

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

# Advice Memorandum

DATE: May 18, 2000

TO : James S. Scott, Regional Director  
Region 32

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

SUBJECT: Boykin Management Group, LLC  
d/b/a Berkeley Radisson Hotel  
Case 32-CA-17706-1, 32-CA-17779-1, 220-2550-3600  
32-CA-17798-1, 32-CA-17799-1, 220-2550-4500  
32-CA-17858-1, 32-CA-17906-1 512-5006-5036  
and 32-CA-17914-1 512-5006-6733  
512-5009-6700  
512-5012-0125  
512-5012-0133-2550  
512-5012-1701-5000  
512-5012-1737  
512-5012-2500  
512-5012-6735  
512-5018  
512-5030  
512-5033  
512-5036  
512-5042-0133-1100  
512-5042-0183  
512-5042-3380  
512-5045  
524-5010  
625-6612

These Section 8(a)(1) and (3) cases were submitted for  
advice on: (1) [*FOIA Exemption 5*]<sup>1</sup>;  
]; (2) whether certain new or revised  
provisions contained in the Employer's "Associate Handbook"  
restrict employees in the exercise of Section 7 rights in  
violation of the Act under Lafayette Park Hotel;<sup>2</sup> (3)  
whether the Employer's requirement that employees submit  
any dispute related to their employment to binding  
arbitration is lawful; (4) whether the Employer violated  
the Act by filing and maintaining a lawsuit against the

<sup>1</sup> [*FOIA Exemption 5*].]

<sup>2</sup> 326 NLRB No. 69 (August 27, 1998).

Union seeking a preliminary and a permanent injunction, or whether Bill Johnson's Restaurants<sup>3</sup> precludes further proceedings at this time; and (5) whether Section 10(j) injunction proceedings are warranted.<sup>4</sup>

### FACTS

Boykin Management Group (Boykin or the Employer), a real estate investment trust, is an Ohio corporation engaged in the business of purchasing, leasing and managing hotels. Boykin owns 32 hotels in 17 different states throughout the United States and operates the Berkeley Radisson Hotel in Berkeley, California.

The Employer employs approximately 200 non-supervisory employees at the Berkeley Radisson. Brij Misra is the general manager. Directly below Misra are the managers of various departments including Betty Eng, the director of human resources. Gary Garrent, vice president of human resources from Ohio, and labor consultant David Garcia also spoke to employees on behalf of management throughout the campaign. The above-named individuals are statutory supervisors and/or agents of the Employer.

The Region has set forth in detail the circumstances of the many unfair labor practices alleged in this case. A brief summary of events is as follows. The Union<sup>5</sup> began organizing the Employer's employees in February 1999.<sup>6</sup> The Employer immediately began committing unfair labor practices, including interrogations, solicitation of grievances, impressions of surveillance, solicitation of employees to surveil and report other employees' Union activities to the Employer, harassment of Union supporters, oral promulgation of stricter work rules, posting excerpts from its handbook regarding solicitation and distribution, and promises of benefits and pay raises.

On the morning of September 13, Union president Jim Dupont delivered a petition to general manager Misra notifying him who was on the Union organizing committee and

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<sup>3</sup> Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

<sup>4</sup> The Section 10(j) request will be addressed in a separate memorandum.

<sup>5</sup> Hotel Employees Restaurant Employees Local 2850.

<sup>6</sup> All dates are in 1999 unless noted otherwise.

that the petition was signed by the 30 employee committee members. Dupont also requested that the Employer agree to a neutral card check, but the Employer refused. That day, employees started wearing Union buttons. Committee members continued to solicit employees at their homes. Immediately thereafter, the Employer intensified its antiunion campaign.

Between September 23 and October 1, top management held mandatory meetings with the employees in every department. At these meetings, Misra announced that employees would be receiving across-the-board, retroactive raises. During these meetings Misra, Eng, Garrent, and Garcia were present with the department managers and supervisors soliciting grievances, promising to remedy grievances and interrogating employees. The tenor of their remarks at all of the meetings was that the employees would be getting raises without the Union, and that having a Union was not necessary to solve their complaints.

