

**United States Postal Service and Local 300, National Postal Mail Handlers Union.** Cases 22-CA-18705(P) and 22-CA-19212(P)

August 24, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND TRUESDALE

On November 29, 1994, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering 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, and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by denying Postal Service employees who worked at other locations access to the parking lot at its Dominick V. Daniels (DVD) facility. In so doing, we reject the Respondent's contentions that the judge erred in applying *Tri-County Medical Center*, 222 NLRB 1089 (1976), and that the employees' access rights should be analyzed under *Lechmere v. NLRB*, 502 U.S. 527 (1992). The Respondent contends that because Postal Service employees Fitzgerald, Perry, and Hogrogian did not work at the DVD center, their status differs from that of the employees denied access to their workplace during off-duty hours in *Tri-County*. Rather, according to the Respondent their status is analogous to the nonemployee organizers in *Lechmere* because, inter alia, they were "strangers" to the DVD facility.

We agree with the judge that *Tri-County* governs here. Initially, we note that the Supreme Court has held that employees picketing at another location of their employer are employees of that employer, not outsiders. *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) (production employees picketing at a retail outlet of their employer). We note further, as did the judge, that the Board has explicitly rejected the argument that *Lechmere* applies to off-duty employees. *Nashville Plastic Products*, 313 NLRB 462, 463 (1993). Finally, we agree with the judge that the Respondent has failed to demonstrate a valid business reason to bar similarly situated employees from nonwork areas.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United States Postal Service, Kearny, New Jersey, its officers, agents, succes-

sors, and assigns, shall take the action set forth in the Order.

*Julie L. Kaufman, Esq.*, for the General Counsel.

*Nancy F. Janes, Esq.* and *Peter W. Gallaudet, Esq.*, of Windsor, Connecticut, for the Respondent.

*Paul Schachter, Esq. (Reinhardt & Schachter, P.C.)*, of Newark, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on April 26, 1993, March 4 and May 4-5, 1994.<sup>1</sup> Upon charges filed on September 29, 1992, and May 26, 1993, complaints were issued on October 19, 1992, and June 25, 1993, respectively. The complaints, which were consolidated on March 4, 1994, alleged that United States Postal Service (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by denying access to its parking lot for the distribution of intraunion campaign materials. Respondent filed answers denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on August 11, 1994.

Upon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Board has jurisdiction in this matter pursuant to section 1209 of the Postal Reorganization Act, 39 U.S.C. § 1209.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that National Postal Mail Handlers Union (NPOMHU) is a labor organization within the meaning of Section 2(5) of the Act and that Local 300 is its agent. See *Postal Service*, 308 NLRB 358, 359 (1992).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

Local 300 represents unit employees employed at Respondent's facilities throughout the New York, New Jersey, and Connecticut metropolitan area, including employees employed at Respondent's Dominick V. Daniels (DVD) facility in Kearny, New Jersey, and employees employed at the Edgewater, New Jersey facility. The parties' collective-bargaining relationship is governed by the nationwide collective-bargaining agreement existing between NPOMHU and Respondent. The unit employees represented by Local 300 are

<sup>1</sup>By order dated May 26, 1994, the testimony of William Quinn before the House Committee on Post Office and Civil Service has been admitted into evidence as R. Exh. 25.

part of a nationwide unit covered by the parties' national collective-bargaining agreement.

## 2. DVD facility

During the summer of 1992, campaigning was taking place for NPOMHU's election for delegates to the national convention. In June Grady Fitzgerald, an employee of Respondent at its Bulk Mail Center (BMC) in Jersey city, and a Local 300 shop steward, engaged in the distribution of internal union campaign literature at the DVD employee parking lot. Fitzgerald arrived at the DVD lot at around 2:30 p.m. and stationed himself in the lot, at the beginning of the employee walkway leading up to the entrance of the DVD building. As Fitzgerald distributed the literature to passing employees, he did not obstruct vehicular or pedestrian employee traffic. While Fitzgerald was engaged in distributing the campaign literature, he was approached by Peter Gillespie, Respondent's labor relations specialist. After ascertaining that Fitzgerald was a postal employee not assigned to DVD, Gillespie told Fitzgerald that he could not distribute the literature because he did not work at the DVD facility. Fitzgerald, however, continued to distribute the literature. Soon thereafter a security guard approached Fitzgerald and told him that he would have to leave the premises. When Fitzgerald protested that he was engaged in protected union activity and had a legal right to be distributing literature in the parking lot, the guard suggested that Fitzgerald speak to his supervisor. They then entered the DVD building where Fitzgerald spoke to Postal Police Lieutenant Ophara Motley and informed Motley that he was engaged in lawful protected union activity and thus he had a right to distribute the literature in the DVD parking lot. Motley told Fitzgerald that pursuant to Respondent's policy only employees working at the DVD facility could distribute campaign literature on DVD premises and therefore Fitzgerald would have to leave the premises.

