

Woodland Molded Plastics Corp. and Warehouse, Mail Order, Office Technical & Professional Employees Union, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner.
Case 13-RC-15021

June 26, 1980

**DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION**

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the objection to an election¹ held on April 18, 1979, and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs and, contrary to the Hearing Officer, finds merit to the Petitioner's objection.

In its objection, the Petitioner alleges that, during the critical period between the filing of the petition on March 8, 1979, and the election, the Employer, through its secretary-treasury, David Blackburn,² engaged in improper surveillance of its employees' union activities.

The facts, which are essentially undisputed, reveal that on March 26 and on March 29, 1979, Blackburn stood outside the Employer's premises and openly observed the Petitioner's organizers hand out literature to employees and engage them in conversation. On each occasion, Blackburn's observation of their activities lasted from 10 to 15 minutes. The Hearing Officer found that on both occasions the Petitioner's representatives were situated on public, rather than on company, property. The Employer, while not contesting this finding, nevertheless points out that the union organizers had previously been seen on its property,³ and that the sole reason for Blackburn's admitted observations of the Petitioner's and its employees' activities on March 26 and 29 was to insure that the union organizers remained off its property.

While we do not dispute the Employer's assertion that it had a legitimate right to keep the Petitioner's organizers off its property, we find that under the circumstances herein Blackburn's actions as described above were well in excess of any required to protect the Employer's legitimate inter-

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 20 for, and 23 against, the Petitioner; there were 2 challenged ballots, an insufficient number to affect the results.

² The Hearing Officer inadvertently referred to Blackburn as the Employer's vice president. The record, however, reveals that Blackburn is the Employer's secretary-treasurer.

³ It is undisputed that on March 2, 1979, the Petitioner's organizers were seen on company property and were thereafter asked to leave by the local police.

ests. Thus, if, as Blackburn suggests, he had gone out on March 26 and 29 to investigate reports that the union organizers were on company property, once having determined that the reports were unfounded, as indeed they were, there would have been no further basis for him to continue observing the activities that were taking place between the Union's organizers and the employees. Nevertheless, Blackburn chose to remain outside, in full view, observing what transpired between the Petitioner's representatives and the employees for what amounted to an extended period of time. Indeed, Blackburn offered no plausible explanation as to why it was necessary for him to prolong his observations once he had determined that the union organizers were not on company property as had been reported. Under these circumstances, we can only conclude that Blackburn's purpose in continuing to observe the events occurring outside the Employer's plant on March 26 and 29 was to effectively survey the union activities of the employees and to convey to said employees the impression that they were being watched.⁴ By engaging in such conduct, we find that the Employer has destroyed the laboratory conditions necessary for the conduct of a free and fair election. Accordingly, we shall sustain the Petitioner's objection to the election held on April 18, 1979, and shall order that election set aside and a new one conducted.

ORDER

It is hereby ordered that the election held on April 18, 1979, be, and it hereby is, set aside, and that a new election be held as directed below.

[Direction of Second Election omitted from publication.]⁵

MEMBER TRUESDALE, dissenting:

Contrary to my colleagues, I would adopt the Hearing Officer's conclusion that the Employer did not engage in unlawful surveillance and his recommendation that the Petitioner's objection be overruled and the results of the election be certified.

As more fully set forth in the Hearing Officer's report, the pertinent portions of which are attached hereto as an appendix, the Hearing Officer found that the Petitioner's organizers periodically conducted their campaign on the Employer's premises.⁶ The Hearing Officer further found that, on each of two subsequent occasions during the critical period, Blackburn, the Employer's secretary-

⁴ See *Ravenswood Electronics Corporation*, 232 NLRB 600 (1977), and *Shrewsbury Nursing Home, Inc.*, 227 NLRB 47 (1976).

⁵ [*Excelsior* footnote omitted from publication.]

⁶ The Hearing Officer relied, *inter alia*, on the admission of the Petitioner's chief witness.

treasurer, observed the organizers' handbilling activities for 10 to 15 minutes. The Hearing Officer credited Blackburn's testimony, however, that he did so only after having received reports that the organizers were on company property and solely in order to enforce the Employer's unquestioned right to keep nonemployee organizers off its premises.