During and after these meetings, virtually every supervisor or manager committed unfair labor practices. Included among the unfair labor practices were: threatening to write up employees for "every little thing", such as eating in the kitchen, failing to wear a name tag, and failing to take a break; interrogating employees about the Union; harassing Union supporters, including physically abusing some; scrutinizing employees' work; issuing disciplinary warnings to several banquet employees; changing work rules or enforcing previously unenforced rules; falsely telling an employee that the Social Security Administration (SSA) office had called and there was something wrong with his Social Security number, and threatening to suspend that employee until he cleared everything with SSA; falsely telling another employee that SSA had called and he needed to verify his Social Security number and get another one and bring it in; threatening employees with unspecified retaliation; stating that Boykin had destroyed every union that tried to organize any of its hotels; stating that employees would not need the Union after they got the pay raises; soliciting employees to quit; issuing unfavorable evaluations to Union supporters who had been highly rated before the Union campaign; and disciplining and discharging front desk employee Mullen, who was a known Union supporter.<sup>7</sup> The Employer granted

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<sup>7</sup> During the mandatory meeting with the front desk staff, Mullen was one of two employees who stood up and said they wanted a Union at the hotel and that the only reason for the raise was to appease the employees not to unionize.

substantial raises to all employees. The raises ranged from 60 cents per hour to \$3.16 per hour. Most raises were an increase of between 25% and 48%.

The Union held a rally on October 6, after which the Employer sent a letter to employees on October 7 which stated that the Employer had planned to possibly increase other benefits, but had to reconsider because of the Union's unfair labor practice charges. The Union held another rally on October 29, during which it gave employees large yellow Union buttons to wear on their uniforms. Later that same day, the Employer posted a flyer limiting the number and size of buttons employees could wear. Thereafter, Misra approached many banquet employees and commented on their Union buttons or insinuated that they should not be wearing a Union button.

The Union held another rally on December 8, during which it called for a boycott. Off duty employees attended that rally, which took place outside the hotel near the front entrance. In response, on December 9, Misra issued a letter to employees reiterating employee Handbook rules and establishing three new rules. The first new rule required employees to get permission from Misra in order to come to the hotel when not scheduled to work. Previously, according to the handbook, employees only needed to get permission from their immediate supervisor. The second new rule prohibited employees from being on hotel property more than 30 minutes prior to their scheduled work time and more than 30 minutes after clocking out. The third new rule prohibited employees from visiting other departments to discuss non-work related matters during work time.

The Union urges, and the Region recommends, that several other provisions of the Handbook violate the Act because they are overbroad and interfere with Section 7 rights of employees. The Handbook has been in effect since 1993, well before the organizing campaign. However, while the Handbook was not promulgated in response to the employees' exercise of Section 7 rights, the Employer did not enforce several of the provisions until it found out about employees' organizing activities.

The eight handbook provisions which are alleged to be unlawful state:

1. DON'T

Tell anyone confidential information.

Be on Hotel property when I do not have a Property Pass and am not scheduled to work.

2. Solicitation and Distribution

I am not allowed to distribute literature or other printed material of any type or description in any work area, or in any area open to the public. I am aware that the distribution of literature or solicitation of associates by anyone not employed by the company is also not allowed.

### 3. Media Questions

If a member of the media (including radio, television and publications) asks about the Hotel, a guest, an associate, an incident or accident, I will immediately refer the person to the General Manager or a representative of Boykin Management Company. I will not answer any question or engage in conversation with the person.

### 4. Other Employment

... I understand it is always my responsibility to protect confidential information at the Hotel, such as trade secrets, company policies and information about guests or other associates.

### 5. My Nametag

Other than my nametag, I will not wear any badge, pin, button or decoration without my supervisor's approval. The only pin I can wear on my nametag is the company service award pin.

### 6. Property Pass

I may obtain permission to return to the Hotel when I am off duty to attend a banquet function or to dine in the restaurant. I must first get my supervisor's permission and get a property pass, which states the date, time and my reason for being at the Hotel outside my working hours. If I do not have a pre-approved property pass, I may not be at the Hotel outside my working hours.

### 7. Security Do's

Discuss any incident or accident which occurs on Hotel property only with my team, and not with a guest or person outside the Hotel.

