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

Advice Memorandum

DATE: August 26, 2008

TO : Martha Kinard, Regional Director
Region 16

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

SUBJECT: CB Richard Ellis 512-5072-3900
Case 16-CA-26188 512-5098

This Section 8(a)(1) case was submitted for advice on whether Lincoln Property had a sufficient property interest in a pedestrian skywalk, which it maintained and used under a license from the City of Dallas, to allow the Employer as Lincoln's Property's building manager to cause police to deny skywalk access to Union handbillers during regular business hours.

We conclude that Lincoln Property's city license did not afford Lincoln Property the exclusive right to possess and use the skywalk during business hours, and that the Employer, asserting Lincoln's insufficient property interest, violated Section 8(a)(1) by causing the police to remove the handbillers.

FACTS

Lincoln Property (Lincoln) owns a large commercial office building (Plaza) and a parking garage located across the street. The garage is used by Plaza tenants but is open for public parking when there is sufficient space. In 1983, Dallas passed Ordinance No. 1784 granting Lincoln a 40 year license to construct a skywalk in the space above, and tunnels in the space below, the city's street separating the garage and the Plaza. The Employer manages the Plaza and the skywalk which connects the second floor of the Plaza to the garage.

The city Ordinance specified certain property, i.e., the depth below and the height above the city street, where Lincoln was licensed access to construct the tunnels and skywalks. The Ordinance accorded Lincoln the right "to occupy, maintain, and utilize [that] certain property . . . for the purpose of constructing, maintaining, and utilizing

pedestrian tunnels and bridges." The Ordinance provided that Lincoln was responsible for the cost of utilities, security, and all routine, custodial and structural maintenance of the skywalk.[1] The Ordinance also provided for pedestrian use by the public upon completion of the skywalk during normal business hours:

> Section 14: Upon completion of the Phase I or Phase II pedestrianway, Grantee agrees such pedestrianway and any connecting linkage within Grantee's dominion and control shall be open for pedestrian use during periods the buildings connected thereby are open to the public during normal business hours, which hours shall initially be from 7:00 a.m. to 7:00 p.m., Monday thru (sic) Saturday, excluding holidays. Grantee shall have the right to change the hours during which the pedestrianways shall be opened to pedestrian use and shall have the right to promulgate rules and regulations, subject to the approval of the City of Dallas. Grantee shall not be required to open or keep open the pedestrianways in the even of fire, act of God or other casualty, civil commotion, governmental regulation order, security consideration, during repair or maintenance deemed necessary by Grantee, or any other cause rendering the use of the pedestrianway unfit or inappropriate for normal use.

Lincoln has not promulgated any rules or regulations under its license but has positioned magnetic locks and card readers in the tunnels and skywalks. After regular business hours, Lincoln "locks down" the tunnels and skywalks allowing access only to individuals with magnetic cards. Individuals without cards may access the skywalk by using an intercom to speak with a security officer.

The Union became involved in an area standards dispute with a subcontractor performing work for a business located in the Plaza. In December 2007, the Union began distributing area standards handbills on the sidewalk outside the Plaza. Around this same time, the Employer

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[1] The Ordinance made Lincoln's license subordinate to the city's right to use the skywalk for a public purpose and allowed the city to giving Lincoln 180 days notice to cancel the license for such purpose.

posted signs at the parking lot entrance to the skywalk stating "Access to Lincoln Plaza for Tenants' Usage Only."

Five months later on May 14, 2008 during normal business hours, the Union positioned two individuals in the skywalk to distribute area standards handbills. The Employer summoned the police, told them it had an agreement with the city to maintain, secure and oversee the skywalk, and provided them with a copy of the Ordinance. The Employer then told the handbillers to leave and the police issued the handbillers written warnings for criminal trespass. The Union handbillers have not returned to the skywalk; the Union has continued to handbill on the sidewalk outside the Plaza.

ACTION

Lincoln's city license did not afford it the exclusive right to possess and use the skywalk during normal business hours, and the Employer, asserting Lincoln's insufficient property right, violated Section 8(a)(1) by causing the police to remove the handbillers from the skywalk.

Except in limited circumstances, an employer may nondiscriminatorily deny the use of its private property to non-employee union representatives engaged in Section 7 handbilling.[2] The employer has the burden of establishing that it possesses a property interest entitling it to exclude others.[3] In determining whether the employer has shown an adequate property interest, the Board construes relevant state law and examines relevant documentary and other evidence.[4]

The Employer argues that Lincoln was licensed the right to "occupy, maintain and use" and thus the right to exclude others. We note, however, that the Ordinance differentiates between Lincoln's rights in the city space over the street versus Lincoln's rights in the tunnels and skywalks. While the Ordinance accords Lincoln the right

[2] See Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

[3] Food For Less, 318 NLRB 646, 649 (1995), enfd. in pertinent part 95 F.3d 733 (8th Cir. 1996).

