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Brasfield & Gorrie, LLC and United Brotherhood of Carpenters and Joiners of America (UBC), Indiana/Kentucky/Ohio Regional Council of Carpenters. Case 09–CA–199567

May 8, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, KAPLAN, AND EMANUEL

On December 8, 2017, Administrative Law Judge Andrew S. Gollin issued the attached decision. The Charging Party filed exceptions and a brief in support. The Respondent filed an answering brief, and the Charging Party filed a reply.

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.

ORDER

The recommended Order of the administrative law judge is adopted and the amended complaint is dismissed.

Dated, Washington, D.C. May 8, 2018

Mark Gaston Pearce, Member

Marvin E. Kaplan, Member

¹ The Charging Party 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 judge’s findings.

In adopting the judge’s finding that the Respondent did not violate Sec. 8(a)(1) by engaging in surveillance of employees, we reject the Charging Party’s argument that the standard for anticipatory photographing and videotaping of employee misconduct applies here. The judge correctly applied the standard for employer photographing and videotaping of employee misconduct *as it is occurring*, and properly found that the Respondent had the requisite “legitimate justification” for doing so.

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Joseph F. Tansino, Esq., for the General Counsel.
James U. Smith III and Jacob W. Crouse, Esqs., for the Respondent.
Eric J. Gill, Esq., for the Union.

DECISION

I. INTRODUCTION¹

ANDREW S. GOLLIN, Administrative Law Judge. This hearing occurred on November 8, 2017, in Cincinnati, Ohio.² Brasfield & Gorrie, LLC (Respondent) is the project manager overseeing construction of the new Omni Hotel building in downtown Louisville, Kentucky. On May 24, employees of a subcontractor chose not to report for work to protest their wages. They stood on the sidewalk across from the construction site throughout the day. On May 25, the employees picketed outside the site, including at entrances used by employees and suppliers. Later, union agents supporting the picketers used their trucks to temporarily block traffic near the site. Respondent’s Senior Safety Manager John Wickham was present both days.

The allegations are that Respondent, through Wickham, violated Section 8(a)(1) of the National Labor Relations Act (Act) when: (1) on May 24, he created the impression of surveillance by making it appear as though he was using his cellular phone to take photos or videos of union activity; and (2) on May 25, he engaged in surveillance by using his phone to take photos and videos of union activity. Respondent denies both alleged violations.

There is a factual dispute over whether Wickham ever used his phone on May 24 to make it appear as though he was taking photos or videos of the employees. There also is a legal dispute over whether Wickham had a legitimate safety concern on May 25 when he admittedly photographed individuals picketing an employee entrance to the site, and later videoed three union agents who stopped their trucks in the street, got out, and began honking their horns in support of the picketers.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent, the Union, and the General Counsel filed posthearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the posthearing briefs and my observations of the credibility of the witnesses, I make the following:

II. STATEMENT OF THE CASE

On August 17, the Regional Director for Region 9 of the Na-

¹ Abbreviations in this decision are: “Tr.” for transcript; “Jt. Exh.” for Joint Exhibits; “GC Exh” for General Counsel’s Exhibit; “R. Exh” for Respondent’s Exhibits.

² All dates are in 2017, unless otherwise stated.

tional Labor Relations Board (Board) issued a complaint alleging that Respondent violated Section 8(a)(1) of the Act on about May 24, when Wickham created the impression of surveillance by making it appear as though he was taking photos and videos of the employees' union activities outside Respondent's Louisville jobsite. The complaint was based upon the original and amended unfair labor practice charges the United Brotherhood of Carpenters and Joiners of America (UBC), Indiana/Kentucky/Ohio Regional Council of Carpenters (Union) filed against Respondent. On August 24, Respondent filed its answer, denying the violation and raising affirmative defenses.