### 8. The B.E.S.T. Problem Solver

...The Hotel wants me to air my concerns within the Hotel family first... When I have a problem or concern, I will go for the B.E.S.T.

If I am not satisfied with the results of STEP 4, I may request that my problem be heard by an independent arbitrator...I believe that arbitration is a fair and efficient method of resolving employment

disputes. I understand that TeamPact guarantees that Boykin will abide by all laws relating to employment. A violation of the law is, therefore, a violation of TeamPact.

I intend and agree that any dispute I may have with Boykin relating to my employment shall be submitted to and resolved through binding arbitration. This applies to any claim I may make that Boykin has violated a federal, state or local anti-discrimination, wage or benefit, contract or tort, or any other law relating to employment. A violation of the law is, therefore, a violation of TeamPact.

...I understand that each party will be responsible for paying for the costs of preparing and presenting their case. Boykin agrees to pay a majority of the arbitrator's fees.

If I have three (3) years' continuous service as a full-time associate, the arbitrator shall have the right to reinstate me...

The arbitrator's fees and expenses shall be divided as follows:  
50% of the arbitrator's fees shall be paid by Boykin  
50% by associate if a request is submitted  
100% of the arbitrator's fees will be paid by Boykin  
if the individual is reinstated.

On December 22, from 4:30 to 5:30 p.m., a group of about 25 non-employee Union representatives held a demonstration in the hotel lobby. The group sat in a circle and loudly sang Christmas carols with anti-Employer lyrics. The group went to the bar and the restaurant for short periods while singing, and then returned to the lobby. In a videotape provided by the Union, it appears that management asked the group to move to one side, but never asked them to leave the lobby, bar or restaurant. During this same time, a group of about 100 people, including employees, was assembled across the street, on public property, in front of the hotel with picket signs.

On December 29, the Employer filed a Complaint, in Superior Court, seeking a temporary restraining order, preliminary injunction, and permanent injunction against the Union. The Proposed Order sought to restrain the Union from the following:

- a. Entering onto Hotel property for the purposes of picketing, singing, chanting, parading,

massing, assembling, patrolling, marching, blocking access to Hotel equipment or facilities, or inducing, encouraging or causing such conduct on the premises located at..., including exits, entrances, parking lots, lobbies, hallways, bars, restaurant and other Hotel property.

b. Blocking, obstructing or impeding in any manner whatsoever the ingress and egress, either by foot or in a vehicle, of employees, guests, potential guests or vendors of Plaintiff, or any other person, from Hotel premises;

c. Committing acts of harassment, intimidation and coercion, or in any manner interfering with Plaintiff's employees, guests, potential guests, vendors and other persons having business with Plaintiff;

d. Yelling, singing, shouting, taunting, or using or engaging in profanity or obscenities of any kind or nature on Hotel premises, including parking lots at the Berkeley Radisson Hotel.

On December 30, Superior Court Judge Ford granted a temporary restraining order against the Union. On January 5 and 6, 2000, Superior Court Judge Morris held a hearing to determine whether a preliminary injunction against the Union should issue. The next day, Judge Morris denied Boykin's request for a preliminary injunction. Judge Morris specifically found that: 1) there was no evidence that the acts would continue; 2) there was no substantial or irreparable injury; 3) Boykin had an adequate remedy at law, that is, it failed to ask police who were present to ask the group to leave or arrest them (and may not have even asked the group to leave); and 4) there was no evidence that the police were unable or unwilling to furnish adequate protection.

With regard to the request for a permanent injunction, on March 21, 2000 Judge Morris granted the Union's demurrer, with leave to amend the complaint to allege that the injury to the Employer would be greater than the injury to the Union if relief were not granted, and that the police are unable to protect the Employer. Boykin amended its complaint to include those allegations.

There is evidence that the Employer's unfair labor practices are having an impact on the Union's majority. The Union has submitted authorization cards from 173 of the approximately 200 employees, most of which were obtained during the early part of the Employer's anti-union

campaign. Since that time, as the Employer's unfair labor practices have continued, support for the Union has waned. Thus, the Union received cards from most, if not all of the employees in the engineering department, but those employees are now refusing to wear their Union buttons and are no longer participating in rallies or attending Union meetings. Employees in the kitchen and housekeeping department also have stopped wearing Union buttons. Other employees have refused to sign cards. One of the front desk clerks who never signed a card indicated that she did not want to sign a card or support the Union because she was afraid Misra would discharge her as he discharged Mullen.

