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**Intertape Polymer Corp. and United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC.** Cases 10-CA-080133, 11-CA-077869, 11-CA-078827, and 11-RC-076776

May 10, 2016

**SUPPLEMENTAL DECISION AND ORDER ON REMAND**

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On May 23, 2014, the National Labor Relations Board issued its Decision, Order, and Direction of Second Election in this proceeding. 360 NLRB No. 114. The Board found that, during the critical period leading up to the election,<sup>1</sup> the Respondent violated Section 8(a)(1) of the Act by confiscating union literature from employees' break room and by engaging in surveillance of employees' union activities. The Board found that these unfair labor practices interfered with employees' free choice and that a second election was necessary.<sup>2</sup>

The Respondent thereafter filed a petition for review of the Board's Order with the United States Court of Appeals for the Fourth Circuit and the Board filed a cross-application for enforcement. On September 8, 2015, the court issued its opinion granting in part and denying in part enforcement of the Board's Order and remanding the case to the Board for further proceedings consistent with the court's opinion. 801 F.3d 224. The court enforced

<sup>1</sup> The Union filed a petition seeking to represent the Respondent's production and maintenance employees on March 16, 2012, and the Board conducted a secret-ballot election on April 26 and 27, 2012. The tally of ballots showed that 97 employees voted for, and 142 against, representation by United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC.

<sup>2</sup> The Board also found that the Respondent unlawfully interrogated an employee regarding his union sentiments, but this violation predated the critical period and did not serve as a basis for setting aside the election. Member Miscimarra dissented from the majority's findings that the Respondent engaged in unlawful surveillance and that the Respondent unlawfully interrogated an employee. Member Miscimarra also dissented from the majority's decision to order a new election because, in his view, it was not possible to conclude that the Respondent's conduct affected the outcome of the election.

The Board subsequently unanimously denied the Respondent's motion for reconsideration. See 2014 WL 4659490. A second election was held in May 2015, and there were 74 votes for unionization and 84 against, with 14 challenged ballots. Objections and challenges in this second election are pending in the Region.

the Board's findings of violations concerning the Respondent's interrogation of an employee and confiscation of union flyers. The court stated that, "[b]ecause our decision eliminates one of the two bases upon which the Board set aside the election . . . the Board will also find it necessary to reconsider its decision to direct a second election." *Id.* at 241. On November 30, 2015, the court issued mandate, returning the case to the Board.

On January 26, 2016, the Board advised the parties that it had accepted the remand and invited the parties to submit statements of position with respect to the issue raised by the remand. Thereafter, the Respondent filed a statement of position.

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

The Board has reconsidered this case in light of the court's opinion, which is the law of the case, and the statement of position, and, for the reasons discussed below, has decided that a new election is warranted on the basis of the Respondent's confiscation of union flyers, conduct that violated Section 8(a)(1).

In the unfair labor practice proceeding, the Board found that the Respondent has a policy prohibiting distributions during working time and in working areas. Before the union campaign began, literature (e.g., newspapers, magazines, etc.) left in the break room remained untouched until at least the end of the workday. After the Union filed its representation petition, supervisors removed union literature shortly after employees finished their breaks on at least three separate occasions.<sup>3</sup> The Board found that the Respondent's change in policy was an unlawful "reaction to and countermeasure against" the union campaign. 360 NLRB No. 114, slip op. at 2.

A violation of Section 8(a)(1) during the critical election period is, a fortiori, conduct that interferes with the results of the election unless it is so de minimis that it is "virtually impossible to conclude that [the violation] could have affected the results of the election." *Super Thrift Markets, Inc.*, 233 NLRB 409, 409 (1977). See also *Baton Rouge General Hospital*, 283 NLRB 192, 192 fn. 5 (1987); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). In determining whether the unlawful conduct is de minimis, the Board considers the number of incidents, their severity, the extent of dissemination, the

<sup>3</sup> The credited testimony of employee Faith Epps, who observed the Respondent removing union literature, shows that the confiscation occurred on March 22, 23, and 29, 2012. In addition, although not independently found unlawful, the judge credited employee John Jordan, who testified that a supervisor told him that he could no longer leave union materials in the break room. 360 NLRB No. 114, slip op. at 9-10.

size of the unit, and other relevant factors. See *Super Thrift Markets*, 233 NLRB at 409.

