

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

# Advice Memorandum

DATE: September 18, 2009

TO : Timothy L. Watson, Acting Regional Director  
Region 16

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

SUBJECT: Equity Office Management, LLC  
Case 16-CA-26429

This case was submitted for advice on whether the Employer had a sufficient property interest in a pedestrian skywalk, which it privately owned subject to a public use easement, to lawfully deny Union handbillers access to the skywalk. We conclude the Region should not issue a complaint that the Employer unlawfully denied the handbillers access to the skywalk because, under Texas law, the City's easement for pedestrian use did not clearly include the right to handbill.

### FACTS

Dallas Skyway Partnership (the "Partnership") consists of three organizations: Plaza of the Americas, Ltd. ("POA"), a mixed retail/office establishment; 2001 Bryan Street ("Bryan Towers"), a commercial office building; and Southland Center Development Co. ("Southland"), which owns the Sheraton Dallas Hotel. The Partnership was formed in 1979 to participate in a joint project with the City of Dallas (the "City") to develop a public park and a skywalk connecting the POA, Bryan Towers and Sheraton Dallas Hotel. Equity Office Management, LLC (the "Employer") is a commercial office property management company that acts as an agent of the Partnership.

On November 2, 1979, the City and the Partnership entered into a development agreement that describes the design and construction of the park and skywalk. The agreement also specifies the parties' obligations and intent with respect to the ownership of the skywalk. Sections 3(c) and 3(g) state that the Partnership shall deed to the City the fee tracts necessary for the development of the park in exchange for the City abandoning

all air rights, easements and licenses necessary for the construction, maintenance and use of the skywalk. Section 9 provides for public use of the skywalk:

*9. Ownership of Sky Bridges and Connecting Structure; Easement for Public's Access.*

[The Partnership] shall own the sky bridges and connecting structure....[The Partnership] shall dedicate to public use an easement providing public access to the sky bridges and connecting structure, subject to the rules and regulations pertaining to the use thereof promulgated by [the Partnership]...

On April 30, 1980, the City passed Ordinance 16552 which mandates the City's abandonment of the airspace where the skywalk is located. The City and the Partnership then entered into a Reciprocal Easement Agreement ("REA").<sup>1</sup> The REA grants each partner an irrevocable easement in the skywalk to permit its erection, maintenance and use. The REA also dedicates to the City for the benefit of the general public "a perpetual easement over and through the Skybridges and Connecting structure for pedestrian passage..." Section 4 provides that use of the skywalk is subject to the rules and regulations promulgated by the Partnership, while Section 5(a) requires the Partnership to permit the free, continuous and uninterrupted pedestrian use of the skywalk by the general public during business hours. Section 5(b) provides that the Partnership has the right to establish and enforce "reasonable rules and regulations pertaining to the safety, cleanliness, security and traffic control within the skybridges." However, the Partnership has never promulgated any rules or regulations pertaining to the use of the skywalk.

Three separate sky bridges connect the POA, Bryan Towers and Sheraton Dallas Hotel. The three sky bridges cross North Pearl Street and Olive Street and meet at a "connecting structure" that is built on the public park. The connecting structure has an entrance providing for public access to the skywalk from the park.

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<sup>1</sup> The parties also refer to the REA as the "Connecting Structure and Skybridge Easements Agreement."

Texas Carpenters and Millwrights Regional Council (the "Union") became involved in an area standards dispute with a subcontractor performing work for a tenant of the POA. In August 2008,<sup>2</sup> the Union began distributing area standards handbills on the public sidewalk surrounding the POA.

On September 29, the Union began handbilling in the skywalk that links the POA with Bryan Towers and the Sheraton Dallas Hotel. The Union distributed handbills undisturbed for approximately two hours that day.

