

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

Advice Memorandum

DATE: February 13, 2003

TO : Alan B. Reichard, Regional Director
Veronica I. Clements, Regional Attorney
Bruce I. Friend, Assistant to the Regional Director
Region 32

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

SUBJECT: Hampton Inn of Stockton
Case 32-CA-19823-1

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This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by ordering non-employee Union handbillers to leave the entrance area to its hotel, and by having the police issue them citations for trespass.

We conclude that the Employer unlawfully ordered the Union handbillers to leave its property because, under California law, the Employer's property interest is not sufficient to exclude peaceful Union activity on parts of the property that are open to the public. We further conclude that the Employer did not violate Section 8(a)(1) by causing the police to issue trespass citations to the Union representatives because, under Loehmann's Plaza,¹ there is insufficient evidence that the Employer caused the citations with an unlawful retaliatory motive.

FACTS

Carpenters Local 25 (the Union) is engaged in a dispute with Hampton Inn of Stockton (the Employer) because the Employer has been using a non-Union construction contractor to build several new hotels in the Stockton, California area. On June 27, 2002, two Union agents who

¹ 305 NLRB 663, 670 (1991), revd. on other grounds 316 NLRB 109 (1995).

were not employees of the Employer stood in the exterior entry area of an Employer hotel, on property owned by the Employer, where they handed out leaflets to people entering and leaving the hotel. The leaflets criticized the Employer for using a construction contractor that did not pay area standard wages and urged the public to telephone the Employer's owner to express concern.

Shortly after the agents began leafleting, the hotel manager approached them and asked them to leave the premises and use the public sidewalk on the perimeter to conduct their leafleting. They refused to leave the entry area. The manager called the police. At the behest of the manager, and after further requests (by both the police and the Employer) that the agents leave voluntarily, the police issued trespassing citations to the Union agents, ordering them to appear in municipal court. Having been told by the police that if they did not then leave the Employer's property they would be arrested and taken to police headquarters, the Union agents moved to the public sidewalk, where they continued leafleting without further incident. The Employer does not contend, and there is no evidence, that the leafleters at any time obstructed access to its entrance or engaged in any coercive or unprotected conduct.

When the Union agents appeared in court, the district attorney announced his decision not to prosecute, and therefore the trespass matter was closed. The Union continued its leafleting campaign at Employer facilities, but with leafleters positioned on public sidewalks.

ACTION

We conclude that, absent settlement, the Region should issue a Section 8(a)(1) complaint alleging that the Employer unlawfully ordered the Union handbillers to leave its property because, under California law, the Employer's property interest was not sufficient to exclude the Union's peaceful activity on parts of the property open to the public. The Region should dismiss, absent withdrawal, the portion of the charge that alleges that the Employer violated Section 8(a)(1) by having the police issue the trespass citations, because there is insufficient evidence that the Employer caused the citations with an unlawful retaliatory motive.

1. The Employer's Denial of Access

In Lechmere, Inc. v. NLRB,² the Supreme Court held that, except in narrow circumstances, "Section 7 guarantees do not authorize trespasses by non-employee organizers." In order to assert a Lechmere privilege, an employer must have a sufficient property interest under the applicable law (generally state law) to exclude others and make refusal to vacate the property at the employer's request a "trespass."³

California defines civil trespass as "an 'unauthorized entry' onto the land of another," regardless of motivation.⁴ However, California labor law and policy clearly limit private property interests to exclude others, and thereby implicitly "authorize" unions to enter onto exterior private property to conduct certain activity.⁵

In Sears, the California Supreme Court held that under the Moscone Act (Cal. Code of Civ. Proc. § 527.3), which prohibits injunctions against persons involved in picketing "not involving fraud, violence or breach of the peace" at "any place where any person or persons may lawfully be," the employer could not evict union pickets from the privately-owned sidewalk surrounding its store.⁶ The court first found that, independent of any constitutional right, California could permit union activity on private property

² 502 U.S. 527, 537 (1992).

³ See Bristol Farms, 311 NLRB 437, 438-439 (1993); Johnson & Hardin Co., 305 NLRB 690, 690 (1991), enfd. in part. part 49 F.3d 237 (6th Cir. 1995).

