Nos. 12-1072 and 12-1143

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DHL EXPRESS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO

Movant-Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

USHA DHEENAN
Supervisory Attorney

NICOLE LANCIA
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2948
(202) 273-2987

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certify the following:

(a) *Parties and Amici*: The Board is respondent/cross-petitioner before the Court; its General Counsel was a party before the Board (Board Case Nos. 9-CA-46294 and 9-CA-46180). The American Postal Workers Union was the charging party before the Board. DHL Express, Inc. ("the Company"), petitioner/cross-respondent before the Court, was respondent before the Board.

(b) *Rulings Under Review*: This case is before the Court on a petition filed by the Company for review of an order issued by the Board on December 22, 2011, and reported at 357 NLRB No. 145. The Board seeks enforcement of that order.

(c) *Related Cases*: This case has not been before this or any other court. Board counsel are unaware of any related cases either pending or about to be presented to this or any other court.

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GLOSSARY OF ABBREVIATIONS

Act	National Labor Relations Act
Board	National Labor Relations Board
Company	DHL Express, Inc.
Union	American Postal Workers Union, AFL-CIO
Teamsters	International Brotherhood of Teamsters
Hallway	Truck Administration Building hallway

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THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of DHL Express, Inc. ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's Order issued against the Company.

The Board found that the Company committed an unfair labor practice by prohibiting off-duty employees from distributing union literature in a hallway used for both recreational and work-related purposes.

The Board had subject matter jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act ("the Act"),[1] which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order issued on December 22, 2011, and is reported at 357 NLRB No. 145. (J.A. 79-83)[2] It is a final order with respect to all parties under Section 10(e) and (f) of the Act.[3]

The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act,[4] which provides that petitions for review and cross-applications for enforcement may be filed in this Court. The Company filed its petition for review on January 31, 2012, and the Board cross-applied for enforcement on March 9, 2012. Both filings were timely, as the Act places no time limitation on such filings.

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[1] 29 U.S.C. §§ 151, 160(a).

[2] ñJ.A.ò references in this final brief are to the deferred Joint Appendix filed by the Company. "S.A." references are to the Supplemental Appendix submitted by the Board. "Br." refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] 29 U.S.C. § 160(e) and (f).

[4] *Id.*

On March 29, 2012, the American Postal Workers Union ("the Union"), which seeks to represent some of the Company's employees, filed a motion for leave to intervene out of time and sought to intervene in this case. The Board did not oppose. The Company opposed the Union's motion, and the Union filed a reply. On June 15, the Court referred the Union's motion to the merits panel assigned to this case and directed the parties and movant-intervenor to "address in their briefs the issues presented in the motion for leave to intervene rather than incorporate those arguments by reference." (J.A. 100.) The Company failed to do so in its opening brief. The Board does not oppose intervention by the Union.

STATEMENT OF THE ISSUES PRESENTED

I. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by prohibiting nonworking employees from distributing union literature in the Truck Administration Building hallway ("the Hallway"), an area not exclusively used for work.

II. Whether the Board's decision comports with Supreme Court precedent, and whether the Board's law on mixed-use areas and incidental-work use is rational and consistent with the Act.

RELEVANT STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are contained in the Addendum.

STATEMENT OF THE CASE

Acting on unfair-labor-practice charges filed by the Union (J.A. 322, 323), the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act by unlawfully precluding employees from distributing union literature in a nonwork area and disparately enforcing its no-distribution rule against employees who sought to form, join, or assist the Union. (J.A. 324.) After a hearing, the administrative law judge issued a recommended decision and Order finding that the Company violated Section 8(a)(1) of the Act as alleged in the complaint. The Company filed exceptions and a supporting brief to the judge's decision, and the General Counsel filed an answering brief.

On review, the Board (Chairman Pearce and Members Becker and Hayes) affirmed the judge's finding that the Company unlawfully prohibited employees from distributing union literature in the Hallway because it is not exclusively a work area (J.A. 79); however, the Board declined to pass on whether the Company discriminatorily enforced its no-distribution rule. (J.A. 79 n.1.) The facts supporting the Board's decision, as well as the Board's Conclusions and Order, are summarized below.

STATEMENT OF FACTS

I. The Board's Findings of Fact

A. Background; Company Operations and Relevant Policies

DHL is engaged in the international express forwarding of mail and freight. It has a facility at the Cincinnati Airport in Erlanger, Kentucky ("CVG"), its only hub location in the United States. Airplanes deliver packages to CVG, where employees unload, sort, and transfer them onto another plane or ground transportation. CVG operates 24 hours a day, 7 days a week with a full-time day shift, part-time night shift, and part-time morning shift. (J.A. 80; 174-78, 180-82, 193.)

The facility employs 1,200 hourly employees, 65 first-line supervisors, and 5 senior managers. (J.A. 80; 174-78.) Approximately 700 employees work in the Main Sort Building, where 85-90% of the Company's packages are sorted. There are 10-15 Quality Control and Shipment Recovery Center ("QC/SRC") employees, including supervisors, who handle damaged or misdirected packages; only 3-5 QC/SRC employees are on duty at any given time. (J.A. 80-81; 178, 196, 275.) Approximately 400 employees work in the ramp area loading and unloading freight, and about 60 employees work in the truck dock area, assisting with deliveries and placing packages on conveyor belts for sorting. (J.A. 116, 180, 210-11.)

Aside from 14 maintenance employees represented by the International Brotherhood of Teamsters ("Teamsters"), the remaining employees are not unionized. (J.A. 80 & n.2; 197.) The Union has attempted to organize at CVG since at least 2009. (J.A. 156-57, 290.)

The Company's employee handbook includes a solicitation and distribution rule, which states in relevant part:

> Solicitation by one employee of another employee is prohibited if either employee is on work time. You are prohibited from distributing advertising materials, handbills or printed and written literature of any kind in work areas. Working time does not include any break periods.

(J.A. 81 n.5; 342). It does not explain what constitutes a "work area." (J.A. 342.) The handbook also prohibits loitering on company premises by non-employees, but not loitering by employees. (J.A. 81 n.7; 342.)

According to Senior Human Resources Manager Paul White, the Company maintains an unwritten "security directive" that prohibits employees from loitering in the Hallway. (J.A. 80-81; 308.) White defines "loitering" as "hanging out in the hallway or any other location where work isn't being done for [a business] purpose." (J.A. 306, 318.) The parties stipulated that the Company never notified its employees of this policy. (J.A. 82 & n.7; 141, 169, 308.)

B. The Hallway at Issue and Its Uses

The Hallway in which the disputed distribution occurred is located in the Truck Administration Building. It is about 10 to 12 feet wide and runs almost the entire length of the building. (J.A. 80-81; 142, 332-33, 354.) On the left-hand side, there are windows overlooking bushes and trees outside of the facility. Near those windows are pillars and six overhead televisions displaying announcements of upcoming events, changes in start times, weather reports, and production results from the previous night. Farther down on the left side are computer stations, which employees use during their nonworking time to view payroll and benefits information, access the internet, and check personal e-mail accounts. Employees often socialize in that area when they are off-duty, and use their cell phones. (J.A. 80-81; 111-15, 227, 307, 332-33, 359-70.)