After Wickham testified, Counsel for General Counsel orally moved to amend the complaint to allege that on May 25 he engaged in unlawful surveillance by taking photos and videos of protected activities. I allowed the amendment, as closely related, over Respondent's objection. *Redd-I, Inc.*, 290 NLRB 1115, 1115–1116 (1988). Amendments to a complaint before, during, or after a hearing are allowed "upon such terms as may be deemed just." Board's Rules and Regulations Section 102.17. Under this provision, a judge has wide discretion to grant or deny such motions. *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 fn. 8 (2015). Whether it is just to grant a motion to amend a complaint is based on three factors: (1) whether there was surprise or lack of notice; (2) whether the General Counsel offered a valid excuse for its delay in moving to amend; and (3) whether the matter was fully litigated. See *Remington Lodging & Hospitality, LLC*, 363 NLRB No. 112, slip op. at 1 fn. 1 (2016); *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1171 (2006), *enfd.* after remand, 315 Fed.Appx. 318 (4th Cir. 2009). I granted the motion to amend because the complaint alleges that on about May 24, Wickham created the impression of surveillance by making it appear as though he was taking photos and videos of the employees' union activities. Respondent, therefore, had notice and was not surprised that Wickham's alleged taking of photos or videos of the employees (or the appearance thereof) on about May 24 was at issue. The first notice the General Counsel had that Wickham actually took photos and a video on May 25 was after he testified about doing so during Respondent's case-in-chief. Respondent's counsel was given the opportunity to present any additional evidence in response to the amendment, and he declined to do so. Also, all parties had the chance to present their arguments and authority regarding the amended allegation in their posthearing briefs. As a result, I believe the matter was fully litigated.³

³ At the hearing, counsel for General Counsel sought to introduce photos taken on May 25 of an unidentified man standing inside the jobsite holding a cellular phone at eye level and pointing it out toward the street. The witness who took the photos could not identify the person, but it was not Wickham. (Tr. 70–71.) Counsel for General Counsel represented that the individual in the photograph was one of Wickham's safety associates, and that the individual could be identified by another witness. Respondent objected to the photographs as being irrelevant. I sustained the objection, noting the complaint only alleged that Wickham engaged in unlawful surveillance. Counsel for General Counsel did not move to amend the complaint to allege that another agent of Respondent engaged in unlawful surveillance. Additionally, I

III. FINDINGS OF FACT⁴

A. Jurisdiction

Respondent is a Delaware limited liability company with its principal place of business in Birmingham, Alabama, and is engaged in the business of providing building construction and project management services. Respondent is currently providing these services at the Omni Hotel construction site in Louisville, Kentucky. During the 12-month period ending August 1, 2017, Respondent, in conducting its operations, purchased and received at the Louisville, Kentucky site goods valued in excess of \$50,000 directly from points outside the Commonwealth of Kentucky. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I, therefore, find this dispute affects commerce and, therefore, the Board has jurisdiction, pursuant to Section 10(a) of the Act.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

B. Alleged Unfair Labor Practices

1. Background

The Louisville Omni Hotel construction project is a 29-story hotel and residential building at 400 South Second Street in downtown Louisville. The project began in the fall 2015, and is expected to be completed in the spring 2018. The building will contain a hotel, apartments, restaurants, retail space, and a bowling alley. According to the maps introduced at the hearing, the entire construction site takes up one square city block. This city block is bordered by West Muhammad Ali Boulevard to the south, West Liberty Street to the north, South 2nd Street to the east, and South 3rd Street to the west. There is a combination of fences, gates, and temporary barriers surrounding the project site. The events at issue primarily occurred in the southwest area of the site, along South 3rd Street, and where South 3rd Street intersects with West Muhammad Ali Boulevard.

As project manager, Respondent was responsible for hiring subcontractors. Respondent entered into a first-tier subcontract with Performance Commercial Contractors, LLC (PCC), a Georgia corporation, to provide drywall construction services on the project. PCC, in turn, entered into a second-tier subcontract with Professional Drywall Concepts, Inc. (PDC), a Georgia limited liability corporation, to provide drywall and insulation services on the project. PCC/PDC has a temporary office on the first floor of the Stark Parking Garage, which is located on the west side of South 3rd Street, across from the site. In May, PCC had 4–5 employees and PDC had around 125 employees assigned to the project.

informed counsel for General Counsel that if there was another basis for introducing the exhibits at issue, such as rebutting Respondent's alleged defenses, he could again move for admission of the rejected exhibits. Counsel for General Counsel did not do so.

⁴ Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

John Wickham is Respondent's senior safety director. He is responsible for overseeing all aspects of safety on the site. He conducts safety orientations and weekly trainings for those working on the project. He also regularly inspects the site to identify and address actual and potential safety risks. Wickham will document these risks by taking photographs with his phone.

