

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

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MACLEAN POWER SYSTEMS
d/b/a MACLEAN–DIXIE

10

and

CASE 10–CA–36799

UNITED STEELWORKERS OF
AMERICA, AFL–CIO–CLC

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Gregory Powell, Esq., for the General Counsel
Mr. Samuel H. Penn, Sr., for the Charging Party
*Mitchell G. Allen, Esq. (Maynard, Cooper &
Gale, PC)*, for the Respondent

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BENCH DECISION AND CERTIFICATION

Keltner W. Locke, Administrative Law Judge: I heard this case on August 17, 2007 in Birmingham, Alabama. After the parties rested, I heard oral argument and, on August 20, 2007, issued a bench decision pursuant to Section 102.35(a)(10) of the Board’s Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as “Appendix A,” the portion of the transcript containing this decision.¹

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In the attached bench decision, I concluded that the presence of Respondent’s managers near union handbillers on April 23, 2007 did not violate the Act. The following legal analysis supplements that in the bench decision.

Additional Legal Analysis

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As discussed in the bench decision, this case involves the unexpected appearance of two Union organizers passing out handbills at the gates of Respondent’s plant. Neither of these handbillers was employed by Respondent and neither had applied to become an employee of Respondent. Strictly speaking, therefore, management’s observation of these two individuals

¹ The bench decision appears in uncorrected form at pages 177 through 184 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

does not constitute unlawful surveillance of employees. See *Wackenhut Corporation*, 348 NLRB No. 93, slip op. at 2 (December 19, 2006).

5 However, the Complaint alleges that Respondent engaged in surveillance of employees' responses to the handbilling activity. In other words, management might infer something about an employee's union sympathies from whether the employee accepted or declined the handbill. Thus, in *Arrow Automotive Industries*, 258 NLRB 860 (1981), the Board found that an employer violated Section 8(a)(1) by its surveillance of handbilling even though none of the handbillers was an employee of the respondent.

10 The Complaint also alleges that Respondent interfered with the rights of employees to receive handbills. The government bases this allegation on the presence of the managers close to the handbillers. The government also contends that one manager, Anthony Popwell, came between the handbiller and a driver and did so in four instances. Based on the credited evidence, I find that Plant Manager Popwell stood about 10 to 15 feet from Organizer Penn and that Human Resources Manager Dennis Veigl stood a similar distance from Organizer Brown. The credited evidence does not establish that either manager came between a handbiller and a driver.

20 The record does not establish that the organizers trespassed on Respondent's property. In fact, the witnesses expressed some uncertainty about exactly where Respondent's property began. The handbillers assumed that certain landmarks, such as power lines, would be located on public right-of-way, and, based on those assumptions, did not cross over onto what they believed to be Respondent's property.

25 In the absence of more specific evidence regarding the location of the handbillers, I will presume that they limited their activities to public right-of-way. However, this right-of-way did include the access drives leading out through the gates and terminating in Red Hollow Road. Respondent's employees used these drives both in coming to the plant and in leaving it.

30 The record does not establish precisely when Plant Manager Popwell and Human Resources Manager Veigl approached the two Union organizers, but it was some time between about 1:15 and 2:00 p.m., when the afternoon shift began, greatly increasing traffic flow into the Respondent's property. Initially when Popwell arrived at Gate 2, Penn was standing in the middle of the drive, close to the gate. Although the evidence does not establish whether or not Penn actually was on Respondent's property, his position in the middle of the drive interfered with the flow of traffic into the plant area. (In making this finding, I have relied in part on the diagram prepared by Plant Manager Popwell and received in evidence as Board Exhibit 1, and on Popwell's testimony, which I credit.)

40 When Popwell initially told Penn to move, Penn replied that he had a right to be there. At that point, Popwell said that if Penn would not move, he would call the sheriff. From the record, it is not clear whether Penn moved before or after Popwell began to call the sheriff's department on his cellphone. Although Popwell reported the presence of the handbillers to the sheriff's department, he did not request their arrest and did not threaten the handbillers with arrest. No employee of Respondent heard either Popwell's discussion with Penn or his call to the sheriff's department. After the handbillers left, Popwell again called the sheriff's department to report that they were gone.

