶ The Guidelines require that “All technicians will be prepared to work at the start of the work day, in proper branded apparel.” Moreover, section 14.2 of the Guidelines states:

⁴ After the end of their work shifts, an unknown number of prem techs are allowed to house their AT&T vans at their homes. The company-provided vans bear the AT&T logo on multiple sides.

⁵ Manager Network Services, Internet and Entertainment Field Services is the official title for Jones, Peters, Griffin, and Matney.

⁶ Premises Technician Guidelines, sec. 14.1

5 BAP is mandatory for all SD&A Premises & Wire Technicians on work time. No other shirt, hat, pants/shorts, shorts 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.

10 (R Exh. 3.) During a period designated by the Respondent, prem techs are allowed to order company-branded apparel through a company approved online vendor. The Respondent gives prem techs money to order five pairs of branded navy pants, five pairs of polo shirts with the AT&T logo on them, and in some circumstances a hat, jacket, or socks.⁷ Management has been flexible in allowing employees to wear nonbranded coats or jackets in severe cold weather. Supervisors also have allowed nonbranded pants if they are neutral blue, black or navy, and nonbranded hats as long as they are also plain and without a logo.⁸ Prem techs are not allowed to wear denim jeans. Pursuant to the Guidelines, “If the clothing or boots are deemed inappropriate, the technician will be sent home unpaid. This will be considered an unexcused absence until the technician returns to work in the proper attire.” (R. Exh. 3.) While working in the field, prem techs must also wear AT&T identification badges, which include their photograph and the Respondent’s logo.

20 The Respondent developed the Midwest Manager’s Guide to Corrective Action (“MMGCA”) to instruct supervisors on the appropriate disciplinary actions to take against nonmanagement employees for work infractions. Included in the MMCGA is a directive that prem tech supervisors are authorized to issue a written warning and a 1-day suspension to prem techs who failed to comply with the BAP.⁹ Generally nonconforming coats and pants, so long as they are the appropriate color and style, have not resulted in disciplinary action against prem techs. Witnesses agreed that if supervisors observed prem techs in the garage (or the field) wearing nonconforming hats, they would usually instruct them to remove the hat, and the prem tech would comply.

7 There was conflicting testimony about the frequency with which prem techs were allowed to order company-branded apparel.

8 At least one supervisor testified that he does not allow prem techs to wear nonbranded hats. This will be discussed in more detail later in the decision.

9 Testimony differs in some respects on this count. Hansen testified the MMGCA lists the expected discipline but conceded on cross-examination that he had no direct knowledge of it being followed. (Tr. 270–272). In his 3 years as a prem tech and steward, Aaron VanVickle (“VanVickle”) testified that he could not recall a single instance of discipline related to dress code violations. (Tr. 164.) Matney and Griffin acknowledged that for the dress code violations they have observed, they have not issued discipline. (Tr. 304, 309; Tr. 335–336.) Matney, Griffin, and Jones also declined on various occasions to discipline three employees who wore jeans to customers’ homes. (Tr. 292, 304, 320–321.)

C. September 7 Premise Technician Demonstration

5 During a Friday morning “huddle” in August 2018, the prem techs were notified that effective September 2018, the Respondent would implement a mandatory 6-day workweek.¹⁰ The prem techs complained: (1) the window to order apparel was not offered with sufficient frequency; and (2) the “wear and tear” on the branded clothing and vendor mistakes in the ordering process left employees with an insufficient number of branded items to wear, especially for a 6-day mandatory workweek. Prem techs claim that for several years leading to the events of September 7, they made management aware of the complaints about torn and tattered branded apparel and the insufficient number of opportunities to order branded apparel. However, they felt management’s responses were ineffective and apathetic with regard to resolving the BAP problems. On the whole, management denied that prior to September 7, prem techs had complained to them about the poor quality of their branded clothes.¹¹

