

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

Advice Memorandum

DATE: July 2, 1999

TO : Ronald M. Sharp, Regional Director
Region 18

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

SUBJECT: Barnes & Noble
Case 18-CA-15074

512-5012-5001
512-5012-6712-6700

This Section 8(a)(1) case was submitted for advice on the issue of whether the Employer unlawfully discriminated against nonemployee handbillers who sought to place area standards handbills in a bin located in the vestibule of the Employer's Roseville, Minnesota, bookstore.

FACTS

The Employer operates bookstores throughout the United States. At the Roseville store, which is located in a strip mall, the Employer's leasehold includes a vestibule where the Employer maintains bins which contain free literature for customers to peruse. Some of the bins are marked for particular publications and some are not. On December 18, 1998, the free literature at Roseville included:

City Pages ("the News and Arts Weekly of the Twin Cities"); an Open University flyer containing a list of courses; the Minnesota Woman's Press; flyers for Roseville Technology Center Community Training Courses; the Twin Cities Internet Guide & Directory; the St. Paul Journal ("A Community Journal of Unique Tastes and Traditions"); Pulse of the Twin Cities ("Your locally grown alternative newspaper"); Twin Cities Blues News; The Midwest Wine and Cigar Connection (newspaper); Computer User (newspaper); Buon Gusto (a newspaper dealing with "Food, Wine and Fine Dining"); the Great River Village Journal ("A Country Journal with Unique Tales and Traditions"); and two Employer flyers: "Discover Great New Writers. A Retrospective 1990-1998 Eight Years of Great Writers," which listed books and authors, and "Barnes & Noble Explorations," which contained book reviews and prices.

The Employer's counsel provided the Region with a two-page extract (pages 8 and 9) of an untitled document, and stated that the extract represented the Employer's "vestibule policy." The extract recites that the Employer seeks to "create an atmosphere of community support and unity." Pursuant to that goal, store managers "may display materials that promote the works of important organizations in your community."

[E]xamples include: calendars of events for [l]ocal [t]heatres... College and University Lecture Series [and]... Performing Arts Flyers... Local Community Event Flyers... Volunteer Information for Special Needs Organizations... Free Flyers.

A section of the extract entitled "Publication Guidelines for the Vestibule Area" states that the

publications should be educational in nature and reflect the most popular periodicals for the market (i.e., alternative weeklies, parents' papers, etc.)... Do not place sales oriented publications in the vestibule area.

A section simply entitled "Guidelines" states that "Materials must promote an event, program, or organization that supports literature, literacy, the arts, and/or the community." A section entitled "Displaying the Material" gives the store manager the options of placing material in a free newspaper rack, the vestibule area, or bulletin boards "(if applicable)." A section entitled "Becoming a Resource" invites the store managers to "schedule community events in your store" and to approach "the most popular periodicals" and to invite them to place their publications in the store entrances, specifically without regard to the Employer's ability to secure advertising space or exposure in the publication.

The Union, the International Brotherhood of Electrical Workers, has a dispute with Augusta Electric, an electrical subcontractor which was performing work for a general contractor on the Employer's St. Cloud, Minnesota, store. In furtherance of its dispute, the Union was distributing pamphlets which stated:

[The Employer] is unfair to workers Please buy your books at some other store that does not break down [] community standards Please do not patronize [IBEW] is appealing to you the consumer. We are not seeking to induce any person to cease work or refuse to make deliveries.

On December 18, 1998, the Union attempted to handbill on the sidewalk directly in front of the exterior entrance to the store. Representatives of the Employer and mall security informed the Union handbillers that if they did not leave, local police would be called, noting that the mall had a policy of barring solicitation without prior approval by the mall. The police were summoned; the Union handbillers left when they were threatened with arrest. The mall also gave the Union representatives a "Trespass Notice" barring them from being in the mall for the next 30 days.¹

Before leaving the mall, the Union representatives asked the Roseville store manager to place a few hundred pamphlets in the publication bins in the vestibule. The store manager refused.

The Employer, by counsel, represented that the Employer is not discriminating against the Union because its policy states that the materials in the vestibule "must promote an event, program, or organization that supports literature, literacy, the arts, and/or the community," and the Union materials do not meet this standard.

ACTION

We conclude that a Section 8(a)(1) complaint should issue, absent settlement, alleging that the Employer's denial of permission to the Union's nonemployee representatives to place their pamphlets in the vestibule was discriminatory and unlawful.

In NLRB v. Babcock & Wilcox, 351 U.S. 105, 112 (1958), the Supreme Court approved the Board's policy of requiring employers to permit nonemployees to distribute literature on an employer's premises where the employer "discriminate[s] against the union by allowing other distribution." In Riesbeck Food Markets,² the Board held that the employer's solicitation policy on its face discriminated against union solicitation of customers. There, the employer maintained a no-solicitation no-distribution no-access policy which specifically prohibited any such conduct involving controversial issues, as well as

¹ The Region has concluded that neither the mall nor the Employer violated the Act when they ordered the Union representatives to cease handbilling and to leave the mall.