On a daily basis, at around 6:30 a.m., Wickham stands at the main pedestrian entrance on the east side of South 3rd Street, near the northeast corner of the intersection between West Muhammad Ali Boulevard and South 3rd Street. He stands there for about half an hour to greet employees as they arrive to make sure they are authorized to be on site, wearing their personal protective equipment, and otherwise fit to work.

South 3rd Street is a one-way street going south. The street normally consists of three lanes of traffic, but Respondent placed temporary orange and white construction barricades along much of the east side of South 3rd Street, separating the street from the jobsite. The barricades reduce the street to about two lanes of traffic. (Tr. 211–212.) Only authorized personnel are allowed inside the barricades on the east side of South 3rd Street. Pedestrians are directed to use the sidewalk on the west side of the street. Employees use the crosswalks at the intersection between West Muhammad Ali Boulevard and South 3rd Street to access the main employee entrance. Upon entering this entrance, they walk along the inside of the barricades and turn into the site by where Wickham usually stands.

North from the pedestrian entrance on the east side of South 3rd Street is a vehicle entrance. This vehicle entrance is almost directly across the street from the PCC/PDC office in the Stark Parking Garage. The vehicle entrance leads to an alley that cuts through the project, connecting South 3rd Street and South 2nd Street. The vehicle entrance on South 3rd Street has a gate that is opened at the start of the day and closed at the end of the day. Delivery drivers regularly drive down South 3rd Street to turn left into this entrance to deliver supplies to the construction site.

2. Wednesday, May 24

A group of PDC employees believed they were being underpaid for their work on the Omni Hotel project, and they contacted the Union regarding their concerns. On May 23, the Union held a meeting with a group of these employees. At the conclusion of the meeting, they decided that the following morning they would go as a group to the PDC/PCC offices on South 3rd Street to raise their concerns about their wages with management.

As planned, on May 24, at around 6:30 a.m., a group of approximately 60–70 PDC employees met outside the PCC/PDC office, across the street from the jobsite. They went inside and asked to speak with management. One of the individuals from the group, Marco Cruz, spoke with Sergio Casilla, a foreman for PDC. Cruz told Casilla that the PDC employees wanted to be paid the same as the other carpenters installing and finishing drywall on the project. Casilla made a call. After the call, he told the employees that it was not up to PDC and PCC, and that

the employees would have to talk to Respondent about their concerns.⁵

After meeting with Casilla, the employees left the PCC/PDC offices, but they did not report for work. Instead, most of the employees remained standing on the sidewalk on the west side of South 3rd Street until the end of their workday, which was around 3 p.m. Approximately 10 of the employees crossed South 3rd Street and stood at the employee entrance on the northeast corner of the intersection of South 3rd Street and West Muhammad Ali Boulevard. The employees did not have picket signs, and there is no evidence they engaged in any other activities to publicize their protest.

On the morning of May 24, Wickham was standing where he normally stands, at the entrance area off of South 3rd Street, greeting employees as they arrived for work. From where he was standing, Wickham saw a large group of employees standing on the west side of South 3rd Street, along the sidewalk outside of the PCC/PDC office. He did not know why they were there or what they were doing. He testified he did not say or do anything in response to them being there.

Luis Estrada Trejo, who worked for PDC as a dry-waller/framer from January through July, was one of the employees who did not report for work and was standing on the sidewalk on May 24. Trejo testified that he knew who Wickham was, and that Wickham regularly would stand at that entrance area in the morning to greet employees as they arrived for work. Trejo testified that at around 9 a.m. on May 24, while the employees were standing along the sidewalk on South 3rd Street, he saw Wickham standing at the entrance holding his cellular phone with both hands at about waist level, pointing it toward the employees across the street, and turning in a side-to-side motion. (Tr. 111–113.) It appeared to Trejo that Wickham was taking a photo or video of the employees standing on the sidewalk. Trejo testified that Wickham did this for a total of about 5 seconds. (Tr. 116–117.) None of the other witnesses testified to seeing Wickham do this.