15 As a result of the announcement about the mandatory 6-day workweek, several of the prem techs began to communicate among themselves about organizing a collective action to protest the change.¹² A prem tech (name unknown) suggested coming to work on Saturday, September 8 in “street clothes” to indicate their displeasure to management about the change. However, Whitmer recommended engaging in the action on Friday (September 7), “because then everybody will see it. They will hear us, and maybe we can get something done, and we can get the uniforms taken care of.” (Tr. 53.) Whitmer spoke with several prem techs in Ternstedt and Dublin encouraging them to participate in the protest on September 7;¹³ and other prem techs also spread word of the idea to those in other garages. Ultimately, only about 30 prem techs from Ternstedt and Dublin participated in the protest. The goal of the September 7, protest was described differently by the witnesses. The various articulated goals were to draw management’s attention to the prem techs’ objection to the mandatory 6-day workweek; force management to acknowledge and resolve

¹⁰ Supervisors at Ternstedt and Dublin held weekly morning meetings with prem techs on Fridays to discuss safety items, and other work-related issues. The meeting is called a “huddle” and lasts from 30 minutes to an hour.

¹¹ Whitmer, Tom Phillips (“Phillips”), VanVinkle, and Ryan Stephens (“Stephens”) heard complaints from coworkers to this effect; and they had conversations with management so felt management was aware of the problem. They also testified that their first-level supervisors would hear their complaints, but then blame bargaining or other issues for the delay, or simply fail to act. Matney, however, denied ignoring complaints about the branded apparel but instead would go through the process to have them replaced by the manufacturer. She further claimed that no one on her team ever came to her with an issue with branded apparel in 2018 up until September 7. Griffin recalled only one complaint, which was resolved within a couple of days. Jones stated he did not recall whether Whitmer ever complained to him about his branded apparel.

¹² Communication about a possible job action to protest the mandatory 6-day workweek occurred in the form of texts and, or telephone calls.

¹³ Whitmer specifically recalled speaking about the possible job protest with VanVickle, McNess (first name unknown), Phillips, Jalen Smith (“J. Smith”), Tim Hall (“Hall”), Derrick Kinsey (“Kinsey”), Hollis Brown (“Brown”), and Stephens.

problems prem techs had getting uniforms; show unity during contract negotiations; and give validity to their collective “irritation and outrage”. (Tr. 54, 169, 206.)

5 On September 7, the huddle was scheduled to begin at 8 a.m. at Ternstedt and Dublin for all the crews. Approximately 30 prem techs came to work at Ternstedt and Dublin in jeans and, or other noncompliant clothing.¹⁴ The Ternstedt supervisors, Jones and Peters, appeared for the Friday huddle for their respective crews and noticed that some of the prem techs were wearing
10 jeans. About 8 to 12 prem techs on Jones’ crew were in nonbranded apparel, and an unstated number in Peters’ crew. Instead of starting the huddles, Jones and Peters left the meeting room to confer with Shawn Jenkins (“Jenkins”), area manager, about what action to take to address the situation. Jones acknowledged, “I think we [Jones and Peters] recognized that it was a possible work action. We weren’t sure.” (Tr. 316.) Jones and Peters proceeded with the huddle until
15 about 40 minutes into the meeting when Jenkins responded by instructing them to tell the prem techs to change into their company-branded clothes; and if they had to leave work to get their clothing, they would be on unpaid time for that period.¹⁵ Consequently, Supervisor Peters instructed the prem techs in his crew in nonbranded apparel to put on their branded apparel and get to work. Jones gave a similar instruction to his crew. Eight of the 15 prem techs who wore jeans and, or other nonbranded clothes to the huddle had company-branded apparel in their work or personal vehicle. They changed into their branded apparel in the garage. Ultimately, all of the
20 Ternstedt prem techs in nonbranded apparel, except Whitmer, changed into company-branded apparel and returned to work the same day. Whitmer went home for the remainder of the day.

25 On September 7, prem techs arrived in the crew rooms at Dublin for the huddle with their respective supervisors, Matney and Griffin. Matney started the huddle with her crew but noticed that all except one of the prem techs were wearing jeans. Consequently, she briefly stepped away from the meeting to contact Area Manager Travis Vandermark (“Vandermark”) for guidance on addressing the situation. Matney continued with the meeting while waiting to hear from Vandermark. Approximately 10 minutes later she received instructions on handling the matter; and told the prem techs that those in nonbranded apparel had to change into their
30 company-branded apparel ready to work. The prem techs complied. However, prem techs who had to leave the premises to change into proper clothing were not paid for that time.

