

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

Advice Memorandum

DATE: October 31, 2003

TO : Victoria E. Aguayo, Regional Director
Region 21

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

SUBJECT: Long Beach Memorial Medical Center
Case 21-CA-35462

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This Section 8(a)(1) case was submitted for advice on the issue of whether an acute care hospital in California was privileged to deny nonemployee organizers access to its property. We conclude that state property law privileged the Employer to exclude nonemployee organizers from the interior of the hospital but that it provided an insufficient property interest in the exterior areas to privilege the Employer's actions there.

FACTS

The Employer operates an acute-care hospital located in a largely residential area in California. The Employer's facility includes several interconnected structures located in a one-square block property, along with a few outlying structures also owned by the hospital. Also located on the property are parking structures owned and operated by the hospital. Adjacent to the hospital property are several medical buildings that are not owned by the Employer, but which share easements with the hospital.

In or about January 2002,¹ Union organizers employed by the Healthcare Workers Alliance ("the Union") began leafleting at the Employer's facility and soliciting authorization cards from the Employer's non-nursing staff. As further detailed below, this case involves three instances where the Employer interfered with Union organizers' activities occurring at exterior areas of the hospital, and six incidents, including the arrest and

¹ All dates are in 2002.

detention of a union organizer where the activity occurred in the interior of the hospital. As noted above, the issue submitted to Advice was whether the Employer was privileged to deny these nonemployee organizers access to its property under California law.

A. Incidents on the Exterior of the Employer's Facility

On October 11, Union organizers were distributing leaflets to employees on the public sidewalk outside the employee parking garage. About 15 minutes after they started leafleting, an Employer security guard told them they had to leave. The organizers initially refused to leave, but when the guards closely monitored the organizers it made it difficult to pass out leaflets to employees and the organizers eventually left the area. The Employer asserts that the organizers were on private property, but provided no evidence to confirm this fact.

On November 20, a Union organizer was waiting to meet two employees in the employee parking lot. When the Employer's Director of Security requested that he leave the property and threatened to have him arrested for trespass, the organizer agreed to leave.

On November 26, 2002, Union organizers were outside the main entrance to the hospital distributing leaflets. One of the Employer's security guards approached them and told the organizers that they could not distribute literature on hospital property and must leave immediately. Another guard told the organizers that if they did not leave, they would be arrested for trespassing. The organizers continued to distribute the literature while the security guards observed them from 20 feet away. After about 45 minutes the organizers left the area.

B. Incidents in the Interior of the Employer's Facility

In July, Union organizer Esperanza Leyva was soliciting employees within the basement of the hospital when she noticed Security Guard Leon Floyd approaching her. In order to avoid an encounter with Floyd, Leyva entered the medical records department, a non-public area of the hospital. Floyd ultimately found Leyva in the medical records department and confronted her. Leyva insisted she

had a right to be in the hospital for the purpose of organizing. Security Guard Floyd escorted her out of the hospital, and told her the next time he saw her on the premises she would be arrested.

In the latter part of July or early August, Leyva was soliciting employees in a hospital waiting room. She was again approached by Security Guard Floyd. Floyd told Leyva that the next time he saw her on the premises he would call the police and have her arrested for trespassing. Leyva left in order to avoid arrest.

On August 23, Leyva and Union organizer Melvin Barcenas were meeting with an employee outside the hospital near the main entrance, when they noticed that they were being observed by Security Officer Floyd. Leyva and Barcenas and the employee entered the hospital through the main entrance. The employee then left the area without incident. Leyva ran into the women's restroom and hid for 20 minutes to avoid detection by Floyd. Floyd detained Barcenas and waited outside the restroom until Leyva came out. When she emerged, Floyd arrested Leyva for trespass.

Between December 2 and 6, another Union organizer solicited employees in the hospital cafeteria, the main lobby, and inside the Emergency Room entrance. Hospital security personnel stopped this organizer in the hallway in the hospital basement on two separate occasions. On both occasions, security personnel told the organizer he could not remain on the premises. As a result the organizer eventually left the area.

On December 6, hospital security guards stopped two Union organizers who were waiting to meet two employees in the hospital cafeteria. When the guards confirmed that they were Union organizers, the guards told them that they had to leave and escorted them off the property.

ACTION

We conclude that the Employer violated Section 8(a)(1) of the Act by denying nonemployee organizers access to the exterior areas of its property. The Employer had an insufficient property interest under California law to exclude the organizers from the exteriors of the premises. On the other hand, we conclude that the Employer did not

violate the Act by denying nonemployee organizers access to the interior areas of the hospital. The Employer had a sufficient property interest under California law to exclude the organizers from the interior areas.

