

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

# Advice Memorandum

DATE: October 18, 2005

TO : James J. McDermott, Regional Director  
Region 31

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

SUBJECT: American Medical Response  
Case 31-CA-27152

512-5072-0400  
512-5072-3900

This Section 8(a)(1) access case was submitted for advice regarding whether the Employer unlawfully attempted to cause the removal of a nonemployee Union handbiller from the common area of a parking lot of an industrial center where the Employer had leased space.<sup>1</sup> We conclude that the Region should allege in its complaint, absent settlement, that the Employer violated Section 8(a)(1) when it caused the removal of the Union representative from the common area of the industrial center's parking lot because, based on the terms of its lease, the Employer did not possess a property interest sufficient to exclude the handbiller from the parking lot.

## **FACTS**

### Background

American Medical Response ("the Employer") provides ambulance services from several dispatch facilities in southern California. The incumbent union, International

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<sup>1</sup> We agree with the Region's original conclusion that the Employer unlawfully caused the removal of the Employer's employees from the Cerritos parking lot because they participated in the November 2004 handbilling with the Union representative, as described below. The Region has also decided to issue a Section 8(a)(1) complaint regarding the Employer's overbroad no-solicitation rule and removal of a bargaining unit employee's vehicle bearing a Union logo from a parking garage at a separate Employer facility.

The Region has decided to dismiss certain Section 8(a)(1) and (2) allegations in the instant charge, which alleged collusion between the incumbent IAEP and the Employer, and has dismissed a Section 8(b)(1)(A) charge (Case 31-CB-11717), alleging unlawful IAEP conduct, in connection with the decertification campaign.

Association of EMTs and Paramedics ("IAEP"), represents a single unit of the Employer's 800 EMTs and paramedics employed at 10 of the Employer's facilities in Los Angeles and Orange counties. The Employer and IAEP were parties to a four-year collective-bargaining agreement that expired June 3, 2004. During fall 2004, as the Employer and IAEP bargained for a new contract, an outside union, National Emergency Medical Services Association ("NEMSA" or "Union"), began a campaign among the Employer's employees to decertify IAEP and to select NEMSA as their representative.

About 200 to 300 bargaining unit employees work at the Employer's Cerritos site where, in November 2004, the events that gave rise to the instant charge took place. At Cerritos, the Employer is one of five tenants leasing space within a football-field-sized industrial center building. The other tenants include a California state transportation agency which, at this site, employs office personnel and field employees and stations vehicles; a television manufacturer's assembly plant and warehouse; an automobile dealer's storage warehouse; and an accounting firm. The facility is not fenced and has no guard or gate controlling access. There is a single entrance and exit to the parking lot from a Cerritos street.

The Cerritos industrial center's five tenants share a common parking lot. Parking rows in the parking lot are separated by landscaped medians. The Employer parks its vehicles on this lot in 100 spaces specifically designated in its lease with the property owner. Those 100 designated spaces are located at the far end of the parking lot's entrance, in the area closest to the entrance to the Employer's leased office space and near a concrete wall separating the lot from a freeway. There is no access from the freeway to the industrial center or to its parking lot. The Employer's employees may park in any of the spaces in the common parking lot that are not specifically designated for the Employer or the other tenants.

#### The Lease and Addendum

The August 2000 lease between the Employer and the property owner, entitled "Standard Industrial Lease -- Multi-Tenant," and the September 2000 lease addendum, entitled "Rules and Regulations for [Employer] Lease," set forth both general rules for the Employer's use of the property, and parking rules. They have the following relevant provisions:

**Standard Industrial Lease**

**2.3 Common Areas—Definition.** The term "Common Areas" is defined as all areas and facilities outside the Premises and within the exterior boundary line of the Industrial Center that are provided and designated by the Lessor from time to time for the general non-exclusive use of Lessor, lessee and of other lessees of the Industrial Center and their respective employees, suppliers, shippers, customers and invitees, including parking areas, loading and unloading areas, trash areas, roadways, sidewalks walkways, parkways, driveways and landscaped areas.