35 Prior to starting the huddle on September 7, Griffin saw several prem techs enter the crew room in jeans. He began the meeting but about 15 minutes later Jason Cook (“Cook”), assistant to the director, and Matney called him into the hallway to tell him to notify all the prem techs

¹⁴ Although the testimony is undisputed that about 30 prem techs came to work on September 7 in nonbranded apparel, the witnesses’ recollection differed from the documentary evidence on the exact number of prem techs in each crew was present on September 7 and the number of prem techs who participated in the action. (GC Exhs. 2–8.)

¹⁵ This differs from Whitmer’s statement in which he asserted that Scott and the managers were on their phones when the meeting was scheduled to start. According to Whitmer, Scott walked into the meeting about 8:40 a.m. and told employees to get into their branded apparel and go to work. The prem techs complied, except for him. Whitmer went home and did not return until the next day.

that they had to change into company-branded apparel before they could begin work. He reentered the crew room and relayed the directive to the prem techs. All of the prem techs on his crew had company-branded clothes in their vehicles or on the premises and were able to quickly change and go to work. Between Ternstedt and Dublin, management estimates that the
 5 Company lost about 25 hours in work productivity because of the action.¹⁶

D. Discipline of Involved Premise Technicians

10 Hansen learned of the September 7, prem techs' protest while he was on the bargaining team for a new CBA and saw a post about it on the Respondent's internal managers' website. Bentz also telephoned Hansen that at "a couple of garages" there were a large number of employees who came to work on September 7, in nonbranded apparel. Hansen discussed the situation with his supervisor, Randy White ("White"), and other [managers] on the bargaining team. Their immediate response was not to pay the prem techs who came to work on September
 15 7 for the time they needed to change into their company-branded apparel. Factors that went into this decision were if they would allow employees to work if they did not have the proper branded apparel and if the answer to that question is no, then those employees should not be paid because they did not come to work prepared to work.¹⁷ Hansen believed the September 7 action was a violation of the prem tech Guidelines, explaining they were concerned it would spread to other
 20 garages in other states at a particularly sensitive time during contract negotiations. However, Hansen admitted that he realized the prem techs coming to work on September 7 was "a planned event. . . ." (Tr. 260-261.) After discussing the situation with White and his "peers," Hansen recommended to Bentz that the prem techs who wore nonbranded apparel to work on September 7, receive a written warning and 1-day suspension. He also discussed his disciplinary
 25 recommendations with business unit managers, Liz Millet ("Millet") and Valerie Hunter ("Hunter"). According to Hansen, due to the ongoing bargaining over a new CBA, management tried to be lenient in meting out discipline which is why they settled on the 1-day suspension and verbal warning.

30 On or about September 28, Scott began meeting individually with prem techs and Whitmer, as their union steward, to interview and discipline them about their action on September 7. Jones and Whitmer, however, quickly agreed to allow Jones to meet collectively with and issue documented verbal warnings to all except two employees who participated in the September 7 action. (GC Exh. 5.)¹⁸ Whitmer was also issued the same discipline in his capacity as a prem tech
 35 because he wore jeans to work on September 7. Jones inadvertently failed to discipline Paul

¹⁶ Hansen testified that the lost in work productivity was based on an estimate that included the overtime some prem techs had to work to cover for others who were not available to work. He also claimed that some customers had to be delayed or rescheduled. (Tr. 278.) He conceded later on cross-examination that he did not have any first-hand knowledge of any customer or employee impacted by the protesting employees' actions. (Tr. 280.)

¹⁷ Hansen insisted that the prem techs were treated no differently than in other instances when employees were sent home without pay to retrieve a driver's license, company identification card, work boots, or other items necessary for the performance of their duties.

¹⁸ The verbal warning letters list either Peters or Jones as the letters' author. (GC Exh. 5.)

Holmes (“Holmes”) and Jeremy Mitchell (“Mitchell”) because they were not working at Ternstedt on September 7. He never corrected the error. Last, Jones acknowledged that he does not recall ever disciplining anyone for nonconformity with the company-branded apparel requirement.