1. The Employer's Denial of Access in Light of California's Limits on Property Interests

In Lechmere v. NLRB, the Court held that, except in narrow circumstances, "Section 7 guarantees do not authorize trespasses by nonemployee organizers."² However, an employer violates Section 8(a)(1) if it interferes with nontrespassory Section 7 activity. Thus, as a threshold matter, in order to assert a Lechmere privilege, an employer must have a sufficient property interest under state law to make the union's presence on the property a "trespass."³ The Board has specifically affirmed that, in deciding Lechmere cases arising in California, it is guided by California law.⁴

Under California law, two independent foundations act to limit private property interests: state constitutional freedom of speech guarantees, and state labor law and policy. California clearly prohibits the exclusion of peaceful union handbillers from exterior areas of an employer's private property as a matter of state labor law and policy. Specifically, under the Moscone Act (Cal. Code of Civ. Proc. Section 527.3), the right 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.⁵ In Winco Foods, Inc., the Board

² Lechmere, Inc. v. NLRB, 502 U.S. 527, 537 (1992) (emphasis supplied).

³ See Bristol Farms, 311 NLRB 437, 438-39 (1993); Johnson & Hardin Co., 305 NLRB 690 (1991), enfd. in pertinent part 49 F.3d 237 (6th Cir. 1995).

⁴ Bristol Farms, 311 NLRB at 438-439; Waremart Foods, d/b/a Winco Foods, Inc., 337 NLRB No. 41, slip op. at 1 (2001), enf. pending No. 02-1038 (D.C. Cir.).

⁵ Sears v. San Diego District Council of Carpenters, 158 Cal.Rptr. 370, 378 (1979), cert. denied 447 U.S. 935 (1980). Regarding the scope of the Moscone Act, the Sears court noted that the phrase "any place where any person or persons may lawfully be" was undefined by the statute and that "a strict reading might appear to authorize picketing

found that California law limited the respondent's right to exclude union handbillers from outside its store.⁶ California state constitutional freedom of speech guarantees also limit private property interests where the property is akin to a public forum.⁷

In light of this state limitation on the Employer's property interest, we conclude that complaint should issue with regard to the Employer's denial of access to the nonemployee union organizers who were leafleting and/or soliciting employees either on public property or on the exterior sidewalks and parking areas of the hospital because the Employer did not possess a sufficient property interest under Moscone/Sears. Thus, as noted above, the Board recognizes that California labor policy, codified in the Moscone Act and as interpreted in Sears, modifies state property law so as to privilege the presence of union organizers on the exterior premises of an employer, including its private sidewalks and parking garages.⁸ Here, the parties agree that the incidents on October 11, November 20, and November 26, occurred exterior to the hospital.⁹ This lawful Union conduct is privileged under Moscone/Sears.

in the aisles of the Sears store or even in the private offices of its executives." Id. at 375. Although the court found it unnecessary to define the phrase in order to resolve the case before it, it suggested that reading the statute to privilege picketing of such interior spaces might excessively interfere with private property rights. Ibid.

⁶ 337 NLRB No. 41, slip p. at 1, citing Sears, supra. The Board rejected the argument that California's limitation on property interests is either preempted or violates the Equal Protection clause of the Constitution. Id., slip op. at 1 and n.3.

⁷ Robins v. Pruneyard, 153 Cal.Rptr. 854 (1979) (solicitation at privately owned shopping center protected by state constitution), affd. 447 U.S. 74 (1980).

⁸ See Winco Foods, Inc., 337 NLRB No. 41, slip op. at 1.

⁹ With regard to the incident of October 11, the Region should first argue that the Employer interfered with lawful union activity on public property. The Region should argue in the alternative that the Employer interfered with lawful Union activity on its exterior private property, per Moscone/Sears.

The Region should not, however, argue that the hospital's exterior areas are the equivalent of a public forum under Pruneyard. The Employer does not hold the hospital out as a public forum. Beyond its patients and their visitors, the Employer does not invite the public to visit the hospital grounds or utilize its facility. Vendors, suppliers, and special education attendees must make specific appointments to be received at the facility, or are specifically invited for an event. Nor is the hospital associated with any other facility which could be said to hold itself out as a public forum. In this regard the hospital here is similar to the "stand-alone" grocery stores which the recent decisions of California courts have held are not Pruneyard public forums.¹⁰

As to the exclusion of non-employee Union representatives from interior areas, in agreement with the Region, we conclude that the Employer did not violate the Act by denying union organizers access to its interior areas. We note that California courts have not yet applied either Pruneyard or Moscone/Sears in a setting equivalent to that of the Employer's interior areas. Although the Board may construe state law to determine property

¹⁰ Trader Joe's Company v. Progressive Campaigns, Inc., 73 Cal.App.4th 925, 86 Cal.Rptr.2d 442, 448 (1 Dist. 1999); Young v. Raleys, 89 Cal.App.4th 476, 107 Cal.Rptr.2d 172, 180 (3 Dist. 2001), order granting review, 111 Cal.Rptr.2d 335 (2001).