**ACTION**

[FOIA Exemption 5

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conclude that the complaint should include allegations that certain sections of the employee Handbook, including the arbitration requirement, violate the Act, and that the Employer's lawsuit violates the Act and is preempted.

I. [FOIA Exemption 5 ]

[FOIA Exemption 5

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[FOIA Exemption 5

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<sup>9</sup> [FOIA Exemption 5

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<sup>8</sup> [FOIA Exemption 5

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<sup>9</sup> [FOIA Exemption 5

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[FOIA Exemption 5

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<sup>10</sup> [FOIA Exemption 5

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<sup>11</sup> [FOIA Exemption 5

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<sup>17</sup> [FOIA Exemption 5

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## II. Unlawful Handbook Provisions

In Lafayette Park Hotel, the Board held that an employee handbook rule barring employees from "divulging Hotel-private information to employees or other individuals" was lawful on its face and stated:

Although the term "hotel-private" is not defined in the rule, employees in our view reasonably would understand that the rule is designed to protect that interest rather than to prohibit the discussion of their wages.<sup>19</sup>

Although Lafayette Park is, in some ways, a departure from prior Board law, it leaves intact the well-established principle that maintenance of an ambiguous rule violates the Act if the rule reasonably would chill employees in the exercise of activity protected by the Act.<sup>20</sup> Further, the Board reaffirmed the principle that if a rule is ambiguous, any ambiguity in the rule must be construed against the employer as the promulgator of the rule.<sup>21</sup>

Based on Lafayette Park and Super K-Mart,<sup>22</sup> we agree with the Region that the Handbook provision prohibiting employees from "tell[ing] anyone confidential information" is lawful. Thus, a rule limited to "confidential" company information is addressed to protecting the Employer's

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<sup>19</sup> 326 NLRB No. 69 (August 27, 1998), slip op. at 3.

<sup>20</sup> J.C. Penney, 266 NLRB 1223, 1224-5 (1983).

<sup>21</sup> 326 NLRB No. 69, slip op. at 5, citing Norris/O'Bannon, 307 NLRB 1236, 1245 (1992). See also e.g. Taylor-Dunn Mfg. Co., 252 NLRB 799, 813 (1980); Paceco, 237 NLRB 399, 400 fn. 8 (1978), enfd. in pertinent part 601 F.2d 180 (5<sup>th</sup> Cir. 1979); The Trustees of Columbia University, 225 NLRB 185, 192 fn. 7 (1976).

<sup>22</sup> K-Mart, d/b/a/Super K-Mart, 330 NLRB No. 29 (November 30, 1999).

legitimate confidentiality interests and does not implicate employee Section 7 rights.

We also agree with the Region that each of the other Handbook provisions cited above are unlawful. These provisions can reasonably be read by employees to interfere with the exercise of Section 7 activity and to bar employees from asserting their statutory rights under the Act. Furthermore, the Employer's sudden enforcement of these rules after the Union requested recognition support the conclusion that the rules have been and are being used to interfere with employees' Section 7 activity.

The rule prohibiting distribution of literature is overbroad in that it is not limited to work areas, but explicitly restricts employees from distributing literature in "any area open to the public."<sup>23</sup>

The rule titled "Media Questions" prohibits employees from speaking with the media about the hotel, a guest, an associate, or any incident or accident. The rule titled "Other Employment" requires employees not to divulge "confidential information" about other employees (associates). The rule titled "Security Do's" prohibits employees from discussing any incident or accident which occurs on hotel property with any guest or person outside the hotel. Each of these rules could be interpreted as prohibiting employees from discussing terms and conditions of employment with a union, or engaging in other concerted protected activity.<sup>24</sup>

The rule titled "My Nametag" prohibits employees from wearing union buttons. The Employer has not demonstrated "special circumstances" permitting the banning of union buttons.<sup>25</sup> Moreover, the Employer has not enforced its policy in a consistent and nondiscriminatory manner.<sup>26</sup> The

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<sup>23</sup> See Beverly Enterprises-Hawaii, Inc. d/b/a Hale Nani Rehabilitation, 326 NLRB No. 37 (1998) (see cases cited therein).

