C# 06858

IN THE MATTER OF
THE ARBITRATION

between

UNITED STATES POSTAL SERVICE	)	
	)	
and	)	Case H1N-5G-C 14964
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	

Decision of the Arbitrator

Before
Neil N. Bernstein
Arbitrator

APPEARING:

FOR THE SERVICE: C. B. Weiser, Attorney
Office of Field Legal Services
United States Postal Service
Southern Regional Office
Memphis, Tennessee 38166

FOR THE UNION: Ms. Shailah T. Stewart
Cohen, Weiss & Simon
330 West 42nd Street
New York, New York 10036

OPINION OF THE ARBITRATOR

This proceeding involves the issue whether the Service violated the National Agreement by prohibiting uniformed letter carriers from wearing buttons bearing the insignia of Local 1280 of the Union on their uniforms in its South San Francisco facility in April 1983.

I

The facts of this dispute are not substantially in controversy. In January, 1983, Local 1280 of the Union began a campaign to induce more members of the bargaining unit to become Union members. As part of that campaign, Local 1280 purchased 1,000 buttons, roughly the size of a 25 cent piece, bearing the Union's identifying logo, and distributed them to its members.

Sometime in late February or early March of that year, Union Steward Gary Ono began wearing his Local 1280 button on his uniform during his regular working hours. His display of the button was noticed by the Postmaster, who contacted Regional Labor Relations for advice on handling the matter. Late in April, the Postmaster was told that the wearing of these buttons on uniforms should be prohibited. Steward Ono was ordered by his Supervisor on April 27, 1983 to remove the button from his uniform. Ono complied with the directive.

The Union requested a Step 1 meeting on the order, which was held on May 11, 1983. When the parties were unable to resolve their differences, the Union filed the instant grievance

on May 23, 1983. Sometime between August 5, 1983 and April 11, 1984, the Union, pursuant to Article 15.4 of the National Agreement, withdrew the case from regional arbitration and referred it to Step 4 of the grievance procedure. After the parties were unable to resolve their dispute at Step 4, the Union, on April 20, 1984, certified the case for National arbitration.

II

The Union relies principally on Article 5 of the National Agreement, under which the Service promises that it will not take any actions affecting terms and conditions of employment that are "inconsistent with its obligations under law". The Union claims that this language incorporates all applicable federal and state statutes into the Agreement, thereby providing an arbitrator with contractual authority to enforce them. The statutes incorporated into the Agreement include the National Labor Relations Act.

Under the National Labor Relations Act, the Union continues, the wearing of union buttons is a protected activity, which cannot be prohibited by management in the absence of "special circumstances". The only possible "special circumstances" that might apply in this case would be a perceived need to present a specific image to the public, which "circumstance" must be balanced against the employees' right to wear their union buttons. Finally, the Union presented evidence that the Service had permitted employees to wear advertising penholders and various buttons and insignia with their uniforms, which both

defeats the claim of a need to present a uniform image and amounts to discriminatory enforcement of its regulations regarding uniforms.

III

The Service relies principally on Article 3 of the National Agreement which gives it the right to prescribe a uniform dress to be worn by letter carriers and other designated employees. Pursuant to that authorization, the Service adopted Section 580 of the Employee and Labor Relations Manual, spelling out its uniform dress prescriptions. Section 583 of the Manual sets out the insignia that may be worn with a uniform. That section, after allowing employees to wear stars or bars to indicate their length of service, provides:

> ".32 Other Insignia. Other insignia may not be worn with the uniform. Exception: An award emblem for safe driving or superior accomplishment, or other officially authorized insignia, may be worn on the cap (left side). Employees not required to wear caps may wear the insignia on the lapel of the jacket."

The Service contends that the Union made no attempt to induce the Service to authorize wearing of the Union buttons involved in this case. Therefore, they were prohibited by Section 583.32, which was incorporated into the National Agreement through Article 19. Secondly, the Service claims that enforcement of Part 583.32 has not been discriminatory. Uniformed employees have only been permitted to wear authorized insignia, which the Union has never challenged. Moreover, the Union has waived its

right to contest these provisions by failing to do so when the regulations were originally promulgated. In addition, the Service notes that it was not trying to prevent the Union from soliciting new members, utilizing the methods specifically permitted by Articles 17.6 and 31.1 of the National Agreement.

With respect to the National Labor Relations Act, the Service contends that only the Board and not an arbitrator has authority to enforce its provisions. The Service also maintains that there has been no violation of the Act, because the Union has waived its right to contest the provisions of Part 583. Finally, the Service argues it has the right to prohibit the wearing of emblems and buttons by uniformed employees to protect the Service's public image.

IV

The Arbitrator concludes that the Service violated the National Agreement by ordering uniformed employees in the South San Francisco office to remove local union buttons from their uniforms in April 1983. Therefore the instant grievance, protesting that order, must be sustained.

This conclusion is derived from the following:

A

If the focus of attention is limited to the contractual provisions relating to uniforms, there is considerable merit to the Service's position. Article 3.E gives management the right to "prescribe a uniform dress to be worn by letter carriers". Pursuant to that authority, the Service has enacted Part 580 of

the Employee and Labor Relations Manual. That part includes Section 583.32, which prohibits uniformed employees from wearing insignia with their uniforms, other than "stars and bars" for years of service and "an award emblem for safe driving or superior accomplishment or other authorized insignia".

