Harco Asphalt Paving, Inc. *and* Laborers International Union of North America, Local Union No. 120, a/w Laborers International Union of North America. Cases 25–CA–30352, 25–CA–30354, 25–CA–30355, 25–CA–30356, 25–CA–30357, 25–CA–30359, and 25–CA–30370

December 31, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On March 6, 2008, Administrative Law Judge Mark D. Rubin issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited cross-exceptions and an answering brief. The Charging Party filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Harco Asphalt Paving, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing union representatives who engage in protected union activity to leave areas where the Respondent has no property right to exclude trespassers, threatening to call the police and calling the police to remove union representatives from such areas, and threatening to obtain a restraining order against union representatives for this purpose.

(b) Engaging in photographic surveillance of our employees and union representatives attempting to communicate with them.

(c) Ordering employees to leave a jobsite in order to avoid contact during their lunchbreak with union representatives in areas where the Respondent has no property right to exclude trespassers.

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

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

(a) Within 14 days after service by the Region, post at its facility in Indianapolis, Indiana, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 25, 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 are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 31, 2007.

(b) 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.

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] Although the Respondent filed exceptions to the judge's finding that it violated Sec. 8(a)(1) of the Act by threatening to obtain a restraining order against the Union's agents, it did not articulate, either in its exceptions or briefs, any grounds for reversing the judge. Accordingly, we find, pursuant to Sec. 102.46(b)(2) of the Board's Rules and Regulations, that the Respondent has effectively waived these exceptions. See, e.g., *Barstow Community Hospital,* 352 NLRB1052 (2008), citing *Holsum de Puerto Rico,* 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

We find no need to pass on whether other actions taken by the Respondent in response to the presence of the Union's agents in the area of Harco Way on May 21 and 31, 2007, violated Sec. 8(a)(1) inasmuch as the Board's Order issued today approving the parties' settlement in Case 25–CA–30671, et al., fully addresses handbilling activity in the areas along Harco Way.

[3] We shall modify the judge's recommended Order and substitute a new notice to conform to our findings and to the Board's standard remedial language. We shall also delete the recommended provision requiring the Respondent to mail letters to local police departments and to a local school district. We find it unnecessary to pass on the General Counsel's request that the notice be read aloud to the Respondent's employees, as the Board's Order in Case 25–CA–30671, et al., provides for the reading of a substantially similar notice.

[4] 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."

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 instruct union representatives who engage in protected union activity to leave areas where we have no property right to exclude trespassers, threaten to call the police and call the police to remove union representatives from such areas, and threaten to obtain a restraining order against union representatives for this purpose.

WE WILL NOT engage in photographic surveillance of our employees and union representatives seeking to communicate with them.

WE WILL NOT order our employees to leave a jobsite in order to avoid contact during their lunchbreak with union representatives in areas where the Respondent has no property right to exclude trespassers.

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

HARCO ASPHALT PAVING, INC.

Belinda J. Brown, Esq., for the General Counsel.
Michael L. Einterz, Esq., of Indianapolis, Indiana, for the Respondent.
Neil E. Gath, Esq., of Indianapolis, Indiana, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

MARK D. RUBIN, Administrative Law Judge. These cases were tried in Indianapolis, Indiana, on December 11, 2007, based on charges filed against Harco Asphalt Paving, Inc. (Respondent) by Laborers International Union of North America, Local Union No. 120, a/w Laborers International Union of North America (the Union or the Charging Party) on the following dates in 2007: June 19 (Case 25–CA–30370), June 5 (Case 25–CA–30359), and June 1 (all other cases). Amended charges in all of the cases except Case 25–CA–30370 were filed on July 30, 2007.[1]

The Regional Director's consolidated complaint, dated September 28, 2007, alleges, in pertinent part, that the Respondent violated Section 8(a)(1) by engaging in the following actions in response to assertedly lawful handbilling engaged in by the Union: instructed handbillers to leave the area; threatened to call the police to have handbillers removed; called the police to have handbillers removed; engaged in surveillance of the protected, concerted activities of the handbillers and employees; instructed employees to physically remove handbillers; and threatened to obtain a restraining order against the handbillers. The complaint further alleges that the Respondent violated Section 8(a)(1) at its jobsites by engaging in the following actions in order to prevent the Union's representatives from communicating with its employees: instructed union representatives to leave the area; threatened to call police to have union representatives removed; called the police to have union representatives removed; ordered employees to leave the jobsite; and engaged in surveillance of the protected, concerted activities of union representatives and employees.

