

Durham School Services, L.P. and International Brotherhood of Teamsters, Local 570.
Cases 05–CA–088893, 05–CA–088894, 05–CA–089702, and 05–CA–103688

September 5, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON, AND SCHIFFER

On March 28, 2014, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The 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 and set forth in full below.²

Background

The Respondent operates 64 bus routes for the transportation of school children for the City of Baltimore. As more fully set forth in the judge’s decision, on April 16, 2013, the Union set up a table on property adjacent to the driveway in front of the Respondent’s facility from which it distributed literature and spoke to employees as they left the facility at the end of their morning shift. In response to complaints that employees were parking their cars on the grass adjacent to the driveway, Acting Safety Supervisor Stacy Richards left the rear of the facility, where she was normally stationed at that time of day to check in returning buses and supervise drivers and aides as they checked their buses to assure no children were still on board, and asked the employees to move their

cars. Richards then walked to the gate at the front of the facility and remained there for approximately 30 minutes. During this time, she made notes on a clipboard, talked on her cell phone, and walked back on several occasions to the area where the Union had set up its table.

Although not mentioned in the judge’s decision, it is undisputed that, at some point that morning, employee Martin Fox, who was returning from his morning bus run, observed Richards in the driveway in front of the Union table, with a clipboard and camera. After parking his bus at the back of the facility, Fox walked to the Union table where he again observed Richards in the driveway, writing on her clipboard.

Discussion

We agree with the judge that the Respondent, by Richards, violated Section 8(a)(1) by engaging in surveillance of its employees’ union activity. In so finding, we stress that Richards was observing employees in a way that was out of the ordinary. While Richards normally was stationed in the rear of the facility where she could oversee the child checks, on this occasion she atypically positioned herself in front of the facility—a place that allowed her to observe the union activity but did not allow her to oversee the child checks. According to Richards’ own testimony, moreover, she “kept coming down [the driveway],” and “went back and forth [down the driveway].”

We also affirm the judge’s finding that Richards unlawfully created the impression of surveillance by the conduct set forth above. An employer unlawfully creates the impression of surveillance by statements or other conduct which, under all relevant circumstances, would lead reasonable employees to assume that their union activities have been placed under surveillance. See generally *Metro One Loss Prevention Services*, 356 NLRB 89, 102 (2010). Contrary to the Respondent’s argument, a statement indicating that surveillance has occurred is not the only manner in which an unlawful impression of surveillance can be created. Instead, the Board has consistently found that conduct alone, such as note taking while employees are engaged in union activity, can create an impression of surveillance as well. See *Monfort of Colorado*, 298 NLRB 73, 85–86, 141 (1990), enfd. in part. 965 F.2d 1538 (10th Cir. 1992) (supervisors stood behind employees who were wearing union insignia and took notes of an undisclosed nature while the employees were working); *Smithfield Packing Co.*, 344 NLRB 1, 3 (2004) (employer’s agents parked 15 to 20 feet away from handbillers for approximately 30 to 45 minutes and appeared to write something down when

¹ The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge’s finding that, by the conduct found unlawful in this case, the Respondent breached a settlement agreement in Cases 05–CA–088893 et al. While the Respondent excepted to this finding, the judge did not act on his finding and set the agreement aside, and the General Counsel did not except to the judge’s failure to set the agreement aside.

² We shall modify the judge’s recommended Order to conform to the Board’s standard remedial language, and we shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

someone in a vehicle accepted a handbill), enfd. 447 F.3d 821 (D.C. Cir. 2006). Here, Fox observed Richards both in front of the union table, and later in the driveway writing on her clipboard, all while employees were engaged in union activity. As noted above, this conduct was out of the ordinary for Richards and we find, for all the foregoing reasons, that the Respondent thereby created the impression of surveillance in violation of Section 8(a)(1). *Hospital Episcopal San Lucas*, 319 NLRB 54, 59 (1995) (respondent engaged in surveillance by looking out an office window at picketing, asking about the picket signs and the identity of the pickets, and writing names of the picketing employees on a piece of paper, and created the impression of surveillance by engaging in the above conduct in front of two employees).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Durham School Services, L.P., Rosedale, Maryland, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(b) Placing employees under surveillance while they engage in union or other protected concerted activities.

