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DHL Express, Inc. and American Postal Workers Union, AFL-CIO. Cases 9-CA-46180 and 9-CA-46294

December 22, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On July 21, 2011, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

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

¹ Chairman Pearce and Member Becker agree with the judge that the hallway in which the employees were distributing union literature is not exclusively a work area and, accordingly, the Respondent violated Sec. 8(a)(1) by prohibiting distribution in that area. Thus, an "employer's right to preclude distribution of literature in working areas does not extend to mixed-use areas." *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 456-457 (2003); *Transcon Lines*, 235 NLRB 1163, 1165 (1978), *aff'd*, in relevant part 599 F.2d 719 (5th Cir. 1979). Nor does it extend to areas used for activities only incidental to the employer's main function. *Santa Fe Hotel and Casino*, 331 NLRB 723, 723 (2000). Therefore, they find it unnecessary to pass on whether the Respondent also violated Sec. 8(a)(1) by discriminatorily enforcing the no-distribution rule. They also find it unnecessary to rely on the judge's citation of *Foundation Coal West*, 352 NLRB 147 (2008), which was decided by only two Board members. See *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010) (holding that a two-member group may not exercise delegated authority when the membership of the group falls below three).

Contrary to his colleagues, Member Hayes would only find that the Respondent violated Sec. 8(a)(1) by discriminatorily enforcing the no-distribution rule. Absent such discrimination, he would find the enforcement of the rule in the hallway lawful because the hallway could reasonably be considered a working area even if all activity within that area did not involve employees performing work.

In its exceptions, the Respondent argues that the Acting General Counsel failed to meet his burden to prove that the employees distributed literature only to other employees who were on nonwork time. As the judge found, there was no evidence that any literature was distributed to on-duty employees; nor did the Respondent direct employees to cease solicitation on that basis. See *Postal Service*, 339 NLRB 1175, 1176 (2003).

² We modify the Order to conform to the violation found. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, DHL Express, Inc., Erlanger, Kentucky, its officers, agents, successors, and assigns shall take the actions set in the Order as modified.

1. Delete paragraph 1(b).
2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 22, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) 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 enforce our no-distribution rules in the hallway area near our office and cafeteria.

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.

DHL EXPRESS, INC.

Catherine A. Terrell, Esq., and Naima R. Clarke, Esq., for the
Acting General Counsel.

David A. Kadela, Esq., of Columbus, Ohio, for the Respondent-Employer.

Robert J. Shore, Esq., of Washington, D.C. for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on May 16 and 17, 2011, in Cincinnati, Ohio, pursuant to a consolidated complaint and notice of hearing (the complaint) issued on March 25, 2011, by the Acting Regional Director for Region 9 of the National Labor Relations Board (the Board). The underlying charges and amended charges were filed on various dates in 2010¹ and 2011 by American Postal Workers Union, AFL-CIO (the Charging Party or Union) alleging that DHL Express, Inc. (the Respondent or Employer) has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent selectively and disparately prohibited the distribution of union literature by employees in a hallway area near the Employer's office and cafeteria.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged primarily in the international express forwarding of mail and freight from various facilities located in numerous foreign countries and throughout the United States, including its facility in Erlanger, Kentucky, the only facility involved in this proceeding. During the past 12 months, Respondent, in conducting its operations performed services valued in excess of \$50,000 in States other than the Commonwealth of Kentucky. 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 labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

At all material times, Shawn Swallow has served as the senior director of hub operations at Respondent's Erlanger, Kentucky facility. Jennifer Miller holds the position of Respondent's security guard captain while Christopher Schulkens serves as its security guard sergeant. Additionally, Paul White holds the position of Respondent's senior human resources manager while Jama Basinger serves as a human resources

trainer.

The Respondent is a small package shipping company concentrating on the International market in Europe and Asia. The Cincinnati (CVG) facility is a spoke in the wheel for the transportation of freight/packages by air or via truck into Cincinnati where it is sorted by automation and loaded back into containers for shipment to its final destination. The CVG facility is the Respondents only hub location in the United States. Once the aircraft land in Cincinnati they taxi to the CVG facility, located on the airport grounds, for unloading of their cargo.

Swallow heads a management team of 5 senior managers who in turn supervise 65 first line supervisors who oversee and supervise the work of approximately 1200 employees. With the exception of 14 maintenance employees who are represented for collective-bargaining purposes by the International Brotherhood of Teamsters, the remaining employees are not represented by any labor organization.² The Charging Party, for a number of years, has attempted to organize and represent these employees but to date has not been successful in this endeavor.

The CVG facility operates on a 24/7 hour basis with a full-time day shift and part-time evening and early morning shifts.