Selvin Zavala Mendoza, who worked for PDC as a dry-waller/framer from February through September, also was one of the employees who did not report for work and was standing outside the site on May 24. Mendoza testified that on May 24, he was standing near the intersection of South 3rd Street and West Muhammad Ali Boulevard. From where he was standing, Mendoza testified that he saw Wickham standing inside the building, on the 16th or 17th floor, facing toward the employees down on the street. Mendoza testified Wickham was pointing his phone toward the employees down on the street, appearing to take a photo or video of them. (Tr. 136–140.) None of the other witnesses testified to seeing Wickham do this.⁶

Wickham testified that nothing out of the ordinary occurred on May 24. He stood at his usual spot and greeted employees,

⁵ It is unclear from the record whether there ever was a meeting or discussion between Respondent and the PDC employees on May 24. (Tr. 61–62) (Tr.110).

⁶ The General Counsel also called Arturo Mendoza Gil, a former employee of PDC at the Omni Hotel project, to testify about May 24 and May 25. He testified that he saw individuals from inside the project "holding their phones to the face." (Tr. 155.) Gil, however, could not identify who any of the individuals were that he saw.

starting at 6:30 a.m. He remained there for about half an hour. He testified that on Wednesdays, he has a regular safety orientation meeting starting at 7 a.m. that he attends. After that meeting, he then goes up through the building to perform his safety checks. (Tr. 240–241.) Wickham testified that he did not take any photos or videos of any employees that day. (Tr. 270.)

3. Thursday, May 25

On May 25, at about 6:30 a.m., approximately 100 PDC employees and another 30 nonemployees arrived outside the construction site with picket signs. The picket signs read, “Brasfield & Gorrie Unfair Labor Practice.” Some signs incorrectly spelled Brasfield as “Barsfield.” The back of the signs said people should honk their horns in support.

That morning, Wickham was at his usual spot greeting employees when he saw the picketers. He noted it was a larger group than the day before, around 135 people. He saw several picketers march along the sidewalk on the west side of South 3rd Street, heading south to the intersection at West Muhammad Ali Boulevard. They proceeded across the crosswalk to the east side of South 3rd Street, and they began picketing the employee entrance on the northeast corner of the intersection. Wickham saw some of the picketers standing in a lane of traffic. (Tr. 244.) Wickham asked them to move out of the way. Some moved, but approximately 25–35 of the individuals continued picketing around the employee entrance and the crosswalk. (Tr. 288–289.) Wickham saw employees that turned around when they could not access the entrance, and there was at least one person who walked down a lane of traffic in order to access the site. (Tr. 290–291.) Employees also reported to Wickham that the picketers were blocking the crosswalk and the employee entrance. Wickham believed that this created unsafe conditions. (Tr. 259.) From where he was standing, Wickham pulled out his iPhone and took two pictures of the picketers as they were picketing the employee entrance. It took him 10–15 seconds to take the pictures. (Tr. 259.) Wickham did not say or do anything else. Later that day, Wickham deleted the photos because the picketers eventually moved on and allowed access that entrance. (Tr. 258–259.)

Wickham also saw picketers to the north at the vehicle entrance on South 3rd Street. It is not clear from the record if the picketers were standing in the street or inside the orange and white barricades. While he was watching them, Wickham saw a delivery truck come down South 3rd Street and attempt to turn into the vehicle entrance. The picketers continued picketing, blocking the entrance. The driver, unable to turn in, eventually drove off. (Tr. 250–251.) Wickham told the picketers to move away from the entrance, and they complied. (Tr. 254.) He did not take any photos or videos of them.

Wickham also testified that there also was a lot of noise from the vehicles honking as they drove by the picketers. Wickham saw three black Ford Explorer trucks with placards that said “union” on them continually driving around the block and honking their horns as they went by the picketers.⁷ Wickham

also saw “a giant union semi-truck and trailer that would come by and lay on its air horn” as it passed the picketers. (Tr. 247–248.)

Later that morning, at approximately 9:06 a.m., Wickham was inside the building performing his inspections. He was on the 14th floor. He looked down on South 3rd Street and saw the same three black Ford Explorers he saw earlier, driving down South 3rd Street. He then saw the drivers, who he later learned were union agents, stop their trucks in the street, get out, and begin honking their horns in support of the picketers. Wickham used his iPhone to take a video of the three trucks blocking the street. Wickham then called the police and reported that there were trucks blocking traffic on South 3rd Street. (Tr. 287.) Two police cars eventually arrived and turned down South 3rd Street. The three union agents got back into their trucks and drove off. (Tr. 262.) The police did not stop the trucks, but they briefly stopped to talk to the picketers on the sidewalk. It was not developed in the record how long the trucks were blocking traffic before the police arrived. No citations were issued. Wickham later deleted the video because he did not believe he needed it after the conduct ended and did not reoccur.