(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 Rosedale, Maryland facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notice to employees are customarily posted. In addition to physical posting of paper notices, the 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 that the notices are not altered, defaced, or covered by any other material. If 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 April 16, 2013.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 5 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.

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 create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

DURHAM SCHOOL SERVICES, L.P.

The Board's decision can be found at www.nlr.gov/case/05-CA-088893 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th St., N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



Pablo A. Godoy and Letitia F. Silas, Esqs., for the General Counsel.

Charles P. Roberts, II (Constangy, Brooks & Smith, LLC), of Winston-Salem, North Carolina, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Baltimore, Maryland, on February 11, 2024. The Charging Party, Teamsters Local 570 filed the charge in Case 05-CA-103688 on April 23, 2013, and the General Counsel issued the complaint on July 22, 2013. In that complaint the General Counsel alleges that Respondent has failed to comply with terms of a February 28, 2013 settlement agreement in Cases 05-CA-088893, 05-CA-088894, and 05-CA-089702. He seeks a finding that Respondent violated the Act as alleged in Case 05-CA-103688 as a basis for filing for default judgment in the other cases.

Case 05-CA-103688 concerns allegations that Respondent by Stacey Richards, then an acting safety coordinator, engaged in surveillance by photographing and taking notes of employees engaged in union activities on April 16, 2013, and also created the impression amongst employees that their union activities were under surveillance.¹ The events in this case occurred 3 days before the Union filed a representation petition on April 19. The majority of eligible voters voted against representation by the Union on May 31, 2013. The Union filed objections to conduct affecting the results of the election. These objections were overruled by Administrative Law Judge Michael Rosas in a recommended decision dated September 12, 2013. (G.C. Exh. 3.) The Union filed exceptions to the recommended decision which is pending before the Board.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent is a nationwide company which provides transportation services. It operates the facility here in the Rosedale section of Baltimore, Maryland, for the transportation of school students. Respondent derives gross revenues in excess of

¹ Richards has since become Respondent's "permanent" safety coordinator. Respondent admits she is a statutory supervisor and was a statutory supervisor in April 2013.

\$250,000 annually from its operations at Rosedale. It also purchases and receives goods and or services valued in excess of \$5000 from outside the State of Maryland at the Rosedale facility. 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, Teamsters Local 570, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent operates 64 bus routes for the transportation of school children for the City of Baltimore. The bus drivers and aides start work as early as 5 a.m.; some of them complete a morning run between 9 and 10 a.m. Some of these employees then go on break for several hours until their afternoon or evening run begins.

On April 16, 2013, at about 9:30 a.m., three Teamster organizers set up a table with coffee, donuts, and other materials on private property bordering on the driveway which leads from Philadelphia Road, a public street, to Respondent's facility. The owner of this property has given the Union permission to use his property. The driveway is the only access into Respondent's facility. The Union set up such a table adjacent to the driveway on several other occasions.

A little after 9:30 three employees stopped to talk to the union representatives. At least two, Linda Kees and Dale Hoffman, pulled part way onto the grass to the right of the driveway as one faces north towards Philadelphia Road. The union table was on the opposite side of the driveway. An employee, who is a part owner of the land on the right side of the driveway complained to Stacy Richards that the two cars would damage the grassy area on which they were partially parked.

Richards at this time was at the rear or south side of Respondent's building supervising the drivers and aides in checking their busses to assure no children were still on board. She then walked past the building and down the driveway to where Kees and Hoffman were parked. Richards told them to move their vehicles and the two employees did so immediately.