**2.4 Common Areas—Lessee's Rights.** Lessor hereby grants to Lessee, for the benefit of Lessee and its employees, suppliers, shippers, customers and invitees, during the term of this lease, the non-exclusive right to any rights, power, and privileges reserved by Lessor under the terms hereof or under the terms of any rules and regulations or restrictions governing the use of the Industrial Center.

**2.5 Common Areas—Rules and Regulations.** Lessor . . . shall have the exclusive control and management of the Common Areas and shall have the right, from time to time, to establish, modify, amend and enforce reasonable rules and regulations. . . . Lessee agrees to abide by and conform to all such rules and regulations, and to cause its employees, suppliers, shippers, customers, and invitees to so abide and conform. Lessor shall not be responsible to Lessee for the non-compliance with said rules and regulations by other lessees of the Industrial Center.

**4.2 Operating Expenses.** Lessee shall pay to Lessor . . . in addition to the Base Rent, Lessee's share . . . of all Operating Expenses . . . .

**6.2(b)** . . . Lessee shall, at Lessor's expense, promptly comply with all applicable statutes, ordinances, rules, regulations. . . . Lessee shall not use nor permit the use of the Premises or the Common Areas in any manner that will tend to create waste or a nuisance or shall tend to disturb other occupants of the Industrial Center.

**Addendum -- Rules and Regulations**

GENERAL RULES

1. Tenant shall not suffer or permit the obstruction of any Common Areas, including driveways, walkways and stairways.

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3. Tenant shall not make or permit any excessive noise or odors except diesel engine noise, diesel fuel and exhaust odors, sirens (except when being tested) that annoy or interfere with other tenants or persons having business with the Industrial Center.

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PARKING RULES

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3. Tenant shall be responsible for seeing that all of its employees, agents and invitees comply with the applicable parking rules, regulations, laws and agreements.

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5. Such parking use as is herein provided is intended merely as a license only and no bailment is intended or shall be created hereby.

November 15, 2004 Events

On November 15, 2004, at about 5 pm, a NEMSA representative and four of the Employer's employees set up a barbeque/tailgate cookout near the entrance to the common parking lot and proceeded to distribute handbills and talk to employees during a shift change about NEMSA and about signing a decertification petition. The four employees were members of the bargaining unit who worked at sites other than the Employer's Cerritos facility.

At about 6:30 pm, the Employer's manager came out of the building and directed the NEMSA supporters to leave. One of the employees said that the group had permission from the property owner's building management to be on the lot.<sup>2</sup> The Employer's manager replied that he would call

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<sup>2</sup> The Region has concluded that NEMSA failed to produce evidence substantiating its assertion that the property

police. At about 7:00 pm, the Employer's manager came out again and said that he could not reach the property owner. The NEMSA representative and the employees continued to handbill and talk to the Employer's employees.

At about 8:30 pm, a police car arrived at the parking lot, and two police officers entered the Employer's office. After the police officers emerged, they questioned the NEMSA representative about the activity. The NEMSA representative explained that the group was engaged in a union organizing campaign. One of the employees told the officers that the property owner had granted them permission to be present. The officers said they had received a complaint that the group was harassing, detaining, and blocking ambulances, and the officers said that although they could not eject the NEMSA supporters from the property, it "would be nice" if the NEMSA group left. The Union representative and the employees moved to a sidewalk outside the parking lot, and remained without incident at that location until about 10 pm.<sup>3</sup>

#### **ACTION**

We conclude that the Employer did not possess a property interest sufficient to entitle it to exclude or cause the exclusion of the Union representative from the parking area because, pursuant to its lease, the Employer

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owner granted it permission to use the parking lot. One of the handbilling employees states that at about an hour before the group began its November 15 activity, he sought permission for them to conduct the handbilling and barbecue at the Cerritos parking lot, and that after an Employer manager denied them access, an individual in the onsite building management office, operated by the property owner, granted the group leave to conduct their activity. The Employer contests this assertion. The Region confirmed with a property owner representative that the owner had not granted the NEMSA group access to the lot.