The employees all returned to work on May 26, and the record does not reflect that there has been any reoccurrence of the activity at issue.

IV. WITNESS CREDIBILITY

While the facts of this case are largely uncontroverted, there is a dispute as to whether on May 24 Wickham ever used his phone in a manner in which he appeared to be taking photos or videos of the employees standing outside the jobsite. Luis Estrada Trejo testified that on May 24, at around 9 a.m., he saw Wickham holding his phone with both hands at about waist level, pointing it toward the employees across the street, and turning side-to-side for a total of about 5 seconds. Selvin Zavala Mendoza testified that on May 24 he saw, from where he was standing on South 3rd Street, that Wickham was up on the 16th or 17th floor of the building, facing the employees, appearing to take a photo or video of them with his cellular phone. Wickham testified he did not take any photos or videos on May 24.

In such instances, as the finder of fact, I must determine the credibility of the witnesses. Credibility determinations may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the evidence, established or admitted facts, corroboration, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a

the three drivers of these trucks at the representation hearing that occurred based upon a petition the Union filed seeking to represent the PCC/PDC drywall employees, and the individuals he saw driving these trucks were identified at the hearing as union agents. (R. Exh. 1) (Tr. 287).

⁷ Wickham testified that he earlier saw one or more of the drivers of these trucks handing out white cards to the picketers out on the street. He did not see what the cards said. Wickham testified that he later saw

judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622.

After carefully listening to the witnesses and observing their demeanor, I find that Wickham did not use his phone on May 24 to make it appear that he was taking photos or videos of the employees standing outside the jobsite. To begin, I found Wickham to be a very credible witness. Throughout the trial, Wickham's demeanor reflected a sincere desire to testify truthfully and accurately about the events that occurred. His testimony reflected that he remembered, in detail, the events that he described. He also testified consistently on both direct and cross-examination.

There is no dispute that in the morning of May 24, approximately 60–70 employees stood across the street, outside of the PCC/PDC office, when Wickham was at the pedestrian entrance greeting people as they arrived. Wickham testified that it was not out of the ordinary for that number of people to not report for work on a given day. Moreover, from all accounts, the employees were simply standing along the street on the sidewalk. As such, it is reasonable to infer that there was nothing out of the ordinary occurring that would have caused Wickham to use his phone to take a photo or video of the employees.

Additionally, I do not credit Trejo and Mendoza's recollections. Although Trejo appeared to do his best to recall what occurred, he did not impress me as having a clear, detailed recollection of the events, particularly as it relates to timing. For example, he testified seeing Wickham standing at the entrance on South 3rd Street, holding his phone at about waist level, pointing it to the employees across the street, and turning it side-to-side, at about 9 a.m. He testified to it being about 9 a.m. because the employees had been outside for about 2 hours by the time he saw Wickham with his phone. (Tr. 115–116.) However, Wickham testified he was not at the entrance at that time. He testified that on Wednesdays he greets employees for about a half an hour, starting at around 6:30 a.m. He then attends a weekly safety orientation meeting at around 7 a.m. After that meeting, Wickham goes up into the building to do his tests. Wickham testified that he did not return to the street. (Tr. 240–241) It is worth noting that out of approximately 60–70 other employees present on the street that day, the General Counsel presented no other witness that could corroborate Trejo's testimony. As a result, I do not credit Trejo that Wickham was standing at the pedestrian entrance on May 24 pointing his cellular phone at the employees out on the street at around 9 a.m.

Similarly, I do not credit that Mendoza saw Wickham on May 24 standing in the building, appearing to use his phone to take photos or videos of the employees down on the street. Logistically speaking, Mendoza testified that he was standing near the intersection of South 3rd Street and West Muhammad Ali Boulevard at the time, and that Wickham was on the 16th or 17th floor of the building, when he saw what appeared to him to be Wickham pointing his phone to take photos or a video of the employees down on the street. I simply do not credit that Mendoza could see with sufficient clarity what Wickham was doing with his hands half a city block away and at least 160–170 feet up in the air. I find that Mendoza's credibility on this point is further undermined by the fact that there is no mention

of it in the affidavit he gave the Board during the investigation into the charge. (Tr. 148.) Again, it is worth noting that out of approximately 130 others present on the street that day, the General Counsel presented no other witness that could corroborate Mendoza's testimony.