On the right-hand side of the Hallway, there is a bulletin board with postings of company policies and government requirements, a small window, and a door used only by QC/SRC employees, which leads to a storage area for distressed packages and a small office for the QC/SRC team; this other hallway also leads to the truck dock area. (J.A. 116, 200-01, 226-28; 359-70.) Farther down the right side of the Hallway are framed portraits of company "milestones" in chronological order, as well as emergency exit doors. (J.A. 80-82; 114-15; 366.) Near the end of the Hallway is an exit door into the truck dock area and an elevator. (J.A. 143,

145, 236; 366.) There are no conveyor belts—the primary means of transporting packages in the facility—or clock-in stations in the Hallway. No freight regularly passes through it and no packages are sorted there. (J.A. 81; 122, 125, 159, 176, 184, 265, 332-33, 359-370.)

Many employees use the Hallway to walk to their workstations in the Main Sort Building or truck dock area at the beginning of their shifts, and to leave the facility after their shifts. (J.A. 81; 122-26, 312.) Upon their arrival, employees pass through a security checkpoint, enter the Hallway, and walk toward a set of sliding doors at the other end. (J.A. 81; 122-26, 312, 332-33.) Employees exit the Hallway through those doors to the breezeway located between the Main Sort Building and the Truck Administration Building. Tugs and forklifts drive through there to transport freight. (J.A. 123, 188, 190, 206, 252, 266, 277, 355.) Employees then cross the breezeway to enter the Main Sort Building, where they clock-in on the second floor and begin their shifts. (J.A. 107-10, 125-26.)

Periodically, truck dock employees assist workers in the ramp area, and they pass through the exit door at the far end of the Hallway for access to the breezeway, where they take shuttles to the ramp area. (J.A. 81; 122, 143-45, 148, 153, 320-21.) There are alternative routes to the ramp area, which do not involve the Hallway. (J.A. 81; 269-70, 279.) Also, in the context of the 90,000-100,000 packages sorted daily, about 4 times per week, QC/SRC employees carry an

average load of 1-3 damaged or misdirected packages through the Hallway to the front entrance for pickup by a courier. (J.A. 81; 229, 250, 270-75.) QC/SRC employees can access their offices, the truck dock area, and the Main Sort Building without using the Hallway. (J.A. 149, 279-80, 313-14.)

The Company has also organized several events in the Hallway. As part of its employee benefits package, the Company held a Wellness Fair, a Financial Fair, and an Education Fair. At those events, outside vendors that partner with the Company's employee benefits program set up tables and consulted with employees in the Hallway, near the pillars and the company milestones. (J.A. 82; 127-33, 238, 293-300, 332-35, 348, 380.) Unrelated to its benefits program, the Company coordinated an Autism Speaks charity event, allowed Urban Active Fitness to set up in the Hallway and offer discounted gym memberships, and permitted employees to distribute Indy car t-shirts and hats for a race car that the Company had sponsored. (J.A. 82; 171-72, 255-56, 286, 301-03, 315, 388.) Employees also raffled NFL Super Bowl tickets there. (J.A. 82 & n.10; 170, 258.) Additionally, the Company occasionally conducts tours of the facility for clients and new employees, spending between five to ten minutes in the Hallway. (J.A. 82; 202-06.)

On three occasions in 2009 and 2010, the Company permitted the Teamsters to set up tables on the left side of the Hallway, where they distributed literature and

spoke to employees about representation, pursuant to a Memorandum of Understanding negotiated in 2009. (J.A. 82; 127, 160-65, 167-68, 238, 256-60, 349.) Senior Director of Operations Shawn Swallow admitted that the Company would allow the Union to handbill in the Hallway if it agreed to the same terms as the Teamsters. (J.A. 82 n.12; 262.)

C. Employees Distribute Union Literature in the Hallway on Their Nonworking Time; Company Security Informs Them that They May Not Loiter in the Hallway and Instructs Them To Relocate

The parties stipulated that four employees handed out union literature in the Hallway on three occasions during their nonworking time, and company security told them they were not permitted to handbill there. (J.A. 80-81; 101.)

On December 1, 2010, at 4:20 a.m., employee Vida Manuel distributed literature on the left side of the Hallway after her shift had ended. (J.A. 81; 134-36, 332-33, 336, 345.) Human Resources Trainer Jama Basinger informed Manuel that she could not hand out flyers in any of the buildings. Then, security guards notified their captain, Jennifer Miller, that Manuel was passing out union flyers to other employees, and Miller told Manuel she could not handbill in the Hallway. Manuel responded that "she had seen the Teamsters in the hallway doing it before at the tables and she thought she was able to do it also." (J.A. 81; 345.)

On December 21, 2010, around 10:45 p.m., nonworking employees Manuel, Bob Woodyard, and James Hamilton handed out the Union's holiday newsletter in

the Hallway, standing by the televisions and milestones. (JA. 80-91; 136-38, 166, 332-33, 339, 346.) Captain Miller informed them that they could not loiter in the Hallway but they could handbill in the cafeteria or break room. (J.A. 80; 346.) When Woodyard told Miller that the Company previously allowed the Teamsters to distribute literature in there, Miller replied that no employees were permitted to loiter in the Hallway. Miller then notified Senior Human Resources Manager White that the three employees were reluctant to leave. White met the employees in the Hallway and reiterated that they could not loiter there. (J.A. 80-81; 346.)

On February 25, 2011, around 5:00 a.m., employees Manuel, Woodyard, and Charles Teeters stood on the left side of the Hallway, handing out union literature to other employees and displaying posters. Security officers said that it was against company policy to loiter in the Hallway and instructed them to move to the cafeteria, a break room, or an outside area. (J.A. 81; 140, 169, 344, 347.)

On each occasion, the employees handbilled for about 20 minutes. (J.A. 82 n.6; 150-51.) There is no evidence that they distributed literature to on-duty employees, or that the distribution interfered with production; the distribution did not violate any Transportation Security Administration policies or hinder ingress or egress. (J.A. 81 & n.5, 82 n.6; 137-38, 224-25, 285, 311.)

II. The Board's Conclusions and Order

On the foregoing facts, the Board (Chairman Pearce and Members Becker and Hayes) affirmed the judge's finding of a violation, with some modification. Chairman Pearce and Member Becker agreed with the judge that the Hallway is not exclusively a work area and found that the Company violated Section 8(a)(1) of the Act by enforcing its no-distribution rule in that area; however, they found it unnecessary to pass on the judge's finding that the Company also violated Section 8(a)(1) by discriminatorily enforcing its no-distribution rule to prohibit union distribution in the Hallway.[5] Member Hayes would have only found that the Company discriminatorily enforced its no-distribution rule and, absent such discrimination, that the Hallway could reasonably be considered a working area. (J.A. 79 n.1, 83.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Order instructs the Company to post remedial notices at its Erlanger, Kentucky facility and to distribute them electronically, if the Company customarily communicates with its employees by such means. (J.A. 82-83.)