<sup>3</sup> In early December 2004, NEMSA filed a representation petition in Case 31-RC-8463 regarding the existing unit. Shortly thereafter, the unit employees ratified the contract bargained for by the Employer and the incumbent IAEP. On December 5, the Employer and IAEP signed a new collective-bargaining agreement. On January 19, 2005, the Region dismissed the petition for an insufficient showing of interest. NEMSA has appealed that determination, alleging that the Employer's conduct prevented employees from signing the petition. That appeal has been held in abeyance pending resolution of this charge.

had only a nonexclusive right to use the common areas of the parking lot. Accordingly, absent settlement, the Region should allege in the complaint it intends to issue that the Employer violated Section 8(a)(1) by attempting to evict the Union representative.

An employer may, except in limited circumstances, nondiscriminatorily deny the use of its private property to non-employee union representatives who wish to handbill the employer's employees for organizational purposes.<sup>4</sup> However, before the employer may deny the use of the property to a union representative, the employer has the threshold burden of showing that it possesses a property interest entitling it to exclude others from the property.<sup>5</sup> In determining whether an employer has established an adequate property interest, the Board construes relevant state law and examines relevant documentary and other evidence.<sup>6</sup> If the employer lacks an exclusory property interest, no conflict between competing rights exists that requires a Lechmere analysis and accommodation, and the employer violates Section 8(a)(1) by interfering with nonemployee Section 7 activity on the property.<sup>7</sup>

The Board generally has decided that an employer's nonexclusive right to use another's property does not

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<sup>4</sup> Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). Organizational handbilling, the activity the Employer sought to prevent, is protected. Ambrose Electric, 330 NLRB 78, 78 n.3 (1999). We reject the contention that the handbilling was unprotected simply because it was enhanced by a barbecue. Handbilling or union activity undertaken along with barbecues or cookouts does not lose its Section 7 status solely in light of that connection. See generally Campbell Electric Co., 340 NLRB 825, 841 (2003) (noting that union activity took place in connection with union-held cookouts).

<sup>5</sup> Food For Less, 318 NLRB 646, 649 (1995), enfd. in pertinent part 95 F.3d 733 (8<sup>th</sup> Cir. 1996). See USCF Stanford Health Care, 335 NLRB 488, 488, 521-22 (2001) (respondent failed to make threshold showing that it possessed any property interest that would entitle it to exclude individuals from the areas where union handbilling took place).

<sup>6</sup> Food For Less, 318 NLRB at 649.

<sup>7</sup> Wild Oats Community Markets, 336 NLRB 179, 181-82 (2001); Best Yet Market, 339 NLRB 860, 864 (2003); Food for Less, 318 NLRB at 649.

constitute a property interest entitling it to exclude nonemployees from that property.<sup>8</sup> The rationale of these decisions is consistent with the legal principles governing California leasehold arrangements.<sup>9</sup> Under California law, whether an interest in the use of land is classified as an easement or a license, the focus is on the terms of the relevant agreement, and what rights and duties are granted to and imposed on the parties.<sup>10</sup> Mere permission to use

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<sup>8</sup> See, for example, Food For Less, 318 NLRB at 650 (lease granting employer mutual, non-exclusive easement held in common with other shopping-center tenants for ingress, egress, and parking, did not establish property interest entitling it to exclude individuals); Giant Food Stores, 295 NLRB 330, 332-333 (1989) (lease granting employer nonexclusive right to use shopping-center common areas, including sidewalk and parking lot, did not establish property interest entitling it to exclude individuals); Polly Drummond Thriftway, 292 NLRB 331, 332-333 (1989), enfd. mem. 882 F.2d 512 (3d Cir. 1989) (lease and sublease granting employer nonexclusive right to use sidewalk adjacent to store, in common with other shopping-center occupants, did not establish property interest entitling it to exclude individuals). See also Wild Oats Community Markets, 336 NLRB at 180-81, 190 (lease granting employer a nonexclusive right in common areas of property, including parking lot, did not establish property interest entitling it to exclude individuals).