There is no contention from the Union that the union button involved in this proceeding comes within any of the exceptions. Therefore, the language of Section 583.32 would appear to prohibit such button-wearing by uniformed employees.

B

But Section 583.32 is not the whole story. Article 3 of the National Agreement qualifies management's right to prescribe a uniform dress by making that right "subject to the provisions of the Agreement and consistent with applicable laws and regulations".

Even more directly, Article 5 of the National Agreement contains this explicit commitment from the Service:

ARTICLE 5

PROHIBITION OF UNILATERAL ACTION

> The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

This language appears curious, because the Service is barred from taking any actions that violate the Agreement or "its obligations under the law", even if Article 5 were totally

absent. The only purpose the Article can serve is to incorporate all the Service's "obligations under law" into the Agreement, so as to give the Service's legal obligations the additional status of contractual obligations as well. This incorporation has significance primarily in terms of enforcement mechanism--it enables the signatory unions to utilize the contractual vehicle of arbitration to enforce all of the Service's legal obligations. Moreover, the specific reference to the National Labor Relations Act in the text of Article 5 is persuasive evidence that the parties were especially interested in utilizing the grievance and arbitration procedure spelled out in Article 15 to enforce the Service's NLRB commitments.

In other words, if the Service has taken action which violated the National Labor Relations Act, it thereby violated Article 5. Consequently, the parties have given the Arbitrator jurisdiction to interpret and apply the National Labor Relations Act.

C

The question of the power of employers to regulate or prohibit the wearing of union buttons by their employees is one that has been extensively litigated under the National Labor Relations Act.

More than forty years ago, the Supreme Court of the United States established that the wearing of union buttons is a protected right under Section 7 of the Act. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). As interpreted by the Board,

this holding does not mean that employees have an absolute right to wear union buttons. However, they do have at least a presumptive right to wear them, and any employer rule that curtails that right is "presumptively invalid unless special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety". Malta Construction Co., 276 NLRB No. 171 (1985). The courts have been more lenient toward employers and have also permitted them to curtail the wearing of union buttons where that curtailment is necessary to avoid distraction from work demanding great concentration or is a part of a policy "to project a certain type of image to the public". Pay'N Save Corp. v. NLRB, 641 F.2d 697 (9th Cir. 1981); Burger King Corp. v. NLRB, 725 F.2d 1053 (6th Cir. 1984).

D

Applying these precedents to Section 583.32 is not easy. It appears that the Board itself would find that the Service has no recognized "special circumstance" for banning the wearing of union buttons by uniformed employees and that the application of the rule in that manner would be found to violate Section 8(a)(1) of the NLRA. On the other hand, if the Service appealed such a holding to a circuit court of appeals, there is a strong likelihood that the court would find the rule, at least on its face, to be permissible because the Service, by outlawing insignia, is trying to "project a certain type of image to the public".

Given this state of the law, the Arbitrator holds that Section 583.32, on its face, does not violate the Service's obligations under the National Labor Relations Act, even though it has an inevitable consequence of curtailing the wearing of union buttons.

E

On the other hand, the Arbitrator find that the regulation was applied in a disparate and inconsistent manner in the South San Francisco office. Consequently, the rule was used there, not to project a certain image of uniform and consistent dress. Instead, the Service at that location was regulating the content of the buttons being worn, and was permitting uniformed employees to wear buttons of distracting size and shape if it like the message that the buttons were projecting, and prohibiting them when it did not like the content. This it may not do, where one of the prohibited buttons is a union button.

The Arbitrator does not base this holding on the Union's evidence with respect to stamp pins, penholders or the APWU "letter perfect" button. The Union's evidence failed to establish that the Service permitted uniformed employees to wear these items at the time that it was prohibiting the wearing of union buttons.

The Arbitrator also believes that the Service had the right to allow uniformed employees to wear insignia of "superior accomplishment", such as safe driving awards. Although it is a closer question, he also finds that the Combined Federal Campaign

button, worn by employees who had contributed to the campaign, is permissible as a recognition of a worthwhile accomplishment, similar to a pin for donating blood. These can be worn without destroying the Service policy of presenting a certain image to the public.

The Service violated the Act, and Article 5 of the National Agreement, by permitting uniformed employees to wear the "attitude makes the difference" buttons while prohibiting union buttons. The "attitude" buttons are much larger and gaudier than the union buttons and constituted a much greater distraction from any consistent image. The fact that the attitude buttons were intended to promote a specific internal program, the Employee Involvement Program, does not explain why these buttons were worn by carriers in contact with the public, where the image was most important. Nor does it matter that the Employee Involvement Program was a joint effort between the Service and the Union.

By banning the union buttons while permitting the "attitude" buttons, the Service enforced its rule in a discriminatory manner and destroyed any "special circumstance" that could have justified its prohibition. Consequently, the ban violated the Service's obligation under the National Labor Relations Act and also Article 5 of the National Agreement.

THE AWARD

The grievance filed on May 22, 1983 on behalf of Branch 1280 is sustained. The Service is directed to refrain from prohibiting the wearing of union buttons whenever it permits

the wearing of any items other than stars and bars, safe driving awards or other insignia which recognize special accomplishments.

Neil N. Bernstein
Arbitrator

Dated: March 11, 1987