On September 30, the Union returned to the skywalk to handbill. This time, after approximately thirty minutes of handbilling, the Union was approached by a security guard hired by the Employer. The security guard informed the handbillers that they were on private property and asked them to leave the skywalk. The handbillers asked to speak to the building manager or to see a plat of property. The security guard denied their request and summoned the police, who arrived on the scene a few minutes later. The handbillers left the skywalk after being issued a criminal trespass warning by the police.

Since the September 30 incident, the Union has not attempted to handbill in the skywalk. However, the Union handbilled on the public sidewalk outside the POA through April 2009 and is now engaged in bannerling on that sidewalk.

#### **ACTION**

We conclude the Employer had a sufficient property interest in the pedestrian skywalk to lawfully deny handbillers access to the skywalk because, under Texas law, the City's easement for pedestrian use did not clearly include the right to handbill.

Under Lechmere, Inc. v. NLRB, an employer may nondiscriminatorily deny the use of its private property to non-employee union representatives engaged in Section 7 handbilling as long as the employer has a sufficient property interest under state law to exclude others and

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<sup>2</sup> Herein all dates are 2008 unless otherwise indicated.

make a refusal to vacate the property a "trespass."<sup>3</sup> The employer has the burden of establishing that it possesses a property interest entitling it to exclude others.<sup>4</sup> In determining whether the employer has shown an adequate property interest, the Board considers the deed, lease, or other instrument that defines the property interest and the state law that establishes the nature and breadth of that interest.<sup>5</sup>

Under Texas law, a landowner's easement, by which it voluntarily relinquishes a portion of its right to exclude, is limited in nature.<sup>6</sup> The landowner continues to own the underlying land in fee simple, and the easement grants access only to the named entities and for the named purposes.<sup>7</sup> Therefore, a landowner can continue to use the

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<sup>3</sup> 502 U.S. 527 (1992).

<sup>4</sup> Food for Less, 318 NLRB 646, 649 (1995), *enfd.* in pertinent part 95 F.3d 733 (8<sup>th</sup> Cir. 1996).

<sup>5</sup> Id. Texas state courts have addressed the balancing of free speech and private property interests in non-labor circumstances. See, e.g., Zarsky v. State of Texas, 827 S.W. 2d 408 (App. Tex. 1992) (Antiabortion protestor's conduct on private walkway outside office complex violated complex owner's constitutional property rights; in conducting its balancing test, the court considered the following factors: nature and purpose of the property, amount of disruption caused by the speech, extent and nature of public's invitation to use the property, and degree that property was dedicated to public use); Right to Life Advocates v. Aaron Women's Clinic, 737 S.W. 2d 564 (App. Tex. 1987) (Considering similar factors the court found that antiabortion picketers had violated the clinic's constitutional property rights). But they have not established any exceptions to the right of private property owners to exclude alleged trespassory union conduct from their premises.

<sup>6</sup> Marcus Cable v. Krohn, 90 S.W. 3d 697, 700 (2002).

<sup>7</sup> Id. ("Unlike a possessory interest in land, an easement is a nonpossessory interest that authorizes its holder to use the property only for particular purposes").

property in any way it sees fit so long as the use is not inconsistent with the purpose for which the easement was granted - or, in other words, so long as the use does not contradict the scope of the easement.<sup>8</sup>

In determining whether a particular use falls within the scope of an easement, Texas courts look at the express grant language.<sup>9</sup> If the use is not specifically mentioned by the grant's terms, the courts also consider whether that use is incidental to, and compatible with, the express purpose of the easement.<sup>10</sup>

In Grimes v. Corpus Christi Transmission Co., for example, a Texas court of appeals analyzed whether a company's use of a highway right-of-way for purposes of laying gas pipelines exceeded the scope of the easement where the grant explicitly stated that the easement was "for the purpose of opening, constructing and maintaining a permanent road." In holding that the company's use did not exceed the scope of the easement, the court explained that the grant of right-of-way encompassed other compatible uses, including the attendant public purposes of transportation of persons and property, communication and

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<sup>8</sup> City of Richland Hills v. Bertelson, 724 S.W. 2d 428, 431 (Tex. App. 1987). See also Marcus Cable v. Krohn, 90 S.W. 3d 697 (2002) (Texas Supreme Court found cable company trespassed when it attached its cables to electric utility poles located in a utility easement granted by landowner; cable company's use exceeded scope of easement because easement was granted only to utility company and only for purpose of erecting utility lines); City of Forth Worth v. Burnett, 114 S.W. 2d 220 (1938) (Texas Supreme Court found that city could not erect library building upon land that was dedicated generally for use as public park because such use was outside the scope of dedication).