Based on the foregoing, I do not credit Trejo or Mendoza regarding the events of May 24, and I find that the General Counsel failed to present any credible evidence to establish that on May 24 Wickham pointed his phone at the employees in a manner that indicated that he was taking photos or videos of them.

V. LEGAL ANALYSIS

The General Counsel alleges that Respondent, through Wickham, violated Section 8(a)(1) of the Act when on May 24 he created the impression of surveillance by making it appear that he was using his phone to take photos or videos of the employees' union activities. The General Counsel further alleges Respondent, through Wickham, violated Section 8(a)(1) of the Act when on May 25, he engaged in surveillance when using his phone to take photos and videos of the employees' union activities. As previously stated, I find that the General Counsel failed to present credible evidence regarding the May 24 allegation. Therefore, the sole focus is whether Wickham engaged in unlawful surveillance by his conduct on May 25.

In general, the Board has held that an employer unlawfully "surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive." *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005), petition for review denied, 515 F.3d 942 (9th Cir. 2008). Indicia of coerciveness include the "duration of the observation, the employer's distance from employees while observing them, and whether the employer engaged in other coercive behavior during its observation." *Id.* The test for whether there has been unlawful surveillance or conduct that creates the impression of surveillance is an objective one and involves a determination as to whether the employer's conduct, under the circumstances, was such that it would tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 7 of the Act. *Durham School Services*, 361 NLRB 407 (2014). See also *Broadway*, 267 NLRB 385, 400 (1983).

The Board has held taking photos or videos of employees' statutorily protected activities, without some legitimate justification, unlawfully creates the impression of surveillance. *F.W. Woolworth*, 310 NLRB 1197 (1993). The fundamental principles governing employer photographing or videoing of employees' protected activity are as follows:

. . . [A]n employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial record keeping tends to create fear among employees of future reprisals. The Board in *Woolworth* reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer's conduct to interfere with employees' right to engage in concerted activity Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it

had a reasonable basis to have anticipated misconduct by the employees. “[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case.”

National Steel & Shipbuilding Co., 324 NLRB 499 (1997), *enfd.* 156 F.3d 1268 (D.C. Cir. 1998) (citations omitted).

The first issue is whether Wickham surveilled employees on May 25 in a manner that was out of the ordinary.⁸ The witnesses familiar with Wickham confirmed that he regularly is out at the entrance on South 3rd Street greeting employees as they arrive for work in the morning, so I find his presence at that location, at that time of the day, was not out of the ordinary. However, it was unusual for Wickham to use his phone to take photos or videos of employees. That being said, it was not unusual for Wickham to use his phone to take photos or videos of what he perceived to be actual or potential safety risks.

The second issue, therefore, is whether Wickham had a legitimate justification for taking the photos and video of the employees and others on May 25. The Board has found that an employer’s photographing or videoing of employees engaged in statutorily protected activities may be lawful, depending on the circumstances. For example, the Board has held it is lawful to photograph strikers as possible evidence to use in legal proceedings, particularly where there is no showing that the employer coupled the picture taking with threats or actual reprisals. See *Hilton Mobile Homes*, 155 NLRB, 873, 874 (1965). See also *Town & Country Supermarkets*, 340 NLRB 1410, 1414 (2004). Similarly, the Board has found an employer’s photographing or videoing of picketing to be lawful when the pickets are trespassing, obstructing traffic, and/or blocking ingress or egress to the employer’s facility, particularly when the photographing or videoing does not occur until after the employer learned of the alleged trespass, obstruction, or blocking. See *Town & Country Supermarkets*, *supra*; *Saia Motor Freight Line*, 333 NLRB 784 (2001); *Cable Car Advertisers, Inc.*, 324 NLRB 732 (1997); and *Concord Metal, Inc.*, 295 NLRB 912, 922 (1989).

