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

Advice Memorandum

DATE: October 30, 2000

TO : Paul Eggert, Regional Director
Region 19

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

SUBJECT: Bi-Mart Corporation
Case 36-CA-8671

This case was submitted for advice on whether the Employer unlawfully excluded nonemployee Union handbillers from sidewalks in front of its two stores, because it either had a insufficient private property interest or accorded them disparate treatment.

The Union was certified to represent a unit of warehouse employees at the Employer's store in Eugene, OR. In support of the Union's economic demands at that location, the Union picketed and handbilled two other Employer stores, as follows.

Woodstock store

Woodstock is a free-standing store accessed via three street entrances to a parking lot. The Employer displays merchandise for sale on the sidewalk in front of this store. In 1999, the Employer also allowed the following use of this sidewalk: the Boy Scouts sold products on three Saturdays, and the Salvation Army solicited between Thanksgiving and Christmas.[1] The Employer leases both this store and the real property pursuant to a lease which, at the time of the Union's demonstration, did not provide the Employer with exclusive use of the sidewalks outside the store.

For approximately two hours on March 25, 2000, around 25 nonemployees handbilled at the street entrances and also picketed on the public sidewalks surrounding the parking lot. Around three to four individuals also handbilled customers on the sidewalk in front of the store. The Employer called the police who ordered these handbillers off this sidewalk.

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[1] On one occasion at some point in the past, the Employer also allowed the Girl Scouts to sell cookies on this sidewalk.

On May 4, the Employer renegotiated its lease at this store location to obtain substantially greater property rights as follows:

> [the Employer] acting through its authorized agents has the authority to take all legal steps required to eject trespassers from the Property to assure [the Employer] continued quiet enjoyment of the Property.

Halsey store

Halsey is not a freestanding store; a carpet store and restaurant also occupy its building. There are two street entrances to this store's parking lot. In 1999, the Employer allowed the following use of the sidewalk directly in front of this store: the Salvation Army and "Toys for Tots" solicited between Thanksgiving and Christmas; and the Boy Scouts and Girl Scouts also solicited during two weekends during that year. The Employer also leases both the store and the real property at this location. At the time of the Union's demonstration, that lease did not provide the Employer with exclusive use of the sidewalk outside this store.

For approximately two hours on April 8, 2000, around 20 nonemployees handbilled the street entrances to the parking lot. Three individuals also handbilled the public on the sidewalk in front of this store. The Employer called the police who restricted these handbillers to the public sidewalk surrounding the parking lot.

On May 4, the Employer also renegotiated its lease at this store location to obtain substantially greater property rights as follows:

> Tenant shall have the right, at its sole cost and expense, to provided (sic) . . . . security services, including the ejection of persons who are not using the Tenant Service Area for ingress, egress, parking and pedestrian movement while conducting business and other permitted activities in the Shopping Center.

We conclude, in agreement with the Region, that the Employer had insufficient property interest to exclude individuals from the front of either of its two stores.[2] We

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[2] Thus we agree that Oregon state law, as interpreted by the state supreme court, has not removed the right of private property owners to restrict union handbillers and picketers as trespassers. See Stranahan v. Fred Meyer, Inc., __ Or __ (Sept. 14, 2000), overruling Lloyd Corporation v. Whiffen,

also conclude, in agreement with the Region, that those few instances per year when the Employer allowed charitable organizations to solicit in front of its stores amounted to an isolated number of beneficent acts which are insufficient to establish disparate treatment of the Union picketers and handbillers.[3] Therefore, the Employer unlawfully excluded the Union solely because the Employer had insufficient property interest at its two stores, and not because the Employer treated the Union discriminatorily.

We note that the Union engaged in picketing and handbilling for only two hours, and on only one day, at each store respectively. We also note that several weeks after the Employer unlawfully removed the Union picketers and handbillers, the Employer obtained additional property rights under its leases with the owners of the real property and stores. We nevertheless would not dismiss this charge on the view that it arguably would not effectuate the purposes and policies of the Act to proceed on these isolated violations because: (1) the Union was present briefly and for only one day; and (2) the Employer may have sufficient property rights to exclude the Union in the future.

First, we note that the Employer and the Union are engaged in an ongoing dispute involving bargaining demands at Employer stores elsewhere. Thus we cannot with assurance state that the Union will not again attempt to picket and handbill these two Employer stores. Second and more importantly, dismissal of the instant charge on non-effectuation grounds would allow the parties to broadly infer that the Employer could lawfully exclude the Union in the future based upon its new leasehold rights.

Thus, the Employer sought the additional leasehold property rights in a direct reaction to, and apparently for the express purpose of, excluding the Union's picketing and handbilling. The Board has long held that an employer's implementation of a face-valid rule limiting employee solicitation may nevertheless violate the Act if motivated

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315 Or 500, 849 P.2d 446 (1993), which had barred property owners from restricting initiative petitioners as trespassers.

[3] See Hammary Mfg. Corp., 265 NLRB 57 (1982).

by the discriminatory purpose of inhibiting union activity.[4] Thus some future action by the Employer under its new property rights may be unlawful because the Employer may have discriminatorily acquired and enforced these new property rights.[5] Even assuming that the Employer may lawfully assert its new property rights, the Employer's conduct here, including its allowing charitable organizations but not the Union to solicit in front of its stores, at the very least suggests that the Employer may discriminatorily use its new property rights in the future.

In sum, based upon the Employer's discriminatory motivation in acquiring these rights, we would not now pass upon the question of whether, in the future, the Employer may lawfully rely upon these property rights to exclude the Union. Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully excluded the Union because it had insufficient property rights.

B.J.K.

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[4] See Woodview Rehabilitation Center, 265 NLRB 838 (1982); Ward Manufacturing, 152 NLRB 1270 (1965); Canondale Corp., 310 NLRB 845 (1993); Bon Marche, 308 NLRB 184 (1992).

[5] See Fresh Fields, Case 5-CA-25730, Advice Memoranda dated March 27, 1996, and May 24, 1996. In that case, a leasing employer acquired from its landlord the additional property right to "evict union handbillers and picketers." Although this property right was discriminatory on its face, the employer argued that its newly acquired right was not discriminatorily intended, and that the facially discriminatory language only reflected the employer's current exigent circumstances. We found no violation based solely on the Region's subsequent finding that the landlords themselves already had in effect face-valid and strictly enforced no-solicitation rules. In those circumstances, there was insufficient evidence in that case that the leasing employer had acquired the new property right for discriminatory purposes.