<sup>9</sup> Because, as discussed below, the terms of the lease and its addendum do not grant the Employer the right to exclude the Union representative from the area where the handbilling occurred, we need not consider whether the California state constitution protects the union activity here. See generally Macerich Mgmt. Co., 345 NLRB No. 34, slip op. at 4 (2005) (noting that although under Walmart Foods v. NLRB, 354 F.3d 870, 874 (D.C. Cir. 2004), Sears v. San Diego Distr. Council of Carpenters, 599 P.2d 676 (Cal. 1979), does not represent current California law as to "stand-alone" stores, the Robins v. Pruneyard Shopping Center, 592 P.2d 341 (Cal. 1979), constitutional framework still provides an answer to questions involving a shopping center's "downtown").

<sup>10</sup> See Golden West Baseball Co. v. City of Anaheim, 25 Cal.App.4th 11, 36, 31 Cal. Rptr. 2d 378 (1994), stating "arrangements between landowners and those who conduct commercial operations upon their land are so varied that it is increasingly difficult and correspondingly irrelevant to attempt to pigeon hole these relationships as 'leases,' 'easements,' 'profits', or some other obscure interest in land devised by the common law in far simpler times.

land, with control retained by the owner, does not include an exclusory interest.<sup>11</sup>

Under the terms of the lease and addendum, the Employer's interest in the industrial center's common parking area is in the nature of a non-exclusive license for ingress, egress, and parking; it does not constitute an exclusive right to those areas that are termed common areas under the lease.<sup>12</sup> Thus, the property owner, through the lease and addendum, granted to the Employer for a definite term the exclusive use only of the designated sections of the office building and of the 100 designated spaces in the parking lot.<sup>13</sup> The lease's addendum classifies the use of the parking lot, common areas, and designated spaces as a license.<sup>14</sup> The property owner retained to itself "the exclusive control and management of the Common Areas."<sup>15</sup> As to the common areas, the property owner granted to the Employer only the "non-exclusive right" to use the common areas, in common with others, subject to any rights reserved by the property owner and to any rules and regulations the property owner should issue governing the use of the Industrial Center.<sup>16</sup> "Common areas," as defined in the lease, include parking areas, walkways, parkways, driveways, and landscaped areas.<sup>17</sup> Thus, under the lease,

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Little practical purpose is served by attempting to build on this system of classification." (Citations omitted.)

<sup>11</sup> See Keller v. Haky, 160 Cal.App.2d 471, 471-477, 325 P.2d 648, 650-651 (1958).

<sup>12</sup> See Nahas v. Retail Clerks Local 905, 144 Cal.App.2d 808, 821, 302 P.2d 829, 830 (1956) (test for "whether an agreement for the use of real estate is a license or a lease is whether *the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely conveys a privilege to occupy under the owner, in which case it is a license, and this is a question of law arising out of the construction of the instrument. (Emphasis added.)*" (citations omitted)).

<sup>13</sup> Lease, ¶ 2.5.

<sup>14</sup> Addendum, Rules and Regulations, Parking Rules, ¶ 5.

<sup>15</sup> Lease, ¶ 2.5.

<sup>16</sup> Lease, ¶ 2.4.