The Respondent defends by maintaining as to certain handbilling that occurred in the area of its offices, that it was simply asserting its private property rights. As to the allegations pertaining to visits by union representatives to its jobsites, the Respondent asserts that the burden is on the General Counsel to prove that the Union's agents engaged in handbilling were not trespassing on property which the Respondent, admittedly, did not own, and that the General Counsel failed to carry this asserted burden. Finally, the Respondent, admitting that it photographed the Union's agents, denies that it engaged in any surveillance of protected, concerted activity.

At the trial, the parties were afforded a full opportunity to examine and cross-examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file posttrial briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Respondent, the General Counsel, and the Union I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, has been engaged in the construction industry as a provider of asphalt paving, concrete, dirt, and maintenance services at its facility in Indianapolis, Indiana, where it annually has received revenue in excess of $50,000 for services provided to the State of Indiana, an entity engaged in interstate commerce. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a

[1] During the course of the hearing, the Respondent, the Union, and the General Counsel reached an informal settlement agreement in respect to Cases 25–CA–30354 and 25–CA–30355, which I approved on the record as it served to effectuate the purposes of the Act. The issues decided in this decision were those not settled. The settled allegations consist of complaint pars. 5(b), 6(a) and (b), and 8.

labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The substantive events described below occurred in the context of the Union's attempt to distribute handbills near the offices of the Respondent, a nonunion contractor, and to visit jobsites where the Respondent was engaged in work. Much of the factual background was either stipulated to by the parties or is undisputed.

Respondent's Premises and Surrounding Property

The Respondent's offices and work facility are located at 1650 Harco Way, in Indianapolis. Harco Way is an east/west street, privately owned by the Respondent, beginning at a "t-intersection" with Harding Street, a main thoroughfare, and with no other public street access. Various businesses, unrelated to the Respondent, occupy the north and south side of Harco Way, including the "Classy Chassis," apparently an entertainment venue, at the northwest corner of Harco Way and Harding, a truck wash on the south side of Harco Way, approximately opposite of the Classy Chassis, and a motel and parking area on the south side of Harco Way, separated from the truck wash to the east by a small grassy area. The Respondent's offices are located on the north side of Harco Way, west of the Classy Chassis and separated from the Classy Chassis parking area by a large grassy area. Harco Way is the only street providing ingress or egress to the Respondent, and to the truck wash and the motel.[2] An easement to Harco Way exists, but is not detailed in the record.[3]

In addition to owning the street Harco Way, the Respondent owns the parcel of property its business is located on, and owns other parcels of property west and south of its offices. While the Respondent owns the street Harco Way, it does not own the property where the motel and truck wash are located on the south side of Harco Way, the property on the north side of Harco Way opposite the truck wash and motel, or the property occupied by the Classy Chassis.[4]

May 21; Harco Way

On May 21, Union Organizers James Daniels and Brian Short[5] arrived in the vicinity of Harco Way at about 6:15 a.m. and began distributing handbills prepared by the Union, as part of its campaign to organize the nonunion Respondent.[6] Initially, Daniels and Short generally stood in the grassy area separating the motel from the truck wash on the south side of Harco Way, a distance from the Respondent's offices, further west. Daniels and Short proffered handbills to passing motorists, including the Respondent's employees, and when a vehicle stopped, they stepped onto the pavement to hand a handbill to the motorist, then stepped back onto the grassy area.[7] Later, they moved across the street to the north side of Harco Way, in the grassy area next to the Classy Chassis, still well east of the Respondent's offices, and engaged in the same activity. Daniels and Short passed out about 15 to 20 handbills in total.[8]