Richards then walked back to a gate at the end of the driveway which is part way towards Respondent's facility from Philadelphia Road. She stayed there for as much as 10 minutes talking to 2 other employees who were leaving the facility. After approximately 10 minutes Richards walked back towards the union table. Union Organizer Moses Jackson took a photograph of Richards. Almost immediately, at about 9:40 a.m., Richards took 2 photographs of the union table, one of which shows Jackson. No employees appear in these two pictures. I conclude that no employees were at the table when Richards took her photos. If Richards had wanted to document which employees were at the union table, or wanted to coerce employees, she would have photographed them.²

² There is no evidence that Richards took photographs other than those that are in the record. I discredit the testimony of the General Counsel's witnesses who testified that they were at the table when Richards photographed the organizers. For one thing, the photographs taken by the Union of employees at the table were clearly taken at a

After taking her photos Richards walked back to the gate. She had a clipboard in her hand. At the gate, Richards spoke with somebody on her cellphone and made some notations on her clipboard. The only photographs taken during this period show Richards talking on her cellphone and making notes on her clipboard while facing south, the direction away from the union table. (GC Exh. 12 (a) and (b).) One would expect that if Richards was staring back at the union table, the Union's photographs would show this. I thus find that the General Counsel has not established that Richards kept the union rally under constant surveillance while she stood at the gate.

Richards stayed at the gate for about 10–15 minutes Tr. 263–266.³ On several occasions that morning she walked back to the area where the union had set up its table. On these occasions Richards observed employees near the union table. Several of these employees, including those who testified at the hearing, observed Richards on one of more of these occasions, but not when she took her photos.

Sometime before 10:03 a.m. Richards spoke with Respondent's general manager, Daryl Owens. At 10:03 Owens emailed corporate labor relations manager Cal Schmidt, as follows:

The teamsters have arrived with their hotdog cart and donuts. Employees were lining the grass along the driveway and Stacey who was in the parking lot asked the employees not to park on the grass or block the driveway and one of the teamsters took a photo of her. She in turn took one of them.

(GC Exh. 21.)

This email, in conjunction with the testimony that Richards remained at the gate for some time after she took the photographs, establishes that the 9:40 timeframe for Richards' photos is likely to be accurate. It also establishes that she walked down the driveway initially to prevent employees from parking on the grass.

The February 28, 2013 settlement and motion for default

On February 28, 2013, the Regional Director for Region 5 approved an informal board settlement in Cases 05–CA–088893, 05–CA–088894, and 05–CA–089702. The Region issued a complaint in these cases on December 12, 2012, alleg-

different time of day, as evidenced by the sunshine, as opposed to the cloudy conditions when a union organizer photographed Richards and she photographed them.

³ Richards' testimony is inconsistent as to why she remained at the gate before and after photographing the union organizers. At Tr. 64 she said she was at the gate talking to employees Shelly Clash and Laura Klingonsmith before she took photographs of the union organizers. At Tr. 266–267 she testified that the reason she remained near the gate for 10–15 minutes after she took the photos of the union table was that she was talking to the same two employees. The photos taken by the Union afterwards do not show anyone with Richards. (G.C. Exh. 12 (a) and (b).) I conclude Richards was standing near the gate for 10–15 minutes before taking the photos and 10–15 minutes afterwards.

Richards' testimony is also inconsistent as to whether she saw employees at the union table after she took the photographs. (Tr. 78–79, 267.) I find that she did observe several employees talking to the union organizers sometime after she took her photographs.

ing that Respondent, by General Manager Darryl Owens, interrogated employees about their union activities on August 6, 2012; that Owens prohibited employees from talking about management and other employees on August 6, that he interrogated employees again on August 29 and that he and Erik Owings, a regional manager, created the impression of surveillance on September 6. In the settlement, Respondent agreed to post a notice and comply with the terms of the notice. The Notice contained promises not to violate the Act as alleged in the complaint. With regard to surveillance the Notice stated, "WE WILL NOT make it appear to you that we are watching out for your activities on behalf of the International Brotherhood of Teamsters, Local 570, or any other union."