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[5] If the Court grants review and denies enforcement of the Board's order, the Board requests that the Court remand the case to the Board to consider in the first instance the judge's finding of discriminatory enforcement. (J.A. 82-83.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company unlawfully prohibited nonworking employees from distributing union literature in the Hallway. It is accepted that an employer may not prohibit off-duty employees from distributing union literature in nonwork or mixed-use areas, unless the employer shows that special circumstances made its prohibition necessary to maintain discipline or production. The Board reasonably found that the Hallway is not exclusively a work area because both work and recreation occur there, which the Company does not dispute. Contrary to the Company's suggestion, the Board does not mechanically allow distribution in all areas with both work and nonwork uses, but engages in fact-intensive inquiries, as it did here, to determine whether or not a disputed location is a work area. Moreover, the Company did not rebut the presumptive invalidity of its prohibition, as it offered only speculative safety concerns, not specific evidence that the distributions disrupted production. Thus, the Company unlawfully interfered with employees' Section 7 rights in violation of Section 8(a)(1) of the Act.

The Company attacks the Board's alleged failure to balance employees' organizational interests and employers' property interests, and the Board's longstanding precedent on mixed-use areas and incidental-work usage of the disputed area. As to the former, the Company erroneously collapses the distinction

between employee and nonemployee rights in arguing that the Board was required to balance the employees' Section 7 interests with the Company's property interests. The latter argument fails in several respects. First, Section 10(e) of the Act precludes the Court from reviewing the Company's related arguments— its legal challenge to the Board's precedent on incidental-work use and its claim that the Board's law on mixed-use areas and incidental-work use lacks any reasoned explanation—since the Company never raised them to the Board for consideration. Second, the Company incorrectly characterizes the presumption to be applied in mixed-use areas as an "open" question, ignoring established Board and court precedent. Finally, the Court should reject the Company's efforts to replace the Board's analysis for mixed-use areas with a bright-line rule that a work area is one where any work is performed; such a rule would ignore the factual nuances of how employees use a particular area and disregard the balancing of organizational and managerial interests, which the Board's evidence-based approach accomplishes.

For these reasons, the Court should enforce the Board's Order in full.

STANDARD OF REVIEW

This Court's review of Board decisions "is quite narrow."[6] The Board's factual findings and its application of the law to particular facts are conclusive if

[6] *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

supported by substantial evidence on the record as a whole.[7] Likewise, courts review the Board's determination that a disputed area is a work, nonwork, or mixed-use area under the "substantial evidence" standard.[8] The Court will affirm the Board's legal rule "as long as it is rational and consistent" with the Act.[9] As the Supreme Court explained: "For the Board to prevail, it need not show that its construction is the *best* way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one."[10]

ARGUMENT

The Company agrees (Br. 41) that the Hallway is not exclusively a work area, but maintains that it can still ban distribution there because, despite the mixed use of the Hallway, it should still be considered a work area. Substantial evidence

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[7] 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *Traction Wholesale Ctr. Co.*, 216 F.3d at 99.

[8] *See, e.g.*, *Brockton Hosp. v. NLRB*, 294 F.3d 100, 105 (D.C. Cir. 2002) (substantial evidence supported Board's finding that hospital vestibule was nonwork area); *United Parcel Serv., Inc. v. NLRB*, 228 F.3d 772, 776 (6th Cir. 2000) (substantial evidence supported Board's finding that check-in area was nonwork area, or mixed-use area at most); *NLRB v. Transcon Lines*, 599 F.2d 719, 721 (5th Cir. 1979) (substantial evidence supported Board's finding that drivers' room was, at best, mixed-use area).

[9] *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990); *Ceridian Corp. v. NLRB*, 435 F.3d 352, 356 (D.C. Cir. 2006).

[10] *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (emphasis in original).

supports the Board's finding (J.A. 79 & n.1, 81-82) that the Company's no-distribution rule in the Hallway is unlawful. The Company mainly challenges (Br. 18-36) the settled law the Board applied, arguing that the Board failed to balance employees' organizational rights with the Company's property rights and that the Board's precedent on mixed-use areas and incidental-work use of an area is irrational and arbitrary. As shown below, both arguments fail.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE HALLWAY IS NOT EXCLUSIVELY A WORK AREA AND, THEREFORE, THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY PROHIBITING EMPLOYEE DISTRIBUTION THERE

A. An Employer May Not Prohibit Employees from Distributing Union Literature During Their Nonworking Time in Nonwork or Mixed-Use Areas, Absent Special Circumstances

Section 7 of the Act grants employees the "right to self-organization, to form, join, or assist labor organizations . . . ."[11] Section 8(a)(1) of the Act protects these rights by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7."[12] The Supreme Court has "long accepted the Board's view that the right of employees to self-organize and bargain collectively [under Section 7]

[11] 29 U.S.C. § 157.

[12] 29 U.S.C. § 158(a)(1).

necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite."[13]

Indeed, the workplace is "uniquely appropriate" for the exchange of views regarding issues of unionization,[14] as it is "where [employees] . . . traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees."[15] This Court has observed that "the statutorily protected organizing rights of employees may be limited only by the legitimate interests of the employer in discipline, workplace efficiency, and property protection."[16]

It is well settled that prohibiting employees from distributing literature in nonwork areas during nonworking time is presumptively invalid, unless the employer shows that "special circumstances" make the prohibition necessary to maintain plant discipline or production.[17] This principle signifies an acceptable "adjustment between the undisputed right of self-organization assured to

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[13] *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978).

[14] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

[15] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (internal quotation marks and citations omitted).

[16] *Rest. Corp. of America v. NLRB*, 827 F.2d 799, 805 (D.C. Cir. 1987).

[17] *Republic Aviation Corp.*, 324 U.S. at 797-98, 802-03 & n.10; *Eastex, Inc.*, 437 U.S. at 575-76.

employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments."[18] Alternatively, an employer may prohibit the distribution of literature in work areas "to prevent the hazard to production that could be created by littering the premises,"[19] as long as the rule is not unfairly applied.[20] In plain terms, "working time is for work."[21] And, as this Court observed, a prohibition against distribution in work areas is presumptively "valid because it is presumed to be directed toward, and to have the effect of, preventing interference with production."[22]

However, "Board precedent has long held that merely because a work function or functions occur in a given space does not render that space a 'work area' within the meaning of the Board's rules regarding distribution."[23] Indeed, since "[s]ome work tasks, whether it be cleaning up, maintenance, or other

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[18] *Republic Aviation Corp.*, 324 U.S. at 797-98; *see Eastex, Inc.*, 437 U.S. at 570.

[19] *United Parcel Serv.*, 327 NLRB 317, 317 (1998), *enforced*, 228 F.3d 772 (6th Cir. 2000); *accord Stoddard Quirk Mfg. Co.*, 138 NLRB 615, 615 (1962).

[20] *Stoddard-Quirk Mfg. Co.*, 138 NLRB at 641; *accord Republic Aviation Corp.*, 324 U.S. at 803 n.10.

[21] *Republic Aviation Corp.*, 324 U.S. at 803 n.10.