5 On October 5, 8, 11, 12, and 16, Matney issued discipline for both crews in the Dublin garage because Griffin was on paternity leave. She met with each prem tech and asked them a series of questions before issuing the punishment. She retained notes of the interviews showing that several of the prem techs told her they wore jeans on September 7 to protest conditions of employment. (GC Exh. 8.) Although Matney initially denied that any of the prem techs told her
10 the reason they wore jeans on September 7, she later acknowledged that during the disciplinary interview on October 5, a few employees informed her that they wore jeans as part of a union effort. (Tr. 306–309; GC Exh. 8.) In a meeting with Matney, VanVickle was issued discipline later than the other prem techs because he was on vacation. (GC Exh. 6.) Similar to Jones, Matney testified that she has never disciplined a prem tech for wearing non-apparel pants that closely
15 resemble the branded pants. Although Matney has told prem techs wearing nonbranded hats to remove them, she has not disciplined them for it. Griffin has, however, in the past issued documented discussions (“coaching”) when “a couple” of prem techs were caught by him wearing nonbranded hats. (Tr. 344.) In response to the prem tech’s action on September 7, the Respondent also placed attendance punctuality discussion documents in the “files” of employees from both
20 Tendstedt and Dublin who had to leave work to get their uniforms before they could begin work.

The union filed grievances disputing the disciplinary actions issued to all of the prem techs for their actions on September 7. According to the Respondent, it agreed to remove the attendance discussions from the employees’ files. However, the General Counsel contends that the grievances
25 were denied at the third step of the grievance process and have not been resolved. Moreover, the General Counsel insists the grievances cannot be arbitrated because the CBA has expired. (GC Br. 11; Tr. 61–62, 270, 281; GC Exhs. 2, 3.)

30 III. DISCUSSION AND ANALYSIS

The rights guaranteed in Section 7 include the right “to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” See Section 7 of the Act. Section 8(a)(1) of the Act provides that it is an unfair
35 labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

In *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), the Board held that “concerted activities” protected by Section 7 are those “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” However, “the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity.” *Whitaker Corp.*, 289 NLRB 933 (1988) (quoting *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d. 1357, 1365 (4th Cir. 1969)). Individual action is concerted if it is engaged
45 in with the object of initiating or inducing group action. A conversation can constitute concerted

activity when “engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees.” *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co.*, 330 F.2d 683, 685 (3 Cir. 1964)). The object of inducing group action, however, need not be expressed depending on the nature of the conversation. See *Sabo, Inc. d/b/a Hoodview Vending Co.*, 359 NLRB 355, 358–359 (2012) (vacated but incorporated by law *Hoodview Vending Co.*, 362 NLRB 690 (2015)). Moreover, *Meyers I* and *II* does not require that concerted activity be well-organized or effective, it needs only be engaged in for other employees for mutual benefit. See also *Stephens Media*, 356 NLRB 661, 679 (2011) (finding the wearing of red arm bands to be protected concerted activity even where no evidence was offered showing management was aware of their purpose).

1. *Charging Party and other prem techs engaged in concerted protected activity*

I find that the evidence establishes Whitmer and the other prem techs engaged in concerted activity. It is undisputed that the prem techs and several union stewards at Ternstedt and Dublin discussed among themselves that the Respondent had failed to address their complaints about giving them a sufficient supply of BAP-compliant clothing, especially with the mandate to work a mandatory 6-day workweek. After talking with union stewards and coworkers on ways to bring their complaints to management’s attention, the prem techs decided to take collective action and wear street clothes to the huddles on September 7. Whitmer’s and the prem techs’ actions are the epitome of protected union and concerted activity because they came together in an attempt to force management to address their complaints about an insufficient supply of company-branded apparel. See *New River Industries, Inc.*, 945 F.2d 1290, 1294 (4th Cir. 1991) (quoting *City Disposal Systems, Inc.*, 465 U.S. 822, 830 (1984) (under the Act the term “concerted activity” “clearly embraces the activities of employees who have joined together in order to achieve common goals.”).

