

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

Advice Memorandum

DATE: January 14, 1997

TO : Rochelle Kentov, Regional Director
Region 12

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

SUBJECT: Gooding's Supermarkets
Case 12-CA-17937

512-5012-1725-1183
512-5012-1725-2200
512-5012-1725-3300
512-5012-8700

This Section 8(a)(1) case is submitted for advice as to whether an off duty employee of one of the Employer's facilities, seeking access to the Employer's property over which the Employer has control, at another facility, for the purpose of making an appeal to the public, is engaged in protected activity such that she cannot be threatened with removal or actually removed from the property.

Background

On March 29, 1996, the Region submitted the Section 8(a)(1) Case 12-CA-17401 for advice as to: (1) whether the Employer's access rule is invalid on its face under Riesbeck Food Markets, Inc.;¹ and (2) whether the Employer discriminatorily prohibited Union activity at its Maitland facility.² On October 18, 1996, the Division of Advice concluded, inter alia, that: (1) the Employer's access rule was lawful on its face; (2) the Employer discriminatorily denied the nonemployee Union picketers and handbillers access to its Maitland facility.³

FACTS

¹ Riesbeck Food Markets, Inc., 315 NLRB 940 (1994).

² At the same time, Cases 12-CA-17371, 12-CA-17402, 12-CA-17470 and 12-CA-17579 were also submitted for advice.

³ See the Division of Advice's October 18, 1996 memorandum for further details.

On March 16, 1996,⁴ Stephanie von Glinsky (the employee), an employee of Gooding's Supermarkets (Employer) at the Employer's Deland, Florida facility, requested six days of unpaid time off from her job with the Employer. The Charging Party UFCW, Local 1625 (Union) admits that von Glinsky is a "salt." On April 11, the director of the store where the employee was working decided to deny her request and to fire her if she took the leave. The employee then decided to "do something about the mistreatment" and contacted the Union. The employee decided to participate in the picketing and handbilling activity at two other facilities of the Employer.

The Maitland Facility

On April 14, at about 10:15 a.m., the employee went to the Employer's Maitland, Florida facility to meet the Union officials and picketers who maintain a regular presence outside of the Employer's property on a public right of way. The Maitland facility is a free-standing store on company owned property. At 10:55 a.m., the employee picked up a picket sign and some fliers and left the Union group that was on public property and walked up to the front entrance of the Employer's Maitland facility where she proceeded to picket back and forth in front of the facility entrance and exit area and distribute fliers to customers. The picket signs state "please ... Don't Shop" and below that "Gooding's" is printed with a red circle and a line through the circle over the word Gooding's. Below the circle are the words "UNFAIR LABOR PRACTICES" and below that is written "Supported by the United Food & Commercial Workers Local 1625." A union "bug" from the printer is visible below that. The employee stated that she "intended to make a statement to the public about why [she] thought the employees of Gooding's need a union."

At 11:10 a.m., the Employer's Maitland store director approached the employee and told her to move to the public sidewalk where the nonemployee picketers were stationed. The employee identified herself to the store director as an employee of the Employer's Deland facility.⁵ The police

⁴ All dates are in 1996 unless otherwise indicated.

arrived at the Deland facility at 11:15 a.m. The police allegedly tried to convince the employee not to support the Union, and threatened to charge her with trespass, arrest, and "criminal problems" for her activity in front of the store if she did not move out to the public sidewalk and join the other picketers. At 11:40 a.m., the employee moved to the public areas and then left entirely shortly thereafter.

The Kissimmee Facility

On April 14, 1996, at 2:05 p.m., the employee repeated the same activity at the Employer's Kissimmee, Florida facility. The Kissimmee facility is part of a large strip mall. The Employer asserts that they have obtained lease addenda which give the Employer added power to control the areas immediately in front of the facility. It is not clear whether these added rights are concurrent with or taken from those of the leasing entity. Nonemployee picketers were picketing in the public area beyond the strip mall entrances and parking area. After the employee picketed for a while, the Kissimmee store director and another employee approached the employee and threatened to call the police if she did not "go out to where the other picketers were." The employee identified herself as an employee from the Deland facility and the other employee stated that he would let the management of the Deland store know that she had been at the Kissimmee facility.⁶ Later that same day, the store director threatened to call the police if the employee did not "go out on the sidewalk with [her] friends." The store director and the other employee stood in the doorway of the facility until the police arrived in the strip mall parking lot. The police told the employee that they had been authorized by the strip mall property owner to charge the employee with trespass. The police instructed the employee to go to the public sidewalk. The police issued a trespass warning to the employee. The employee then picketed with the nonemployee picketers for a few minutes and then departed. The

⁵ The employee was also wearing her employee name tag, identifying her as a Gooding's employee.