As stated above, Wickham took two photographs on May 25 of the picketers at the employee entrance at the northeast corner

⁸ Respondent contends the allegations should be dismissed because, as an initial matter, the General Counsel failed to establish that the picketers and others were engaged in statutorily protected activities. Respondent argues the employees were not engaged in statutorily protected activity because their picket signs identified that their dispute was with Respondent, and the employees worked for PDC or PCC, not Respondent. Respondent cites to a June 23 representation decision from the Regional Director for Region 9 of the Board finding that Respondent was not a joint employer of the employees who worked for PDC or PCC on this project. Although I received the decision into evidence, it postdates the events at issue, and the employees could not have known of that finding at the time of the May 25 picketing. That being said, the Board has found it unnecessary to decide if the picketing is unprotected or unlawful in order to decide if there has been unlawful surveillance. See *Cable Car Advertisers, Inc.*, 324 NLRB 732 *fn.* 2 (1997).

of the intersection between South 3rd Street and West Muhammad Ali Boulevard. He testified that he took the photos after he saw the picketers blocking employees from safely crossing the street and accessing that entrance. He saw employees come up, then turn around, and walk away when they got to the picketers at the entrance, and at least one employee actually walked down the lane of traffic of South 3rd Street to access the jobsite. Employees also reported the same to him. After personally seeing this, and after hearing from employees that they were unable to access the entrance, Wickham took two photographs of the picketers blocking the employee entrance. He testified he did this because he believed the picketers were creating unsafe conditions, and he wanted to document it. Wickham did not say or do anything else to the picketers when he took the photos. In light of the evidence, and consistent with established precedent, I find that Wickham, who is the Senior Safety Director, had a legitimate justification for photographing the picketers who were blocking employees from safely accessing the jobsite.⁹

The same is true of the video Wickham took on May 25 of the three union agents who stopped their trucks on South 3rd Street, got out, and began honking their horns in support of the picketers. Wickham testified, unrefuted, that the union agents were blocking traffic on South 3rd Street, which is a street suppliers use to enter the jobsite to make deliveries. Wickham took a video of the scene—as it was occurring. Wickham did not say or do anything else other than take the video. It is further worth noting that this followed the earlier incident Wickham observed in which the picketers blocked a delivery truck from turning off South 3rd Street into the vehicle entrance to the jobsite. See *Concord Metal, Inc.*, *supra* at 921 (preservation of proof is a good defense to unlawful surveillance, particularly after incident where a delivery was delayed by pickets blocking a truck from accessing an entrance).

Finally, I reject the General Counsel and the Union’s arguments that Wickham took the photos and video because he anticipated misconduct. The photos and video were taken while the misconduct was occurring. Wickham took the photos of the picketers as they were blocking employees from safely crossing the crosswalk and accessing the employee entrance to the site. Similarly, Wickham took the video of the union agents as they were blocking traffic on South 3rd Street and impeding access to the vehicle entrance to the site. This occurred about 2 hours after Wickham saw the picketers block a delivery truck

⁹ The General Counsel contends that I should not credit Wickham’s testimony as to why he used his phone to take the photos and the video because he later deleted them. Wickham testified that he deleted the photos because the picketers eventually moved from the entrance. (Tr. 258–259.) Wickham was never asked why he deleted the video. However, it occurred after the police arrived and the union agents drove off and were no longer blocking the road. I find the deletion of the photos and video was not unreasonable under the circumstances. Wickham testified that this is the first time that he had ever dealt with any sort of work stoppage. (Tr. 246.) He likely did not see a reason to keep the video. I, therefore, do not discredit Wickham’s testimony for why he took the photos and video, simply because he did not keep the photos or video after the blocking of the employee entrance and the street accessing the vehicle entrance ceased.

from turning into the vehicle entrance on that same street. See *Town & Country Supermarkets*, supra at 1415 (not anticipatory photography when evidence of earlier obstruction); *Saia Motor Freight Line*, supra at 784.

Based on the foregoing, I find that Respondent had a legitimate justification for taking the two photos and the video on May 25. I, therefore, find that the General Counsel has failed to establish either alleged violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Brasfield & Gorrie LLC, at its Louisville, Kentucky jobsite is engaged in commerce within the meaning of § 2(2), (6), and 7 of the Act.

2. The Union is a labor organization within the meaning of § 2(5) of the Act.

3. Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁰

ORDER

The amended complaint is dismissed in its entirety.

Dated, Washington, D.C., December 8, 2017.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.