In their testimony, the organizers tried to downplay any traffic congestion caused by the handbilling. However, I find that the presence of the handbillers at shift change did indeed cause a backup in traffic because the handbilling slowed the entry of vehicles onto Respondent’s property. Penn’s testimony, quoted in the bench decision – that Popwell opened the closed side of the gate to “alleviate the bottleneck of cars trying to get into the plant” – implicitly recognizes the traffic problem.

As noted above, although Penn testified that Popwell came between him and one of the cars he was trying to approach, and did this four times, I have not credited this testimony. Rather, I have found that Popwell did not interfere with the handbilling in any way, but instead limited his activity to motioning to drivers to keep going towards the plant.

Neither Popwell nor Veigl photographed the handbilling, and neither manager took notes concerning which employees accepted a handbill. On one occasion, an employee approached Popwell and asked what was happening. Popwell ascertained from the employee that he was on duty and told him to return to work. Before the employee left, he walked to the Union organizer and received a handbill.

The record contains no evidence of antiunion animus and I conclude that such animus did not motivate the actions of either Popwell or Veigl. Similarly, I find that Popwell notified the sheriff’s department because he was concerned about traffic backups caused by the handbilling, and not because of hostility to the Union. However, as noted in the bench decision, the presence or absence of animus does not determine whether an employer’s action constitutes unlawful interference under Section 8(a)(1) of the Act. In determining whether particular activity violates Section 8(a)(1), the Board applies an objective standard to decide whether the activity reasonably would interfere with, restrain or coerce employees in the exercise of their Section 7 rights. See, e.g., *Scripps Memorial Hospital Encinitas*, 347 NLRB No. 4 (May 15, 2006).

Managers’ Presence During Handbilling

The Board has long held “that management officials may observe public union activity, particularly where such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary.” *Arrow Automotive Industries*, above, citing *Metal Industries, Inc.*, 251 NLRB 1523 (1980).

The General Counsel bears the burden of proving that the management officials observing public union activity have done “something out of the ordinary.” In the present case, the General Counsel elicited testimony from the managers that directing traffic was not an ordinary part of their job duties.

The General Counsel further argues that the presence of high–level managers directing traffic inherently chilled the exercise of Section 7 rights. If Respondent simply had been concerned about traffic backup, the General Counsel contends, it would have sent security guards out to direct the traffic rather than use managers for that purpose.

However, the General Counsel has not established that Respondent ordinarily uses security guards to direct traffic coming in and out of the plant. Indeed, the government hasn't shown that anyone directs traffic – or that anyone needs to direct traffic – except in those unusual circumstances when something has caused a bottleneck at the gates.

Although the record suggests that Respondent had security guards on the premises at night, no evidence establishes that they were on duty at 2 o'clock in the afternoon. Notwithstanding the General Counsel's argument, I can infer nothing from the absence of security guards at the gates.

As a practical matter, Respondent did not have time to hire or reschedule the work shifts of security guards. Respondent received no advance notice that the handbillers would be coming, and management had to decide on the spot how to handle the resulting traffic problem. To say now, in hindsight, that management should have sent someone else out to the gates amounts to second guessing.

Considering that the record fails to establish that Respondent customarily posts security guards at its gates at 2:00 p.m., the presence of such uniformed personnel at that time of day arguably would be just as "out of the ordinary" as the presence of managers. If Respondent's representatives at the gates had been security guards rather than managers, could the General Counsel then argue that this "out of the ordinary" action constituted an unfair labor practice?

The fundamental inquiry must concern what effect the managers' presence reasonably would have on employee rights. Obviously, not everything which is "out of the ordinary" chills the exercise of such rights. Instead, the Board has focused on unusual actions which reasonably would communicate a message to employees discouraging them from protected activity. Accordingly, the phrase "out of the ordinary," when used to test the legality of employer action, must be treated as a term of art, its definition firmly rooted in Board precedent.

In *Aladdin Gaming, LLC*, 345 NLRB No. 41 (August 22, 2005), the Board stated the general rule that a supervisor's "routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance," and the exception: "However, an employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and therefore coercive. *Sands Hotel & Casino, San Juan*, 306 NLRB 172 (1992), *enfd. sub nom mem S.J.R.R., Inc. v. NLRB*, 993 F.2d 913 (D.C.Cir. 1993)." The Board then listed three factors to be considered: "Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation."

