

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

Advice Memorandum

DATE: August 24, 2007

TO : Ronald K. Hooks, Regional Director
Region 26

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

SUBJECT: Denso Manufacturing Arkansas
Case 26-CA-22575

512-5012-6712-6700
512-5012-8300
512-5012-8320-5022
512-5072-0200
512-5072-3900

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by its response to non-employee handbilling at the entrance and exit driveways to its facility. More specifically, the Region sought advice as to whether the Employer violated the Act by summoning the police, by prohibiting the handbillers from stepping onto the driveways, and by instructing employees not to stop in front of the handbillers. The Region also sought advice as to whether action should be taken to enjoin Osceola, Arkansas officials from applying a state statute in a manner which restricts handbilling.

We conclude that the Employer did not unlawfully summon the police. We also conclude that the Employer violated Section 8(a)(1) by prohibiting the handbillers from stepping onto the right-of-way section of the driveways and by instructing employees not to stop in front of the handbillers. Finally, we conclude that there is no current need to enjoin the actions of city officials.

FACTS

Denso Manufacturing Arkansas, Inc. (the Employer or Denso) manufactures radiators at its facility in Osceola, Arkansas. The Denso property faces Keiser Road, a four-lane highway. The employee parking lot has a one-way entrance driveway from Keiser Road that is two-lanes wide, and a one-way exit driveway onto the highway, also two-lanes wide. A publicly owned right-of-way separates the Denso property and Keiser Road. Denso possesses an implied easement for ingress and egress over the right-of-way where it crosses the entrance and exit driveways.

In late September 2006, the United Auto Workers International Union (the Union) attempted to organize the Employer's 350 production employees. Nonemployee organizers Oten Wyatt, Mike Mund, and Ken Holland led the campaign. The three organizers passed out handbills to drivers as they entered and exited the employee parking lot at shift changes. The organizers were stationed in the right-of-way where it crosses the entrance and exit driveways. The handbilling did not result in any unusual traffic backups on Keiser Road¹ that blocked ingress to or egress from the facility.

In response to the handbilling, Denso contacted the local police on multiple occasions. Denso officials believed that the handbillers' presence on the driveways, even though within the right-of-way, constituted trespassing. The police agreed, deeming the driveways, including the right-of-way, to be the Employer's private property. Accordingly, the police barred the organizers from stepping onto any part of the driveways.² Denso's private security guards, as well as the police, repeatedly enforced the prohibition. The ban forced the handbillers to stand on the grassy shoulders of the driveways and use an extension pole to pass handbills to passing vehicles.

The security guards also directed traffic when the organizers were present, although they did not normally do so at shift changes. The guards directed incoming drivers to keep moving by saying, "let's go, let's go," and "keep moving, you can't stop," even when no other cars were behind a vehicle. When drivers would defy the guard and stop to receive a handbill, the guard would yell "what did I tell you" as they passed. The guards also attempted to prevent employees from approaching the handbillers on foot.

The organizers ceased handbilling in mid-October 2006, but the campaign has continued. The Osceola city attorney now acknowledges that the handbillers have a right to step

¹ An Osceola police officer observed one or more cars having to stop on Keiser Road before pulling into the driveway. There is no evidence whether this routinely occurs during shift changes or was a result of the handbilling.

² In addition to trespass, Osceola authorities also relied on Arkansas Code Section 27-51-1302 to bar the organizers from stepping onto any portion of the driveway. That provision prohibits a person from parking, stopping or standing a vehicle in front of a public or private driveway. The law does not specifically bar individuals from standing as pedestrians on a public right-of-way.

onto the right-of-way where it crosses the Denso entrance and exit driveways in order to reach passing vehicles.

ACTION

We conclude that the Employer did not violate Section 8(a)(1) by summoning the police because it had a reasonable concern of a trespass where it was unclear whether the right-of-way area occupied by the handbillers was the Employer's private property. However, we also conclude that the Employer violated Section 8(a)(1) by prohibiting the handbillers from stepping onto the right-of-way section of the driveways, because the Employer did not possess a property interest entitling it to exclude the handbillers from that area and the handbilling was not otherwise unprotected. Further, we conclude that the Employer violated Section 8(a)(1) by instructing employees not to stop in front of the handbillers, because it had no legitimate justification for doing so. Finally, we conclude that there is no current need to enjoin officials of the city of Osceola, Arkansas because the city attorney acknowledges that the handbillers have a right to step onto the right-of-way where it crosses the Denso entrance and exit driveways in order to reach passing vehicles.