[22] *Rest. Corp. of America*, 827 F.2d at 805; *accord Stoddard Quirk Mfg. Co.*, 138 NLRB at 615.

[23] *Brockton Hosp.*, 333 NLRB 1367, 1375-76 (2001), *enforced in relevant part*, 294 F.3d 100 (D.C. Cir. 2002).

incidental work, are performed at some time in almost every area of every company,"[24] to define work areas as all areas where any work is performed would "effectively destroy[] the right of employees to distribute literature."[25] To safeguard against that possibility, the Board analyzes the type and amount of the work performed in that area[26] and has found that the periodic occurrence of work that is incidental to the employer's primary business is insufficient to establish a work area.[27] Accordingly, "in order to constitute a work area, an area must be integral, not merely incidental, to the employer's main function."[28]

Consistent with these principles, the Board has explained that "the concerns for protecting the production process . . . do not rise to the same level when an

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[24] *U.S. Steel Corp.*, 223 NLRB 1246, 1248 (1976), *enforced*, 547 F.2d 1166 (3d Cir. 1976) (table).

[25] *Id.* at 1247-48.

[26] *See, e.g.*, *Meijer, Inc.*, 344 NLRB 916, 921-22 (2005), *enforced in relevant part*, 463 F.3d 534 (6th Cir. 2006); *Santa Fe Hotel, Inc.*, 331 NLRB 723, 723, 730 (2000); *Timken Co.*, 236 NLRB 757, 763-64 (1978).

[27] *See, e.g.*, *Meijer, Inc.*, 344 NLRB at 921-22 (finding retail parking lot to be nonwork area because periodic and sporadic retrieval of shopping carts and customer assistance, and outside companies' promotional events are incidental to primary function of selling merchandise inside stores); *Santa Fe Hotel, Inc.*, 331 NLRB at 730 (security, maintenance, and gardening incidental to main function of housing guests and allowing them to gamble).

[28] *Meijer, Inc. v. NLRB*, 463 F.3d 534, 543 (6th Cir. 2006) (internal quotation marks omitted); *see Santa Fe Hotel, Inc.*, 331 NLRB at 730.

employer compromises a work area by permitting non-work use of it."[29] As such, an employer's right to preclude employee distribution in work areas does not apply to mixed-use areas[30]—areas used for work and nonwork functions, "where [employees] may either work or relax."[31] Thus, absent a showing of special circumstances, an employer may not prohibit employees' distribution of union literature in a mixed-use area.[32]

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[29] *United Parcel Serv.*, 327 NLRB 317, 317 (1998), *enforced*, 228 F.3d 772 (6th Cir. 2000); *see U.S. Steel Corp.*, 223 NLRB at 1247 ("In primarily nonworking areas[,] the element of protecting the production process is not present. Whether employees are distributing literature or doing other nonwork functions . . . makes no difference to production or the tasks performed by employees in these nonwork areas.").

[30] *Arkansas-Best Freight System, Inc.*, 257 NLRB 420, 424 (1981) (unlawful ban on distribution in drivers' room, which was mixed-use area), *enforced sub nom. ABF Freight System, Inc. v. NLRB*, 673 F.2d 228 (8th Cir. 1982); *Transcon Lines*, 235 NLRB 1163, 1165 (1978) (same), *enforced in relevant part*, 599 F.2d 719 (5th Cir. 1979); *see, e.g.*, *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 456-47 (2003) (lunchroom was mixed-use area because employer held infrequent meetings there); *Oak Apparel, Inc.*, 218 NLRB 701, 701-02 & n.7 (1975) (unlawful ban on distribution in plant production area mainly used as lunchroom during time of distribution, where no evidence showed literature was distributed to working employees); *Rockingham Sleepwear*, 188 NLRB 698, 701 (1971) (sewing area used as lunchroom was not "work area" during lunch period and distribution could not be prohibited at that time), *enforced*, 1972 WL 3048 (4th Cir. 1972) (unpublished).

[31] *Transcon Lines*, 235 NLRB at 1165.

[32] *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 493 (1978); *United Parcel Serv., Inc. v. NLRB*, 228 F.3d 772, 776 (6th Cir. 2000).

B. Employees Use the Hallway for Recreational and Work Purposes, and Any Work Performed There Is Incidental to the Main Function of the Company's Facility

As the Board found (J.A. 81), the Company compromised the Hallway by allowing employees to use it for nonwork functions and, thus, the Hallway is not exclusively a work area where distribution could be banned.

The Hallway is primarily used for recreation, supporting the Board's finding that it is not exclusively a work area. (J.A. 81-82.) Employees use computers to surf the Internet, check personal e-mails, and view their paychecks and benefits during nonworking time. They also use their cell phones and socialize with other employees during breaks and before and after their shifts. (J.A. 81-82; 111-15, 227, 307.) And the Company does not restrict how early employees may arrive for their shifts, or require employees to leave the facility at the end of their shifts. (J.A. 316-17.)

Furthermore, while the Company held some employee benefits-related events in the Hallway, it also permitted numerous unrelated events to occur there. (J.A. 81-82; 127-33, 238, 293-300, 332-35, 348, 380.) For example, it allowed an Autism Speaks fundraiser, an outside gym's sale of discounted memberships to employees, and the distribution of t-shirts and hats for a company-sponsored Indy car. None of those events involved the Company's benefits package or employees' work. (J.A. 81; 171-72, 255-56, 219, 315, 388.) The Company also authorized the

Teamsters to handbill in the Hallway. (J.A. 82; 160-165, 167-168.) And employees raffled off Super Bowl tickets on nonworking time. (J.A. 82 & n.10; 170, 258.) These various nonwork activities demonstrate that the Hallway is a mixed-use area, where employees "may either work or relax."[33]

To the extent the Hallway is used for work, that work is only incidental to the main business purpose of CVG—sorting packages and freight.[34] (J.A. 81.) Employees primarily use the Hallway to get to their workstations in the Main Sort Building, where they clock-in and clock-out, and to exit the facility at the end of their shifts. (J.A. 122, 125-26, 158-59, 166, 224, 234-35, 312, 319-20.) On sporadic occasions when truck dock employees must work in the ramp area, they walk through an exit door at the end of the Hallway out to the breezeway for transportation to the ramp area. (J.A. 81; 122, 146-148, 153, 269-270, 320-321.) While elsewhere in the facility employees process 90,000 - 100,000 packages daily, about 4 times a week, a handful of QC/SRC employees pass through the Hallway to deliver 1-3 packages to the front entrance for pickup by a courier. (J.A. 81; 229, 270-275, 288-289, S.A.1.) The Company also occasionally conducts tours for clients and new employees, but they spend only five to ten minutes in the

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[33] *Transcon Lines*, 235 NLRB at 1165.

[34] *See Meijer, Inc.*, 463 F.3d at 543; *U.S. Steel Corp.*, 223 NLRB at 1248; *Santa Fe Hotel, Inc.*, 331 NLRB at 730.