Such "other coercive behavior" can take a number of forms. For example, in *Kenworth Truck Co.*, 327 NLRB 497, 501 (1999), the supervisor observing the handbilling repeatedly and erroneously accused the handbillers of trespassing and, sometimes shouting, ordered them off company property.

In *Arrow Automotive Industries*, above, the Board considered another factor: The number of supervisors present. More specifically, it considered whether the number of

supervisors present exceeded the number needed to perform legitimate functions:

5 Soon after the handbilling began. . . 11 of Respondent’s supervisors lined up in varying numbers near each of the three gates, observing employees as they drove past the union handbillers. The testimony is unequivocal that the presence of the supervisors was highly unusual, and we agree with the Administrative Law Judge’s conclusion that the supervisors’ presence was “deliberately calculated. . .to show and demonstrate observation, in numbers and force. . .” While we also agree with the Respondent that it has a legitimate interest in preserving the integrity of its property, we find that its actions went far beyond what was necessary to accomplish this end. As noted by the Administrative Law Judge, the union official in charge of the handbilling ascertained at the outset the location of the company property line, and there is no evidence that the handbillers showed any intention of encroaching on Respondent’s property.

15 258 NLRB at 860–861 (italics added; footnotes omitted). See also *PartyLite Worldwide, Inc.*, 344 NLRB No. 155 (July 29, 2005), a representation case in which the Board found that the employer had engaged in objectionable surveillance. In that case, the employer stationed a large number of supervisors and managers both around its parking lot and at entrances while union organizers distributed handbills to employees. The Board considered employee testimony that the presence of so many supervisors and managers was surprising and unusual. Significantly, the Board also noted that “the Employer established no legitimate explanation for why any of its managers and supervisors were stationed in the parking lot during the Petitioner’s handbilling.”

25 Unlike the employer in *PartyLite Worldwide*, the Respondent in this case established a legitimate reason for the presence of the managers, preventing a backup of traffic on Red Hollow Road during the shift change. Moreover, unlike the employers in *Arrow Automotive Industries* and *PartyLite Worldwide*, Respondent placed only one of its managers at each of the two gates, which were about 100 yards apart. That was the minimum number necessary to accomplish the legitimate purpose of keeping traffic moving through the gates during the shift change. Also unlike *Arrow Automotive Industries*, one of the handbillers initially indicated an unwillingness to move from the middle of the drive far enough to prevent slowing of the traffic.

35 As to the indicia of coerciveness listed by the Board in *Aladdin Gaming, LLC*, at each gate, the manager stood within a few yards of the cars coming through. Although the managers did not note the identities of the employees who took handbills, they were close enough to do so. Accordingly, that factor weighs towards a finding that the presence of the managers was coercive.

40 The managers stayed at the gates until the handbillers left, but the entire handbilling lasted only about an hour. The managers stayed at the gates no longer than their legitimate reason for being there, preventing a traffic bottleneck. The duration of the managers’ presence near the handbillers does not, in my view, militate in favor of finding their presence coercive.

45 The record does not establish that Respondent engaged in any other behavior which might be considered “coercive.” The absence of such behavior weighs in favor of a finding that the managers’ presence at the gates was noncoercive.

5 The Board applies an objective standard, deciding how employees reasonably would react, rather than examining evidence of how employees actually did react to the presence of the managers near the handbillers. However, it may be noted that the credible evidence does not establish that the managers' presence discouraged employees from accepting handbills. The Union organizers gave away all the handbills they had brought.

10 Although Brown's testimony suggested that one employee appeared to be apprehensive, I am highly skeptical of that testimony, which was conclusory and offered no facts to support Brown's conclusion. It would be difficult for anyone to judge the state of mind of someone in a car driving through the gate, even if it stopped momentarily.

15 The only credible evidence of employee reaction suggests that Popwell's presence at gate 2 did not dissuade employees from accepting handbills. Thus, even after Popwell told an employee, who was "on the clock," to go back to work, the employee went to the organizer and got a handbill before returning to his post. That action certainly does not indicate that Popwell's presence had a scarecrow effect. However, because the Board applies an objective standard, I do not consider this evidence in determining whether the presence of the managers interfered with the exercise of Section 7 rights.