In reversing the Hearing Officer, my colleagues do not dispute his factual findings. Nor do they dispute his findings that the Employer had a legitimate right to keep the Petitioner's organizers off its property. Nevertheless, they conclude that Blackburn's conduct was objectionable. They do so on the basis that, after having determined that the organizers were not in fact on the Employer's property on those two occasions, Blackburn nevertheless chose to remain outside the plant "in full view" to observe the organizers' activities.⁷ My colleagues also find that on each occasion Blackburn offered no plausible explanation for remaining outside for what they find to be an "extended" period of time. Contrary to the Hearing Officer, the majority concludes that the "only purpose" for Blackburn's continuing to observe the events on those two occasions was to survey the union activities of the employees.

My colleagues' reasoning is both faulty and unpersuasive. Thus, the uncontroverted evidence is that Blackburn came outside for a lawful purpose: to keep the Petitioner's organizers off the Employer's premises. Given this concession of Blackburn's legitimate purpose in observing such activities in the first place, it is clear to me that Blackburn's assertion that he continued to observe the organizers' activities solely to insure that they remained off company property is not only a plausible explanation for his conduct of 10 to 15 minutes' duration on both occasions, but also, as found by the Hearing Officer, is an assertion well supported by the record.⁸

Having chosen to engage in organizational activity at the Employer's premises, the Petitioner

⁷ Although my colleagues refer to Blackburn as having remained outside "in full view" during both the March 26 and 29 incidents, it is clear from the testimony of both the Employer's witnesses that Blackburn sat in his car, which was parked on the company lot, for the entire 10- to 15-minute period during the March 29 incident. However, in view of my other findings herein, I place no special significance on that fact.

⁸ As indicated by my colleagues, it is undisputed that on March 2 the Petitioner's organizers entered onto company property, and that the police, after being called to the plant by Blackburn, instructed them to remain on public property. Further, the Hearing Officer noted Blackburn's testimony that, prior to the incident on March 29, he had asked the "Union people" to get off company premises four times that day. The Petitioner's chief witness did not controvert this testimony. Blackburn also testified that on several previous occasions he had to ask the organizers to leave the premises, and that on another prior occasion he had to escort an organizer off company property. As noted above, the Petitioner concedes that its organizers, in fact, periodically entered onto the Employer's property.

should have no cause to complain that the Employer observed such activity.⁹ There is no evidence, and indeed no contention, that Blackburn made notes or took photographs of the organizational activity. In the circumstances present here, I am unable to conclude that, merely because the nonemployee organizers were not on the Employer's property during the limited time that Blackburn appeared outside the plant on the two occasions involved, Blackburn's conduct thereby became unlawful.¹⁰

In view of the foregoing, I cannot join in my colleagues' finding that the Employer has engaged in objectionable conduct. I therefore dissent from their directing a second election herein.

⁹ *Porta Systems Corporation*, 238 NLRB 192 (1978); *Chemtronics, Inc.*, 236 NLRB 178 (1978); *Acacio Guerra, Individually; Columbia Casuals, Inc.; Guerra Garments; and Island Pond Mfg. Co.*, 180 NLRB 741 (1970); *Dumas, Inc. d/b/a Sterling Manufacturing Company*, 169 NLRB 892 (1968); *Milco, Inc., T.O.D. Manufacturing Co., Inc. and Allan Marine Division of Jervis Corp.*, 159 NLRB 812 (1966).

¹⁰ *Ravenswood Electronics Corporation*, 232 NLRB 609 (1977), and *Shrewsbury Nursing Home, Inc.*, 227 NLRB 47 (1976), relied on by my colleagues, are clearly distinguishable from the instant case. Thus, neither of these cases involved a situation, as here, in which nonemployee organizers periodically entered onto the employer's premises despite the employer's efforts to prohibit them from doing so. Furthermore, unlike *Shrewsbury*, the Employer's observation here was limited in duration and specifically was in response to reports that the organizers had entered onto company property. Finally, unlike here, in *Ravenswood* it does not appear that the employer offered any reason for its conduct, and in *Shrewsbury* the Board found that none of the employer's asserted reasons for its conduct was supported by the facts.

Appendix

The Petitioner withdrew all of its objections save one: the allegation that the Employer engaged in surveillance of its employees union activities. The Union started to organize at the Employer's premises around February 27, 1979; the petition was filed on March 8, 1979. Much testimony was introduced about an incident that took place on March 2, 1979. On this occasion David Blackburn the Company Vice-President, and the man allegedly responsible for the subsequent surveillance, drove his son to work. When the son stepped out of the car an organizer handed him a union card. This led a few minutes later to an altercation. Blackburn allegedly tried to run down a union organizer; the union representative may have threatened Blackburn. About 15 minutes later Blackburn came back outside the plant and watched the Union organizers talking to and soliciting employees. Since this incident occurred outside the critical period I can only think of one reason why the Petitioner put it in the record: to shed light on the motive behind Blackburn's subsequent behavior. In this case there is not much dispute about the facts. In fact are there no critical credibility issues to resolve. The issue to be decided is Blackburn's motive in coming out to watch the Union organizers on subsequent occasions: was he trying to spot employee union activities or was he trying to make sure that the Union organizers, who were not employees, stayed off the Company premises.