Hallway. (J.A. 82; 281, 284.) Furthermore, there are no conveyor belts in the Hallway, no freight regularly passes through the Hallway, and no packages are actually sorted there.[35] (J.A. 81; 122-25, 146-48, 152, 159, 320, 332-33, 359-61, 363, 365-66.) In fact, all sorting, loading, and unloading occurs in separate areas—in the Main Sort Building, truck dock area, and ramp area. (J.A. 80; 123-25, 146.) Therefore, these limited work uses of the Hallway are incidental, not integral, to the main function of the facility.

The Board's analysis and finding here is consistent with its past cases on employee distribution. In determining whether an area is a work area, "the Board has looked at the quality and quantity of work, which occurs in the area at issue, and examines whether the work is more than de minimis and whether it involves production."[36] In each case, as here, the Board thoroughly explicates how the disputed area is used and compares the work and nonwork usage of that area before determining whether the employer's prohibition is presumptively lawful or unlawful. A sample of cases demonstrates this approach.

- In *United Parcel Service*, the Board invalidated a distribution ban for a driver check-in area that was a *nonwork* area or, at most, *mixed-use*

[35] *Compare Vapor Corp.*, 242 NLRB 776, 790 (1979) (room where forklifts entered regularly was work area); *Timken Co.*, 236 NLRB 757, 764 (1978) (hallway with regular cart and tow-motor traffic was work area).

[36] *Brockton Hosp.*, 333 NLRB 1367, 1376 (2001), *enforced*, 294 F.3d 100 (D.C. Cir. 2002).

area, between 7:30 and 8:30 a.m. because the drivers "openly read, lounge, engage in social conversation" and while "supervisors occasionally give some instructions or supplies to drivers" there, "this is the exception and not the rule."[37]

- In *Transcon Lines*, the Board found that distribution should be allowed in the drivers' room, which it found was a *mixed-use* area "where drivers may either work or relax." Specifically, employees completed travel documents and reports, and read company notices and bulletins. But they also drank coffee or ate snacks, talked with co-workers, posted offers to sell cars and rent homes, collected funds for various causes, and solicited union membership there.[38]

- In *Meijer, Inc.*, the store unlawfully banned distribution in a retail parking lot that was a *nonwork* area. Employees performed "periodic or sporadic work activities," such as retrieving carts and assisting customers in loading purchases. But no employees were permanently stationed there and there were no cash registers. Other companies occasionally held promotional events, but these functions were "merely incidental" to the employer's primary function of "selling merchandise inside its stores."[39]

- In *Timken Co.*, the Board upheld a distribution ban in a corridor it found was a *work* area because its use was "substantially work related." On-duty employees traversed the corridor to get to the toolroom and maintenance area, the carts and tow motors frequently used it to travel between different departments, the traffic in the corridor was "substantial" and "heavy," and "the weight of traffic was [not] limited to just those times when employees were reporting to work through the plant entrance in that corridor."[40]

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[37] 327 NLRB 317, 317 (1998), *enforced*, 228 F.3d 772 (6th Cir. 2000).

[38] 235 NLRB 1163, 1165 (1978), *enforced in relevant part*, 599 F.2d 719 (5th Cir. 1979).

[39] 344 NLRB 916, 923 (2005), *enforced in relevant part*, 463 F.3d 534 (6th Cir. 2006).

[40] 236 NLRB 757, 763-74 (1978).

- In *Litton Microwave Cooking Prods., Division of Litton Systems, Inc.*, the main lobby—which was no wider than the two doors on each side through which nearly 600 employees passed on their way to work—was a *work* area between 6:30 and 7:00 a.m. In the lobby, security guards "had to check badges, issue temporary badges and take telephone calls from incoming employees as well as check employees who had obvious physical injuries and keep them from going to work before the nurse saw them."[41]

The Company wrongly suggests (Br. 14, 29-31, 34-36) that the Board automatically deems an area with any nonwork use to be a nonwork or mixed-use area in which distribution must be allowed; on the contrary, the Board decides cases based on sound, evidence-based examinations of the work and nonwork uses of an area to assess whether a no-distribution rule is entitled to the presumptive validity applicable to work areas. As these cases illustrate, the Board carefully considers the *amount* of work and nonwork usage as well as the *type* of work that occurs in a particular area. In fact, this line of precedent explicitly refutes the Company's claim (Br. 30-31) that, under Board law, "an area must be devoted exclusively to work that is not incidental to employer's main purpose" to be a work area. Thus, the Company's prediction (Br. 31) that the Board's law on mixed-use areas "could lead to the evisceration of the right of employers 'to control the use of [their] property'" is mere hyperbole.

Although the Company concedes that the Hallway is not exclusively a work area, it still asks this Court to find that "sufficient" work occurs there so it must be

[41] 300 NLRB 324, 347, 355 (1990).

deemed a work area, analogizing this case to *The Times Publishing Co. v. NLRB*,[42] *Patio Foods, A Division of R.J. Reynolds Foods, Inc. v. NLRB*,[43] and *McDonnell Douglas Corp. v. NLRB*.[44] (Br. 41-42.) However, *The Times Publishing Co.* is inapposite because it involved heavy business use of the location the court deemed to be a work area: the newspaper's lobby was open to the public and customers for reading and buying issues and other items, applying for jobs, and submitting advertisements and news items.[45] Likewise, *Patio Foods* involved employee distribution in an area restricted to truck loading operations where the only asserted nonwork functions were employee ingress and egress.[46] Lastly, *McDonnell Douglas Corp.* did not involve whether a particular location was a work or nonwork area, but whether the employer showed that the "militarily sensitive" and "classified" nature of its work constituted "special circumstances" justifying its no-

[42] 576 F.2d 1107 (5th Cir. 1978).

[43] 415 F.2d 1001 (5th Cir. 1969).

[44] 472 F.2d 539 (8th Cir. 1973).

[45] 576 F.2d at 1108-09.

[46] 415 F.2d at 1002-03.

solicitation and distribution rule.[47] Accordingly, those easily distinguishable cases are of no import.

In addition to challenging the distribution's location, the Company attacks its timing and the Board's observation (J.A. 79 n.1) that there was no evidence that any of the recipients were on duty. Yet, the Court need not address the Company's unsupported assertion (Br. 37) that the General Counsel had to show that employees who received literature were on nonworking time "because that was not the reason the [Company] denied access to the employees to solicit them."[48] Rather, it told the employees that they could not loiter in the Hallway. (J.A. 79 n.1, 80-81; 134-41, 169, 305-06, 309.)

[47] 472 F.3d at 541, 547-48 (finding that Board failed to adequately consider employer's national security concerns where it manufactured government missiles, space vehicles, and other aircraft, and maintained elaborate security system).

[48] *Postal Serv.*, 339 NLRB 1175, 1176 (2003), *enforced sub nom. Am. Postal Workers Union v. NLRB*, 370 F.3d 25 (D.C. Cir. 2004); *see NLRB v. Transcon Lines*, 599 F.2d 719, 721-22 (5th Cir. 1979) (rejecting defense that there was no proof that recipients of distribution in mixed-use area were on nonwork time; "the precise nicety of proof hypothesized by the employer was not required").