⁴ Civic Western Corp. v. Zila Industries, Inc., 135 Cal.Rptr. 915, 925 (Cal. App. 2 Dist. 1977).

⁵ Sears v. San Diego District Council of Carpenters, 158 Cal.Rptr. 370 (1979), cert. denied 447 U.S. 935 (1980). California state constitutional freedom of speech guarantees also limit property interests. See, Robins v. Pruneyard, 153 Cal.Rptr. 854 (1979), affd. 447 U.S. 74 (1980).

⁶ Sears, 158 Cal.Rptr. at 381.

as a matter of state labor law.⁷ It then interpreted the Moscone Act as insulating from the court's injunctive power all union activity declared to be lawful under prior California decisions.⁸ Because Schwartz-Torrance⁹ and In re Lane¹⁰ had established the legality of peaceful union picketing and handbilling on private sidewalks outside a store, the court concluded that the state legislature had now codified this rule into its labor statutes.¹¹ Thus, the court found that the California legislature had determined, as a matter of state labor law, that the rights of property owners to exclude others from the exterior areas surrounding business establishments must be subordinated to the rights of persons engaging in peaceful labor activities directed at those establishments.¹²

We conclude that California labor law, as codified in the Moscone Act, prohibited this Employer, a hotel, from excluding the Union representatives. The Union's conduct was at all times peaceful, and the entrance area to the hotel constitutes a "place where any person or persons may lawfully be." Although both Schwartz-Torrance and In re

⁷ The court (158 Cal.Rptr. at 377 n.5) noted Robins v. Pruneyard, recently decided, and said that:

The Robins decision rests on provisions of the California Constitution. In the instant case, our decision rests on the terms of Code of Civil Procedure Section 527.3; accordingly, we express no opinion on whether the California Constitution protects the picketing here at issue.

⁸ Sears, 158 Cal.Rptr. at 375-376.

⁹ Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers Union, 40 Cal.Rptr. 233 (1964), cert. denied 380 U.S. 906 (1965) (reversing injunction of union picketing on privately owned sidewalk outside bakery involved in labor dispute).

¹⁰ In re Lane, 79 Cal.Rptr. 729 (1969) (reversing trespass conviction of union representative who handbilled on privately owned sidewalk outside supermarket involved in labor dispute).

¹¹ Sears, 158 Cal.Rptr. at 379.

¹² Id. at 378.

Lane involved picketing or handbilling in front of stores, the court's conclusion upon balancing a union's need to peacefully picket "at the most effective point of persuasion" against a property right "worn thin by public usage"¹³ obviously would apply to leafleting in the privately-owned public entry area outside a hotel. Thus, the Employer's denial of access to the Union was unlawful under Section 8(a)(1).

Because the substantive law of trespass requires, as a prerequisite to instituting civil or criminal trespass proceedings, that a property owner explicitly deny the alleged trespasser access to the property, this analysis of NLRA law creates an arguable tension with the directives of Bill Johnson's¹⁴ and BE & K.¹⁵ On the one hand, the denial of access is unlawful under the NLRA; on the other hand, those Supreme Court decisions prohibit finding a court proceeding to be unlawful under the NLRA if it is reasonably based and lacks a retaliatory motive. To the extent that the owner's denial of access is an element of the state court cause of action, it might be argued that it should be analyzed within the rubric of Bill Johnson's and BE & K. We conclude, however, that the Supreme Court's analysis in Sears¹⁶ reconciles this apparent conflict in favor of Board jurisdiction to adjudicate the legality of the denial of access. The Supreme Court, in discussing circumstances where trespass lawsuits may be preempted by the Act, stressed in Sears that because certain union trespasses on employer property may be protected under Section 7, the Board must determine the legality of access in the first instance so long as the aggrieved union files a charge based on an employer demand to leave. 436 U.S. at 201-202. The Court proceeded to note that a prior demand to leave is imperative for an employer to bring a valid trespass lawsuit, and the Board can determine in the first instance whether union presence on the property is

¹³ Id. at 376.

¹⁴ Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

¹⁵ BE&K Construction Co. v. NLRB, 122 S. Ct. 2390 (2002).