⁶ The Deland facility was contacted and informed of the employee's activities at the Employer's other stores on April 14.

employee says that she told customers orally at the Kissimmee store, "that employees had tried to organize in the past and that I was there to organize the employees now and that I felt I had been mistreated because I supported the Union."

ACTION

We conclude that a Section 8(a)(1) complaint should issue, absent withdrawal, for the reasons set forth below. In deciding these cases, we must first consider the applicable standard: Lechmere or Jean Country.

1. Pre-Lechmere Precedent

In NLRB v. Babcock & Wilcox, Co.,⁷ the employer prohibited nonemployee union organizers from distributing union literature on employer-owned parking lots. The Board had found a violation by applying the Supreme Court's conclusion in Republic Aviation⁸ that an employer cannot prohibit employees from union solicitation activities on company property before or after working hours.⁹ The Court reversed. It held that the Board erred when it "failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees"¹⁰ "The distinction," stated the Court, "is one of substance."¹¹ Thus, while the Court noted that, "no restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline ... no such obligation is owed nonemployee

⁷ 351 U.S. 106 (1956).

⁸ Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803-04 n.10 (1945), reh'g denied 325 U.S. 894.

⁹ The Babcock and Wilcox Co., 109 NLRB 485, 493 (1954).

¹⁰ NLRB v. Babcock & Wilcox, 351 U.S. at 113.

¹¹ Ibid.

organizers."¹² Accordingly, the Court upheld the employer's ban on nonemployee solicitation and concluded that,

an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distributions.¹³

Subsequently, in Hudgens v. NLRB,¹⁴ the Supreme Court addressed the question of whether employees could use private property to attempt to communicate with the public. In Hudgens, a group of economic strikers entered the petitioner's enclosed mall in order to picket Butler Shoe Co., their employer who leased a store within the mall. Representatives of the mall prohibited the strikers from picketing within the mall or on the adjacent parking lots. The Board found a violation, holding that since the picketers -- like the general public -- were invitees on the mall property, the picketers did not need to show that they had no alternative means of communicating with their employer's customers or employees.¹⁵

The Court concluded that the access rights of the striking employee handbillers were controlled by principles set forth in Babcock & Wilcox. The Court noted that a proper accommodation of Section 7 and property rights "may largely depend upon the content and the context of the Section 7 rights being asserted,"¹⁶ and that the locus of that accommodation "may fall at differing points along the spectrum depending on the nature and strength of the

¹² Ibid. (emphasis supplied).

¹³ Id., 351 U.S. at 112.

¹⁴ 424 U.S. 507 (1976).

¹⁵ Scott Hudgens, 205 NLRB 628, 631 (1973).

¹⁶ Hudgens v. NLRB, 424 U.S. at 521.

respective Section 7 rights and private property right asserted in any given context."¹⁷ Among other things, the Court noted that, as opposed to Babcock & Wilcox and Central Hardware, "the Section 7 activity here was carried on by Butler's employees (albeit not employees of its shopping center store), not by outsiders."¹⁸

Consequently, the Court remanded the case to the Board for consideration of "a proper accommodation" between employees' Section 7 rights and the petitioner's property rights.¹⁹

2. Lechmere

In Lechmere, Inc. v. NLRB,²⁰ the Supreme Court upheld an employer's prohibition against nonemployee union agents who tried to handbill Lechmere employees for organizational purposes on its private parking lot. Applying Jean County,²¹ the Board had found that access to the employer's private property was necessary after balancing the employees' Section 7 rights and the employer's property rights and then assessing the reasonable alternatives to trespassory access. The Supreme Court rejected the Jean Country standards, reversed and ruled that strict compliance with the Court's decision in Babcock & Wilcox was required.²²

The Court stated that Babcock's "general rule" is that an employer is permitted to bar a nonemployee union organizer from access to the employer's private property unless the union carries its "heavy" burden of proof that

¹⁷ Id., 424 U.S. at 522.

¹⁸ Ibid.

¹⁹ Hudgens v. NLRB, 424 U.S. at 521 (quoting Central Hardware v. NLRB, 407 U.S. 539, 543 (1972)).