I also find that despite the Respondent’s protestations to the contrary, it was aware that the prem techs were engaging in a concerted protest. Hansen testified that he believed the prem tech’s September 7, action was “a planned event. . .” (Tr. 260–262.) Hansen noted various demonstrations had occurred in the midst of the parties bargaining over a new contract. In 2018, the Respondent’s other Midwest employees had worn union buttons, picketed, and engaged in various demonstrations to protest workplace conditions. Hansen’s knowledge of the prem techs’ action being a concerted activity is buttressed by his admitted concern, in light of the sporadic 2018 employee demonstrations, that the prem techs’ actions could spread to other garages. Likewise, Jones testified that he and Peters, “recognized it was a possible work action. We weren’t sure.” (Tr. 316.) Matney admitted that during the disciplinary interviews, a few prem techs told her they wore jeans on September 7 to protest working conditions (i.e., insufficient supply of uniforms and the mandatory 6-day workweek). (Tr. 306–307; GC Exh. 8.) See *Kysor Industries Corp.*, 309 NLRB 237 (1992) (finding that the employer knew that employees who assembled at a supervisor’s desk to seek clarification of their work assignments were engaged in protected concerted activity notwithstanding that the employees did not explain their confusion was related to two notices the employer recently issued.).

2. Charging Party and other prem techs concerted activity was protected

Pursuant to section 7 of the Act, concerted activity is protected if it is undertaken for the mutual aid or protection of the employees, 29 U.S.C. § 157 (1976). However, exceptions exist, including where concerted activity constitutes a partial strike or slowdown. *First National Bank of Omaha*, 171 NLRB 1145, 1149 (1968) (“A concerted stoppage, or strike . . . which is ‘partial,’ ‘intermittent,’ or ‘recurrent’ is commonly cited as a type of unprotected activity”). Employees engage in an unprotected partial strike by “refusing to work but remaining in their work areas or withholding their labor from certain portions of their work while continuing to perform other portions.” *Johnnie Johnson Tire Co.*, 271 NLRB 293, 265 (1984). Partial strikes are not protected by the Act because they are attempts by workers to establish working conditions without taking on the risk of the usual consequences associated with a legal strike, such as “loss of pay and risk of being replaced.” *First National Bank*, 171 NLRB at 1151.

Based on the evidence I find that the prem techs’ action was protected under the Act. Under the “mutual aid and protection” clause of the Act, employees are protected if they engage in an act for the common purpose of improving their “terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). There is a myriad of working conditions that employees may seek to improve, including the imposition of dress codes. See *New River Industries, Inc.*, supra at 1294 (“The conditions of employment are sufficiently well identified to include . . . dress codes . . . and the like.”) Accordingly, I find that the September 7, protest pertained to their working condition (effort to obtain a sufficient supply of branded apparel); and therefore, was for their “mutual aid and protection”. The question then becomes whether the prem techs’ action lost the protection of the Act.

The Respondent argues that the prem techs’ action on September 7 lost the protection of the Act because it is “a classic partial strike.” (R. Br. 16.) The reasons the Respondent cites to support its position are: (1) branded apparel is necessary to perform their positions and the prem techs arrival at work without the apparel show they refused to perform one of their assigned duties; (2) most of the prem techs who participated in the action, changed into company-branded apparel immediately when directed because they understood the rule did not allow them to work in jeans; and (3) case law supports the Respondent’s position that by wearing jeans to work the prem techs were engaged in an unprotected partial strike. The General Counsel counters the Respondent’s position by arguing: (1) even a presumptively valid rule violates the Act if, as in the present case, it is applied disparately; (2) when instructed to change into branded apparel, every prem tech except for Whitmer immediately complied; and (3) the Respondent was aware of the concerted protected nature of the prem techs’ action.

I do not find the Respondent’s arguments persuasive. According to the Respondent’s witnesses, prem techs have to wear branded apparel so that customers are able to readily identify them as AT& T employees. Therefore, they need to be in branded apparel when they arrive at customers’ homes or businesses. There is no evidence, however, any of the prem techs who participated in the protest arrived at customers’ homes or businesses in street clothes. The record is clear that when instructed to do so all (except Whitmer) of the prem techs who attended the

5 huddle in street clothes, quickly changed into their branded apparel and went into the field. There is no evidence that other than Whitmer any of the prem techs refused to change into branded apparel or perform any of their duties. Even Whitmer did not refuse to partially perform his job. Rather, he took off the remainder of the day because he did not have clean company-branded apparel to wear for work that day.