¹⁶ Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978).

protected based on that demand;¹⁷ the employer's continuing ability to have its property interests adjudicated in state court would then depend on the Board's decision regarding the denial of access.

The Board took this precise approach in Loehmann's Plaza and, after finding that the denial of access was unlawful, decided that the lawsuit was not preempted until issuance of complaint regarding the denial of access. Thus, the Board decided that the continued maintenance of the lawsuit was preempted and unlawful;¹⁸ however, the Board also found that the precomplaint filing and maintenance of the lawsuit was lawful.¹⁹

2. The Employer's Causing of the Union Representatives to be Cited for Trespass

As described above, the Employer called the police to have the Union representatives removed from the Employer's property. At the behest of the Employer, the police issued trespassing citations to the Union representatives, who eventually agreed to move to the public sidewalk rather than be arrested and taken to police headquarters. When the Union agents appeared in court pursuant to the citations, the district attorney announced his decision not to prosecute. We conclude that the Employer did not violate Section 8(a)(1) of the Act when it caused the police to issue the trespass citations.

The Employer's having caused the police to issue the trespass citations must be viewed separately from the denial of access, and must be analyzed under the Johnson & Hardin Co.²⁰ application of Bill Johnson's. In doing so, we

¹⁷ Id. at 207, fn. 44.

¹⁸ 305 NLRB at 667, 669 n. 43, 671.

¹⁹ Id. at 670.

²⁰ Supra, 305 NLRB at 691 (Board held that it would view a criminal trespass complaint under the same standard as that used for determining whether a civil lawsuit violates Section 8(a)(1)). We note that in Urban Retail Properties Co., JD(SF) 39-99, slip op. at 10-11, 1999 WL 33454754 (NLRB Div. of Judges), the ALJ found that a citizen's

find Loehmann's Plaza, supra, to be controlling. There, although the Board found that the employer's direction to union agents to leave its private property violated Section 8(a)(1), it concluded that the employer's pre-ULP complaint pursuit of a state court injunction proceeding against trespass was not unlawful under a Bill Johnson's analysis.²¹ The Board found no evidence of retaliatory motive for the suit at that pre-ULP complaint stage even though the suit was directed at activity that the Board eventually found protected under Section 7. Rather, the Board found that the Employer's purpose was to "protect or, at least have adjudicated," its property rights.²²

Here, as in Loehmann's Plaza, there is insufficient evidence of retaliatory motive. Rather, the evidence shows that the Employer had a genuine desire to protect its property rights. Although causing the trespass citations was directed at the Union's peaceful handbilling, under Loehmann's Plaza activity is not considered preempted until the General Counsel issues a complaint alleging that the handbilling was protected by the Act.²³ And, as in Loehmann's Plaza, there is no extrinsic evidence of retaliatory motive in this case. We therefore conclude that the Employer did not violate Section 8(a)(1) by causing the police to issue the citations, which were dismissed before this complaint will issue, to the Union

arrest is indistinguishable from the swearing out of a criminal complaint, as in Johnson & Hardin, or the filing of a civil complaint, because "all three effectively petition for government action to redress exactly the same type of grievance." This reasoning is consistent with the Supreme Court's observation in BE & K Construction Co. v. NLRB, 122 S. Ct. at 2396, that "the right to petition extends to all departments of the Government."

²¹ 305 NLRB at 670.

²² Id.

²³ Id.

representatives, because it did not cause those citations with an unlawful retaliatory motive.²⁴

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²⁴ We recognize that the Supreme Court's decision in BE & K, supra, which looks first to whether the petition or suit was reasonably based, calls into question the sweeping effect of the Loehmann's Plaza approach, which proceeds directly to retaliatory motive and apparently assumes reasonable basis. For three reasons, however, we believe that this is a poor vehicle to place before the Board the continued viability of the Loehmann's Plaza approach after BE & K. First, the General Counsel's reasonable cause to believe that the Union representatives were privileged under California law to be at the hotel entrance does not necessarily mean that it would be frivolous for the Employer to argue that the Moscone Act does not protect the Union's presence based on the nature of the property. Second, the trespass action in this case ended when the district attorney declined to pursue it. Finally, any desired future Union access to the entry area of the hotel would be controlled by the Board's decision on the denial of access complaint.