²⁰ 112 S.Ct. 841 (January 27, 1992).

²¹ 291 NLRB 11 (1988).

²² Lechmere, 112 S.Ct. at 850.

no other reasonable means of communication with the employees exist. It is only when there is no reasonable alternative means of communication that it becomes necessary to balance the employees' Section 7 rights with the employer's property rights.²³ However, the Court approved of such a balancing test where employees, rather than nonemployee union organizers, engaged in handbilling or picketing activities.

In cases involving employee activities, we noted with approval [in Babcock], the Board "balanced the conflicting interests of employees to receive information on self-organization on the company's property during nonworking time, with the employer's right to control the use of his property".... In cases involving nonemployee activities (like those at issue in Babcock itself), however, the Board was not permitted to engage in that same balancing (and we reversed the Board for having done so).²⁴

Thus, the Court left open the question of whether Jean Country applies to cases involving employee activities.²⁵

3. Current Board Law: A-1 Schmidlin

In A-1 Schmidlin Plumbing & Heating Co.,²⁶ the ALJ found that under Jean Country the employer unlawfully

²³ 112 S.Ct. at 848. The Court noted that in Babcock it held that Section 7 rights belong directly to employees, while the nonemployees' rights are only derivative. 112 S.Ct. at 846. The Court called this a "critical distinction." Ibid.

²⁴ Lechmere, 112 S.Ct. at 848 (emphasis in original) (quoting Babcock, 351 U.S. at 109-10).

²⁵ The Court limited its scrutiny to, "whether Jean Country -- at least as applied to nonemployee organizational trespassing -- is consistent with our past interpretation of §7." Lechmere, 112 S.Ct. at 847.

²⁶ 312 NLRB No. 47 (September 20, 1993).

excluded from its parking lot an unlawfully discharged employee attempting to handbill the employer's customers.

Although the employee could have safely picketed on a public right-of-way, the ALJ found that the handbill's protestation of the employer's refusal to bargain and "multifaceted" compliance issues relating to adjudicated unfair labor practices "could not be adequately explained in the legend of a picket sign."²⁷ In a footnote to its summary affirmance of the ALJD, the Board stated -- without explanation or analysis -- that Lechmere was inapplicable because A-1 Schmidlin "involves an employee/discriminatee seeking access for the purpose of communicating with the public concerning the Employer's unfair labor practices"²⁸ Similarly, in Providence Hospital,²⁹ a pre-Lechmere case, the Board applied a Babcock analysis (as then understood by Fairmont Hotel)³⁰ to off-duty employees seeking access to communicate with the public.³¹

With respect to the Maitland facility, a free-standing store, we conclude that the Employer violated Section 8(a)(1) of the Act by discriminatorily denying the employee

²⁷ Id., JD slip op. at 15.

²⁸ Id., slip op. at 1 n.3. The Board noted that the Lechmere Court held that the balancing test in Jean Country was an invalid analysis, "[a]t least as applied to nonemployees." Ibid. (quoting Lechmere, 112 S.Ct. at 843).

²⁹ 285 NLRB 320 (1987).

³⁰ 282 NLRB 139 (1986).

³¹ We realize, of course, that generally the access rights of working employees are governed by Republic Aviation Corp. v. NLRB, supra. A special rule, more akin to Republic Aviation than Babcock, applies to off-duty employees seeking access to communicate with other employees. Tri-County Medical Center, 222 NLRB 1089 (1976); Providence Hospital, supra, at 322 n.8. See also New Process Co., 290 NLRB 704, 734 (1988). The Board has not extended the Republic Aviation/Tri-County line of cases to employee communications with the public.

access to handbill and picket on its premises. In the prior Goodings Advice memorandum, we concluded that the Employer violated Section 8(a)(1) of the Act by discriminatorily denying nonemployee Union picketers and handbillers access to the Maitland facility to engage in informational and consumer boycott picketing.³² A fortiori, if the Employer violated Section 8(a)(1) of the Act by discriminatorily denying nonemployee Union picketers and handbillers access to its premises,³³ then it would also violate Section 8(a)(1) by discriminatorily denying an off duty employee access for the purposes of picketing and handbilling.