The majority of Respondents' employees (6-700) work in the main sort building where the packages are sorted (R Exh. 2(a)).

B. The Facts

On December 1, employee Vida Manuel, was distributing union literature in the main hallway at approximately 4:20 a.m.³ Basinger told Manuel that she could not be handing out flyers in any of the buildings but could go outside to pass them out. Miller informed Manuel of the same policy. Manuel replied, "That she had observed the Teamsters Union engaging in the same type of conduct and believed she should be entitled to distribute union literature in the hallway" (GC Exh. 9).

On December 21, around 10:45 p.m., Manuel, James Hamilton, and Robert Woodyard were passing out union literature in the hallway.⁴ Miller arrived on the scene and informed the employees that they could not loiter in the hallway but that they could go to the cafeteria or a breakroom to distribute their literature. Woodyard informed Miller that the Teamsters Union was previously permitted to distribute literature in the hallway. Miller replied that, "there was no loitering permitted for any of Respondent's employees." Miller notified White that the three employees were reluctant to leave the hallway area, and after

² The Respondent took over the business and the facility of Airborne Express in Wilmington, Ohio, that was housed in an old air force base. It employed mechanics to service equipment attendant to its operation who were represented by the Teamsters Union. Due to financial difficulties, the Respondent abandoned the Wilmington location and relocated in 2009 to its present CVG hub facility. It retained a maintenance complement of 14 employees when it relocated to Cincinnati who are still represented by the Teamsters Union.

³ Manuel was standing in front of the Respondents milestones, depicted by a "U" on GC Exh. 2, and was handing out union flyers and literature.

⁴ The three employees were standing in the hallway where the "F" and "W" are depicted on GC Exh. 2, and were handing out union flyers and literature.

¹ All dates are in 2010 unless otherwise indicated.

White arrived, he advised the employees that they could not loiter in the hallway while passing out union flyers and literature (GC Exh. 10).

On February 25, 2011, around 5 a.m. Manuel, Woodyard, and Charles Teeters were standing in the hallway area distributing union flyers and literature to employees. Schulken and Basinger informed the three employees that they should move to the breakrooms, cafeteria, or outside if they wanted to loiter for any reason including the distribution of union literature (GC Exh. 11). Manuel also displayed two signs that urged employees to join the Charging Party (GC Exh. 8). The signs were placed against the pillars on the hallway wall near the “F” and “W” depicted on General Counsel Exhibit 2, that was adjacent to the location where the employees were distributing union literature.

C. Discussion

The Board has long held that rules prohibiting distribution of literature are presumed valid unless they extend to activities during nonworking time and in nonworking areas. It has also held that an employer may lawfully prohibit employees from distributing literature in work areas in order to prevent the hazard to production that could be created by littering the premises. *Stoddard Quirk Mfg. Co.*, 138 NLRB 615 (1962). However, the Board has also found, with court approval, that this rule does not apply to a mixed-use area. *Transcon Lines*, 235 NLRB 1163, 1165 (1978), *affd.* in pertinent part 599 F.2d 719 (5th Cir. 1979) (employer failed to meet burden of establishing that distribution, which took place in area used for recreation as well as work, occurred in a work area or during worktime); *Rockingham Sleepwear*, 188 NLRB 698, 701 (1971) (sewing area which is work area for greater portion of day, but used as lunch area during lunch period, not “work area” within meaning of *Stoddard Quirk* for duration of lunch period, but lunchroom where distribution may not lawfully be prohibited). The concerns for protecting the production process which were at issue in *Stoddard Quirk* do not rise to the same level when an employer compromises a work area by permitting nonwork use of it.

The General Counsel takes the position that the hallway area is a nonwork area, where employees on their nonworktime are privileged to distribute union literature to coworkers.

They further argue that even if the hallway area is not a nonwork area, the evidence establishes that it is a mixed-use area (area used for recreation and some work) privileging the right of employees to distribute union literature. *United Parcel Service*, 327 NLRB 317 (1998), *enfd.* 228 F.3d 772 (6th Cir. 2000).

The Respondent argues that the hallway area is a work area and its actions in prohibiting the distribution of union literature is justified based on business necessity, including security, safety, cleanliness, and production-related considerations.⁵

⁵ Respondent’s employee handbook states in pertinent part: You are prohibited from distributing advertising materials, handbills or printed and written literature of any kind in work areas (GC Exh. 7). With respect to security concerns, Swallow testified that the employees did not break any Transportation Security Administration (TSA) policies or guidelines when distributing union literature in the hallway area and

The Respondent supports its position that the hallway area is a work area by citing numerous work-related responsibilities.