<sup>9</sup> Marcus Cable v. Krohn, 90 S.W. 3d at 700-01.

<sup>10</sup> See, e.g., Grimes v. Corpus Christi Transmission Co., 829 S.W. 2d 335 (Tex. App. 1992); Harlingen Irrigation District Cameron County v. Caprock Communications, 49 S.W. 3d 520 (Tex. App. 2001).

travel.<sup>11</sup> Therefore, the company's installation of pipelines to transport gas for public consumption was found to be an incidental use and consistent with the expressed purpose of the easement.<sup>12</sup>

In the instant case, the skywalk is privately owned by the Partnership subject to a public use easement. Therefore, applying Texas law, the Partnership was entitled to exercise its property interest and deny skywalk access to the Union agents unless the handbilling falls within the scope of the easement. To make that determination, we first review the express grant language establishing the purpose for which the easement was granted. The easement grant clearly indicates that the purpose of the easement is to provide for pedestrian passage and/or pedestrian use of the skywalk. The language does not, however, refer to public handbilling or otherwise elucidate on the meaning of "pedestrian passage." Thus, the easement language, alone, does not clearly demonstrate that the handbilling falls within the scope of the easement.

As to whether public handbilling is incidental and compatible with the express purposes of the easement, cases in other jurisdictions have found expressive activity "inherent" in a pedestrian use easement.<sup>13</sup> But research has uncovered no Texas state law indicating that handbilling is a use that would be encompassed by an easement providing for pedestrian passage and/or pedestrian use. And, in some circumstances, Texas courts have found no obligation to permit expressive activity on private property open to the public for some purposes.<sup>14</sup> As discussed above, Texas law provides that a landowner's easement voluntarily relinquishing any portion of its right to exclude is

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<sup>11</sup> 829 S.W. 2d at 337.

<sup>12</sup> Id.

<sup>13</sup> See First Unitarian Church v. Salt Lake City Corp., 308 F.3d 1114, 1128 (10<sup>th</sup> Cir. 2002).

<sup>14</sup> Zarsky v. State of Texas, 827 S.W. 2d 408 (App. Tex. 1992); Right to Life Advocates v. Aaron Women's Clinic, 737 S.W. 2d 564 (App. Tex. 1987).

limited in nature. Accordingly, based on the absence of Texas precedent interpreting its easement to include handbilling, we cannot say that the Partnership had, by virtue of the easement, relinquished its property interest under state law to exclude the Union agents from the skywalk.<sup>15</sup> If the Union desires clarification of this area of state law, it can file a motion for declaratory relief and place this issue before the Texas courts.

Further, the Union has not met its heavy burden to show that trespassory access must be granted because it had no reasonable alternative means of communicating with the Employer's employees.<sup>16</sup> Prior to the incident in the skywalk, the Union engaged in handbilling on the public sidewalk surrounding the POA. The Union continued to handbill at this location after the incident and is now engaged in bannerling there. Therefore, the Union cannot establish that the Employer's employees were "'beyond the reach' of the union's message" because there was a reasonable alternative means of communicating with them.<sup>17</sup>

Accordingly, we conclude that the Region should dismiss the charge, absent withdrawal.

B.J.K.

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<sup>15</sup> See Marcus Cable v. Krohn, 90 S.W. 3d at 700.

<sup>16</sup> See Lechmere Inc. v. NLRB, 502 U.S. at 535-40.

<sup>17</sup> Id. at 540, quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956).