We agree with the Region that the setting here is different than the teaching hospital in UCSF-Stanford, Case 32-CA-17092, Advice Memorandum dated July 15, 1999, where we argued that the open, park-like character of that hospital's campus, situated between a shopping center and the main university campus, made it likely California courts would find it a public forum. The Board decided that case in UCSF Stanford Health Care, 335 NLRB 488 (2001). Finding a violation, the Board expressly did not rely on either a Pruneyard analysis or the Moscone/Sears analysis discussed *infra*, but found that the respondent's lease alone was insufficient evidence of any property interest. The ALJ had rejected the General Counsel's argument that the hospital was like a public forum, but did rely on Moscone/Sears as an alternative ground for finding the eviction of the Union handbillers violative. See *id.* at 525-527.

interests in access cases,¹¹ we concluded that where no California court has extended Pruneyard and Moscone/Sears to union activity inside a privately owned hospital's interior areas, it would be inappropriate to argue that the Employer had no property right of exclusion as to those areas. We therefore find that the Employer's exclusion of the Union from the interior areas of the hospital was not unlawful under either Pruneyard or Moscone/Sears.

Since the Union had no protected right to enter the hospital's interior areas, the arrest of Union organizer Leyva presents no NLRA issue.

¹¹ See, e.g., Bristol Farms, 311 NLRB at 438-39.

2. Any Arguments that California Property Law Is Unconstitutional or Preempted Should Be Rejected Consistent with Extant Board Law

A. The Board cannot resolve the constitutional challenge

In Winco Foods, Inc., supra, the Board relied on Sears to find that, under California property law, the respondent did not have a right to exclude union representatives from its property.¹² The respondent there had argued that the Board should not apply California's limitation on its property interest because the state's approach was both unconstitutional as a violation of Equal Protection, and preempted. The Board rejected those arguments and they are currently under consideration in the enforcement proceeding before the D.C. Circuit.¹³

While these questions are pending before the D.C. Circuit, extant Board law is clear. The Board rejected the Equal Protection argument because, "[w]hen interpreting State law, we are bound by the decision of a State's highest court."¹⁴ Since no California state court has sustained such a constitutional challenge, the Board declined the invitation to do so. Therefore, a complaint in this matter with regard to the exterior areas of the hospital is within both extant State and Board law.

B. Moscone/Sears is not preempted by the NLRA.

The Respondent in Winco Foods, supra, had also urged that the Moscone/Sears doctrine was preempted based on

¹² 337 NLRB No. 41, slip op. at 1.

¹³ Case No. 02-1038. On July 1, 2003, the D.C. Circuit asked the California Supreme Court to address several questions concerning the constitutionality of giving greater protection to labor speech than would appear to be provided to other speech in California. The California Supreme Court refused to accept the D.C. Circuit's request to certify the questions.

¹⁴ Winco Foods, 337 NLRB No. 41, slip op. at 1, citing NLRB v. Calkins, 187 F.3d 1080, 1088 (9th Cir. 1999).

"Machinists Preemption."¹⁵ Machinists preemption prohibits state and municipal regulations of areas that Congress intended to be "controlled by the free play of economic forces."¹⁶ Winco had argued that the right to exclude non-employees from its property was an "economic weapon" protected under Machinists. The Board rejected this argument, stating that "[t]he right of employers to exclude union organizers from their private property emanates from State common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it."¹⁷ In other words, Machinists preemption is not applicable in access cases because the right of nonemployee union organizers to enter the property of employers -- or the lack thereof -- is not a zone free from all state and federal regulation. Rather, an employer's general privilege, recognized by the Board, to exclude nonemployee union representatives, stems not from an effort to prevent interference with an economic weapon, the basis for preemption in Machinists, but from the Board's obligation under Lechmere to accommodate property rights granted by state law.

The Employer here further urges that NLRB v. Babcock & Wilcox Co.¹⁸ and Lechmere, supra, establish the scope of a union's right to, and an employer's obligation to provide access to, private property under federal law and that those decisions preempt California's state law. We reject this argument because, as the Board held in Winco, both Lechmere and Babcock & Wilcox stand for the proposition that otherwise protected conduct, like the conduct of the nonemployee organizers here, may be prohibited on private property in order to accommodate the important interest of states in enforcing their trespass laws. Thus, as noted above, the threshold question in any Lechmere case is whether the employer has a sufficient property interest under state law to make the union's presence on the property a "trespass."¹⁹ Thus, under California law, the

¹⁵ Machinist Lodge 76 v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976).

¹⁶ Id. at 140.

¹⁷ Winco, 337 NLRB No. 41, slip op. at 1, citing Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 217 fn. 21 (1994).

¹⁸ 351 U.S. 105 (1956).

¹⁹ Winco, 337 NLRB No. 41, slip op. at 1, n.3, and 5-6, citing NLRB v. Calkins, 187 F.3d at 1095, "which squarely

Employer never had a sufficient property interest to assert a Lechmere privilege.

We conclude, therefore, that the Region should issue complaint, absent settlement, alleging that the Employer's exclusion of the Union from the exterior areas of the hospital violates Section 8(a)(1). Absent withdrawal, the Region should dismiss those allegations of the charge relating to the Union's presence in the interior areas of the hospital, including the arrest of organizer Leyva on August 23.

B.J.K.

rejects this argument", and Bristol Farms, 311 NLRB 437, 438-39 (1993); Johnson & Hardin Co., 305 NLRB 690 (1991), enfd. in pertinent part 49 F.3d 237 (6th Cir. 1995).