Between 7 and 7:15 a.m., the Respondent's office manager, Cindy Sartain, drove by Daniels and Short, and stopped her vehicle about 10 feet past where they were standing. Short stepped into the street towards Sartain's vehicle and offered a handbill to her. Sartain opened her window and asked what the handbill was. Short responded, "Just information." Sartain rolled up her window and drove a few feet, and then did a "u-turn" back towards Daniels and Short, stopped again, and exited her vehicle. Then, the parties stipulated and I find, Sartain instructed Daniels and Short to leave the area, threatened to call the police to have them removed from the area, and called the police to have Daniels and Short removed. Some of Sartain's words to Daniels and Short were aggressive and obscene.[9] When Sartain exited her car, the union representatives began

[2] These facts were stipulated to by the parties, by exhibit and verbal stipulation. Indeed, most facts found herein were stipulated to by the parties during the hearing. The Respondent maintains in its counsel's brief that "the relevant facts have been stipulated to by the parties, eliminating the need for credibility determinations."

[3] The parties stipulated that "on Harco Way there is an ingress/egress easement," but the record contains no further detail.

[4] Stipulated by the parties, as part of GC Exh. 2. In its brief, the Union asserts that "all of the property depicted in GC Exh. 5 allegedly belongs to Harco. . . ." The stipulation, however, was that "the highlighted areas are owned by Harco. . . ." Thus, the stipulation does not demonstrate that all of the property depicted in the exhibit belongs to the Respondent, but that the property not highlighted, occupied by the Classy Chassis, the motel, and the truck wash, does not belong to the Respondent.

[5] Daniels and Short are employed by the Union.

[6] There is no other evidence as to the contents of the handbill other than it was part of the Union's organization campaign and that the organizers distributed the handbills to the Respondent's employees, among others.

[7] Credited testimony of Daniels.

[8] Credited testimony of Daniels and Short who, in my observation, demonstrated the testimonial demeanor of witnesses truthfully testifying. This testimony is generally uncontroverted. The Respondent's office manager, Cindy Sartain, testified that when she first observed Daniels and Short, they were standing on the pavement. This testimony does not controvert the testimony of Daniels and Short to the effect that they generally remained on the grassy area, with brief forays into the street. To the extent that it does, and for the reasons discussed below, I do not credit Sartain as to this testimony. Daniels credibly testified that Sartain initially pulled her car up in the street lane next to the grassy area and "she kind of blocked us right there."

[9] The Respondent essentially stipulated to par. 5, subpars. (i), (ii), and (iii) of the complaint. The actual testimony of Sartain, Daniels, and Short differs as to how vociferously Sartain expressed herself and whether or not she used obscenities. Sartain described herself as frightened. The testimony of Daniels and Short both as to the language Sartain used and her aggressive manner would indicate to the contrary. I credit the testimony of Daniels and Short as to Sartain's manner and words and find that Sartain, in fact, was not frightened by the appearance and actions of Daniels and Short. Thus, I find, that Sartain told Daniels and Short that "they were non-union, that they didn't want us union mother-fu— there, that we were trespassing, and that she was going to call the cops." Both Daniels and Short, by demeanor, good recollection of various events, and demonstrated proclivity to fully answer the questions of all counsel, displayed the traits of truthful witnesses. Sartain was less impressive. She appeared uncomfortable on the witness stand and less willing to engage the questions of opposing counsel. Most of the facts found herein were either stipulated to or were uncontroverted. Any other facts found are based on the credited testimony of Daniels and Short for the reasons stated above.

videotaping. Sartain used her cell phone to take photos of Daniels and Short and then to call the Indianapolis Police Department.

At some point during the confrontation, a pickup truck with Harco markings on the door and four occupants, drove past Sartain, Daniels, and Short. Sartain yelled towards the truck to pull over and wait for the police.[10] The truck pulled over into the truck wash, faced the vehicle north towards Harco Way, and parked.

An Indianapolis Metropolitan Police squad car arrived on the scene about 7:15 to 7:30 a.m., and pulled into the truck wash parking area. Sartain walked to the police car and told the officer that Daniels and Short were trespassing.[11] The police officer walked over to Daniels and Short. Short handed him a handbill. The officer said he didn't need to see the handbill, and that Daniels and Short were trespassing. The organizers replied that they were on public property because there was an easement. The officer replied that they were on private property and needed to leave.[12] The officer added that if they returned, they would be arrested.[13] Daniels and Short proceeded to their vehicle and left the area.