<sup>24</sup> See Flamingo Hilton-Laughlin, 330 NLRB No. 34 (1999); Eastex, Inc., 98 LRRM 2727 (1978).

<sup>25</sup> Republic Aviation Corp. v. NLRB, 324 U.S. 793, 802 (1945); The Ohio Masonic Home, 205 NLRB 357 (1973), enfd. 511 F.2d 527 (5<sup>th</sup> Cir. 1975).

<sup>26</sup> See Holladay Park Hospital, 262 NLRB 278, 279 (1982); St. Joseph's Hospital, 225 NLRB 348 (1976); The Ohio Masonic Home, 205 NLRB 357 (1973).

Employer has permitted employees to wear other kinds of buttons. The Employer issued a memo limiting the size and number of buttons that employees could wear immediately after the Union gave employees large yellow buttons to wear. Thus, the enforcement of the rule was not consistent and nondiscriminatory.

The rule titled "Property Pass" prohibits employees from being at the hotel outside their working hours unless they have prior approval and a property pass from their supervisor. This rule does not limit access solely to interior areas, and therefore prohibits employees from engaging in union activities in exterior areas before or after their shifts without their supervisor's permission. Requiring employees to get their supervisor's permission and approval of their reason for being at the hotel outside of working time is very likely to have a chilling affect on Section 7 rights. The Board held in Tri-County Medical Center, Inc.<sup>27</sup> that no-access rules which deny off-duty employees entry to parking lots, gates and other outside non-working areas will be found invalid, except where justified by business reasons. The Employer has shown no business justification for this rule, and we therefore conclude it is unlawful.

The new rules promulgated in response to the Union's organizing activity are also unlawful. The rule requiring that off-duty employees receive permission from Misra to be at the hotel, and the rule prohibiting access to the hotel, before and after shifts, are unlawful under Tri-County Medical for the reasons discussed above. The rule prohibiting employees from visiting other departments to discuss non-work related matters during work time is facially valid but discriminatory in that the Employer has permitted such conversations regarding other matters such as lotto and football pools.

### III. The Arbitration Provision

We conclude, in agreement with the Region, that the Employer violated Section 8(a)(1) by maintaining the B.E.S.T. Problem Solver arbitration provision in the employee Handbook. The provision impermissibly requires employees to waive their statutory right to file charges with the Board.

Section 10(a) of the NLRA provides in relevant part that the Board:

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<sup>27</sup> 222 NLRB 1089 (1976).

is empowered...to prevent any person from engaging in any unfair labor practice...This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.<sup>28</sup>

From its inception, the NLRA has permitted the Board to treat individual contracts of employment, when used to frustrate the exercise of statutory rights, as either void or voidable. In National Licorice,<sup>29</sup> the Supreme Court found that individual employment contracts which required employees to relinquish the right to strike, to demand a union security clause, or a written contract with any union, and expressly foreclosed arbitration as to a discharge, imposed illegal conditions on the exercise of Section 7 and 8 rights. The Court found the effect of the clause barring arbitration of a discharge was to "discourage, if not forbid," the presentation of grievances, by discharged employees to the employer through a union, or in any way except personally.<sup>30</sup> Consistent with National Licorice, the Board has regularly held that an

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<sup>28</sup> The House Conference Report No. 510 on H.R. 3020 (the Taft-Hartley Act) reads:

The Senate amendment [to Section 10(a)], because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions suable, omitted the language giving the Board exclusive jurisdiction of unfair labor practices, but retained that which provides that the Board's power shall not be affected by any other means of adjustment or prevention. 1 Legislative History of the Labor Management Relations Act of 1947, p.556.

<sup>29</sup> National Licorice Co. v. NLRB, 309 U.S. 350 (1940).