<sup>17</sup> Lease, ¶ 2.3.

the area where the Union Representative was handbilling is part of the "common areas" over which the property owner, not the Employer, retained ultimate control, and about which the Employer had only a non-exclusive right to its use.<sup>18</sup> It is undisputed that the Union's activity was located at some distance from the Employer's leased office space, and from its designated parking spaces.<sup>19</sup>

According to the Employer, the lease's provisions obligate it to employ measures to stop improper use of common areas or any use that tends to disturb other occupants and, thus, it had authority to expel the NEMSA representative.<sup>20</sup> This contention lacks merit. The lease's requirements that the Employer abide by and conform to all rules and regulations, and to cause its employees, suppliers, shippers, customers, and invitees to so abide and conform, do not grant the Employer the right or obligation to regulate conduct by third parties in common areas. In Great American, 322 NLRB 17, 23 (1996), the Board rejected a similar contention. In that case, a provision requiring tenants to cause their concessionaires, invitees, and licensees to abide by the property owner's rules regarding the use of common areas did not convey a property interest to the respondent permitting the exclusion of nonemployee union handbillers. That lease agreement, as here, merely granted tenants the nonexclusive right to use common areas.<sup>21</sup> In addition, the Board has found that lessees who undertake in common areas such responsibilities as patrolling, repairing, and maintaining common areas or expelling skateboarders from common areas do not, by such conduct, transform an interest similar to that granted here into a more substantial property right providing the legitimate power to expel.<sup>22</sup>

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<sup>18</sup> See Giant Food Stores, 295 NLRB at 332 n.8.

<sup>19</sup> There is no evidence or contention that the Union representative was handbilling from any of the Employer's designated parking spaces when he was threatened with eviction and arrest.

<sup>20</sup> See Lease ¶¶ 2.5, 6.2(b); Addendum, Parking Rules ¶ 3.

<sup>21</sup> The Board noted that, in any event, none of the nonemployee union handbillers in that case fell within the listed categories of concessionaires, invitees, and licensees. Similarly, here, the Union representative did not fall within the lease's listed categories.

<sup>22</sup> Food For Less, 318 NLRB at 650 (lease explicitly grants nonexclusive easement in shopping-center held in common with lessor and other lessees subject to lessor's exclusive

California law does not permit a licensee, who has no interest in land, to bring an action for trespass or ejection, but only for "invasion or disturbance" of its license.<sup>23</sup> However, even if the lease and addendum were read to provide the Employer with sufficient property interest to bring an action for disturbance of its use of the common areas, the evidence does not establish that the November 15 conduct constituted such an interference. There is no evidence that the handbilling caused traffic delays, or otherwise hindered the Employer's conduct of

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control; nonexclusive easement in common areas not transformed into exclusory property interest simply because that employer repaired and maintained parking lot and maintained insurance coverage); Mr. Z's Food Mart, 325 NLRB 871, 871 n.2, 883-84 (1998), enf. denied in pertinent part 265 F.3d 239 (4<sup>th</sup> Cir. 2001) (nonexclusive easement in shopping-center common areas not transformed into exclusory property interest by mere facts that employer maintained liability insurance coverage, patrolled common areas, expelled skateboarders, and used common-area sidewalk to store carts and conduct business without owner's objection); Johnson & Hardin Co., 305 NLRB 690, 691, 695 (1991), enfd. in pertinent part 49 F.3d 237 (6<sup>th</sup> Cir. 1995) (nonexclusive easement in driveway on state-owned land gave respondent right only to use property for ingress and egress, handbilling did not interfere with that right, and the easement was not transformed into exclusory property interest even though employer had elected to pave, maintain, and beautify the area at its own expense and otherwise acted as though it were the owner). Target Stores, 300 NLRB 964 (1990), is clearly distinguishable from those cases as well as the Employer's use of the common areas at issue here. In affirming the ALJ's decision, the Board emphasized that no exceptions had been filed to the ALJ's finding that the employer had an exclusory property interest in front of its store, even though the sidewalk and parking lot were for the common use of all shopping-center tenants, because the employer maintained, policed, and used the area in front of its store and had a long history of repeated enforcement of its own no-solicitation policy without objection of the lessor. Id. at 964 n.2, 969.

<sup>23</sup> See Lucky Auto Supply, 244 Cal.App.2d 872, 881, 53 Cal. Rptr. 628, 633 (1966) (licensee has no interest in land and may not bring action for trespass or ejection); Nahas v. Retail Clerks Local 905, 144 Cal.App.2d at 820-821, 302 P.2d at 830.

business or interfered with its license.<sup>24</sup> In any event, the Board has held that brief delays to employee cars for receiving leaflets do not constitute interference sufficient to justify a handbiller's eviction from the premises.<sup>25</sup> The Union representative's handbilling did not interfere with the Employer's nonexclusive license or interest in the common areas of the parking lot.