May 31; Harco Way

On May 31, union organizers returned to the Harco Way area and resumed handbilling. This time organizers Daniel and Short, were accompanied by fellow organizers Chris Guerrero and Joe Hardwick. The organizers arrived at about 6:15 a.m., and positioned themselves on the grassy area between Harco Way and the Classy Chassis, on the north side of Harco Way. The organizers held out handbills to passing vehicles on Harco Street and then stepped onto the street to hand handbills to motorists who stopped. They also distributed handbills to some motorists on Harding Street. Sartain drove up at about 6:40 a.m., and parked on the corner of Harco Way and Harding Street, near where the organizers were standing.

The parties stipulated, and I find, that Sartain instructed the organizers to leave, threatened to call the police to have the organizers removed from the area, called the police to have the organizers removed from the area, threatened to obtain a restraining order against the handbilling by the organizers, and photographed the organizers. The parties also stipulated, and I find, that the Respondent's superintendent, Charlie McClellan, photographed the organizers while they were engaged in the handbilling.

On both May 21 and 31, during the handbilling, other vehicles, unrelated to the Respondent or its employees, traveled Harco Way to access other businesses. The organizers testified that Sartain did not talk to these drivers, nor did they observe her call the police in respect to those vehicles.

At about 7 a.m. the police arrived, asked the organizers for identification, and told them that they were trespassing and were banned from the property. Daniels told the police that the organizers disagreed that they were trespassing, that they had plats and deeds and believed they were in an easement. The police responded that the organizers were banned from the property, that they were never to come back, and would be arrested for trespassing (if they did). At these instructions, the organizers departed and have not been back since.

June 1; Avon, Indiana

On June 1, Daniels, Hardwick, and Guererro traveled to the Cedar Lake Elementary School, in Avon, Indiana, a western suburb of Indianapolis. According to Daniels' testimony, the purpose of the trip was to provide a pizza lunch to union-represented employees of a union contractor and to employees of the Respondent, both of which groups were working on a project at the public school. The organizers arrived at the school at about 11:30 a.m., parked on a drive behind the school, but discovered that the union contractor was not on the job that day. The organizers shouted at the Harco employees, about 75 feet away, that when they were on their lunchbreak, they were welcome to "come over and eat pizza." The Respondent's employees walked over to where the organizers parked and ate the pizza provided by the organizers.

At about noon, McClellan arrived at the scene, and told his employees to go to lunch and leave immediately.[14] The parties stipulated, and I find, that McClellan instructed the organizers to leave the area, threatened to call the police to have them removed, called the police to have them removed, and photographed the organizers.

About 15 minutes after McClellan arrived, Avon police cars arrived on the site, sirens on, wheels squealing.[15] An officer asked the organizers who was fighting. One of the organizers responded that there was no fighting. One of the officers asked if the organizers had a "beef" with McClellan. Daniels said, "No." An officer requested their driver licenses, and told the organizers to sit on the curb while they spoke to McClellan. The officers spoke to McClellan and the construction manager for the general contractor, and then told the organizers that they were not wanted on the property, that the general contractor didn't want them there, and that they were to leave. The organizers thereupon left, at about 1 p.m. The Harco employees had returned to the jobsite from lunch while the police were checking the organizers' driver's licenses, and were on the jobsite when the organizers departed.

June 4; Perry Meridian High School

The parties stipulated, and I find, that on June 4, Dan Dennis, acting under the instructions of the Respondent's owner, Paul Harding, instructed the Union's representatives to leave the Perry Meridian High School jobsite, where the Respondent was

[10] Daniels testified that Sartain yelled towards the truck to pull over, "to get us off the property." Short testified that she yelled, "Stop, pull over, and wait for the police to come." Short, in his testimony, appeared to directly quote Sartain, while Daniels did not. I conclude as to this testimony that Short is more reliable.

[11] Credited testimony of Daniels who testified he was able to hear this part of the conversation.

[12] In the transcript, Short appears as having testified that the officer used the words "public property." If he did so testify, he used the words inadvertently. Clearly he meant to testify that the officer used the words "private property," and I so find.

[13] Credited and uncontroverted testimony of Daniels.

[14] Credited testimony of Hardwick. Daniels, whose testimony is similar, but not identical to Hardwick's, seemed less sure of the exact words used by McClellan, who did not testify.