20 On the other hand, it is appropriate to take into account that the Union organizers were distributing handbills at Respondent's plant for the first time. The record does not establish that employees had any advance knowledge that Union representatives would be present and thus had no way to know, before accepting a handbill, that it pertained to the Union.

25 The record does not support a finding that, in the past, Respondent had done or said anything to lead employees to believe it had an antiunion attitude. However, even should I assume that an employee would be reluctant to accept a Union handbill while a manager was watching, that assumption would apply only if the employee knew that the document pertained to the Union. The record does not establish that a typical employee driving into work that afternoon would have been aware that the man offering him something to read was a Union representative.

35 Two photographs of Organizer Penn, taken at Gate 2 on the day of the handbilling, are in evidence. Penn does not appear to be wearing any clothing which would identify him with the Union. (Other photographs in evidence show a woman wearing a Union shirt, but she did not engage in the handbilling and the record does not indicate that she was present at the time of the handbilling.)

40 Neither manager made any gestures signaling that employees should not accept handbills. They simply waved the cars through the gate. Whatever the incidental effect on the organizers' efforts to distribute handbills, it was perfectly legitimate, and noncoercive, for the managers to motion for the drivers to move on because otherwise, during the shift change, traffic would have backed up on Red Hollow Road.

45 Moreover, the managers' presence at the gates was unaccompanied by coercive conduct. These facts align the present case not with *Arrow Automotive Industries* but with *Aladdin Gardens*, above, in which the Board found supervisors' presence to be nonviolative.

After examining the evidence in light of the Board’s *Aladdin Gaming* and *Arrow Automotive Industries* standards, I conclude that the two managers’ actions were not “out of the ordinary” within the meaning of the Board decisions using that term. Further, I conclude that the presence of the two managers at Respondent’s gates during the handbilling did not constitute unlawful surveillance or otherwise interfere with, restrain or coerce employees in the exercise of their Section 7 rights. See *Wackenhut Corp.*, above.

Calling the Sheriff’s Department

In determining that Popwell did not violate the Act either by threatening to phone the sheriff’s department or by doing so, I have concluded that the present facts distinguish this case from *Roadway Package Systems*, 302 NLRB 961 (1991). In that case the Board, citing *All American Gourmet*, 292 NLRB 1111 fn. 2 (1989), held that an employer violated Section 8(a)(1) when a manager told employee handbillers he would call the police, and then did call the police.

In the present case, however, Manager Popwell did not tell employees that he was going to call the sheriff’s department. Rather, he made this statement to a Union organizer who was not an employee. The record does not establish that any of Respondent’s employees heard either Popwell’s statement or his cellphone call to the sheriff’s department. See *Wackenhut Corporation*, above, 348 NLRB No. 93, slip op. at 2.

In some circumstances, however, an employer violates the Act by threatening with arrest a union representative who is not its employee. Such a threat of arrest may constitute unlawful interference, restraint or coercion even if the person threatened isn’t an employee but instead is an agent of the employees and is engaged in protected activity on their behalf. In other words, when employees have selected a union to be their exclusive representative, interference with the protected activities of a union official will constitute, in certain circumstances, interference with the rights of the employees which the union represents.

For example, *Golden Stevedoring Co., Inc.*, 335 NLRB 410, 413–415 (August 27, 2001), involved a company which performed work at a public dock. While its striking employees picketed at a gate reserved for their employer’s use, their union agent investigated to determine whether they could picket lawfully at other gates. From vantage points on public property, the union agent watched the “neutral gates” to learn whether employees or suppliers of the primary employer actually had been using those gates, thereby “tainting” the gates and making it lawful to picket at them.

The employer sent the union agent letters threatening him with arrest, even though the agent had not trespassed on the employer’s property. The Board held that even though the union agent was not an employee of this employer, the threats directed at him unlawfully interfered with employees’ exercise of their Section 7 rights.

This conclusion flows rather effortlessly from general notions about the agent–principal relationship. Interfering with the lawful activities of an agent on his principal’s behalf harms the principal as well as the agent. However, the present facts differ from *Golden Stevedoring* in a significant way. Respondent’s employees had not chosen the Union to represent them.