10 Moreover, there was credible evidence that the rule requiring the prem techs to wear branded apparel was not consistently applied. Prem techs and, or union stewards Whitmer, Phillips, VanVickle, and Stephens credibly testified that either themselves or other prem techs have worn nonbranded caps and pants to work without being disciplined; and are allowed to wear nonbranded coats in frigid temperatures. Supervisors Matney and Jones also acknowledged that despite observing violations of the branded apparel rule, they have never issued a prem tech discipline because of it. Although Griffin has given a “coaching” to “a couple” of prem techs for wearing nonbranded hats, he admits to allowing prem techs to wear nonbranded pants without repercussions. Likewise, he did not issue discipline to employees he observed wearing nonbranded shirts or coats but rather told them to take it off and they complied. It is also undisputed that prem techs Holmes and Mitchell, who participated in the September 7 action, were not disciplined. It was an oversight, but Jones admitted that once it was discovered the error was not corrected. Based on the evidence, I find that the Respondent did not consistently adhere to its rule that prem techs have to wear company-branded apparel to work.

25 Second, the Respondent’s argument that the prem techs were engaged in a partial strike because they knew that one of the Company’s rules mandated that they wear branded apparel to work is equally unpersuasive. The evidence shows that while the prem techs knew they were required to wear branded apparel, the supervisors’ inconsistent enforcement of the rule rendered the rationale behind it, security, almost meaningless, especially if one considers that employees have to carry company identification badges and drive company-branded vehicles.

30 Third, I find the cases the Respondent relied on to support its arguments are inapposite. In the present case, the prem techs’ intent was to make management aware that there was insufficient access to branded apparel, thus making it difficult to work a mandatory 6-day workweek and comply with the branded apparel rule. Each of the cases cited by the Respondent in support of their unprotected partial strike theory involves specific work duties or tasks that the employees refused to perform, or certain shifts the employees refused to work. *See Honolulu Rapid Transit Co.*, 110 NLRB 1806 (1954) (employees refusing to work on Saturdays or Sundays in several consecutive weeks constituted an unprotected partial strike), *Yale University*, 330 NLRB 246, 247 (1999) (student teaching assistants refusing to submit grades but performing their other duties constituted an unprotected partial strike), and *Audubon Health Care Center*, 268 NLRB 135 (1983) (nurses refusing to cover duties in one section of the hospital while continuing to complete duties in their respective assigned sections was an unprotected partial strike). These cases are distinguishable from the matter at hand because, here, the prem techs were willing to perform their actual job duties (participating in the Friday huddle, gathering their tools, and going to customers locations to perform maintenance and installation, etc.). Moreover, all of the prem techs, except Whitmer, quickly complied with the directive to change into company-branded apparel; and there

is no objective evidence that the prem techs' action caused, if at all, anything more than a *de minimis* delay in serving customers.

5 The Respondent has proffered no case law indicating that violation of a dress code constitutes failure to complete an essential work duty that can be considered an unprotected partial strike. To the contrary there is case law that wearing casual clothing, shirts, or armbands in protest of a work rule is protected concerted activity. See *American Arbitration Assn.*, 233 NLRB 71 (1977) (addressing employee protest actions including wearing jeans to work and sending questionnaires and letters to arbitrators working with the employer, finding the Act did not protect the actions due to the disparagement and ridicule of the employer in the letters and questionnaires, but not for a failure to complete job duties constituting a partial strike); See also *Stephens Media*, supra; *Medco Health Solutions*, 357 NLRB 170 (2011) (finding employee wearing a shirt critical of a company policy in violation of dress code to be protected concerted activity). There is also an extensive series of cases protecting violations of dress codes in the form of wearing union apparel as a protected concerted activity, even where customers might see the non-conforming apparel. See, e.g., *Chinese Daily News*, 353 NLRB 613 (2008) (employer violated the Act by creating a dress code policy prohibiting employees from wearing clothing with the name or logo other than the employer, specifically including the union); *P.S.K. Supermarkets, Inc.*, 349 NLRB 34 (2007) (the Board held the exposure of customers to union buttons, standing alone, is not a special circumstance, nor is the fact that the rule prohibited all buttons, not just union buttons); *Wal-Mart Stores v. NLRB*, 400 F.3d 1093 (8th Cir. 2005), enfg. as modified 340 NLRB 637 (2003) (employer violated the Act because there was no evidence that shirts with union logos interfered with the operation of the store); *Goodyear Tire & Rubber Co.*, 357 NLRB 337 (2011) (employer ban on employees wearing T-shirts that said, "scab" in relation to contract employees was not justified by special circumstances).

