

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: February 15, 2008

TO : Martha Kinard, Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: America's Beverage Co.
Case 16-CA-25889

512-5012-1725-7100
512-5012-8320-5000
512-5012-8360

This Section 8(a)(1) case was submitted for advice on whether the Employer lawfully denied nonemployee Union agents access to a utility easement on the Employer's property where the agents were distributing organizational handbills. We conclude that (1) the Employer had a sufficient property interest under state law to lawfully deny access to the Union agents; and (2) the agents were not entitled to trespassory access because the Employer's employees were not "beyond the reach of reasonable union efforts to communicate with them."¹

FACTS

In September 2007, an employee called the Union about organizing the Employer's employees. On September 20, two Union agents began distributing organizational handbills on either side of the driveway entrance to the Employer's plant, located off a service road of a state highway. Employer guards informed the agents that they were on Employer property. The agents relocated to a utility easement between a utility pole and the highway. The guards nevertheless called the police who arrived and told the agents that they needed a permit to handbill.

The agents returned on October 4 to handbill in the same area. The police reappeared, repeated that the agents needed a permit, and ordered them to leave or be arrested. The Union agents returned on October 25 armed with a letter from Union's counsel stating that they did not need a permit for handbilling. An Employer representative called the police and argued that the agents were on the Employer's property. The police, however, advised the agents that they could handbill between the utility pole

¹ Lechmere Inc. v. NLRB, 502 U.S. 527, 539 (1992).

and the highway on the utility easement. After the police left, the Employer representative remained to monitor the agents' handbilling.

The Employer continues to maintain that the Union agents are unlawfully on its property when they handbill on the utility easement. The Employer argues it granted a limited easement solely to the City and its utilities, and that this easement may not be used by the Union. A plat of the Employer's property contains an Owner Certification and Dedication of an easement that surrounds the property perimeter. The Certification and Dedication provides:

The easements shown on the plat have been granted and dedicated and reserved for the mutual use and accommodation of the City of Irving and all public utilities . . . including but not limited to . . . telephone poles and lines, electrical power lines and appurtenances. . . . The City of Irving and all public utilities shall at all times have the full right of access and egress to or from and upon said easement strips . . .

The Employer's plant is not located in a remote or isolated area. Employees working at the plant live in the surrounding cities of Irving, Dallas and Ft. Worth. The Union asserts that it has chosen handbilling because that is least expensive method of communication.

ACTION

The Employer had a sufficient property interest under state law to lawfully deny access to the Union agents. Further, the agents were not entitled to trespassory access because the employees were not inaccessible.

The Board looks to state law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives.² Under Texas law, a land owner who grants access to its property via a voluntarily granted easement continues to own the underlying land in fee simple, and such an easement grants access only to the named entities and only for the named purposes.³

In Marcus Cable v. Krohn, the Texas Supreme Court considered whether a private cable company lawfully

² See, e.g., Glendale Associates, Ltd., 335 NLRB 27, 28 (2001) enfd. 347 F.3d 1145 (9th Cir. 2003).

³ Marcus Cable v. Krohn, 90 S.W. 3d 697 (2002).

attached its cables to electric utility poles located on a utility easement granted by the land owner. The cable company argued, among other things, that its cables were consistent with the granted easement, and that it had obtained permission from the utility to attach the cables. The court first held that the land owner's easement must be interpreted according to its express terms, and that the land owner continued to own the underlying property in fee simple. The court noted that the easement was expressly granted only to the utility company and only for the purpose of erecting utility lines. The court thus held that the utility company only had the limited right of its own access and only for the purposes granted to it by the easement. The court thus found a trespass because cable company had no right of access and the utility had no authority to grant the cable company access.⁴

Here, the Employer granted an easement solely to the City of Irving and public utilities, retaining the underlying land in fee simple. Thus, the Employer had a sufficient property right under Texas law to deny the Union agents permission to handbill on this easement. The Union argues that Marcus Cable v. Krohn and Gleason v. Taub involved permanent intrusions onto utility easements, and also that neither case considered the Union's First Amendment rights. It seems clear, however, that under current state law the Employer had a clear property right to deny the handbillers access. We also conclude that the Union has not met its heavy burden to show that trespassory access must be granted because the Employer's employees are inaccessible.

First, the Supreme Court's explanation of the limited scope of the "inaccessibility" exception indicates that it applies only where an aspect of the employment relationship contributes to the employees' inaccessibility. In Lechmere, the Court stated that "Babcock's exception was crafted precisely to protect the § 7 rights of those employees who, *by virtue of their employment*, are isolated from the ordinary flow of information that characterizes our society."⁵ Cases involving employees living during work

⁴ See also Gleason v. Taub, 180 S.W. 3d 711 (2005) (Texas court of appeals found company trespassed when it removed dirt from utility easement; trespass occurred even though the dirt removal had both improved the property and furthered the drainage purpose of the easement).

⁵ Lechmere Inc. v. NLRB, 502 U.S. at 540 (emphasis added). Quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956), the Court said the exception applies only "where 'the location of a plant and the living quarters of the

periods at isolated work sites were characterized by the Court as "classic examples" of such circumstances.⁶ The Court held that employees who do not reside on the employer's property "are presumptively not 'beyond the reach' of the union's message."⁷ The employees here, living openly in the cities surrounding the Employer's plant, were not inaccessible in the sense contemplated by Lechmere and Babcock.

Second, the Union has failed to demonstrate that it had no reasonable alternative means of communicating with these employees. The Union's burden to show no reasonable alternate means is a heavy one.⁸ The Union asserts that it preferred to use handbilling at the plant entrance as the least expensive method of communication. This assertion does not establish that the employees were 'beyond the reach' of the union's message."⁹

Accordingly, the Region should dismiss this charge, absent withdrawal.

B.J.K.

employees place the employees beyond the reach of reasonable union efforts to communicate with them.'" Id. at 539.

⁶ Id.

⁷ Id. at 540. See also Oakwood Hospital v. NLRB, 983 F.2d 698, 702 (6th Cir. 1993); Farm Fresh, 326 NLRB 997, 1000 (1998).

⁸ See Lechmere, Inc. v. NLRB, 502 U.S. at 535, quoting Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 205 (1978).

⁹ Lechmere Inc. v. NLRB, 502 U.S. at 540.