Under some circumstances, however, a threat which dissuades a union organizer from contacting an employee might interfere unlawfully with the exercise of Section 7 rights even though the union did not represent the employee and the union official was in no sense the employees’ agent. The present record, though, does not afford an opportunity to explore the contours of that principle because the evidence does not establish that either manager threatened to take any action if the union representative persisted in protected activity. Popwell’s statement that he would call the sheriff’s department followed the union organizer’s persistence in standing in the drive. Whatever protection the Act affords handbilling by a nonemployee organizer, that protection does not extend to blocking the flow of traffic.

Moreover, in context, Popwell’s statement that he would call the sheriff’s department does not constitute a threat of arrest. Thus, the facts distinguish this case from *Golden Stevedoring*, in which the respondent made a specific threat to have the union agent arrested. Such an explicit threat to have someone arrested cannot be equated with a mere statement, unelaborated and unamplified, of intent to call the police. People don’t always call the police to have someone arrested. Instead, they may summon a law enforcement officer simply so that the respective rights of the parties may be sorted out in a peaceful way. That is particularly true where, as here, the issue concerned the proper use of public right-of-way under government supervision and control.

Precedents such as *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1972) address the conflict between an employer’s right to exclude trespassers from its own property and the access rights of nonemployee union organizers. However, it would be incorrect to assume that Respondent’s only legitimate interest arises from the legal principles pertaining to trespassing. Respondent also has a bonafide concern that its employees, suppliers and customers may use the drive to enter or leave the facility without delay. This interest does not depend on whether a person standing in the middle of the drive has his feet on Respondent’s property or on the public right-of-way.

Typically, when a government entity owns property, it does not allow members of the public, even taxpaying members, to use it at all times for all purposes. Motorists aren’t free to park their cars in the traffic lane and have a tailgate party. A person aggrieved that a public road has become, or might become unavailable for its designated purpose certainly has a right to contact the public authority – in this case the sheriff’s department – which can correct or prevent the problem.

Respondent’s legitimate interest in the patency of the drive into its facility distinguishes the present case from *Wild Oats Community Market*, 336 NLRB 179 (2001). The respondent in that case operated a store in a strip mall shopping center, and did not have the legal right to exclude nonemployee union representatives from the parking lot. Instead, the respondent contacted the strip mall owner, which called the police.

Even though the respondent did not contact the police, file a complaint with the police, or ask the police to take any action, the Board concluded that the respondent acted unlawfully when it notified the mall owner that union representatives were handbilling and picketing, thereby “initiating a chain of events that culminated in the attempted removal of nonemployee union

representatives engaged in lawful, protected activity from the parking area in front of the Respondent’s store. . .”336 NLRB at 180 (footnote omitted).

5 Significantly, the respondent in the *Wild Oats Community Market* case did not act out of
a concern that the handbilling and picketing was impeding or could impede access to the parking
lot or to the store. Indeed, when other groups had engaged in activities in the parking lot, the
respondent had not notified the mall owner. See 336 NLRB at 181, fn. 10. The Board had no
reason in that case to consider the respondent’s interest in the smooth and unobstructed flow of
10 traffic because the respondent had not asserted such an interest and the record did not establish
that the presence of the union representatives either was causing or foreseeably could cause such
a problem.

15 In the present case, unlike *Wild Oats Community Market*, the record does not indicate that
any other handbillers had appeared at Respondent’s gates. Thus, the evidence does not support a
conclusion that Respondent contacted the sheriff’s department because of the subject of the
handbilling – union organizing – rather than because of concerns about the adverse effect of the
handbilling on traffic flow.

20 Moreover, the actions of Manager Popwell are consistent with the conclusion that he
called the sheriff’s department because he reasonably expected the handbilling to cause a traffic
problem, not because the handbilling concerned a union. Popwell did not threaten the organizer
with arrest but only said that he was going to call the sheriff’s department. Moreover, Popwell
said that he was going to call the sheriff’s department after the organizer refused to move
sufficiently to allow vehicles unimpeded ingress. It is difficult to imagine what else Respondent
25 lawfully could have done to make sure that traffic could enter and leave its facility unimpeded.