1. The Employer had a reasonable concern when it contacted the police.

It is well established that an employer may seek to have the police take action against handbillers where the employer is motivated by a "reasonable concern," such as interference with its legally protected interests.³ As long as the employer "is acting on the basis of a reasonable concern, Section 8(a)(1) is not violated merely because the police decide that, under all the circumstances, taking action" is unwarranted.⁴ Thus, the employer need not be substantively correct when it summons the police in response to handbilling activity; it must merely be acting reasonably in that circumstance.⁵

³ Nation's Rent, Inc., 342 NLRB 179, 181 (2004) (trespass by picketers), citing Great American, 322 NLRB 17, 21 (1996) (handbilling causing interference with vehicular traffic).

⁴ Nation's Rent, 342 NLRB at 181.

⁵ Id. at 181 (employer had reasonable concern justifying call to police even though it had caused the complained of trespass, and the other reasons for the call were ultimately unsubstantiated).

In this case, Denso had a reasonable concern that the handbillers were trespassing on its private property when it summoned the police. At that time, the exact nature of the Employer's property interest in the right-of-way where it crosses the entrance and exit driveways was not clear to Denso or the authorities. Denso believed that it had a legally protected property right to exclude the handbillers from the area in question. The police agreed, and repeatedly told the handbillers that stepping onto that area constituted trespassing. Indeed, there were no prior events indicating that either Denso or the police should have known the precise identity of the Employer's property interest or the specific rights conveyed therewith. We note that no one, including the Union, had yet asked the city attorney to clarify the Employer's property interest. In these circumstances, we would not argue that Denso's concern regarding trespassing, although it later proved to be wrong, was unreasonable. Hence, the Region should dismiss this allegation of the charge, absent withdrawal.

2. The Employer interfered with the employees' Section 7 right to receive literature from the Union by prohibiting the handbillers from stepping onto the right-of-way section of the driveways and instructing employees not to stop in front of the handbillers.

In situations where handbilling by nonemployee organizers on a public easement "is assertedly in conflict with [an employer's] private property rights," an employer which expels organizers has the threshold burden to establish that it had, at that time, an interest which entitled it to exclude individuals from the property.⁶ The employer must also establish "that the handbilling was outside the scope of the public easement, such that the [employer] was entitled to exercise its property interest and expel the handbillers."⁷ In determining whether the employer has shown an adequate property interest, the Board examines "the law that created and defined the [employer's] property interest, which is state ... law."⁸ If the employer fails to meet its burden, there is no actual conflict

⁶ See Snyder's of Hanover, 334 NLRB 183, 183 (2001), enf. denied in rel. part 39 Fed.Appx. 730 (3d Cir. 2002), citing Indio Grocery Outlet, 323 NLRB 1138, 1141 (1997), enf. sub nom. NLRB v. Calkins, 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000).

⁷ Snyder's of Hanover, 334 NLRB at 183.

⁸ Id., quoting Indio Grocery Outlet, *supra*.

between private property rights and Section 7 rights, and the employer's ejection of the organizers violates Section 8(a)(1).⁹

Here, Denso did not have a property interest in the right-of-way area of the driveways which entitled it to exclude the handbillers from stepping onto that area. Per Arkansas law, the right-of-way where it crosses the entrance and exit driveways was public property, not Denso property. Denso did possess an implied easement for ingress and egress over that area.¹⁰ However, the public at large also had a concurrent right to access the right-of-way.¹¹ Thus, absent evidence of meaningful interference with Denso's easement, the Employer could not prohibit the handbillers from stepping onto the right-of-way.¹²

No such evidence exists here. The evidence is insufficient to establish handbillers caused any unusual traffic backups on Keiser Road or infringed on Denso's property rights by blocking ingress to or egress from the

⁹ See Snyder's of Hanover, 334 NLRB at 183-184.

¹⁰ Wright v. City of Monticello, 47 S.W.3d 851, 855, 857 (Ark. 2001) ("under our decisions, the owner of property abutting upon a street or highway has an easement in such street or highway for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself"); Arkansas Code Section 27-49-212(a) ("'Street or highway' means the entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic").

¹¹ Wright v. City of Monticello, 47 S.W.3d at 857 ("an abutting landowner has two distinct kinds of rights in a road: a public right that he enjoys in common with all other citizens and certain private rights that arise from his ownership of property contiguous to the highway"); Arkansas State Highway Commission v. Kesner, 388 S.W.2d 905, 909, n.1 (Ark. 1965) (private easement subordinate to public's reasonable use of street).

