

OFFICE OF THE ELECTION SUPERVISOR
for the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

IN RE: JOE KOZUBOWSKI,)	Protest Decision 2010 ESD 61
)	Issued: December 22, 2010
Protestor.)	OES Case No. P-056-112910-NE
_____)	

Joe Kozubowski, member of Local Union 317, filed a pre-election protest pursuant to Article XIII, Section 2(b) of the Rules for the 2010-2011 IBT International Union Delegate and Officer Election (“*Rules*”). The protest alleged that UPS, his employer, impermissibly interfered with his right under the *Rules* to campaign in a non-work area on non-work time.

Election Supervisor representative Maureen Geraghty investigated this protest.

Findings of Fact

This is the second protest filed by supporters of Sandy Pope working at the UPS Syracuse hub. In the first, *DiPietro*, 2010 ESD 52 (December 8, 2010), the protestor sought to campaign not only in designated break rooms but also in non-work areas adjacent to break areas. The five additional areas were: 1) immediately outside the main break room next to the employee pay phone; 2) immediately outside the feeder break room next to the employee pay phone; 3) near the coat hooks between Door No. 1 and the break room doors where unloaders sit during breaks; 4) the hallway in front of the union bulletin board in the Syracuse east center area, near where the stairs lead to the restrooms and upstairs locker area; and 5) next to the orange belt area where employees sit for breaks and UPS allows “United Way” charity pizza sales during Friday breaks. UPS agreed to permit campaigning in those additional areas, and we deemed the protest resolved on that basis.

Protestor Kozubowski in this case seeks to campaign during a 10 minute break period in the “finger area” of the hub. The finger area is a large work area containing many conveyor belts, including the tan, white, yellow, pink, Henrietta and Rochester belts; these belts move 80,000 to 100,000 packages each shift, run from floor to ceiling and do not run in straight lines. The 10 minute break period generally runs from 8:30 to 8:40 p.m. but may change as production demands dictate.

The finger area is staffed almost exclusively by part-time employees who work a 3½ to 4 hour shift Monday through Friday evenings. Employees are stationed at the start and end of the conveyor belts, loading and unloading freight and transporting it to and from delivery vehicles.

During the 10 minute break, employees are free to leave their work areas to go outside and smoke or to any of the designated break areas. The closest inside break area is a short walk up a flight of stairs to a space containing tables, chairs and vending machines. Some part-time employees remain in the finger area during break, talking, eating and resting. Normally, all of the conveyor belts are shut down during the break.

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Management reserves the right to direct some employees to continue working during the break based on the production needs of the shift and actually exercises that right. For example: management sometimes directs a few employees to continue to unload trailer shipments during break. Other employees have been instructed to search the conveyer belts during break for packages that have fallen or been mis-fed. Management has directed others to continue operating electric carts in the finger area during break, searching for and moving freight.

All witnesses verified that UPS management has not permitted solicitation of any kind in the finger area for several years. There is a factual dispute among the employee witnesses, with some stating solicitation has not been allowed in the finger area for at least 8 to 10 years, and others stating management has only banned solicitation for 4 to 5 years. Management witnesses state solicitation has never been permitted in the finger area. (One employee witness, DePietro, stated that he distributed 5 copies of *Teamster Voice*, TDU's successor publication to *Convoy Dispatch*, in October 2010, but he said that management did not see him do so.)

Protestor Kozubowski has been employed at UPS Syracuse for 16 years and is a full-time steward. He and DePietro were in frequent communication while DePietro's protest was being investigated and resolved. On November 15, 16 and 17, Kozubowski solicited accreditation petition signatures for Pope in break room areas in view of and without interference by supervision. Beginning on November 18, in coordination with DePietro, Kozubowski sought to expand the area for solicitation to production areas during break time. On that date, he began circulating accreditation petitions in the finger area, next to the pink belt. He did so for 3 days during break time and was not observed by supervision. He told our investigator he did not bring his activity to management's attention because he expected management would not permit it.