Under *Washington Aluminum*,¹⁹ employees can lose protection of the Act if their protests are "unlawful," "violent," in "breach of contract," or "indefensible" because it exhibits "a disloyalty to the workers' employer which . . . [is] unnecessary to carry on the workers' legitimate concerted activities." 370 U.S. at 17. There is no accusation (or evidence) that the prem techs' action was unlawful, violent or exhibited an indefensible disloyalty to the Respondent. While the Respondent may argue that the prem techs violated the branded apparel rule, there is no evidence that their action rose to the level of a "breach of contract." Except for Whitmer, none of the prem techs involved in the action refused to perform their duties that day. Moreover, the majority of the prem techs were able to change into their branded apparel, leave the huddle at their normal start time, and complete their daily assignments. The evidence is nonexistent to minimal that the Respondent suffered financial or other operational harm as a result of the September 7 action.

40 Accordingly, I find that on September 7, the prem techs engaged in concerted protected activity and did not lose protection of the Act. The next question is whether the Respondent disciplined the prem techs for that reason; and I find in the affirmative.

¹⁹ 370 U.S. 9 (1962).

5 The Respondent's managers testified that they issued discipline because the prem techs wore jeans and, or other nonbranded apparel; and I previously found that before issuing discipline several managers were aware of the reasons the prem techs were taking such action. Investigatory notes from some of the discipline interviews establish that a few of the prem techs made clear to management that the September 7 was to protest a condition of employment. Moreover, the formal discipline step forms specifically note that they were being issued because the prem techs wore jeans to work; and two of the supervisors acknowledged that on the day the prem techs wore jeans to the huddle, they highly suspected it was a group action to protest working conditions (insufficient supply of company-branded apparel). Hansen testified that when he learned on the same day of the action that some of the prem techs had branded apparel in their car, he concluded that "it was a planned event. . . ." Jones admitted that he and Peters recognized that the prem techs were engaged in a protest action. Furthermore, the fact that the prem techs only wore the jeans to the huddle and not with customers, the majority of the prem techs had their company-branded apparel in their vehicles, they immediately changed into their company-branded apparel when instructed, and there is no persuasive evidence that their protected activity negatively impacted the Respondent's operations. Consequently, this indicates that the disciplines were based entirely on the prem techs protest regardless of whether they refused to perform their job.

20 Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

25 1. The Respondent, The Ohio Bell Telephone Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

30 2. The Respondent violated Section 8(a)(1) and (3) of the Act by the following conduct:

a. when about September 25, 2018, it issued attendance occurrences and placed attendance punctuality discussion documents in the files of Tyler Hill, Brian Hinkle, and Jalen Smith.

35 b. when about October 12, 2018, it issued attendance occurrences and placed attendance punctuality discussion documents in the files of Anthony Donnelly, Douglas Faiella, and Jesse Canter.

c. when about October 16, 2018, it issued an attendance occurrence and placed an attendance punctuality discussion document in the file of Richard Whitmer.

40 d. when about September 28, 2018, it issued written warnings to employees Richard Whitmer, Sammy Muoy, Willie Cooley, Nick Kness, Derek Kinsey, Kyle Kemper, Scott McAndrew, Thomas Phelps, Tyler Hill, Brian Hinkle, Jalen Smith, Nick Phillips, and Douglas Orr.

e. when about October 5, 2018, it issued written warnings to employees John Senn, Phillip Rengifo, Dennis Kelty, and Justin Doyle.

f. when about October 8, 2018, it issued written warning to employees Brandon Baliuff, Jason Damron, Ryan Stevens, Rajpal Punia, and Ian McMahon.

