

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

## Advice Memorandum

DATE: September 18, 1996

TO : Daniel Silverman, Regional Director  
Region 2

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

SUBJECT: Barnard College  
Case 2-CA-29350

512-5012-8700

This case was submitted for advice on whether the Employer unlawfully denied striking employees access to its premises.

The Employer's campus is enclosed by fences surrounded by public sidewalks. The fences contain four gate entrances which are open to the public during weekday hours. During evenings, weekends and special occasions, only the single main gate is open and individuals may not enter there without producing a College identification. Two of the other three gates are connected by a footpath which runs the length of the campus. Members of the public regularly use this footpath during the weekday as a convenient shortcut across the Employer's property.

The Union represents the Employer's clerical employees and the parties' most recent bargaining agreement expired on December 31, 1995. The Union engaged in an initial economic strike from February 22 to March 5, 1996. During this strike, the Employer followed its weekend policy for gate access, closing all but the main gate. A second economic strike began on April 10 and continues to date. During this strike, the Employer initially followed its usual gate opening procedures. At various times early in this second strike, groups of striking employees entered the campus to handbill, chant, blow whistles, and bang pots. The Employer did not request these employees to leave and did not take any disciplinary action against them.

In mid to late April, the Employer's approach changed apparently in reaction to some different types of Union demonstrations. On April 13 at a campus residential hall, the Employer hosted a reception for minority students who

had recently received admission notices. A group of striking employees led by the Union President entered the residential hall and chanted union slogans. On April 23, the Employer hosted an open house for all newly admitted students and their families. A group of striking employees together with some students engaged in a demonstration inside a building that housed administrative offices and classrooms. The group blew whistles, used bullhorns, chanted slogans and yelled and also banged on office doors. The group then exited to disturb campus tours with similar conduct. The group then engaged in the same conduct inside another building; both in building demonstrations lasted around 20 minutes.

On April 24, the Employer sent letters to several employees who had been identified as part of the above campus demonstrations. The letters advised five of these employees that they had entered campus without permission, had participated in the disruption of College events, and that further misconduct would subject them to discipline including possible termination. The letters to three other employees advised that they had engaged in disruption of College events and would be suspended for three days at a future appropriate time. All the letters warned that the employees may not enter "any College property, other than to report to work."<sup>1</sup>

On this same date, April 24, the Employer sent the Union a letter informing it of the above disruptions and advising it that striking Union members were "not permitted on campus, and may not enter the College buildings, including off-campus residence halls." In a subsequent June 13 letter, the Employer clarified its earlier letter by stating that the Employer "will not deny access to striking employees to the extent that such employees engage in those peaceful activities which [the Employer] permits of the general public, i.e., passage [on the footpath between two of the gates] during those periods of time when [those] gates are open."

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<sup>1</sup> On April 25, the day after the Employer sent these letters, a group of striking employees led by the Union again engaged in a disruptive demonstration both inside and outside an Employer building.

We conclude that the Employer lawfully denied the strikers access for the purpose of communicating with the public under A-1 Schmidlin,<sup>2</sup> but that the Employer's denial of access was unlawfully overbroad as also denying access for the purpose of communicating with fellow employees under Tri-County Medical.<sup>3</sup>

B. The Applicable Access Standard: Lechmere or Jean Country

1. Pre-Lechmere Precedent.

In NLRB v. Babcock & Wilcox, Co.,<sup>4</sup> 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 Aviation<sup>5</sup> that an employer cannot prohibit employees from union solicitation activities on company property before or after working hours.<sup>6</sup> The Court reversed holding that the Board erred when it "failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees."<sup>7</sup> 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 organizers." Ibid. (emphasis supplied).

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<sup>2</sup> A-1 Schmidlin Plumbing and Heating Co., 312 NLRB 201 (1993) relying upon Jean Country, 291 NLRB 11 (1988).

<sup>3</sup> Tri-County Medical Center, 222 NLRB 1089 (1976).

<sup>4</sup> 351 U.S. 106 (1956).

<sup>5</sup> Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803-04 n.10 (1945), reh'g denied 325 U.S. 894.

<sup>6</sup> The Babcock and Wilcox Co., 109 NLRB 485, 493 (1954).

<sup>7</sup> NLRB v. Babcock & Wilcox, 351 U.S. at 113.

Subsequently, in Hudgens v. NLRB,<sup>8</sup> 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.<sup>9</sup>

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,"<sup>10</sup> 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." Id., 424 U.S. at 522. 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." Ibid.

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.<sup>11</sup>

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<sup>8</sup> 424 U.S. 507 (1976).

<sup>9</sup> Scott Hudgens, 205 NLRB 628, 631 (1973).

<sup>10</sup> Hudgens v. NLRB, 424 U.S. at 521.

<sup>11</sup> Hudgens v. NLRB, 424 U.S. at 521 (quoting Central Hardware v. NLRB, 407 U.S. 539, 543 (1972)).

## 2. Lechmere

In Lechmere, Inc. v. NLRB,<sup>12</sup> 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 Country, 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. Lechmere, 112 S.Ct. at 850.

