

NLRB: Retailer Violated NLRA by Forcing Non-Union Workers to Distribute Flyers Apologizing for Bothersome Union Organizing Efforts

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The National Labor Relations Board ruled earlier this week that an employer violated federal law when it required non-union employees to distribute fliers apologizing for union protests in front of its store.

The case, *Tesco PLC d/b/a Fresh & Easy Neighborhood Market, Inc.*, 358 NLRB 65 (June 25, 2012), arose out of a union organizing campaign at the employer's grocery store. As part of the campaign, union representatives and off-duty employees distributed pro-union flyers in the parking lot outside the employer's store. After a number of customers complained to management, the employer decided to distribute its own flyer. The flyer apologized for any inconvenience caused by the union, affirmed that it offered fair pay and benefits, and stated (falsely) that the pro-union literature was not being distributed by its employees. Following its standard practice for flyers and coupons, the employer required employees to personally hand the flyer to customers entering the store. Two employees objected and filed an unfair labor charge, alleging that the employer had violated the National Labor Relations Act by requiring employees to make an observable choice against the union organizing campaign.

The administrative law judge who first addressed the case found that there was no unfair labor practice because, in her opinion, the flyer did not "express a position on unionization." The union appealed. The Board was direct in its response to the judge's initial decision. "We disagree," the Board stated, because "material need not contain an explicitly antiunion message in order to be part of an employer's campaign." Rather, "the key inquiry is whether employees would understand the material to be a component of the employer's campaign." The Board reasoned that, in this case, that test was met. The employer's flyer had been a direct response to the union's protected handbilling and had been a clear effort "to generate community opposition to the organizing effort." Under those facts, the Board found, the "employees were not permitted to choose whether to express an opinion or remain silent; instead, they were compelled to participate publicly in making the Respondent's statement."

Employers should take note of this NLRB decision and the lesson that it contains: a response to pro-union activity during a union organization campaign, even a response that is necessitated by customer complaints, could lead

to unfair labor charges if not carefully handled. A proper response to interfering union activity must never compel employees to make a choice (or appear as if they have made a choice) against the union.

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