<sup>30</sup> Id. at 360. See also J.I. Case v. NLRB, 321 U.S. 332, 337 (1944), where the Supreme Court held that individual employment contracts were not a bar to the selection of a collective-bargaining representative, noting, "Wherever private contracts conflict with [the Act's] functions, they must obviously yield or the Act would be reduced to a futility."

employer violates the Act when it insists that an employee waive his statutory right to file charges with the Board or to invoke his contractual grievance-arbitration procedure.<sup>31</sup>

The arbitration provision involved in this case has precisely the same unlawful effect as these waiver demands or agreements long condemned by the Board. The arbitration provision requires, as a condition of employment, that the employee relinquish his/her right to file charges with the Board. The employee instead agrees to resolve any dispute concerning employment by using the Employer's unilaterally chosen arbitration process. We further conclude that the Employer's arbitration plan is not comparable to or an adequate substitute for the Board's processes. The Act permits the employee to claim that his termination violated his statutory rights and to seek reinstatement regardless of tenure with the Employer. The instant arbitration provision prevents employees with less than three years tenure from seeking reinstatement.

[FOIA Exemption 5

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#### IV. The Preemption and Bill Johnson's issues

We agree with the Region that the Employer's lawsuit has a retaliatory motive, and that portions of the lawsuit lack a reasonable basis in fact or law.

Under Bill Johnson's Restaurants, the Board may enjoin as an unfair labor practice the filing and prosecution of a state court lawsuit when the lawsuit lacks a reasonable basis in fact or law and was commenced for a retaliatory motive.<sup>32</sup> The Board may also enjoin lawsuits that have an illegal objective or which are preempted by the Act.<sup>33</sup> A lawsuit is preempted if "it is clear or may fairly be assumed that the activities are protected by Section 7...or

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<sup>31</sup> See, e.g., Kolman/Athey Division of Athey Products Corporation, 303 NLRB 92 (1991); Kinder-Care Learning Centers, 299 NLRB 1171 (1990); Great Lakes Chemical Corp., 298 NLRB 615, 622 (1990); Retlaw Broadcasting Co., 310 NLRB 984 (1993).

<sup>32</sup> 461 U.S. 731, 743-44, 748-49 (1983).

<sup>33</sup> Id. at 737-38 fn. 5.

[prohibited] by Section 8," or even if they are "arguably subject" to those sections.<sup>34</sup>

In the instant case, the Employer seeks to enjoin the Union from engaging in certain conduct protected by Section 7 and permitted by California law, on its "premises," including "exits, entrances, [and] parking lots."

The Board has ruled that Section 7 protects nonemployees engaging in picketing or other publicity for the purpose of truthfully advising the public that an employer does not employ union members or have a contract with a labor organization.<sup>35</sup> In Lechmere, Inc. v. NLRB,<sup>36</sup> the Supreme Court held that, except in narrow circumstances, Section 7 of the Act does not authorize trespasses by non-employee organizers. However, an employer violates Section 8(a)(1) if it interferes with non-trespassory Section 7 activity. Thus, the threshold question in determining whether the Employer's lawsuit is directed at protected activity is whether the Employer has a sufficient property interest in the areas from which it is trying to exclude the Union to make the Union's activity there trespassory.

It is well established that property rights are generally created by state law rather than federal law; thus, we must look to the law of the State of California to determine the nature and extent of the Employer's property interest.<sup>37</sup> California recognizes only a weak property interest in the areas outside business establishments and has determined, as a matter of state labor law and policy, that this interest is insufficient to exclude individuals engaged in peaceful union activities.<sup>38</sup> Thus, in Sears, supra, the California Supreme Court held that, under the

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<sup>34</sup> San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959).

<sup>35</sup> See Indio Grocery Outlet, 323 NLRB 1138 (1997), enfd. sub nom. NLRB v. Calkins, 187 F.3d 1080 (9<sup>th</sup> Cir. 1999).

<sup>36</sup> 502 U.S. 527 (1992).

<sup>37</sup> Bristol Farms, 311 NLRB 437, 438-39 (1993).

<sup>38</sup> Sears v. San Diego District Council of Carpenters, 158 Cal. Rptr. 370 (1979); In re Catalano, 171 Cal. Rptr. 667 (1981); Schwartz-Torrence v. Bakery & Con. Workers Union, 40 Cal. Rptr. 233, 234, 238 (1964).