Here, the Respondent unlawfully removed union literature from employees' break room on at least three separate occasions, beginning within a week of the Union filing a representation petition. By removing union literature, the Respondent inhibited employees' ability to share and receive information about union issues and hindered communication between the voters themselves during the critical period. Although there is no evidence that word of the unlawful confiscation was widely disseminated, the Respondent's unfair labor practice affected not only employees who knew of the unlawful confiscation, but all employees who entered the break room and would have seen the materials had they not been unlawfully removed. In these circumstances, we find that the Respondent's conduct interfered with employees' free choice. See *Allied Mechanical*, 343 NLRB 631, 632 (2004) (finding that removing union literature during the critical period "denied employees access to an important medium of communication during the union campaign" and warranted setting aside the election); *Bon Marche*, 308 NLRB 184, 185 (1992) (finding change in bulletin board policy to prohibit non-work literature "clearly affected the entire bargaining unit that the Union sought to represent"). The fact that the Union's message may have been distributed via other means does not diminish the infringement on employees' right to receive information. See *id.* at 185 fn. 7.

Removing union literature during the critical period denied employees access to an important medium of communication during the campaign. Contrary to our dissenting colleague, we find that this clearly constitutes more than de minimis unlawful conduct and warrants setting aside the election. Because a second election has already been held, we shall remand this case to the Regional Director for further processing consistent with this decision.

#### ORDER

IT IS ORDERED that the election held on April 26 and 27, 2012, in Case 11-RC-076776 is set aside and Case 11-RC-076776 is remanded to the Regional Director for Region 11 for further appropriate action.

Dated, Washington, D.C. May 10, 2016

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, before the Board's earlier decision was partially reversed and remanded by the Court of Appeals for the Fourth Circuit, the Board majority found that the Respondent committed two unfair labor practices during the critical pre-election period: (i) confiscation of union literature, and (ii) surveillance of employees' pro-union leafleting. The Board majority concluded that these two violations of the Act warranted setting aside a Board-conducted election and directing a second election. 360 NLRB No. 114 (2014).<sup>1</sup> In a separate opinion, I agreed that the Respondent had unlawfully confiscated union literature, but I respectfully dissented from my colleagues' finding that the Respondent engaged in unlawful surveillance of employees' leafleting. Moreover, I concluded that "even if the surveillance allegation had merit" so that the Respondent had committed both critical-period violations, "the record would still warrant certifying the election results here, without setting the election aside." *Id.*, slip op. at 5 (Member Miscimarra, dissenting in part).

After the Board issued its decision, the Respondent filed a petition for review, which the Fourth Circuit granted in part and denied in part. See *Intertape Polymer Corp. v. NLRB*, 801 F.3d 224 (4th Cir. 2015). In its decision, the Fourth Circuit overturned the majority's finding of unlawful surveillance. However, the court upheld the Board's finding that the Respondent violated the Act by confiscating union literature, and the court remanded the case to the Board to determine whether that violation alone is sufficient to warrant a second election. My colleagues find that the literature confiscation violation, standing alone, requires a second election. I disagree.

As stated in my partial dissent from the underlying decision, I would have upheld the election results even if the Respondent had committed *both* critical-period violations. Accordingly, I believe it is even more unreasonable for the Board to overturn the election where the only critical-period violation involved confiscation of union literature. As stated in my partial dissent: "In my view, it is not possible to conclude that the Respondent affected the lopsided outcome of this election (97 for and 142 against the Union) by expediting the cleanup of a break

<sup>1</sup> The majority also found that the Respondent unlawfully interrogated an employee about his views concerning the Union. However, this incident occurred before the Union filed the representation petition, so the majority did not rely on it in deciding to set aside the election. See 360 NLRB No. 114, slip op. at 3 fn. 12.

room that, at most, involved the removal of certain material for several hours” on a few days “approximately 1 month before the election.” I concluded that the “record demonstrates . . . employees had many other opportunities to campaign and read union literature, the vote margin was wide, and there is no evidence that more than a single employee knew of the Respondent’s action.” 360 NLRB No. 114, slip op. at 5.

Accordingly, I respectfully dissent from the majority’s finding that the literature confiscation violation, by itself, warrants a new election.

Dated, Washington, D.C. May 10, 2016

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Philip A. Miscimarra, Member

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