On November 23, Kozubowski again was soliciting signatures next to the pink belt in the finger area during the 10 minute break when he was approached by a supervisor. When the supervisor asked what he was doing, Kozubowski replied that he was doing union business. The supervisor looked at the clipboard Kozubowski held, told Kozubowski that he was campaigning and that such activity was not allowed there. Kozubowski stopped his activity.

Kozubowski told our investigator that he hoped UPS would permit his activity in the finger area, just as it had with respect to the areas involved in the earlier protest. When UPS did not, this protest followed.

Analysis

The *Rules* protect the pre-existing rights of members to campaign on employer premises. Article VII, Section 12(d). Pre-existing rights arise from past practice or from Section 7 of the National Labor Relations Act.

Here, the evidence is clear that no practice exists that permits campaign solicitation in the finger area. Management has uniformly enforced a no-solicitation policy in the area for at least the last four to five years, and employees know that the policy will be enforced against them if they are observed soliciting there.

We likewise cannot conclude that employees have a Section 7 right to solicit in the finger area. Case law firmly establishes that Section 7 protects the right of members to campaign in

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non-work areas during non-work times. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). It is also settled that employers may not ban literature distribution or solicitation in mixed-use areas during non-work times. *Eastex v. NLRB*, 43 U.S. 556 (1978) (employer rule banning solicitation in 7 foot passageway containing chairs and benches for employees to sit in time-clock area physically separate from production area was unlawful; employees have the right to distribute union literature in non-work areas of the employer's premises during non-work periods and employers may not interfere with the right except to the extent necessary to maintain production or discipline). *Also see Cooper Tire and Rubber Co. v. NLRB*, 957 F.2d 1245 (1992) (employer required to permit solicitation during break times, whether formal or informal, so long as area is break area, or adjacent to break area, such as a pathway to main break area); and *UPS v. NLRB & Dunning*, 228 F.3d 772 (6th Cir. 2000) (employer may not prohibit campaign activity in a non-production area immediately outside a break room or in a large check-in area where employees congregate, sit and talk before the shift starts).

The finger area does not meet the definition of a non-work area (such as a break room, lunch room, or drivers' lounge), in which no work is performed and where the employees using it are break. Likewise, it is not a mixed-use area, where at times when work is being performed, all are working, and when all are on break, no work is being done. To the contrary, the finger area is a classic, high-volume production area where multiple conveyors move thousands of packages each hour. Work in that area does not always stop when the break is called, as employees may continue to move packages while others search for packages that have fallen or been mis-fed. That some employees choose to take their 10 minutes in their work area, does not convert the individual work space of each employee or the entire finger area to a non-work or mixed-use area in which solicitation cannot be prohibited.

In this way, the finger area is distinguished from the area near the orange belt that UPS consented could be used for solicitation in *DiPietro*. The area near the orange belt is contiguous to the feeder break room area, and no work continues when the belt is turned off. In addition, management has used the area near the orange belt for solicitation (Friday pizza parties to raise contributions for the United Way). In contrast, work in the finger area does not cease altogether during break and no solicitation of any kind has been permitted there for at least several years.

On these facts, we find that UPS management did not violate Article VII, Section 12(d) by halting Kozubowski's petition activity in the finger area adjacent to the pink belt, as no pre-existing right exists to campaign in that area. Accordingly, we DENY the protest.

Any interested party not satisfied with this determination may request a hearing before the Election Appeals Master within two (2) working days of receipt of this decision. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Supervisor in any such appeal. Requests for a hearing shall be made in writing, shall specify the basis for the appeal, and shall be served upon:

Kenneth Conboy
Election Appeals Master
Latham & Watkins
885 Third Avenue, Suite 1000
New York, NY 10022
Fax: (212) 751-4864

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Copies of the request for hearing must be served upon the parties, as well as upon the Election Supervisor for the International Brotherhood of Teamsters, 1801 K Street, N.W., Suite 421 L, Washington, D.C. 20006, all within the time prescribed above. A copy of the protest must accompany the request for hearing.

Richard W. Mark
Election Supervisor

cc: Kenneth Conboy
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