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 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.<sup>13</sup> 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

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<sup>12</sup> 112 S.Ct. 841 (January 27, 1992).

<sup>13</sup> 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.

itself), however, the Board was not permitted to engage in that same balancing (and we reversed the Board for having done so).<sup>14</sup>

Thus, the Court left open the question of whether Jean Country applies to cases involving employee activities.<sup>15</sup>

3. Current Board Law: A-1 Schmidlin

In A-1 Schmidlin, supra, the ALJ found that under Jean Country the employer unlawfully 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." 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...."<sup>16</sup>

The Board in Schmidlin did not address the Hudgens decision which, as noted above, applied the principles of Babcock/Lechmere to determine the access rights of striking employees appealing to customers of their employer. Similarly, in Providence Hospital,<sup>17</sup> the Board

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<sup>14</sup> Lechmere, 112 S.Ct. at 848 (emphasis in original) (quoting Babcock, 351 U.S. at 109-10).

<sup>15</sup> 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.

<sup>16</sup> 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).

<sup>17</sup> 285 NLRB 320 (1987).

applied a Babcock analysis (as then understood by Fairmont Hotel)<sup>18</sup> to off-duty employees seeking access to communicate with the public.<sup>19</sup> Thus, inasmuch as the picketers here are striking employees, under Hudgens and Providence Hospital, which essentially treated the employees there as nonemployees, one could have concluded prior to A-1 Schmidlin that Babcock -- under its most recent refinement in Lechmere -- would govern the instant case.

However, without more guidance from the Board, we believe that under A-1 Schmidlin, the striking employees' picketing here is 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. Accordingly, a Jean Country analysis will determine the legality of the Respondent's exclusion of the striking employees from its property at least with respect to communications with the public.

### C. The Jean Country Analysis

Applying the Jean Country test, both the Employer and the Union are asserting strong rights. The strikers are asserting a core Section 7 right and the Employer is the sole occupant of its facility although it does permit some public access in certain areas. Concerning whether the striking employees' have reasonable alternative means to communicate with the public, including potential students

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<sup>18</sup> 282 NLRB 139 (1986).

<sup>19</sup> 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, supra; 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.

and their parents, we conclude, in agreement with the Region, that reasonable alternative means do exist.

With few exceptions, all individuals entering or exiting the Employer's campus must necessarily pass through one of the four gate entrances. Since these entrances are from public sidewalks, the striking employees have ample opportunity to picket and/or handbill directly to their public audience.

C. The Tri-County Medical Analysis

We note that the Employer denied access to striking employees in toto and without regard to whether the strikers sought to communicate with the public or with fellow employees. We recognize that the Employer itself was primarily concerned about the public audience for the Union demonstrations, viz., potential students and their parents and what the Employer viewed as disruptive behavior. However, the Employer's ban does not permit strikers to enter nonwork areas on the Employer's property and communicate with fellow employees on nonwork time. Accordingly, we conclude that the Employer's broad denial of access should be tested under Tri-County Medical as well as under A-1 Schmidlin.

In Nashville Plastic Products,<sup>20</sup> the Board reaffirmed the holding in Tri-County Medical that a no-access rule for off-duty employees is valid only if it:

- (1) limits access solely with respect to the interior of the plant and other working areas;
  - (2) is clearly disseminated to all employees; and
  - (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.
- Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates and other outside nonworking areas will be found invalid.

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<sup>20</sup> Nashville Plastic Technologies, Inc. d/b/a/ Nashville Plastic Products, 313 NLRB 462 (1993).

We conclude that the Employer's broad denial of access to the strikers was unlawful as not limited to building interiors and other working areas.

The Employer initially allowed the striking employees access to outside areas of the campus, and then broadly denied such access. Interestingly, the Employer's later broad denial was in apparent reaction to the strikers' interior building demonstrations. Under Tri-County Medical, the Employer lawfully could have denied such interior access, but did not do so. We reject the contention that the Employer had sufficient business justification to deny access even outside buildings and in nonwork areas given the fact that the Employer had freely allowed such access in the past. The Employer may contend that its broad denial was in reaction to the April 13 and 23 demonstrations which disrupted its hosting of potential students and admitted students, respectively, on those dates. However, the Employer's ban went to far. Therefore, the Employer's over-reaction and broad denial of access on all occasions was not justified.

Finally, we would not allege that the Employer's broad denial of access constituted disparate treatment and therefore was discriminatory. The Union alleges that the Employer has allowed student demonstrations and also vendor sales on campus property. However, the Employer notes that its rules allow for only peaceful, nondisruptive student demonstrations and that it has taken action against students whose behavior exceeded "peaceful protest." We note that the relationship between the Employer and tuition paying students is markedly different than the relationship between the Employer and its employees. We therefore conclude, in agreement with the Region, that there is insufficient evidence to establish disparate treatment of the striking employees based upon the Employer's reaction to student demonstrations.

Accordingly, further proceedings are warranted to the limited extent that the Employer's changed access policy amounted to an overbroad restriction against striking employee access outside buildings and in nonwork areas for the purpose of communicating with fellow employees.

B.J.K.