[15] Credited testimony of Daniels and Hardwick.

performing a contract, threatened to call the police to have the Union's representatives removed from the area, and that Sartain called the police to have them removed. The record is devoid of other evidence as to this incident.

June 18; Avon, Indiana

On June 18, organizers Hardwick, Guerrero, and Daniels again traveled to Avon, this time to visit a project the Respondent was working on, located on a public trail behind the Avon town hall. The purpose of the visit was to "see how far along the job was."[16] The organizers encountered a number of people leisurely walking on the trail, and McClellan working on a backhoe. The parties stipulated, and I find, that McClellan threatened to call the police to have the organizers removed. McClellan asked the organizers if they were planning on working a "half-day," and told them he was going to call the police. The organizers told McClellan that they weren't out there to speak to his employees, and they departed. On this occasion, the organizers did not handbill, did not carry picket signs, and did not speak to the Respondent's employees.

Analysis and Conclusions

May 21 and 31; Harco Way Incidents

The General Counsel alleges that Sartain's and the Respondent's actions on May 21 and 31 in instructing the Union's organizers to leave, threatening to call the police, calling the police to have them removed, and instructing employees to physically remove the organizers (May 21) violated Section 8(a)(1) of the Act. The General Counsel and the Union argue that the Respondent has failed to establish a sufficient property interest to exclude individuals from the property in question. The Union further argues that the easement on Harco Way demonstrates that the Respondent had no property interest sufficient to exclude the public, including the organizers. Contrariwise, the Respondent asserts that it is the General Counsel who maintains the burden to demonstrate that "the Union representatives were not trespassing on Respondent's property," and that the General Counsel failed in carrying such burden.

"The Board has stated that in cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representatives, an interest which *entitled* it to exclude individuals from the property [emphasis in original]." *Indio Grocery Outlet*, 323 NLRB 1138, 1142 (1997), quoting *Food For Less*, 318 NLRB 646, 649 (1995). Absent such a showing, there is no conflict between competing rights requiring an analysis and an accommodation under *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992). *Indio Grocery Outlet*, supra.

Here, as noted, the facts are largely undisputed. The Union's organizers were utilizing handbilling in order to contact the Respondent's employees as part of its organizing drive. The street, Harco Way, is private property belonging to the Respondent, but there is no evidence, nor does the Respondent contend, that the Respondent had any property interest in the grassy areas abutting the street, at least in the areas where the Union's organizers spent most of their time standing, walking, and offering handbills to passing motorists. While the organizers did spend brief moments venturing into the street to hand their handbills to passing motorists who had stopped, the Respondent did not simply seek the organizers removal from its property, the street, but sought the organizers removal from the entire area.[17] Inasmuch as the Respondent instructed the organizers to leave the area, and threatened to and did call the police to accomplish such, in circumstances where it had no assertable interest in the property where the organizers spent most of their time, and where the Respondent did not limit its actions to property where it did have such an interest, I conclude that the Respondent's actions violated Section 8(a)(1). *Indio Grocery Outlet*, supra.[18]

Inasmuch as the record is devoid of evidence detailing the easement[19] on Harco Way, there is no basis to determine whether, under Indiana law, said easement is sufficient to preclude the Respondent from asserting a sufficient property right in respect to the street itself. However, since I found that the handbillers spent all but a small portion of their time in areas where the Respondent had no assertable property interest, and that the Respondent's actions alleged as violations were directed to expulsion of the organizers from the entire area, and not just the area where it asserts a private property claim, I have concluded that the Respondent's actions violated the Act.[20]

Further, I conclude that the Respondent did not violate the Act by, assertedly, instructing "employees to attempt to physically remove Local 120 handbillers." Here, the General Counsel presented two witnesses with contrary testimony as to what Sartain shouted to employees driving by the organizers. I credited Short who testified that Sartain simply shouted instructions to pull over and wait for the police to arrive. Accordingly, I conclude that the Respondent did not violate Section 8(a)(1) as so alleged.

[16] Credited testimony of Daniels.

[17] I found this to be a fact, based on the parties' stipulations.

[18] The Board's decision in *Hoschton Garment Co*., 279 NLRB 565 (1986), cited by the Respondent in its brief, is inapposite. In *Hoschston*, the union organizers were trespassing on the employer's property.