On March 8, 2013, Darryl Owens certified that the Notice was posted on that date on a bulletin board to the left of the dispatcher's window and in a hallway. The Notices should have still been in place on April 16, when the alleged violations by Stacey Richards occurred. The settlement contained language stating that in the event of noncompliance with any terms of the settlement the Regional Director could reissue a complaint to which Respondent waived its right to file an answer.

Analysis

The idea behind finding, "an impression of surveillance" as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. An employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement, *Flexsteel Industries*, 311 NLRB 257 (1993).

Nevertheless, it is not a violation of the Act for an employer to merely observe open union activity, so long as its representatives do not engage in behavior that is "out of the ordinary," *Partylite Worldwide, Inc.*, 344 NLRB 1342 (2005); *Arrow Automotive Industries*, 258 NLRB 860 (1981), *enfd.* 679 F.2d 875 (4th Cir. 1982).

I conclude that Respondent, by Stacy Richards, violated Section 8(a)(1) of the Act. I do not base this conclusion on the first trip Richards made up the driveway to tell employees to move their cars off the grass. However, I find that Richards created an impression of surveillance by standing by the gate to the facility where the union table was visible for an extended period of time afterwards. I also find she created the impression of surveillance by making repeated trips up the driveway ostensibly to see whether any other employees were parking on the grass.

Richards did not normally perform her duties at the gate. She performed them much farther from the driveway where the union rally was not visible. There was no need for Richards to remain at the gate to protect the turf next to the driveway. She could have put up a "Do Not Park on the Grass or on the Driveway" sign at the gate. She could also have told employees not to park on or next to the driveway when they parked their school busses.

I also conclude that Richards actually engaged in surveillance. There was no need for her to approach the union table to

protect the turf next to the driveway. There is also no evidence that Richards was aware of the February 2013 settlement. Thus, she is likely to be unaware that she should refrain from keeping the union table under observation. Although no employees were at the union table when Richards took her photographs, employees were at the table later while she remained at the gate and when she walked up the driveway on other occasions. (Tr. 78–79.)

CONCLUSIONS OF LAW

Respondent, by Stacy Richards, violated Section 8(a)(1) of the Act on April 16, 2013, by engaging in surveillance of employees' union activities and by creating the impression that their union activities were under surveillance.

REMEDY

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

The General Counsel has asked that the Board set aside the settlement in cases 05–CA–088893, 05–CA–088894, and 05–CA–089702 and find Respondent in default of that settlement. In addition to posting a notice relating to the allegations in case 05–CA–103688, the General Counsel seeks an order that the notice be read to assembled employees by a responsible management official or a Board agent, that the Union be given access to Respondent's bulletin boards and other places where Respondent customarily posts notices for employees, and that Respondent be ordered to provide the Union an updated list of the names and addresses of unit employees.

I decline to either set aside the settlement agreement or order the Respondent to take the measures requested by the General Counsel. The violations here were isolated, committed by a low-level supervisor for a period of approximately 1/2 hour and concerned open union activity. It has not been established that Stacy Richards was acting at the direction of any higher level official.⁴ In view of these factors, I conclude the enhanced remedies are unwarranted.

The Board has stated that it may order extraordinary remedies when the Respondent's unfair labor practices are so numerous, pervasive and outrageous that such remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found, *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003). I find that Respondent, by Stacey Richards breached the February settlement agreement during the 60-day notice posting period. However, I find that this violation, even in conjunction with the violations alleged in the December 2012 complaint do not rise to the level which would warrant any of the extraordinary remedies requested by the General Counsel.

[Recommended Order omitted from publication.]

⁴ I find her denial that she told employee Martin Fox that Darryl Owens had directed her to monitor the union activity as credible as Fox's testimony that she did so. (Tr. 217, 264.) Like Respondent at p. 23 of its brief, I do not conclude that Fox was being untruthful. I am, however, uncertain that his recollection of a brief conversation that occurred 9–10 months earlier is accurate.