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

Advice Memorandum

DATE: February 28, 1996

TO : F. Rozier Sharp, Regional Director
Region 17

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

SUBJECT: Paul Mueller Co.
Case 17-CA-18397

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This Section 8(a)(1) and (3) case was submitted for advice as to whether striking employees were privileged to erect and maintain a picket shelter on the Employer's property.

Facts

The Employer, a manufacturer of stainless steel tanks, has had a collective-bargaining relationship with Sheet Metal Workers Local 208 (the Union) since 1977. The most recent contract covering about 400 unit employees expired on June 11, 1994.

Based on charges filed since September 1994, the Region has issued several Section 8(a)(5) complaints, including one on July 18, 1995. On July 25, 1995, the Union commenced what the Region has alleged as an unfair labor practice strike. Pickets have been stationed at the employee and main entrances to the plant, and it is undisputed that the strike has been conducted in a peaceful manner. The Union also placed a picket tent, large enough to house 10 employees, at the employee picnic area in the parking lot across the street from those entrances. The strikers had cookouts, coolers with soft drinks and a TV in this area and, as the weather grew cold, built fires in a barbecue grill to keep warm. Non-unit and management personnel, including the Employer's president and his wife, frequented the tent and shared in the refreshments. The Union eventually removed the tent due to wear and tear.

On November 11, the Union brought a wooden picket shelter, 4 feet by 12 feet by 8 feet high, to the picnic area. The shelter is painted blue (the Company color), and has a door, two small windows, about five chairs, and a

kerosene heater to protect strikers from the weather and to give them a place to rest when not picketing at the entrances. When the Employer shut down for holidays from November 23 through 26 and from December 27 through January 2, no picketing occurred.

On December 27, Union representatives were summoned to a meeting with an Employer official and a police officer, during which the Employer stated the police would remove the shelter if the Union failed to do so by the following day. On December 28, Employer officials asked Union representatives at the picket shelter if they were going to remove it, and a Union official stated he had no such authority. The Employer allowed the Union to remove items from the shelter, and then the Employer used a forklift to move the shelter to a storage building behind its plant across the street.[1]

On January 3, an International representative and four strikers went to the plant to claim the shelter. After a long discussion in which the Employer said it would check abandoned property laws, the Employer stated in a letter that the International representative could claim the shelter for $150. On January 4, the International paid by check (on which payment was later stopped) and returned the shelter to the picnic area. That afternoon, strikers informed the Union that police had arrived at the Employer's guard shack and an Employer forklift was near a plant entrance. Several Employer officials ordered four strikers to leave the shelter because they wanted to remove it unless the Union placed it on public property (bordering the picnic area) or hauled it away. Several strikers went into the shelter, and were given five minutes to vacate or be "written up." When the strikers remained, the Employer threatened them with possible discharge, and then issued written warnings to eight strikers. However, striking employees have continued to staff the shelter on a 24-hour basis to prevent its removal by the Employer.

The Employer contends that the unauthorized erection of the shelter on its property, and the subsequent sit-in by strikers, constitute unprotected activity. The Employer does not object to strikers picketing on the public easement bordering the parking lot/picnic area, or even on

[1] Police were present but took no action.

the parking lot "so long as they stay close to the border of the property." However, the Employer considers the shelter to be an eyesore and a nuisance which, under Lechmere,[2] it is privileged to remove by any necessary means.

Action

We conclude that the Employer violated Section 8(a)(1) by removing the picket shelter on December 28 and ordering strikers to abandon the shelter on January 4, and violated Section 8(a)(3) by issuing written warnings to the eight strikers. As discussed below, this conclusion is not based on Lechmere or any other accommodation analysis under NLRB v. Babcock & Wilcox, 351 U.S. 106 (1956), but rather on the view that the Employer's conduct was calculated to interfere with its employees' right to strike.

In Hudgens v. NLRB,[3] 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.[4]

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

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[2] 502 U.S. 527 (1992).

[3] 424 U.S. 507 (1976).

[4] Scott Hudgens, 205 NLRB 628, 631 (1973).

Section 7 rights being asserted,"[5] and that the locus of that accommodation "may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights and private property right asserted in any given context."[6] Among other things, the Court noted that, as opposed to Babcock & Wilcox, "the Section 7 activity here was carried on by Butler's employees (albeit not employees of its shopping center store), not by outsiders."[7]

In Jean Country, 291 NLRB 11 (1988), the Board set forth an analysis which it would apply when a Babcock & Wilcox accommodation is required, i.e. whether access to employer property is necessary after assessing the relative strengths of the Section 7 and property rights involved and evaluating the reasonable alternatives to access. However, in Lechmere, the Supreme Court rejected the Board's application of Jean Country standards where nonemployee union agents tried to engage in organizational handbilling on the employer's parking lot, and held that such cases are strictly controlled by the Babcock & Wilcox rule that balancing rights is appropriate only when a union carries its "heavy" burden of proof that no other reasonable means of communication exist. 502 U.S. at 538, 540. In contrast, 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

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[5] Hudgens v. NLRB, 424 U.S. at 521.