[19] The General Counsel and the Union seem to hint on the record, and in their briefs, that the easement is for the general public to reach the businesses located on Harco Way. The Respondent, in its brief, says that "the motel and truck wash are party to an ingress/egress easement." But there is no evidence in the record establishing whom the easement runs to or its details. The following exchange between myself and the counsel for the General Counsel occurred on the record as to a stipulation that an easement exists on Harco Way: Ms. Brown—"on Harco Way there is an ingress/egress easement." Judge Rubin—"An ingress/egress easement?" Ms. Brown—"Yes, sir." Judge Rubin—"And is there any further description of the easement?" Ms. Brown—"No, just ingress/egress easement, and it is listed on GC Exh. 5." Utilizing a magnifying glass to attempt to read the fine print on Exh. 5, it appears that the following notation appears on Harco Way: "Driveway and Ingress/Egress easement."

[20] Thus, even in a situation where union representatives were trespassing, an employer couldn't seek their removal from other areas where the employer had no assertable property interest. *Food For Less*, supra at fn. 6.

As to the surveillance allegations, the General Counsel apparently points to the stipulations that Sartain photographed the organizers on May 21 and 31, and McClellan on May 31.[21] The Respondent, in its brief, argues "the union representatives may not complain of surveillance when they are conducting their activities in the open," and that "this is particularly true where . . . the union representatives chose to engage in their activities while trespassing on the employer's premises." In *Roadway Package System,* 302 NLRB 961 fn. 1 (1991) (citations omitted), in circumstances where photography was not involved, the Board held, "it is well settled that where . . . employees are conducting their activities openly on or near company premises, open observation of such activities by an employer is not unlawful."

The Board, in *F. W. Woolworth Co*., 310 NLRB 1197 (1993), set forth fundamental principles governing employer surveillance of protected, employee activity. "The Board in *Woolworth* reaffirmed the principle that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial recordkeeping tends to create fear among employees of future reprisals. The Board in *Woolworth* reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity." *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997) (citations omitted).

Here, the Respondent didn't merely observe union activities taking place in the open, but photographed those activities. Sartain, who photographed the handbillers with her cell phone camera, testified she was in fear when she took the photographs. However, there is no credible evidence in the record which would support such an asserted fear. The only activity that took place was peaceful handbilling by a very limited number of handbillers. Nor does the Respondent contend in brief or argument at the hearing, that the photography of Sartain or McClellan[22] was justified by any perceived danger or undertaken to document alleged trespass, and there is no credible evidence of such.

The Respondent's taking of photographs of the handbillers, would clearly serve to chill any prospective attempts by the Respondent's passing employees to either obtain a handbill or speak to the organizers, both of which were the stated purposes of the organizer's handbilling. Thus, under the instant circumstances, I find that by taking photographs of the Union's organizers on May 21 and 31, the Respondent engaged in surveillance, and violated Section 8(a)(1) of the Act.[23]

Finally, as to May 31, the complaint alleges that the Respondent violated Section 8(a)(1) when Sartain threatened the organizers that she would obtain a restraining order. The Board has long held that the threat to file a lawsuit, as opposed to the filing of a lawsuit, violates the Act. *S. E. Nichols Marcy Corp*., 229 NLRB 75 (1977); *Auto Workers Local 651 (General Motors Corp.)*, 331 NLRB 479 fn. 1 (2000). Here, Sartain's threat to seek a restraining order, together with her other actions and threats, was designed to prevent the organizers from attaining their objective of reaching the Respondent's employees with their message. Under these circumstances, and in the context of the other findings herein, I conclude that Sartain's threat to seek a restraining order violated Section 8(a)(1) of the Act.

June 1, 4, and 18

On June 1, 4, and 18, the interactions between the Respondent and the organizers alleged as violations of Section 8(a)(1), occurred on public property, which the Respondent claims no ownership interest in.[24] I found that on June 1, McClellan instructed the organizers to leave the area, threatened to call the police to have them removed, called the police to have them removed, and photographed the organizers. I further found that on June 4, Dan Dennis, acting under the instructions of the Respondent's owner, Paul Harding, instructed the Union's representatives to leave the Perry Meridian High School jobsite, where the Respondent was performing a contract, threatened to call the police to have the Union's representatives removed from the area, and that Sartain called the police to have them removed. Finally, I found that on June 18, McClellan threatened to call the police to have the organizers removed from the area.

