

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: July 24, 2014

TO: Joseph F. Frankl, Regional Director  
Region 20

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: United States Postal Service  
Case 20-CA-121738

512-5024  
512-5024-4100  
512-5024-4150  
512-5024-6300

This Section 8(a)(1) case was submitted to Advice as to whether the Employer engaged in unlawful surveillance by sending a public relations representative<sup>1</sup> to Union<sup>2</sup> rallies protesting the Employer's partnership agreement with Staples at several Staples stores near San Francisco, California. We agree with the Region that the charge should be dismissed, absent withdrawal.

The traditional Board test of surveillance—that mere observation of open, public union activity is lawful unless the employer does so in a way that is out of the ordinary and/or is otherwise coercive—is applicable here.<sup>3</sup> We cannot demonstrate that the Employer's conduct was out of the ordinary, where the Employer asserts that it routinely sends a public relations representative to public rallies regarding Postal Service issues and where Union witnesses merely contend that they were not aware of, or did not recall seeing, such representatives at protests in the past, specifically

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<sup>1</sup> The representative was a retail services manager for the San Francisco district who was on a months-long detail as a corporate communications specialist. There is no evidence that the purpose of the detail was anything other than to temporarily fill a public relations vacancy. *See Wal-Mart Stores*, 352 NLRB 815, 815-16 (2008) (two-member Board decision).

<sup>2</sup> Specifically, the American Postal Workers Union organized these rallies as part of its Stop Staples campaign.

<sup>3</sup> *See Nabors Alaska Drilling*, 325 NLRB 574, 587 (1998) (lawful observation of handbilling in plain view at public airport ordinarily used by the employer), *enforced in part*, 190 F.3d 1008 (9th Cir. 1999).

citing protests by citizens groups over the proposed closing of a facility in Berkeley.<sup>4</sup> In fact, evidence submitted in another case suggests that a public relations representative was present at those Berkeley protests, and this evidence is particularly supportive of the Employer's position here given that the Berkeley events appear not to have been Union-organized events.<sup>5</sup>

In addition, although the public relations representative was present throughout the events, stood amongst the protestors, held a clipboard with papers, and took notes at one of the protests, we agree that the Employer has adequately explained this conduct as furthering its legitimate interest in defending the partnership program in the press.<sup>6</sup> Specifically, the representative was present to distribute a one-page position statement to members of the media, which she carried on her clipboard; she stayed for the duration to ensure that she met with all members of the press who attended the event; and she navigated among the protestors to locate less conspicuous reporters. In addition, the Employer provided a copy of the notes she took, which consisted of press contacts to whom she distributed the one-pager.<sup>7</sup> Thus, the representative did not take any actions inconsistent with her purported purpose,

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<sup>4</sup> See *Partylite Worldwide, Inc.*, 344 NLRB 1342, 1342 (2005) (Board precedent requires employer to explain its conduct once it is shown to be out of the ordinary).

<sup>5</sup> See Judith Scherr, *Berkeley Residents Lash Out at Planned Post Office Sale*, CONTRA COSTA TIMES, Feb. 27, 2013, available at [http://www.contracostatimes.com/ci\\_22682852/berkeley-residents-lash-out-at-planned-post-office](http://www.contracostatimes.com/ci_22682852/berkeley-residents-lash-out-at-planned-post-office); Dylan Tokar, *Berkeley Residents Protest Sale of Main Post Office*, THE DAILY CALIFORNIAN, July 25, 2012, available at <http://www.dailycal.org/2012/07/25/berkeley-residents-protest-sale-of-main-post-office-building/>.

<sup>6</sup> Although the duration of the observation and the employer's distance from employees are indicia of coercion, the Board considers an employer's explanation for such conduct prior to finding a violation. See *DHL Express, Inc.*, 355 NLRB No. 144, slip op. at 1 n.2 (Aug. 27, 2010) (weighing whether employer came forward with adequate explanations for positioning its officials and guards close to handbillers); *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005) (listing indicia of coercion), enforced sub nom. *Local Joint Executive Bd. of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008).

<sup>7</sup> See *EDP Medical Computer Systems*, 284 NLRB 1232, 1265-66 (1987) (no unlawful surveillance where employer officials observed union handbilling near employer's premises; although one official wrote on papers during observation, evidence showed these were work-related documents and official was not taking notes of union activity).

and there is no evidence that she was sent to monitor or identify employee-participants in the protests.<sup>8</sup>

Finally, we view *Intertape Polymer Corp.*<sup>9</sup> as distinguishable. In that case, the employer unlawfully surveilled employees by distributing its own handbill near the plant gate while union supporters were simultaneously leafleting at that location, which enabled the employer to observe which employees were distributing and accepting union leaflets, as well as which employees would accept or reject the employer's handbill. There the presence of supervisors at the plant gate was unusual, and there was no evidence that the employer had previously leafleted in order to communicate with employees. Thus, the employer's 8(c) conduct was considered coercive since it was out of the ordinary and put employees' activities under surveillance.<sup>10</sup> Here, we cannot meet the General Counsel's burden of demonstrating that the public relations representative's presence was unusual, and the Employer has proffered a legitimate reason for its actions, namely, to identify and communicate its position to members of the media covering the events.

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/  
B.J.K.

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<sup>8</sup> *Compare Sodexo, Inc.*, Cases 4-CA-37729, 4-CA-37730, Advice Memorandum dated Apr. 27, 2011 (unlawful surveillance where high-ranking official and company lawyer went out of their way for the admitted purpose of monitoring picketing at customer's facility).

<sup>9</sup> 360 NLRB No. 114 (May 23, 2014).

<sup>10</sup> *Id.*, slip op. at 1-3.