30 When Popwell alerted the sheriff’s department that handbillers were present, that action
served two separate interests. Respondent, of course, had a particular interest in assuring that its
employees, suppliers and customers could enter and leave the plant without delay. Respondent
also had a civic interest in assuring that the traffic into and out of its plant did not cause a
bottleneck for others using the busy Red Hollow Road. Both interests are legitimate and merit
consideration.

35 In these circumstances, I conclude that Respondent did not violate Section 8(a)(1) of the
Act. Accordingly, I recommend that the Board dismiss the Complaint in its entirety.

Conclusions of Law

40 1. The Respondent, Maclean Power System doing business as Maclean–Dixie, is an
employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

 2. The Charging Party, United Steelworkers of America, AFL–CIO–CLC, is a labor
organization within the meaning of Section 2(5) of the Act.

45 3. The Respondent did not violate the Act in any manner alleged in the Complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended²

ORDER

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The Complaint is dismissed.

Dated Washington, D.C., September 27, 2007.

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Keltner W. Locke
Administrative Law Judge

² If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

APPENDIX A

Bench Decision

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This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board’s Rules and Regulations.

Procedural History

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This case began on April 24, 2007, when the Charging Party filed an unfair labor practice charge against Respondent.

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. On June 27, 2007, after investigation of the charge, the Regional Director for Region 10 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the “Complaint.” In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the “General Counsel” or as the “government.”

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A hearing opened before me on August 17, 2007 in Birmingham, Alabama. At the start of hearing, the parties stipulated that Respondent’s correct name is Maclean Power System doing business as Maclean–Dixie, and I am amending the case caption to reflect that correction.

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Also on August 17, 2007, after all sides had rested, counsel presented oral argument. Today, August 20, 2007, I am issuing this bench decision.

Admitted Allegations

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Based on admissions in Respondent’s Answer, I find that the government has proven the allegations raised in Paragraphs 1, 2, 3 4 and 5 of the Complaint. Accordingly, I conclude that the charge was timely filed and served, as alleged, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and meets both the statutory and discretionary standards for the exercise of the Board’s jurisdiction.

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Further, based upon Respondent’s Answer and a stipulation at hearing, I conclude that the following individuals are Respondent’s supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act, respectively: Plant Manager Anthony Popwell; Human Resources Manager Dennis Veigl; and Plant Superintendent Jimmy Johnson.

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Additionally, based upon Respondent’s Answer, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Credibility of Witnesses

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All of the relevant events in this case took place during a one–hour period on the afternoon of April 23, 2007. At that time, two Union organizers, Samuel Penn Sr. and Clarence Brown, distributed handbills to employees coming to work at Respondent’s factory in Birmingham, Alabama. In general, all of the witnesses gave rather similar accounts of these

events. However, to the extent it is necessary to resolve conflicts in the testimony, I credit that of Anthony Popwell and Dennis Veigl rather than that of Samuel Penn Sr. and Clarence Brown.

5 Both Penn and Brown testified that one of the men who approached them while they were handbilling at Respondent’s plant was Jimmy Johnson, the plant superintendent. However, the record does not establish that Johnson was present. Moreover, Popwell and Veigl testified that Johnson was not. The record suggests that Penn and Brown misidentified Veigl, mistaking him for Johnson.

10 Additionally, although Penn sought to minimize, in his testimony, any suggestion that the handbilling caused traffic congestion, he gave one response on cross–examination that suggests otherwise. Penn had testified that the plant gate actually consisted of two parts which presumably swung together in the center in the customary manner. Penn also testified that when he arrived, one side of the plant gate was closed but that the plant manager, Anthony Popwell, 15 opened it. On cross–examination, Penn testified, in part, as follows:

Q. And so what he did in opening the gate helped you, correct?

A. I’m not going to give you that. What he did was alleviate the bottleneck of cars trying to get into the plant.

20 Such testimony suggests that there was, indeed, a traffic bottleneck. Penn’s efforts to downplay the effect of the picketing on the traffic flow suggests that he was somewhat partisan in his testimony.

25 Similarly, some of Brown’s responses on cross–examination seemed somewhat partisan, causing me to have some doubts about the objectivity of the testimony. As already stated, there are few major disagreements in the testimony of the witnesses, but where conflicts do exist, I credit the testimony of Popwell and Veigl rather than Penn and Brown.