C. The Company Failed To Show Special Circumstances Justifying Its Ban on Employee Distribution of Union Literature in the Hallway

Prohibiting employee distribution of union literature in a nonwork or mixed-use area is presumptively unlawful, absent "special circumstances"[49] proving that the ban is necessary to maintain production or discipline. "Special circumstances" means "problems associated with distribution which go beyond the normal problems of litter and production efficiency which the Board took into account . . . when it granted employers the additional limit of banning distributions from work areas."[50] Speculative apprehensions "as to what would happen in the absence of the prohibition" are insufficient to overcome the presumption.[51] And the Board has rejected as insufficient mere concerns about litter prevention, safety, and the promotion of production efficiency.[52]

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[49] *U.S. Steel Corp.*, 223 NLRB 1246, 1248 (1976), *enforced*, 547 F.2d 1166 (3d Cir. 1976) (table).

[50] *Id.*; *see Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962).

[51] *U.S. Steel Corp.*, 223 NLRB at 1248; *see Meijer, Inc. v. NLRB*, 463 F.3d 534, 544-45 (6th Cir. 2006) ("generic safety concern" does not satisfy burden); *Stoddard Quirk Mfg. Co.*, 138 NLRB at 621 (mere assertion that ban is needed to maintain production "hardly proves that it is actually 'necessary' for the employer to prohibit union handbilling by his own employees in nonworking areas").

[52] *U.S. Steel Corp.*, 223 NLRB at 1248; *see, e.g., General Aniline and Film Corp.*, 145 NLRB 1215, 1218-19 (1964) (litter and safety considerations insufficient where employer had housekeeping and safety rules to prevent potential hazards of distribution); *Minneapolis-Honeywell Regulator Co.*, 139 NLRB 849, 852 (1962)

Here, the Company only speculates that employees' distribution of literature could conceivably cause congestion and littering, which might pose a threat to employee safety. (Br. 39.) As the Board found (J.A. 82 n.4), the Company did not show that the three distributions "caused any disruption [or] interfered with the safety or cleanliness of the facility."[53] In fact, the distributions did not violate Transportation Security Administration policies, interfere with employees' ingress or egress, or affect the sorting or shipping of freight and packages. (J.A. 81 & n.5, 82 n.6; 137-38, 224-25, 285, 311.) Moreover, the Company has not even attempted to show that employees' distribution of union literature would likely disrupt production.[54] (J.A. 81-82 & n.12.) Indeed, the Company concedes (Br. 39-40) that it cannot identify any "empirical data" to support its claim.

To rationalize the lack of operational disruption, the Company claims it never confronted unauthorized distribution before and relies on its swift crack-down on union distribution. Thus, it effectively asserts that it could not show any

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(empty assertions about promoting discipline, production, and housekeeping insufficient).

[53] *U.S. Steel Corp.*, 223 NLRB at 1248 (employer "failed to show that distributions caused any problems"); *see Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 457 (2003) (no evidence that distribution in lunchroom "led to any unsightly, disorganized, or hazardous condition" or interfered with distribution of company materials).

[54] *See Brockton Hosp. v. NLRB*, 294 F.3d 100, 104 (D.C. Cir. 2002) (substantial evidence supported Board's finding that hospital did not show likelihood that distribution would disturb patients).

disruption because it did not wait to see what happened and "instructed [employees] to stop before any issues arose." (Br. 40.) That defense hardly meets its burden of providing "specific evidence of unusual circumstances."[55] While the Company asserts a significant safety risk from employees stopping in the Hallway "even for a moment" (Br. 39), it stipulated that it never told employees of any anti-loitering policy to prevent this supposed hazard. Moreover, the Company condoned frequent loitering in the Hallway—permitting employees to socialize, talk on cell phones, and use computers for personal use during nonworking time. It has also allowed the Teamsters to handbill there. (J.A. 82; 258, 260, 349.) And Senior Director of Operations Swallow admitted that he would allow the Union to distribute literature in the Hallway if it agreed to the same terms as the Teamsters, which, the Board found, "undermines the [Company's] position in not permitting the [Union] to distribute literature in the same area" because of safety concerns. (J.A. 82 n.12; 262.) Yet the Company has not explained why its safety concerns

[55] *Meijer, Inc.*, 463 F.3d at 545; *see also Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 472-73 (5th Cir. 2001) (employer failed to make "a particularized showing" that its prohibition on distribution in a mixed-use area was valid); *U.S. Steel Corp.*, 223 NLRB at 1248 (employer's claimed special circumstances were speculative and existed in the absence of actual distribution in nonwork areas).

about congestion are attributable only to employees' distribution of union literature but not to the myriad of other nonwork uses of the Hallway.[56]

In a similar vein, the Company erroneously suggests (Br. 40) that it need not permit employees to distribute union literature in the Hallway because employees have "sufficient access" to nonwork areas, such as the break room, cafeteria, and parking lot. But "the availability of alternatives for employee communication, moreover, does not generally affect an employee's right to distribute literature," since employee distribution may not be prohibited in a mixed-use area "even if other non-work areas exist."[57]

II. THE BOARD'S DECISION COMPORTS WITH SUPREME COURT LAW, AND THE BOARD'S PRECEDENT ON MIXED-USE AREAS AND INCIDENTAL-WORK USE IS RATIONAL AND CONSISTENT WITH THE ACT

Where the facts are compelling and largely undisputed, the Company attempts to manufacture a legal controversy where none exists. First, it incorrectly claims (Br. 14, 20-21, 23-24, 28-29) that the Board needed to balance employees'

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[56] *See United Parcel Serv.*, 331 NLRB 338, 338 (2000) (rejecting asserted littering hazard of union newspaper where drivers could read non-union-related newspapers in the nonwork or mixed-use area and there was no evidence of any operational disruption); *see Transcon Lines*, 235 NLRB 1163, 1165 (1978) (rejecting argument that union distributions in mixed-use area would distract drivers where other distributions there "presented as great a potential for distracting drivers"), *enforced in relevant part*, 599 F.2d 719 (5th Cir. 1979).

[57] *United Parcel Serv., Inc. v. NLRB*, 228 F.3d 772, 777-78 (6th Cir. 2000) (rejecting employer's argument that right of distribution in mixed-use areas is preconditioned on absence of nonwork areas).

Section 7 rights against the Company's property rights and, in failing to do so, deviated from Supreme Court precedent. Second, it challenges (Br. 14-15, 29-36) the Board's settled law on mixed-use areas and incidental-work use. These contentions do not pass muster.

A. The Board Was Not Required To Balance Employees' Section 7 Rights with the Company's Property Rights in This Case

The Company's balancing argument improperly rests on Supreme Court cases involving nonemployee access rights (Br. 20, 23-24, 28, 36) and wrongly conflates employers' property rights and managerial interests.

As the Supreme Court explained in *Eastex, Inc. v. NLRB*: "A wholly different balance was struck when organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests were there involved."[58] In *Republic Aviation Corp.*, the Supreme Court upheld the Board's ruling that an employer may not prohibit its *employees* from distributing union literature in nonworking areas during nonworking times, unless the employer shows that a restriction is necessary to maintain production or discipline.[59] By contrast, in

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[58] *Eastex, Inc.*, 437 U.S. at 571-72 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 521-22 n.10 (1976)) (discussing difference between *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)) (internal quotation marks omitted).