First, the hallway area is utilized by employees arriving for work after they check in at the security area and continue walking through the hallway on their way to their workstations, and on their way out from the facility at the conclusion of their shifts. Additionally, employees working in the truck dock area who are assigned to complete additional tasks in the ramp area must walk through the hallway area to a breezeway where they are picked up by a van for transport to the ramp area. The Respondent admits, however, that this does not occur on a regular and routine basis but rather is dictated by the amount of work in the ramp area requiring extra manpower.

The evidence also establishes that there are alternative ways to reach the ramp area that can be utilized to avoid the hallway and some employees take this route. Lastly, Swallow testified that there are no conveyor belts in the hallway which is the primary means that Respondent uses to transport packages nor does freight regularly pass through that area.

Based on these circumstances, I find that the hallway is not exclusively a work area. In this regard, while employees use the hallway for walking to and from their work areas it is incidental to the main function of the facility as the evidence establishes that no work (the sorting of freight or packages) is performed in the hallway area. *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000) (security, maintenance, and gardening were only incidental to the employer’s main purpose—housing guests and allowing guests to gamble). Moreover, no evidence was adduced that the above employees distributed literature to on-duty employees or that the distribution of the union literature interfered with production or discipline.

Second, the Respondent asserts that the quality control (QC) and shipment recovery center (SRC) employees utilize the hallway when relocating packages. These two sections that are comprised of 10–15 employees, work together in an effort to address issues of damaged or misdirected packages. Normally three to five employees are on duty 24/7 in their office that is located directly off the hallway area. While the entire facility sorts and distributes between 90–100,000 packages on a daily basis, the QC/SRC departments handle packages four to five times per week with an average load of 1–3 packages. On occasions, when it is determined the packages correct destination or after repairs are made to a damaged package, it is necessary for QC/SRC employees to physically carry/transport the package through the hallway area and out the front door for pickup by a courier. This procedure does not happen on a daily basis and when packages are transported in this manner, it takes approximately 2–3 minutes from their starting point to exiting the front door of the facility.

Under these circumstances, I find that the hallway area for QC/SRC purposes should not be classified exclusively as a work area. *Foundation Coal West, Inc.*, 352 NLRB 147, 150 (2008) (a hallway with doors leading to administrative offices, a warehouse, a training room, and changing rooms was, at best, a mixed-use area where both socializing and nonproduction

White testified that employees were not hindered in their ingress or egress from the facility.

work, incidental to the employer's main function, the digging and mining of coal, took place).

Third, the Respondent points out that third party tours are conducted in the hallway area.

In this regard, Swallow testified that while a normal pre-hire/new employee orientation tour or one to acquire new business could take between 1 and 3 hours, the average time that these employees spend in the hallway area is between 5–10 minutes. Swallow further stated that while such tours could occur daily, the majority of times they are held on a less frequent basis.

Accordingly, I reject the Respondent's position that the holding of tours for employees in the hallway area for an average of 5–10 minutes in duration on a less frequent basis than once a day converts the hallway area exclusively into a work area prohibiting the distribution of union literature.

Fourth, the Respondent argues that it prohibited the distribution of union literature in this case based on a policy of not permitting employees to loiter in the hallway.⁶ The fallacy with this defense is that the Respondent's employee handbook, in its solicitation and distribution section, does not address this issue (GC Exh. 7).⁷

Moreover, the evidence adduced at the hearing establishes that when employees are in the hallway area they are permitted to use the computer stations during their nonworktime,⁸ are allowed to stop and talk with fellow employees or make cell phone calls, and can watch the television monitors located in the hallway while conversing with coworkers.

Lastly, Manuel, Hamilton, and Teeters credibly testified that they have never been informed about a "nonloitering" policy in the hallway area nor have they been presented with any written rules or regulations to this effect. *Wexler Meat Co.*, 331 NLRB 240, 242 (2000) (employer violates Section 8(a)(1) by implementing a new policy or enforcing a previously unenforced policy in response to union activity if the policy restricts lawful employee union activities).

Fifth, the Respondent asserts that while it has permitted certain authorized events to take place in the hallway area such as a Wellness Fair (GC Exh. 4) during the week of October 18–22, a Financial Fair (GC Exh. 3) on November 18, a Autism speaks event in early May 2011, an Education Fair (R Exh. 11) on September 22–23, and the Teamsters Union distribution of literature once in late 2009 and two additional times prior to the spring of 2010, these functions are Employer sponsored events

⁶ During the distribution period on December 1 and 21, and February 25, 2011, that consumed on each occasion less than 20 minutes, the Respondent did not establish that any of the union literature/flyers (GC Exhs. 5 and 6) caused any disruption nor interfered with the safety or cleanliness of its facility.