Inasmuch as on all three occasions, the Respondent possessed no property interest in the public school or public trail sites where the confrontations occurred, I find that the Respondent has failed to meet its threshold burden of demonstrating that it maintained a property interest which entitled it to exclude individuals from the property. *Indio Grocery Outlet*, supra. Accordingly, I conclude that the Respondent violated Section 8(a)(1) of the Act on June 1, 4, and 18 by instructing the organizers to leave, threatening to call the police to have the organizers removed, and calling the police, and by photographing the organizers and, thus, engaging in surveillance on June 1.[25]

[21] The General Counsel's brief does not address the surveillance allegations other than to assert that Sartain photographed the handbillers and the Respondent apparently, therefore, engaged in surveillance.

[22] McClellan did not testify. The parties stipulated that he photographed the organizers on May 31.

[23] See fn. 18.

[24] In his brief, the Respondent's counsel argues that the Avon Cedar Elementary School jobsite, where the June 1 actions alleged as 8(a)(1) violations occurred, is owned by Avon Community School Corporation, a public corporation, that property owned by a public corporation is not public property in Indiana, and that the organizers did not have permission from the public corporation to enter the property. While the record is devoid of evidence as to the legal status of the Avon Community School Corporation, the record is uncontroverted that the Respondent maintained no private property interest in the site. Thus, when it engaged in the admitted actions alleged as 8(a)(1) violations, the Respondent had no private property rights which entitled it to eject or seek the ejection of the organizers. *Indio Grocery Outlet*, supra.

[25] As to the June 18 incident, which occurred on a public trail, the Respondent argues in its brief, that "there was no testimony that the organizers were visiting the trail as a result of their employment with the Union," seemingly implying that, perhaps, they were there on a lark or just to enjoy a walk on the trail. But as the Respondent also acknowledges in its brief, Daniels testified that the organizers visited the

The complaint further alleges that on June 1, the Respondent also violated Section 8(a)(1) by ordering employees to leave the jobsite. I found that when McClellan saw some of the Respondent's employees eating pizza with the organizers, he told the employees to leave immediately and go to lunch, which they did. While it's not clear whether or not the Respondent's employees were on their lunchbreak when they were eating the Union's pizza, it is clear that McClellan was ordering them to go to lunch, away from the organizers. Inasmuch as the obvious purpose of giving such orders to the Respondent's employees was to preclude any contact with the organizers, even including during their lunchbreak, I find that the Respondent, thus, coerced and interfered with employees in their exercise of Section 7 rights, and violated Section 8(a)(1). See *Holiday Inn-JFK Airport*, 348 NLRB 1, 3 (2006).

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following actions, on the dates set forth below, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

(a) On May 21 and 31, June 1 and 4, 2007, instructing representatives of the Charging Party to leave the area.

(b) On May 21 and 31, June 1, 4, and 18, 2007, threatening to call the police to have representatives of the Charging Party removed from the area.

(c) On May 21 and 31, June 1 and 4, 2007, calling the police to have representatives of the Charging Party removed from the area.

(d) On May 21, 31 and June 1, 2007, engaging in surveillance of representatives of the Charging Party and its employees, by taking photographs of the representatives of the Charging Party.

(e) On May 31, 2007, threatening to obtain a restraining order against representatives of the Charging Party.

(f) On June 1, 2007, ordering employees to leave a jobsite in order to avoid contact with representatives of the Charging Party.

4. The unfair labor practices set out in paragraph 3, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent, in no manner other than that specifically found herein, including any other manner alleged in the complaint, has violated the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, as is set forth above, it will be ordered to cease and desist therefrom and from any like or related conduct. It will also be ordered that the Respondent post a remedial notice.

[Recommended Order omitted from publication.]

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site to see how far along the Respondent was in performing its contract. Clearly this visit was an action in furtherance of the Union's attempt to organize the Respondent's employees, and the Respondent's threat to call the police was an effort to combat the organizational drive, and to preclude whatever contact between the organizers and the Respondent's employees might occur as a result of their visit.