¹² See Johnson & Hardin Co., 305 NLRB 690, 690, 695 (1991), enfd. in pertinent part 49 F.3d 237 (6th Cir. 1995) (exclusion of organizers violated Section 8(a)(1) where "handbilling posed minimal if any interference" with employer's easement for ingress and egress over state-owned land).

Denso facility.¹³ Further, the Osceola city attorney acknowledges that the public easement encompasses stepping onto the driveway while handbilling.¹⁴ Thus, the handbillers' activities were within the scope of the public easement.

The Employer argues that Arkansas Code Section 27-67-304(a) gave it the right to expel the handbillers from the right-of-way. Section 27-67-304(a) provides that:

[t]he rights-of-way provided for all state highways shall be held inviolate for state highway purposes ... No physical or functional encroachments, installations, signs other than traffic signs or signals, posters, billboards, roadside stands, gasoline pumps, or other structures or uses shall be permitted within the right-of-way limits of state highways.

The plain language of this section, as well as the limited case authority interpreting it, indicate that it bars physical structures or inappropriate land uses from public rights-of-way.¹⁵ The statute does not refer to individuals such as handbillers attempting to communicate with employees. Indeed, the interpretation proffered by Denso may have adverse First Amendment implications for the statute's viability.¹⁶ Hence, Section 27-67-304(a) did not

¹³ See Snyder's of Hanover, 334 NLRB at 184 (handbilling in public right-of-way permissible where traffic not impeded); Greenbrier, 340 NLRB 819, 819-820 (2003) (nonemployee handbillers did not lose statutory protection where they did not create traffic hazard or interfere with private property interests), enf. denied 377 F.3d 394 (4th Cir. 2004). Compare Great American, 322 NLRB at 21 (potentially dangerous traffic backup caused by handbilling interfered with employer's private property rights and privileged its eviction of handbillers from public property).

¹⁴ See Snyder's of Hanover, 334 NLRB at 184 (view of local authorities relevant to determining if handbilling within the scope of the public easement).

¹⁵ See, e.g., Arkansas State Highway Commission v. Townsend, 858 S.W.2d 66, 67-68 (Ark. 1993). The legislative history of Section 27-67-304 was not published and is not available.

¹⁶ See Snyder's of Hanover, Inc. v. NLRB, 39 Fed.Appx. 730, 733-734 (3d Cir. 2002) ("[i]t is not clear to us whether ... the First Amendment would permit a municipality to prohibit the distribution of leaflets in public rights-of-way").

give Denso the right to exclude the handbillers from the right-of-way.¹⁷

Thus, by totally excluding the handbillers from the driveways, Denso interfered with the employees' Section 7 right to receive literature from the Union and violated Section 8(a)(1).¹⁸

Finally, Denso again interfered with the same Section 7 right by repeatedly instructing employees not to stop in front of the handbillers. An employer violates the Act by giving that instruction, unless it has a legitimate justification for doing so.¹⁹ In this case, the handbillers did not cause any unusual traffic backups on Keiser Road or block ingress to or egress from the Denso facility. In fact, the guard gave the instruction even when no other cars were behind a stopped vehicle. Further, there is no evidence that employees who approached the handbillers on foot posed any threat to safety. Thus, Denso had no legitimate justification for giving the instruction, and it violated Section 8(a)(1) by doing so.

¹⁷ Arkansas Code Section 27-51-1302, which, as noted above, was cited by the Osceola authorities, also did not give Denso the right to exclude the handbillers from the driveway. That section prohibits the parking, stopping or standing of a vehicle in front of a public or private driveway, and is thus inapplicable to pedestrians by virtue of its plain language.

¹⁸ Because the Osceola city attorney now acknowledges that the handbillers have a right to step onto the right-of-way where it crosses the Denso entrance and exit driveways in order to reach passing vehicles, there is no current need for injunctive relief against the city. Further, since there is no indication that any Osceola authorities plan on applying Arkansas law differently from the city attorney's current construction, there is no need to apprise them in any official capacity at this time. [FOIA Exemption 5

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¹⁹ See Intermedics, Inc., 262 NLRB 1407, 1413, 1415 (1982) (security guards waving employee traffic in through gate to avoid handbillers violated Section 8(a)(1) where no legitimate justification existed), *enfd.* 715 F.2d 1022 (5th Cir. 1983).

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by prohibiting the handbillers from stepping onto the right-of-way section of the driveways and by instructing employees not to stop in front of the handbillers. The Region should dismiss, absent withdrawal, the allegation that the Employer unlawfully summoned the police. Finally, the Region should not take any judicial action against officials of the city of Osceola, Arkansas at this time.

B.J.K.