[59] 324 U.S. at 797-98, 801-05.

Babcock & Wilcox Co., the Court held that the employer could prevent *nonemployees* from distributing union literature on its property as long as other channels of communication were available to the union.[60] Thus, "there is a distinction of substance between rules of law applicable to employees and those applicable to nonemployees,"[61] so nonemployee access cases like *Lechmere, Inc. v. NLRB*,[62] on which the Company's argument is premised, are inapposite. Similarly, the other Supreme Court cases it cites (Br. 20-22, 34 n.6) involve different issues, such as First Amendment rights and allegedly discriminatory enforcement of a valid no-solicitation rule,[63] and do not support its view that the Board wrongly failed to consider its property rights in this case. Accordingly, where, as here, it is

[60] 351 U.S. at 112-13.

[61] *Eastex, Inc.*, 437 U.S. at 571 (quoting *Babcock & Wilcox Co.*, 351 U.S. at 113) (internal quotation marks omitted).

[62] 502 U.S. 527, 535, 538-39 (1992) (employer lawfully barred nonemployee union organizers from accessing its property, where union had reasonable alternative means of communicating with employees).

[63] *Hudgens v. NLRB*, 424 U.S. 507, 520-22 (1976) (warehouse employees had no First Amendment right to enter private shopping center, where they did not work, to advertise their strike against their employer, which had retail store there); *NLRB v. United Steelworkers of America*, 357 U.S. 357, 362-64 (1958) (enforcement of undisputedly valid no-solicitation rules was not discriminatory despite employers' antiunion solicitation).

undisputed that the distributing employees were rightfully on the premises, the Company's "reliance on its property right is largely misplaced."[64]

The Company's assertion (Br. 28) that the Board has never balanced organizational rights and managerial interests also disregards established law. The Board did, in fact, balance such interests, with Supreme Court approval, in creating the rebuttable presumption that an employer may not prohibit employee distribution in nonwork areas, unless it shows that the prohibition is necessary to maintain production or discipline.[65] As the Supreme Court stated: "The effect of these rules [applying the principle of accommodation] is to make particular restrictions on employee solicitation and distribution presumptively lawful or unlawful . . . subject to the introduction of evidence sufficient to overcome the presumption."[66] By enabling an employer to show particularized production or operational concerns to rebut the presumptive invalidity of a no-distribution rule in a nonwork or mixed-use area, the Board's judicially approved test already accounts for employees' organizational and employers' managerial rights.

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[64] *Eastex, Inc.*, 437 U.S. at 572-73.

[65] *Id.* at 570-71; *Republic Aviation Corp.*, 324 U.S. 793, 797-98, 801-03, 803 n.10 (1945) (recognizing Board's distribution analysis accounts for organizational rights and employers' right to maintain discipline).

[66] *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 492 (1978); *see also Babcock & Wilcox Co.*, 351 U.S. at 112 ("The determination of the proper adjustments rests with the Board.").

B. The Board's Precedent on Mixed-Use Areas and Incidental-Work Use Is Rational and Consistent with the Act

The Company unsuccessfully attempts to disturb the Board's judicially accepted precedent on mixed-use areas and incidental-work use, contending that it is an "open" question of law (Br. 32, 34-35), unreasoned, and irrational. (Br. 29-36.) This attempt fails for multiple reasons.

1. The Court lacks jurisdiction to consider the Company's challenge to the Board's incidental-work precedent and claim that the Board has failed to adequately explain its law on mixed-use areas and incidental-work use

The Court is jurisdictionally barred from considering the Company's legal challenge to the Board's incidental-work use precedent and its claim that the Board has never explained its long-held analysis of mixed-use areas and incidental-work use. Section 10(e) states, "No objection that has not been urged before the Board . . . shall be considered by the court. . . ."[67] This provision promotes the "salutary policy . . . of affording the Board opportunity to consider on the merits questions to be urged upon review of its order."[68] The Board's regulations fortify this statutory mandate by providing that "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been

[67] 29 U.S.C. § 160(e).

[68] *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 256 (1943).

waived."[69] And "the grounds for the exception"[70] must be evident from the context in which it is raised.[71]

In its opening brief, the Company attacks the legal concept of incidental-work use (Br. 29-31) and challenges the Board's alleged failure to sufficiently explain its mixed-use area and incidental-work use precedent (Br. 15, 33-35). However, since the Company did not present or even allude to those arguments in its exceptions or supporting brief to the Board, Section 10(e) bars this Court from considering them.[72]

First, the Company criticizes (Br. 29-30) the Board's *legal* principle that, to constitute a work area, work use of that area cannot be merely incidental to the employer's primary operation. Before the Board, however, the Company only contended, *factually*, that the work-related activities in the Hallway were not merely incidental to CVG's main function. (J.A. 35-36; 55-56.) In arguing that the "nature" of the specific work uses of the Hallway made it a work area (J.A. 56), the Company recognized the Board's incidental-work use standard as part of the legal framework for evaluating whether an area is a work area and objected only to

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[69] 29 C.F.R. § 102.46(b)(2).

[70] 29 C.F.R. § 102.46(b)(1).

[71] *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 417 (D.C. Cir. 1996).

[72] *See, e.g.*, *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1094 (D.C. Cir. 2012); *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 32-33 (D.C. Cir. 2007).

the judge's application of that framework here. Moreover, the Company admitted that the "legal framework" for distribution cases is "settled." (J.A. 53.) Therefore, having failed to do so before the Board, the Company may not assail that "settled" law now. In any event, this and other courts of appeals have approved the Board's analysis of the type of the work done in an area,[73] and the Company has shown no reason to disturb that law.

Second, the Company belatedly asserts that "the Board has never engaged in a 'considered analysis' of the mixed-use and incidental-work exceptions to the working area rule or 'explained its chosen interpretation' of the statute to permit them." (Br. 33-35.) In its exceptions, the Company objected "to the ALJ's finding that a mixed-use area must be treated the same as a non-work area for purposes of application of a no distribution rule." (J.A. 35.) In its brief to the Board, immediately after reiterating that objection, the Company posited that the judge's conclusion "abandon[s] the Board's responsibility to balance employees' Section 7 rights against an employer's property and managerial rights . . . ." (J.A. 56.) These statements did not put the Board on notice that the Company believed that the Board had never sufficiently *explained* its long-standing precedent on mixed-use areas and incidental-work usage. Nor was the Company's intention to raise

[73] *See, e.g.*, *Brockton Hosp. v. NLRB*, 294 F.3d 100, 105 (D.C. Cir. 2002); *Meijer, Inc.*, 463 F.3d 534, 543 (6th Cir. 2006).

that issue evident from the context of its exceptions, given that it cast its argument in terms of the Board's responsibility to balance employee and employer rights, not the Board's lack of explanation in its precedent. After all, just as "[j]udges are not like pigs, hunting for truffles buried in briefs,"[74] neither are Board members. Moreover, its brief to the Board indicated the opposite—describing the applicable legal framework as "for the most part, settled" (J.A. 53), not one lacking a "reasoned" (Br. 33) or "considered" (Br. 35) analysis. Accordingly, Section 10(e) bars appellate review of this argument. In any event, the Company overlooks Board precedent thoroughly examining the work and nonwork uses of a disputed area.[75]

2. The Board's decision does not involve an open question and instead applies its long-standing precedent on distribution in areas used for both work and nonwork

The Company incorrectly suggests (Br. 32-34) that this case involves unsettled questions of law and, relying on *ITT Industries, Inc. v. NLRB,*[76] insists that the Court must vacate the Board's decision. As an initial matter, this assertion contradicts the Company's statement to the Board that the "legal framework under

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[74] *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

[75] *See supra* pp. 23-26 and cases cited in note 30.