Respondent has admitted that its "Do's and Don'ts" policy, upon which Gillespie relied in instructing Fitzgerald to leave the premises, is Respondent's national policy effective since at least 1986, and is applicable to all of Respondent's facilities nationwide. The portion of the "Do's and Don'ts" relevant to the instant proceeding is paragraph 6, which states:

6. DO NOT permit an employee from another post office or postal facility to enter your facility for the purpose of campaigning.

## 3. Edgewater facility

Jeffrey Perry, treasurer of Local 300, has been an employee of Respondent since 1974. At the time of the hearing he was on a leave of absence from Respondent's BMC. Paul Hogrogian, executive vice president of Local 300, also is an employee of Respondent who at the time of the hearing was on a leave of absence from the BMC facility.

At around 6 a.m. on May 26, 1993, Perry and Hogrogian stationed themselves outside of the employee entrance of Respondent's Edgewater facility and began distributing intraunion campaign literature. The two employees stood on either side of the base of the stairway leading to the employee entrance. Neither Perry nor Hogrogian blocked the entrance or the exit to the Edgewater building while they dis-

tributed the literature. After a few minutes, Carol James, manager of the Edgewater facility, informed Perry and Hogrogian that they would have to leave and told them that they could not distribute any more literature.

## B. Discussion and Conclusions

### 1. Applicable law

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board stated "except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid." Respondent contends that instead of examining this case under the guidelines set forth in *Tri-County*, a balancing test should be performed as outlined in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). I disagree. It is clear that *Lechmere* is concerned with the distribution of union literature by nonemployee organizers. As the Board stated in *Nashville Plastic Products*, 313 NLRB 462, 463 (1993):

We reject the Respondent's argument that *Lechmere* applies to off-duty employees. *Lechmere* itself emphasized the critical distinction between employees and nonemployees as established in *NLRB v. Babcock & Wilcox*, and a fortiori, the rule enunciated in *Lechmere* does not apply to employees. By virtue of the continuing employment relationship, an off-duty employee, even if not scheduled to work on the day he seeks access to the premises, remains an employee of the employer. [Footnote omitted.]

Respondent contends that an employee seeking access to a parking lot at a facility other than the one to which he is assigned should be considered a nonemployee for purposes of determining his access rights. No case has been cited which would warrant the distinction which Respondent proposes. In the instant case Respondent's employees enjoy the same benefits and working conditions regardless of the facility at which they work. For example, vacation benefits accrue in the same manner and rate regardless of an employee's assigned facility. Years of employment are counted toward an employee's pension from the day the employee is hired to the day he or she retires, regardless of which facility he or she is assigned to. In addition, an employee who is involuntarily transferred from one postal facility to another maintains his or her seniority regardless of the change of facility. In *Nashville Plastic Products*, supra, the Board recognized that "the rule enunciated in *Lechmere* does not apply to employees." No distinction was made as to whether an employee worked at any particular facility. In addition, in *Tri-County*, supra, the Board prohibited a rule which denied off-duty employees entry to parking lots, gates, and other outside nonworking areas. Again, no distinction was made as to whether the off-duty employee worked at any particular facility. Accordingly, I believe that the rule enunciated in *Tri-County Medical Center*, supra, is controlling in the instant proceeding.

### 2. Business justification

*Tri-County*, supra, prohibits the above-described no-access rule "except where justified by business reasons." In its brief, Respondent argues that "approximately 650,000 bar-

gaining unit employees of the Postal Service employed at some 40,000 worksites nationwide may gain access to the parking lot of postal facilities, irrespective of where they are employed, for the purposes of disseminating literature on behalf of themselves or other candidates running for union office during an intra-union campaign.” Respondent appears to argue that unless it is permitted to retain its present rule, hundreds or perhaps thousands of employees from different facilities could converge on the parking lot of one particular facility. There is nothing in this record to substantiate such a fear. The record contains evidence of only one or two Postal Service employees sporadically distributing union literature at facilities to which they are not assigned. In the instant proceeding neither Fitzgerald, Perry, nor Hogrogian interfered with pedestrian or vehicular traffic. I find that Respondent has not borne its burden of showing a justification for business reasons, based upon its conjecture that hundreds or thousands of employees from different facilities might converge on any one particular facility.