Moscone Act (Cal. Code of Civ. Proc. 527.3), the employer could not evict pickets protesting Sears' refusal to adhere to a master carpentry agreement from the privately-owned sidewalk surrounding its store. The court first found that, independent of any constitutional right, the State of California could by statute or judicial decision permit union activity on private property as a matter of state labor law.<sup>39</sup> The court then interpreted the Moscone Act, which prohibited injunctions against persons involved in peaceful picketing at "any place where any person or persons may lawfully be," as insulating from the court's injunctive power all union activity declared to be lawful under prior California decisions. Since Schwartz-Torrance and In re Lane<sup>40</sup> had established the legality of peaceful union picketing on private sidewalks outside a store, the court concluded that the State Legislature had now codified this rule into its labor statutes.<sup>41</sup>

The Sears court's determination to allow peaceful picketing on the employer's external property did not

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<sup>39</sup> The court noted Robins v. Pruneyard, 23 Cal. 3d 899 (1979), recently decided, and said that:

The *Robins* decision rests on provisions of the California Constitution. In the instant case, our decision rests on the terms of Code of Civil Procedure section 527.3; accordingly, we express no opinion on whether the California Constitution protects the picketing here at issue.

See also Schwartz-Torrance, 40 Cal.Rptr. at 234, where the court found that the union's strong interest in picketing rested both upon constitutional principles protecting free speech and upon state policy favoring concerted activities of employees.

<sup>40</sup> 79 Cal.Rptr. 729 (1969).

<sup>41</sup> The court also noted that California trespass statutes exempt "lawful" union activity from the definition of criminal trespass. 158 Cal.Rptr. at 379, n. 9. See also In re Catalano, 171 Cal.Rptr. 667, 670 n. 4 (1981) (union representatives could not be convicted of violating trespass laws for entering jobsite to "investigate the safety of working conditions;" statute specifically exempts such lawful union activity as well as activities "for the purpose of engaging in any organizational effort").

depend on whether the sidewalk constituted a "public forum" where members of the public could congregate generally to exercise their free speech rights. Rather, the court found that the California legislature had determined, as a matter of state labor law, that the rights of property owners to the exterior areas surrounding business establishments must be subordinated to the rights of persons engaging in peaceful labor activities directed at those establishments.<sup>42</sup> Although Sears may not extend to peaceful labor activities within a business establishment like the Hotel, it is clear that the Union cannot be prohibited from engaging in labor activities on the exterior premises such as parking lots and entrances.

We conclude, therefore, that portions of paragraphs (a), (c) and (d) of the lawsuit are baseless under state law and retaliatory against protected activity in that they seek to enjoin Section 7 conduct which is expressly permitted by state law. Thus, although the Employer may seek to enjoin, inside the hotel, the activities listed in paragraphs (a), (c) and (d), the portions of these paragraphs that seek to restrain the Union's activities on the outside premises of the hotel are unlawfully overbroad. The Region should not allege that paragraph (b) is baseless and retaliatory because neither California nor the Act permits blocking of access even on the exterior of an employer's premises, and the Employer has presented at least some evidence that blocking may have occurred. For the same reasons, the portions of paragraphs (a) and (c) concerning blocking, massing, harassment, intimidation, and coercion are not unlawful.

Finally, we conclude that, as soon as complaint issues, the state court suit is preempted. In Loehmann's Plaza,<sup>43</sup> the Board held that once a complaint issues alleging violations involving arguably protected activity, a state court lawsuit concerning the same issues is preempted and the continued pursuit of such a lawsuit violates Section 8(a)(1).<sup>44</sup> A respondent therefore has an affirmative duty to take action to stay the state court lawsuit within seven days following issuance of the Board complaint.<sup>45</sup> [FOIA Exemption 5

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<sup>42</sup> 158 Cal.Rptr. at 378.

<sup>43</sup> Loehmann's Plaza, 305 NLRB 663 (1991), revd. on other grounds, 316 NLRB 109 (1995).

<sup>44</sup> Id. at 670.

<sup>45</sup> Id. at 671.

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B.J.K.

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<sup>46</sup> [*FOIA Exemption 5*

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