30 **Disputed Allegations**

35 Complaint paragraph 7 alleges that on April 23, 2007, the Respondent, by Popwell and Veigl, at a public right–of–way adjacent to the Respondent’s facility on Red Hollow Road in Birmingham, Alabama, engaged in surveillance of employees’ responses to Union handbilling activities.

40 Complaint paragraph 8 alleges that on about April 23, 2007, Respondent, by Popwell and Veigl, at the same location, interfered with the rights of employees of the Respondent to receive Union handbills being distributed there.

45 The Complaint further alleges that these actions violated Section 8(a)(1) of the Act. Respondent denies all of these allegations.

Facts

On April 23, 2007, Union organizers Penn and Brown came to Respondent’s facility on Red Hollow Road in Birmingham, Alabama. Both Penn and Brown are employed by the Union.

Neither is an employee of Respondent. Moreover, the record does not establish that either has sought employment with Respondent.

5 A high chain–link fence surrounds Respondent’s factory. Although there are four gates in the fence, Respondent opens two of them for use by employees coming to work or leaving. Near these two gates, there are signs on the fence stating “Restricted Area.”

10 The government has not raised any assertion that Respondent lacked the legal right to exclude people from its property. I conclude that it had such a right.

15 Both of the plant gates used by employees – labeled Gates 2 and 3 – have driveways connecting with Red Hollow Road, a busy road with both residential and business traffic. Penn stationed himself by Gate 2 and Brown by Gate 3 and began handing out handbills to drivers of cars entering the plant.

20 Popwell and Veigl, inside the plant, learned that two men were at the gates and decided to investigate. Respondent had not received any word that Union organizers would be coming to the plant and they were unaware of that fact until they arrived at the gates.

25 Although the Union organizers assert that they were not on Respondent’s property, I find, crediting Respondent’s witnesses, that at some point they were in the middle of the driveways and thus in a position to block traffic entering and leaving the plant. It is undisputed that Veigl and Popwell told Brown and Penn, respectively, to move and that if they did not, they would call the sheriff’s department. The two handbillers did move to locations outside the gates and alongside the driveway.

30 Popwell did notify the sheriff’s office by cellphone that the handbillers were present. However, neither Popwell nor Veigl made any threat to have anyone arrested. The evidence does not establish that any employee heard Popwell call the sheriff’s department. Similarly, the evidence does not establish that any employee heard any of the discussions between Veigl and Brown, or between Popwell and Penn.

35 The second shift began at 2 p.m. and traffic increased greatly. I do not credit testimony asserting that Popwell stood between the Union organizer and four of the entering cars, an act which Popwell denies. Rather, I find that the only thing which either Popwell or Veigl did in connection with the picketing was to watch from several yards away, and to motion cars to enter the plant.

40 There is no allegation that Popwell or Veigl photographed the pickets or employees or took notes of which employees accepted handbills. I find that they did not. Additionally, I find that the handbillers distributed all of the handbills which they brought with them.

Discussion

45 Because of the heavy traffic on Red Hollow Road, Respondent had an interest in assuring that employees could enter the facility to report for work without stopping traffic on the road. I find that this interest motivated Veigl and Popwell.

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Additionally, I conclude that antiunion animus did not enter into either manager's motivation. Were this case to be decided on the basis of motive, clearly the Act would not be violated.

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However, motive is not relevant to the finding of an 8(a)(1) violation. Rather, I must judge whether the Respondent's conduct reasonably would have a tendency to interfere with, restrain or coerce employees in the exercise of Section 7 rights. In this instance, I conclude that the actions of Popwell and Veigl would not.

Although the actions of Popwell and Veigl were not part of their daily routine, and in that sense were out of the ordinary, the handbilling was also out of the ordinary.

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In these circumstances, viewing the events from the perspective of a typical employee, I do not conclude that the actions of Popwell or Veigl interfered with, restrained or coerced employees in the exercise of their Section 7 rights.

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When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to this case,

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Throughout this proceeding, all counsel demonstrated high levels of civility and professionalism which are truly appreciated. The hearing is closed.