[76] 251 F.3d 995 (D.C. Cir. 2001).

which the issues are to be resolved is, for the most part, settled." (J.A. 53.) It also improperly analogizes this case to *ITT Industries*.

In that case, the Court ruled that the "question of off-site employee access rights was an open one," so the Board could not implicitly assign off-site employees the same Section 7 rights as on-site off-duty employees without explaining its decision.[77] Here, however, the Board applied its well-established principle that employees may distribute union literature in their own workplace in mixed-use areas—where both work and nonwork usage occurs[78]—absent the employer's showing of a sufficient justification for curtailing that right.[79] (J.A. 80-82.) In concluding that the Hallway was not exclusively a work area, the Board examined the amount of work versus nonwork usage of the area, and the type of work performed there.[80] It found that employees' limited work use of the Hallway

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[77] *Id.* at 1004.

[78] *Transcon Lines*, 235 NLRB 1163, 1165 (1978), *enforced in relevant part*, 599 F.2d 719 (5th Cir. 1979); *United Parcel Serv.*, 327 NLRB 317, 317 (1998), *enforced*, 228 F.3d 772 (6th Cir. 2000).

[79] *See, e.g.*, *Meijer, Inc.*, 463 F.3d 534, 543-45 (6th Cir. 2006); *United Parcel Serv.*, 327 NLRB at 317; *Transcon Lines*, 235 NLRB 1163, 1165 (1978), *enforced in relevant part*, 599 F.2d 719 (5th Cir. 1979); *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 456-57 (2003); *Oak Apparel, Inc.*, 218 NLRB 701, 701 (1975); *Rockingham Sleepwear*, 188 NLRB 698, 701 (1971), *enforced*, 1972 WL 3048 (4th Cir. 1972) (per curiam) (unpublished).

[80] *Santa Fe Hotel, Inc.*, 331 NLRB 723, 730 (2000); *U.S. Steel Corp.*, 223 NLRB at 1248.

was only incidental to CVG's main business purpose. (J.A. 81.) And courts of appeals have accepted the Board's mixed-use[81] and incidental-work precedent.[82] Accordingly, this case involves long-held precedent, not "open" questions of law as in *ITT Industries*.

3. The Court should reject the Company's attempt to replace the Board's fact-intensive approach to deciding distribution cases with a mechanical, unaccommodating bright-line rule

The Company urges the Court to rewrite Board law to reflect its opinion that "[i]f work is performed in an area, the area is necessarily a work area" (Br. 29). But this and other courts of appeals, as well as the Board, have already rejected the argument that minimal work use of a location makes it a work area.[83] In propounding that argument, the Company merely substitutes its own categorical rule for what it inaccurately believes to be the Board's categorical rule for mixed-

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[81] *See, e.g.*, *Meijer, Inc.*, 463 F.3d at 543; *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 472-73 (5th Cir. 2001); *United Parcel Serv., Inc. v. NLRB*, 228 F.3d 772, 776 (6th Cir. 2000); *NLRB v. Transcon Lines*, 599 F.2d 719, 721 (5th Cir. 1979).

[82] *See, e.g.*, *Meijer, Inc.*, 463 F.3d at 543; *see also Brockton Hosp. v. NLRB*, 294 F.3d 100, 105 (D.C. Cir. 2002).

[83] *See Brockton Hosp.*, 294 F.3d at 105 ("cleaning, guarding, and escorting patients do not a work area make"); *United Parcel Service, Inc. v. NLRB*, 228 F.3d 772, 775-77 (6th Cir. 2000) (check-in area where drivers sometimes received instructions was not work area); *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 472-73 (5th Cir. 2001) (upholding judge's finding that entranceway with desk at which foreman occasionally sat was not work area); *U.S. Steel Corp.*, 223 NLRB 1246, 1248 (1976) (rejecting employer's contention that nonproduction employees' performance of incidental work converts nonwork areas to work areas), *enforced*, 547 F.2d 1166 (3d Cir. 1976) (table).

use areas—that an area with any nonwork usage is automatically a nonwork or mixed-use area. (Br. 30-31, 36.) Even if its characterization were accurate, the Company offers no reason for replacing the Board's assertedly "mechanical" rule (Br. 34 n.6) with its preferred mechanical rule. Moreover, in contrast to the Board's fact-intensive analyses of the work and nonwork usage of an area, the Company's proposed bright-line rule forecloses any thorough examination of the area's uses. Therefore, the Board's approach, which accounts for the factual nuances of an area's uses, better accommodates employees' Section 7 rights and employers' managerial rights by making determinations based on the specifics of each case.

CONCLUSION

The Company unjustifiably prohibited employees from distributing union literature in a Hallway used for a minimal amount of incidental work and substantial nonwork activities. In doing so, it interfered with employees' Section 7 right of self-organization. Based on the foregoing, the Board respectfully requests that the Court enforce the Board's Order and deny the Company's petition for review.

s/ Usha Dheenan_____
USHA DHEENAN
Supervisory Attorney

s/ Nicole Lancia_____
NICOLE LANCIA
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2948
(202) 273-2987

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DHL EXPRESS, INC.	)	
Petitioner/Cross-Respondent	)	Nos. 12-1072, 12-1143
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case Nos.
	)	9-CA-46180
and	)	9-CA-46294
	)	
AMERICAN POSTAL WORKERS UNION, AFL-CIO	)	
	)	
Movant-Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof contains 9,663 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 7th day of November, 2012

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	)	
Movant-Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not, by serving a true and correct copy at the address listed below:

David A. Kadela
Littler Mendelson, P.C.
21 East State Street
Suite 1600
Columbia, OH 43215

James B. Coppess
AFL-CIO
815 16th Street, NW
Washington, DC 20006

s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 7th day of November, 2012

ADDENDUM OF STATUTES, RULES, AND REGULATIONS

Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.):

Sec. 7. [29 U.S.C. § 157]

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. [29 U.S.C. § 158]

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . .

Sec. 10 [29 U.S.C. § 160]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .

. . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in such 2112 of title 28, United States Code. Upon the filing of such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it

deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive. . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Relevant provisions of the Board's Rules and Regulations:

Sec. 102. 46 [29 C.F.R. § 102.46]

(b)(1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. . . .

(b)(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.