With respect to the Kissimmee facility, we conclude that the Employer violated Section 8(a)(1) of the Act by denying the employee access to handbill and picket. The Kissimmee facility is part of a large strip mall. The Employer has an addendum to its lease which gives the Employer the power to control the areas immediately in front of the facility which the Employer leases.³⁴ The sidewalk and parking lot of this store is open to the public. The employee was engaged in picketing and handbilling which advised the public generally of "unfair treatment of workers," of unfair labor practices, and of allegedly high prices. The picket signs and handbills also asked customers to refrain from shopping at the Employer's stores. The employee says that she told customers orally at the Kissimmee store, "that employees had tried to organize in the past and that I was there to organize the employees now and that I felt I had been mistreated because I supported the Union." Given that the sidewalks and the parking lots of these stores are open to the public, we conclude that the Employer's property interest here is less substantial than in more private nonretail settings.³⁵ On

³² Goodings Supermarkets, Case 12-CA-17371 et al, Advice Memorandum dated October 18, 1996.

³³ Id. See the prior Advice memorandum, at pages 12-15, where this theory of violation is fully set forth.

³⁴ It is unclear whether these added rights are concurrent with or taken from those of the leasing entity.

the other hand, although area standards picketing, unlike organizing, is not a "core" Section 7 right,³⁶ the area standards picketing here is being conducted by an off duty employee rather than a nonemployee. Also, the picketers on the sidewalks in front of the stores, i.e. one, were limited in number, peaceful and unobstructive. Therefore, we conclude that, under all of the circumstances, both the Employer's and the employee's respective property and Section 7 rights are relatively weak and of roughly equal weight.

With respect to alternative means of accessing the employee/picketer's intended audience, i.e., the public, the Region made a finding of fact that the Union and the employee can not communicate the same message in a safe yet highly visible manner at the entrances to the stores' parking lots. The Region found that handbilling from public areas at the Kissimmee location would appear to involve the need to reach automobile traffic on relatively high speed highways.³⁷ In addition, perimeter handbilling at the Employer's Kissimmee facility carries with it the risk of enmeshing mall shoppers, who are seeking to shop at facilities other than that of the instant Employer in the dispute. Further, handbilling at the perimeter of the Kissimmee facility would dilute the message, because the employee would not be able to discern who was shopping at the Employer and who was shopping at other facilities in the strip mall. Therefore, we conclude that, since the property interest and the Section 7 right are roughly equal in weight and the Region has found that the employee does not have a reasonably effective alternative means to communicate his message, this Section 8(a)(1) charge has merit.

We further conclude that the fact that the employee was a paid Union "plant" from the outset of her employment does not require a contrary result. The Supreme Court has held that paid union organizers are "employees" under

³⁵ Target Stores, 292 NLRB 933, 935 (1989).

³⁶ Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 206 (1978).

³⁷ W.S. Butterfield Theaters, 292 NLRB 30, 33 (1988).

Section 2(3) of the Act.³⁸ This group includes both employees of the union such as business agents and members who are given a stipend to organize. Thus, the paid Union "plant" in this case is clearly an "employee" under Section 2(3) of the Act and so is entitled to the full protections of the National Labor Relations Act. Therefore, the Employer violated Section 8(a)(1) of the Act by denying the employee access to its premises notwithstanding the fact that the employee was a paid Union "plant."

We also conclude that the Employer's other defenses are without merit. First, we conclude that the Employer's contention that the employee blocked ingress and egress to its stores is without merit, because the Region found that there was no evidence to support the Employer's contention. Second, we conclude that the Employer's disparagement argument is without merit in that the employee sought to convey a "do not patronize" message that was part of the ongoing labor dispute between the parties and, therefore, did not remove the employee's conduct from the protections of the Act.³⁹ In addition, the Region found no evidence that the price comparisons were "maliciously false."⁴⁰ Third, we find without merit the Employer's argument that Von Glinsky was not an employee of the Employer within the meaning of Jean Country because she was employed by the Employer at another facility.⁴¹ Finally, we conclude that the Employer's contention that the store sidewalks in front of the entrances to the stores are work areas does not require a contrary result in that the Region found no evidence that these areas were work areas.

Accordingly, we conclude that a Section 8(a)(1) complaint should issue, absent settlement.

³⁸ NLRB v. Town & Country Electric, Inc., 116 S.Ct. 450 (1995).

³⁹ Riesbeck Food Markets, 315 NLRB 940 (1994).

⁴⁰ See Sacramento Union, 291 NLRB 540 (1988).

⁴¹ See United States Postal Service, 318 NLRB 466 (1995).

B.J.K.