45 g. when about October 11, 2018, it issued written warnings to employees Jesse Lewis, Douglas Faiella, Jesse Canter, and Aaron VanVickle.

3. The above violations are unfair labor practices that affects commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act except as set forth above.

5

REMEDY

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

10

The Respondent having discriminatorily disciplined named employees must remove from its files (both official and unofficial) all references to the discipline relating to the events of September 7.

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Backpay for said employees because of the discriminatory discipline shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

20

The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate named employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

25

Further, the Respondent will be required to post and communicate by electronic post to employees the attached Appendix and notice that assures its employees that it will respect their rights under the Act.

30

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

35

The Respondent, Ohio Bell Telephone Company, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from

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²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Disciplining or otherwise discriminating against its employees in retaliation for their protected concerted activities.

5 (b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

10 (a) Within 14 days from the date of the Board's Order, make Richard Whitmer, Tyler Hill, Brian Hinkle, Jalen Smith, Anthony Donnelly, Douglas Faiella, and Jesse Canter whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

15 (b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline of Ian McMahon, Justin Doyle, Rajpal Punia, Ryan Stevens, Dennis Kely, Phillip Rengifo, Anthony Donnelly, Aaron VanVickle, Douglas Faiella, Jesse Lewis, Jason Damron, Brandon Balluff, John Senn, Jesse Canter, Richard Whitmer, Sammy Mouy, Willie Cooley, Nick Kness, Derek Kinsey, Kyle Kemper, Scott McAndrew, Thomas Phelps, Tyler Hill,
20 Brian Hinkle, Jalen Smith, Nick Phillips, and Douglas Orr, and within 3 days thereafter notify the same in writing that this has been completed and that the disciplines will not be used against them in any way.

25 (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

30 (d) Within 14 days after service by the Region, post at its Dublin and Ternstedt garages in Columbus, Ohio, copies of the attached notice marked "Appendix."²¹ Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are
35 customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered,
40 defaced, or covered by any other material.

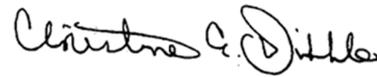
²¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated: Washington, D.C. March 26, 2020

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Christine E. Dibble (CED)
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discipline you or issue you attendance occurrences or attendance/punctuality discussions because you briefly, as a group, wear your street clothes during employee meetings as a way of complaining to us about the condition of your company-issued uniforms or other terms and conditions of your employment.

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

WE WILL remove from our files all references to the discipline of Ian McMahon, Justin Doyle, Rajpal Punia, Ryan Stevens, Dennis Kelty, Phillip Rengifo, Anthony Donnelly, Aaron VanVickle, Douglas Faiella, Jesse Lewis, Jason Damron, Brandon Balluff, John Senn, Jesse Canter, Richard Whitmer, Sammy Mouy, Willie Cooley, Nick Kness, Derek Kinsey, Kyle Kemper, Scott McAndrew, Thomas Phelps, Tyler Hill, Brian Hinkle, Jalen Smith, Nick Phillips, and Douglas Orr for briefly wearing their street clothes to complain about the condition of their company-issued uniforms and **WE WILL** notify them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL remove from our files any attendance occurrences or attendance/punctuality discussions given to Richard Whitmer, Tyler Hill, Brian Hinkle, Jalen Smith, Anthony Donnelly, Douglas Faiella, and Jesse Canter for time spent changing into their uniforms after briefly wearing their street clothes to complain about the condition of their company-issued uniforms, and **WE WILL** notify them in writing that this has been done and that the occurrences or attendance/punctuality documents will not be used against them in any way.

WE WILL pay employees Tyler Hill, Brian Hinkle, Jalen Smith, Anthony Donnelly, Douglas Faiella, and Jesse Canter for the wages and other benefits they lost because we sent them home to change into their uniforms.

The Ohio Bell Telephone Company

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

National Labor Relations Board

550 Main St. Room 3003

Cincinnati, OH 45202-3271

Telephone: (513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/09-CA-233901> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 505-248-5128.