[4] Ibid.

"to occupy, maintain and utilize" the city space for construction, it accords only the rights of "maintaining and utilizing" the tunnels and skywalks. The language according Lincoln only the right to "utilize" the skywalk does not clearly indicate Lincoln had a right to exclude others.[5] More importantly, the Ordinance requires Lincoln to agree to public pedestrian use of the skyway during normal business hours, which was when the Employer excluded the Union handbillers.

Section 14 explicitly provides that the "pedestrianway and any connecting linkage within [Lincoln's] dominion and control shall be open for pedestrian use during periods the buildings connected thereby are open to the public" during normal business hours. Section 14 relieves Lincoln of its agreement to keep open the skywalk only when the skywalk is unfit or inappropriate "for normal use." The language "shall be open for pedestrian use" and "for normal use" indicates that the Lincoln does not have the right to exclude the public from using the skyway for such use during business hours.

Research uncovered no Texas state law, and the Employer has pointed to none, indicating that Lincoln had exclusive use under this license.[6] Under Board law, Lincoln's obligations to maintain and keep secure the skywalks during regular business hours are not indicia of the right of exclusive use. The Board has found similar factors to be insufficient to transform a mere easement interest into an exclusive property right.[7] We therefore

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[5] A license to use generally is only a defense to trespass. See Restatement (First) of Property, Section 519, Comment c. "A license permitting the use of land of the licensor protects the licensee from liability for trespass . . ."

[6] Compare Maples v. Erck, 630 S.W.2d 488, 492 (Tx. Ct Appls. 1982)(parties' agreement establishing "boundary lines forever" of the parties' fences on their adjoining property did not grant "exclusive and permanent right to possession" but rather granted only "a non-exclusive permission or license to use the property . . .")

[7] Food For Less, 318 NLRB at 650 (nonexclusive easement in shopping-center common areas not transformed into exclusory property interest merely because employer repaired and maintained parking lot and maintained insurance coverage); Mr. Z's Food Mart, 325 NLRB 871, 871 n.2, 883-84 (1998),

find that the Employer has not carried its burden of showing that Lincoln had a sufficient property interest to exclude the Union handbillers during regular business hours.

We also conclude that the Employer, asserting Lincoln's insufficient property right as its agent, violated Section 8(a)(1) by causing the police to remove the handbillers from the skywalk. Section 2(2) of the Act includes within the definition of employer "any person acting as an agent of an employer, directly or indirectly . . . ." Thus, the Board has found a management company and a labor consultant liable for unfair labor practices they themselves committed as agents of the employers.[8]

The Employer, hired as Lincoln's property manager and asserting Lincoln's license, caused the police to remove the handbillers from the skyway. Since the Employer itself committed this violation, the Region may issue complaint against the Employer.[9]

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enf. denied in pertinent part 265 F.3d 239 (4th Cir. 2001) (nonexclusive easement in shopping-center common areas not transformed into exclusory property interest merely because employer maintained liability insurance coverage, patrolled common areas, expelled skateboarders, and used common-area sidewalk to store carts and conduct business without owner's objection).

[8] See, e.g., Blankenship and Associates, Inc., 306 NLRB 994 (1992), enf. 999 F.2d 248 (7th Cir. 1993); Richmond Convalescent Hospital, Inc., 313 NLRB 1247 (1994)(employer and company it hired to manage its facility both committed, inter alia, 8(a)(3) discharges and 8(a)(1) failures to remit deducted dues to union). See also Alliance Rubber Co., 286 NLRB 645, 645-46, 668-69 (1987)(polygraph company acting as employer agent itself violated the Act); Projections Inc., Case 34-CA-9217, Advice Memorandum dated October 3, 2000 (company producing threatening video tape shown to employees of employer violated 8(a)(1) as employer's agent). Cf. Blankenship and Associates, Inc. (Diamond Printing Co.), 290 NLRB 557, 558 (1988)(labor consultant not liable as respondent for advising employer to commit 8(a)(1) violation where consultant did not commit violation himself).

[9] [*FOIA Exemptions* 2 and 5

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Accordingly, the Region should issue complaint, absent settlement.

B.J.K.