² Riesbeck Food Markets, 315 NLRB 940 (1994), enf. denied 91 F.3d 132 (4th Cir. 1996) (unpublished table decision).

activities that might harm the employer's business. In addition, the employer denied access to any individual or group that would not, in the employer's judgment, promote its business. The policy expressly permitted limited access to charitable organizations, and the stores' actual practice was to permit a variety of charitable, quasicharitable, and civic groups to make charitable appeals.

The Riesbeck union commenced informational picketing and handbilling near the customer entrances of two of the employer's stores, with picket signs and handbills which stated that the employer did not employ union members or have a contract with the union, and asked customers not to patronize the employer. The employer, pursuant to its above stated policy, asked the pickets and handbillers to leave. They refused to do so, and the employer thereafter obtained state court injunctions limiting the union's activity to public property away from the employer's stores. The Board found that the employer's conduct was discriminatory. The Board expressly rejected a defense that the employer did not discriminate because its policy and practice denied access to, and prohibited solicitation and distribution by, all persons and activities which adversely affected the employer's business. The Board stated, 315 NLRB at 942, that, "A practice that distinguishes among solicitation based on an employer's assessment of the message to be conveyed is discriminatory within the meaning of Babcock & Wilcox..." and that the employer's rule would vest the employer with discretion to permit or deny access, solicitation and distribution as it sees fit. As informational picketing with a message asking customers not to patronize an establishment is protected activity, the employer's practice was violative of Section 8(a)(1).

In the instant case, the Employer's policy document set forth above evidences conflicting goals. On the one hand, the document recites that the Employer's objective is to "create an atmosphere of community support and unity," and purports to permit placement in its stores' vestibules only of materials which are "educational in nature" and which "promote an event, program, or organization that supports literature, literacy, the arts, and/or the community." In addition, the Employer prohibits the placement of "sales oriented publications in the vestibule area." On the other hand, the Employer's guideline repeatedly mentions approvingly the publications of organizations and noneducational institutions, e.g., "important organizations in your community Special Needs Organizations Materials should reflect the most popular periodicals for the market (i.e. alternative

weeklies, parents' papers etc.) organization that supports ... the community community events ... the most popular periodicals." These materials do not appear to clearly support reading in general or the Employer in particular.

The Employer's practice at the Roseville store similarly reflects a willingness to distribute literature whose relationship with the Employer, or more generally with the products it sells (literature, art and music), is not obvious. Thus, not all of City Pages is likely to be devoted to literature, the arts and music. This is equally true of the Minnesota Woman's Press. We also presume that less of the contents of the other publications in the vestibule were likely to be devoted to these topics. There is no evidence that the Employer screens the literature in the bins in order to bar, e.g., literature containing advertisements promoting competitors of the Employer, such as other bookdealers or retailers who sell a variety of merchandise including books, or internet booksellers which compete with the Employer's retail stores. In these circumstances, we concluded that the Employer's refusal to permit the Union to place its literature in its vestibule discriminated against the Union's message.

The Employer may argue that its discrimination against the placement of Union literature in its vestibule differs from the kinds of discrimination that the Board proscribed in Babcock & Wilcox and its progeny. In analyzing this argument we find distinguishable four kinds of cases:

- (1) cases in which an employer discriminatorily denied its own prounion employees the use of employer bulletin boards,³ because here we are dealing with union agents who are not employees of the employer that barred them access to the premises;
- (2) cases in which an employer lawfully, by its own agents, conveyed its own message to employees, but barred employees or nonemployees from conveying their

³ E.g., Benteler Industries, 323 NLRB 712 (1997), enfd. mem. 149 F.3d 1184, 159 LRRM 2640 (6th Cir. 1998) (incumbent union); Von's Grocery, 320 NLRB 53 (1995); Wells Aluminum Corp., 319 NLRB 798 (1995); Jordan Marsh Stores Corp., 317 NLRB 460 (1995); Miller Brewing Co., 311 NLRB 1364 (1993) (no discrimination found); Honeywell, Inc., 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983).

- message on company property,⁴ because in the instant case the publishers and distributors of the papers in the Employer's bins were not agents of the Employer;⁵
- (3) cases in which an employer lawfully tolerated the presence of others than its own employees on its property, but not the presence of nonemployee union agents, where the activities of the others were "necessary" to the functioning of the employer,⁶ or the others engaged in "work related activities that assisted" the employer,⁷ because that exception is a narrow one⁸ and more to the point, as described above, that exception is not applicable here; and
- (4) cases in which the Board has denied union access while tolerating a few isolated incidents of charitable solicitation,⁹ because what the Employer tolerates herein is neither charitable nor isolated.