Although the Employer contends that a barbecue in the parking lot during business hours would tend to disturb other occupants, it provided no evidence to support its speculative assertion; therefore, the activity cannot constitute a nuisance under California law.<sup>26</sup> The barbecue

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<sup>24</sup> See Food for Less, 318 NLRB at 650 n.7 (Board noted, "in passing," that respondent, who did not have a sufficient property interest to exclude union activity, did not even show that the handbilling constituted a nuisance, that is, an interference with or obstruction of the business uses--ingress, egress, and parking--protected by the respondent's easement). Cf. Great American, 322 NLRB at 21 (even though employer lacked exclusory property interest in parking lot, employer lawfully summoned police to evict handbillers because they were interfering with vehicular traffic entering the lot, causing traffic to back up onto the street, and infringing on the employer's property interest of enabling its customers to have unimpeded entry onto the parking lot).

<sup>25</sup> Johnson & Hardin Co., 305 NLRB at 691 & n.11, 695 (handbilling in question posed minimal, if any, interference with employer's right to use easement for ingress and egress where employees merely stopped their vehicles, accepted proffered literature, and resumed driving). See also Best Yet Market, 339 NLRB at 863 (no evidence that handbilling or picketing interfered with employer's conduct of business or with anyone's ingress to or egress from store); Mr. Z's Food Mart, 325 NLRB at 884 n.30 (no evidence organizers obstructed right of customers to freely use sidewalk or adjacent parking lot or to enter or exit stores); Food For Less, 318 NLRB at 650 n.7 (employer failed to demonstrate that handbilling obstructed ingress, egress, or parking).

<sup>26</sup> In California, activity that is injurious to health or an obstruction to the free use of property is a nuisance. Calif. Civ. Code § 3479. A public nuisance is one that "affects at the same time an entire community or neighborhood, or any considerable number of persons . . .;" any nuisance that is not public is a private nuisance. Calif. Civ. Code § 3480 (public nuisance); § 3481 (private nuisance).

did not begin until about 5 pm, and the Employer did not provide evidence even that any of the property owner's tenants maintained business hours in the evening or that, if they did, the handbilling and related barbecue hindered the other tenants' use and enjoyment of their leased space at the Industrial Center.<sup>27</sup> There is no evidence of complaints from other tenants, all of whom leased space closer to the Union activity and who, under the standard lease employed by the property owner, presumably would have the same interest in the common areas as the Employer.<sup>28</sup> Moreover, the noise or odors connected with the Union activity would not exceed those contemplated by the Employer's license, which permits diesel engine noise, diesel fuel and exhaust odors, and noise associated with testing sirens.

For the reasons discussed above, the Employer did not have an exclusory property interest in the parking area where the Union Representative was handbilling. Accordingly, the Employer violated Section 8(a)(1) by attempting to eject the Union representative, thus interfering with Section 7 activity.<sup>29</sup>

B.J.K.

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<sup>27</sup> Addendum, General Rules, ¶ 3.

<sup>28</sup> Cf. Willson v. Edwards, 82 Cal.App. 564, 256 P. 239 (1927) (private nuisance created when operator of food stand located its business in residential area and sold items, including barbecued ham and beef, that "caused odors, smells, and stench" so offensive, when taken together with the noise of the large number of patrons who talked, shouted and sang, and honked their car horns between the hours of 10 pm and 3 am, as to deprive a residential dweller of the use and enjoyment of his property, which was sited near the food stand).

<sup>29</sup> Barkus Bakery, 282 NLRB 351, 354 (1986), enfd. mem. sub nom. NLRB v. Caress Bake Shop, 833 F.2d 306 (3d Cir. 1987).