[6] Id., 424 U.S. at 522.

[7] Ibid.

> engage in that same balancing (and we reversed the Board for having done so).[8]

In A-1 Schmidlin Plumbing Co., 312 NLRB 201 (1993), the Board affirmed the ALJ's finding of a Jean Country violation where an unlawfully discharged employee seeking to communicate with employer customers was excluded from the employer's parking lot, and briefly stated that Lechmere was inapplicable to employee access. The Board did not address the Hudgens decision which, as noted above, applied the principles of Babcock (the case which underlies the Supreme Court's rationale in Lechmere) to determine the access rights of striking employees appealing to customers of their employer. Thus, since those using the picket shelter here are striking employees, under Hudgens, one could have concluded prior to A-1 Schmidlin that Lechmere's recent refinement of Babcock would govern the instant situation. However, we believe that under A-1 Schmidlin, the employees' use and maintenance of the picket shelter to meaningfully strike would be governed by the Board's construction of Babcock & Wilcox as set forth in Jean Country, rather than the more restrictive Lechmere construction. Moreover, A-1 Schmidlin squarely held that the Lechmere refinement of Babcock does not apply to employees.

This case does not involve access of the strikers to employer property, however, but rather the maintenance of the picket shelter which arguably was necessary to protect them from the elements when they were taking a break from picketing in rotation with other strikers. Nevertheless, while the employees are engaged in the exercise of a very strong Section 7 right (conducting a ULP strike) and the Employer's property interest in the employee parking lot/picnic area, frequented by employees without prior Employer protest, is relatively weak, it is clear that the strikers had reasonable alternative means of protecting themselves from the elements in order to meaningfully strike. At a minimum, since the picnic area where both the tent and shelter were located is part of the employee parking lot, employees can remain in cars to keep warm and dry while they are not actually picketing. There is no

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[8] Lechmere, 502 U.S. at 537 (emphasis in original) (quoting Babcock, 351 U.S. at 109-10).

showing that the Employer would have prohibited this or that such an alternative is unfeasible; indeed, it is consistent with the general purpose for which a parking lot is used. Therefore, under a Jean Country analysis alone, we would not argue that the Employer must allow the shelter to be placed on its property.

However, the Board does not engage in a Babcock & Wilcox accommodation, whether under Jean Country, 291 NLRB at 12, n.3, or Lechmere,[9] where an employer denies access to its property for discriminatory reasons. Moreover, this principle is applicable in situations where an employer allows certain employee use of its private property but denies use by employees trying to exercise their Section 7 rights. For example,

> legal principles applicable to cases involving access to company-maintained bulletin boards are simply stated and well established. In general, "there is no statutory right of employees or a union to use an employer's bulletin board." However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items... sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or, in general, any nonwork-related matters, it may not "validly discriminate against notices of union meetings which employees also posted."10

Thus, "the disparate enforcement of a dormant policy, especially by a supervisor in front of employees, is inherently coercive and interferes with the employees' exercise of their Section 7 rights."[11]

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[9] See Davis Supermarkets, 306 NLRB 426 (1992), enfd. 2 F.3d 1162 (D.C. Cir. 1993).

[10] Vons Grocery Co., 320 NLRB No. 5, slip op. at 3 (December 18, 1995), quoting Honeywell, Inc., 262 NLRB 1402 (1982), enfd. 722 F.2d 406 (8th Cir. 1983) (footnotes omitted).

[11] Wells Aluminum Corp., 319 NLRB No. 104, slip op. at 12 (November 30, 1995) (enforcement of lax policy, requiring permission prior to posting bulletin board notices, at the

The Employer conduct here evidences the same kind of attempt to chill the employees' right to strike. The Employer allowed employees from the inception of the ULP strike to maintain some facility on its property to protect them against the elements. Thus, its officials allowed, and even frequented and shared refreshments at, the tent until the Union had to dismantle it due to wear and tear. The Employer then condoned the maintenance of the picket shelter itself for over a month until the onset of winter. The Employer only took action opposing employee use of the shelter when the facility began to serve an even more compelling purpose of protecting employees from the extremely cold of winter. We would argue that by seeking to remove the shelter, without any business justification it could have advanced earlier, the Employer sought to impose additional weather-related burdens on the strikers and thereby end the strike. We further note that the Employer's Section 8(a)(5) violations evidence its intent to undermine the Union as the collective-bargaining representative. In these circumstances, we agree that the Region should add this Section 8(a)(1) and (3) allegation to the outstanding consolidated complaint, absent settlement.

B.J.K.

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commencement of organizing campaign motivated "to chill employees' union activities").