⁴ E.g., Hale Nani Rehabilitation & Nursing Center, 326 NLRB No. 37 (1998); Fairfax Hospital, 310 NLRB 299 and fn. 3 (1993), enfd. 14 F.3d 594 (4th Cir. 1993) (unpublished table decision); Summitville Tiles, 300 NLRB 64, 66 (1990); Livingston Shirt Corporation, 107 NLRB 400, 405-406 (1953). See also NLRB v. United Steelworkers of America (Nutone), 357 U.S. 357 (1958).

⁵ Lucile Salter Packard Children's Hospital, 318 NLRB 433 (1995), 97 F.3d 583 (D.C. Cir. 1996).

⁶ George Washington University Hospital, 227 NLRB 1362, 1374 n. 39 (1977), modified 83 LC para. 10566 (D.C.Cir. 1978) (white elephant sale and activities by women's board).

⁷ Rochester General Hospital, 234 NLRB 253, 259 (1978). (activities of nurses' association, displays by drug companies and by manufacturers of medical products, activities of hospital auxiliary group which donated proceeds to hospital and Red Cross blood bank).

⁸ Lucile Salter Packard Children's Hospital, supra, at 433 ("an integral part" of the employer's "necessary functions"); Knogo Corporation, 262 NLRB 1346, 1360-1362 (1982), enfd. in relevant part 727 F.2d 55 (2d Cir. 1984).

⁹ Oakland Mall, 316 NLRB 1160 (1995). See Lucile Salter Packard Hospital v. NLRB, 97 F.3d 583, 587 (D.C. Cir. 1996).

However, we are considering only cases in which an employer has discriminatorily barred nonemployee union organizers or other union agents from handing out literature or engaging in other union activity on its premises.¹⁰ Any argument that the cases cited in footnote 10 do not control the instant case must be based on one or both of two distinctions: first, that an employer enjoys a greater right to bar distribution of a message distributed within the facility itself than a right to bar a message distributed on employer-owned parking lots or sidewalks; and second, that an employer enjoys a greater right to bar a message distributed in its bin than the employer does with respect to a message distributed by a live handbiller or a message placed on a consumer's car windshield. However, there have been two recent Board decisions which did not recognize the first distinction. In both, the Board found unlawful the discriminatory denial of access to nonemployees who sought to convey their message within an employer's premises. Thus, in Lucile Salter Packard Children's Hospital, supra, the nonemployee organizer sought to distribute literature on the premises at a table in a hallway outside a public cafeteria. And in Dow Jones & Co., 318 NLRB 574 (1995), nonemployee agents of CWA sought to meet with employees on company property to discuss an affiliation of their bargaining agent. As for the second distinction, literature in a bin is less invasive of an employer's property rights and of its right to operate its business than is distribution by a live handbiller or by the placement of literature on the consumer's automobile windshield.

In addition, we considered and would distinguish the situation in which a union may argue that it should be able to distribute its literature in a doctor's office because the physician's waiting room contains publications by drug manufacturers describing the nature and cure of various ailments and advancing their products. We recognize that in Rochester General Hospital, supra at 259, the Board held that there was no discrimination where the employer granted access to nonemployees such as representatives of drug and medical product manufacturers who were engaged in "work

¹⁰ Price Chopper, 325 NLRB No. 20 (1997), enfd. 163 F.3d 1177 (10th Cir. 1998); Great American, 322 NLRB 17, 23-24 (1996); Be-Lo Stores, 318 NLRB 1,10,36 (1995); Great Scot, Inc., 309 NLRB 548 (1992), enf. denied on other grounds 39 F.3d 678 (6th Cir. 1994). See also Knogo Corporation, supra; George Washington University Hospital, supra.

related activities that assisted the hospital." There, some of the medical products were medical books that might be of value to hospital physicians. Other products were drugs that the hospital pharmacy purchased and dispensed, i.e., the products of manufacturers with whom the hospital had a business relationship. None of the products were over-the-counter drugs. In the situation we consider, the physician is unlikely to sell the drugs, but the physician may be able to establish that the drug manufacturers' materials explain the nature of and cures for various ailments and promote medications including some that the physician does at times prescribe and will expect his patients to use. Even absent a business relationship between the drug manufacturers and a doctor, the drug manufacturers' publications promote the physicians' operations to a substantially greater degree than the publications in the Employer's vestibule promote its business. Without deciding how the Board should treat the physician's office situation, we simply note that that situation and the facts of the present case are quite different and that a decision in one would not control the decision in the other.

[FOIA Exemption 5

.] The charge does not attack the facial validity of the rule.¹¹ Moreover, a fair reading of the rule which permits a store manager to place materials in the vestibule that are published by "important organizations in your community organization[s] that support ... the community," or that are "local community event flyers" would also permit a store manager to place union literature in general, and the specific literature which is the subject of this case, in the vestibule. [FOIA Exemption 5

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B.J.K.

¹¹ Nor does the Employer claim that the vestibule is a portion of the selling area where solicitation and distribution may be barred. See e.g., J.C. Penney Co., 266 NLRB 1233, 1234 (1983).