⁷ While that section of the handbook prohibits nonemployees to distribute literature or other materials for any purpose at any time, unless specifically authorized or sponsored by the Respondent, no such corresponding policy exists for incumbent employees. Indeed, Human Resources Manager White acknowledged that employees have never been informed either orally or in writing that a policy exists prohibiting loitering in the hallway area and the parties stipulated to this fact.

⁸ Employees are permitted to use the computers for work purposes, to surf the internet or check their personal email accounts.

in which the organizers sought permission of the Respondent.⁹

Indeed, the Respondent argues that the Wellness, Financial, and Education Fairs are related to its fringe benefit package offered to its employees and the Autism event is a charity that the Respondent has sponsored and its employees have made donations and participated in the "Walk for Autism."

Assuming *arguendo* that the above-sponsored events do not violate the Act, there have been other events held in the hallway area that were permitted to take place. For example, the Respondent in October 2010 permitted Urban Active to solicit employees to join its gymnasium at a discounted rate and use the computers in the hallway to sign them up for memberships.

This activity, however, is not part of the Respondent's employee benefit program. Likewise, a booth was set up in the hallway in early January 2011 in which Respondent employees sold Super bowl raffle tickets,¹⁰ and it allowed the distribution in May 2011 of T-shirts and hats by employees for a race car that was being supported by the Respondent and DHL Global Mail in the Indianapolis car series races.¹¹ See *Dow Jones & Co.*, 318 NLRB 574, 574–575 (1995), *enfd. mem.* 100 F.3d 950 (4th Cir. 1996) (employer discriminated against union organizers when it granted access to other nonemployee organizations, e.g., weight watchers and a stop-smoking program).

Additionally, while the Teamsters Union was permitted by a Memorandum of Understanding (MOU) negotiated with the Respondent (GC Exh. 13) to set up tables in the hallway area on three separate occasions to distribute organizational materials and discuss the benefits of joining their labor organization, the Employer acknowledged that there was no interference with the conduct of its business nor with the performance of work by its employees in the hallway area.¹²

For all of the above reasons, I find that the hallway area is not exclusively a work area in which the distribution of union literature could be prohibited. Rather, I conclude that the hallway area is used for recreation as well as some work but the Respondent compromised the hallway area by permitting non-work use of it, and therefore, I find that the Respondent violated Section 8(a)(1) of the Act by enforcing its no-distribution rule in the hallway area. I further find that the Respondent violated Section 8(a)(1) of the Act by permitting the use of the

⁹ See *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583, 587–589 (D.C. Cir. 1996), *enfg.* 318 NLRB 433 (1995) ("no violation of Section 8(a)(1) occurs if the solicitations approved by the employer relate to the employer's business functions and purposes" including informational solicitations relating to benefits that are part of employees' regular benefit package).

¹⁰ While Respondent witnesses testified that they were not aware of any employees selling Super bowl raffle tickets, the testimony of employee Teeters to this effect stands un rebutted.

¹¹ Employees were informed the night before that T-shirts and hats would be available the next day. While the Respondent argues that the T-shirts and hats are a benefit for employees, it is noted that this is not an official benefit listed in the 2011 benefit package for employees (R Exh. 12).

¹² Swallow testified that if the Charging Party would agree to the same terms as the Teamsters he would allow them access to distribute literature in the hallway, an admission that undermines the Respondent's position in not permitting the Charging Party to distribute literature in the same area.

hallway area for the selling of Super bowl raffle tickets, soliciting employees to join a gymnasium at a discounted rate, and distributing T-shirts and hats but discriminately prohibited the distribution of union literature in the same area.

CONCLUSIONS OF LAW

1. The Respondent is an employer 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. The Respondent violated Section 8(a)(1) of the Act by prohibiting employees from distributing union literature in a hallway area while permitting non-union literature and other paraphernalia to be distributed.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, DHL Express, Inc., Erlanger, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Enforcing its no-distribution rule in the hallway area near Respondent's office and cafeteria.
 - (b) Disparately enforcing its no-distribution rule against employees with respect to their distribution of union literature.
 - (c) 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 Erlanger, Kentucky, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴ If this Order is enforced by a judgment of the 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."

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 December 1, 2010.

(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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 21, 2011

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

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WE WILL NOT enforce our no-distribution rules in the hallway area near our office and cafeteria.

WE WILL NOT discriminatorily enforce our no-distribution rule against employees who are distributing union literature or other protected publications.

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.

DHL EXPRESS, INC.