This March 2 incident does not tend to show an unlawful motive. Before Blackburn came back out and watched the union organizers he had already called the police. He was standing outside waiting for the police to come. Further, on this occasion, by their own admission the union organizers were on company property.

The union officials testified to two other incidents the first occurring on March 26, 1979. The Union was out handbilling that day around 3 in the afternoon. About 10 or 15 minutes later Blackburn came outside and stood there for about 10 or 15 minutes. The union witness claims that during this period they gave handbills to or talked to some six or seven employees; Blackburn was some 12 feet away. During this time they were on public property.

A second incident took place on March 29, 1979 again in the afternoon. According to the union witness, Blackburn came out and sat in his car for about 10 or 15 minutes as the Union talked to some six or seven employees. The car was parked on the company parking lot and the estimation is that Blackburn was some 10 to 15 feet away from the union organizers. Again the Union was on public property.

Mr. Blackburn did not deny the substance of either one of these allegations. Although he could not recall the dates of the incidents he admitted that he had engaged in this activity. He did deny that there were any employees present when he came out and stood there the first time watching the union organizers. The second shift starts at 3:15 p.m. and the first shift ends at 3:30 p.m. He said that he purposely came out after the second shift employees had started work and left before the first shift employees came out. He did admit that there were employees present on the occasion when he sat in his car and on other occasions when he came out of the plant to watch the union organizers. It is unlikely that he could have been so precise in his timing on March 26 or remembered that incident with sufficient particularity. Therefore, I credit the union organizer that employees were present during the March 26, incident.

Blackburn said that the only times he came out to watch the Union organizers was when he had received reports either directly from employees or transmitted from foreman that they were on company property. He testified about one occasion when the organizers had almost reach the back door of the plant and he had to walk them off the property. As for the incident when he sat in the car, he said he had previously asked the union people to get off the company property four times that day; he sat in his car for 15 minutes to make sure they stayed off the premises.

Blackburn testified that every time the union organizers were out at the plant he had to go outside to tell them to get off the company property; on some of these occasions employees were present. He said that he only stayed out and watched them for any length of time when the organizers repeatedly returned to the company premises during any one visit. His asserted reasons for being out there was to make sure they remained on public property.

The chief witness for the Petitioner, a nonemployee organizer, testified that they came out to the plant on 7 different days and that on 3 of these days they were out there more than once; most of these times were after the petition was filed. This witness said that they did go on to the company grounds periodically though for the most part they stayed on public property; particularly since on March 2 the police had told them to stay off the Employer premises. This particular witness who was the one who testified about the incidents of March 26 and March 29 did not indicate whether the union people had violated the Employer's space before Mr. Blackburn made his appearance on those days.

While there is a difference in emphasis, there is no real credibility dispute. Blackburn's asserted reason for going out of the plant to watch the union organizers is supported by the record: the union organizers did in fact conduct their activities periodically on the Employer's premises. Further, there is no reason to discredit Blackburn's further assertion that he only went out to watch the union organizers after he had received reports that they had entered the company grounds. He said that he was careful to only go out on these occasions because he had been advised what to do by his lawyer.

Petitioner argues that the Employer would have had no reason to be concerned about union organizers being on its premises: other outside [people] such as salesmen are regularly allowed to come on company property. Further after March 2, Blackburn made no further attempt to have the organizers arrested; he did not even call the police.

This argument misconstrues the applicable law. First, an employer is free to keep nonemployee organizers off his property even if he allows others on. *Babcock and Wilcox Co.*, (Sup. Ct., 1956) 351 U.S. 105. Second, if the Union chooses to engage in its activities on the Employer's premises then it must run the risk [of]the Employer observing these activities; it is not up to the Employer to provide reasons to justify its conduct. *Porta Systems Corporation*, 238 NLRB 192; *Chemtronics Inc.*, 236 NLRB 178. Therefore, I recommend that the Petitioner's remaining objection be overruled, and that the election results be certified.