In addition, Respondent contends that “security would be jeopardized if employees from facilities other than the one in which they were working were permitted to enter the parking lots to distribute literature.” Again, while Respondent expresses the fear that “security would be jeopardized,” it has not sustained its burden in this record of showing that in fact, security has been jeopardized, by allowing Postal Service employees from other facilities to distribute union literature.<sup>2</sup>

### 3. Access by others

Respondent conducts a “New York Metropolitan Area Road-oo,” in which its employees from approximately seven different postal districts compete. The competition is held in the BMC parking lot. The participants, together with family members and fellow workers, attend the competition. Inasmuch as I have found that the rule in *Tri-County*, supra, is applicable and therefore paragraph 6 of Respondent’s “Do’s and Don’ts” policy is invalid, it is not necessary that I decide whether by sponsoring the “Road-oo,” Respondent discriminatorily enforced its no-solicitation rule.<sup>3</sup>

<sup>2</sup>In this connection, I note the testimony of Marilyn Williams, labor relations specialist located at Respondent’s Kennedy Airport facility. Williams testified that employees who worked at Respondent’s LaGuardia Airport facility, which is approximately 10 miles away from the Kennedy facility, would be permitted to distribute union literature in the Kennedy parking lot. This apparently would not be a security problem even though the security personnel at Kennedy presumably would not be personally familiar with the non-Kennedy employees.

<sup>3</sup>General Counsel’s brief cites Fitzgerald’s testimony that he campaigned several times at the Edgewater and Hackensack facilities and was not asked to stop. In addition, the brief points to Hogrogian’s testimony that several times he distributed campaign literature at Edgewater and other facilities and was not asked to stop. General Counsel has not made a showing that on those occasions “such activity took place in the presence of supervisors or was condoned or approved by them.” *Intercommunity Hospital*, 255 NLRB 468, 474 (1981). In addition, I credit the testimony of Tall Johnson, manager of the Edgewater facility, that other than the May 26, 1993 incident, he was not aware of persons not assigned to Edgewater having campaigned there. I also credit the testimony of Ben Nowacky, supervisor at the Hackensack facility, that he was never

### CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter pursuant to section 1209 of the Postal Reorganization Act, 39 U.S.C. § 1209.

2. NPOMHU is a labor organization within the meaning of Section 2(5) of the Act and Local 300 is its agent.

3. By denying off-duty employees access to its parking lots for the purpose of distributing intraunion campaign materials, Respondent has violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### THE REMEDY

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

General Counsel has moved to amend the complaint to seek a nationwide remedy, but not a nationwide notice posting.<sup>4</sup> I granted General Counsel’s motion. Since Respondent has admitted that its “Do’s and Don’ts” policy is a nationwide policy and since the Union’s members are members of a nationwide unit, I believe that the nationwide remedy is appropriate.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

### ORDER

The Respondent, United States Postal Service, Kearny, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying its off-duty employees access to its parking lots for the purpose of engaging in the distribution of union campaign materials.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Revoke paragraph 6 of its “Do’s and Don’ts” guidelines.

(b) Permit its off-duty employees, whether or not those employees are assigned to that particular facility, access to its parking lots for the purpose of distributing union campaign materials.

(c) Post at its facilities at Kearny and Edgewater, New Jersey, copies of the attached notice marked “Appendix.”<sup>6</sup>

made aware of anyone distributing union campaign literature in the parking lot.

<sup>4</sup>Inasmuch as General Counsel was not seeking a nationwide posting, Respondent did not object to the proposed amendment.

<sup>5</sup>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.

<sup>6</sup>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

Copies of the notice on forms provided by the Regional Director for Region 22, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT deny our off-duty employees access to our parking lots for the purpose of distributing union campaign materials.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL revoke paragraph 6 of our "Do's and Don'ts" guidelines.

WE WILL permit off-duty employees, whether or not they are assigned to any particular facility, access to our parking lots for the purpose of distributing union campaign materials.

UNITED STATES POSTAL SERVICE