

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

# Advice Memorandum

DATE: February 13, 2006

TO : Dorothy L. Moore-Duncan, Regional Director  
Region 4

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

SUBJECT: High Associates  
4-CA-34193

512-5012-8300-0000  
512-5012-8320-2500  
512-2012-8320-5022

This case was submitted for advice on the issue of whether a property manager representing the majority owner in a business park possessed a sufficient property interest under Pennsylvania law to exclude Union organizers from distributing handbills on a concrete drainage area abutting a public road running through the business park.

We conclude that the property manager did not possess a sufficient property interest to exclude the Union from distributing handbills, as the drainage area where the handbillers were stationed is public property. We also conclude, in the event that the drainage area is found to be private property, that there was an insufficient property interest to exclude the Union because the organizers did not commit trespass under Pennsylvania law where the property was open to the public and not adequately posted against the Union's activities.

## **FACTS**

High Properties is the majority owner<sup>1</sup> of the Greenfield Corporate Center (the Center), which is a 450 acre business park in Lancaster, Pennsylvania that houses numerous commercial and industrial businesses. High Properties also manages the Center, through its agent High Associates. In addition to the commercial and industrial businesses within the corporate park's boundaries there are four eateries, two hotels, a branch of Penn State University, a daycare center, a dry cleaner, a bank, a flower shop, a hair salon, a branch of the U.S. Postal Service, a FedEx World Service Center, an exercise circuit, walking trails, a park and a pavilion that are all held open to the public. The Center touts on its website that

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<sup>1</sup> High Properties owns 428 of the 450 acres.

its amenities provide both "tenants and visitors" with time-saving conveniences. Signs posted at the four main entrances and at several points where the walking trail meets interior roads state:

WELCOME TO GREENFIELD CORPORATE CENTER

FOR THE ENJOYMENT OF  
OUR PEDESTRIAN PATRONS  
THE PARK OPENS AT  
SUNRISE AND CLOSES AT 9:00 P.M.

TRESPASSING IS PROHIBITED.  
SKATEBOARDING OR OTHER UNAUTHORIZED USE OF THE PARK IS NOT PERMITTED  
HEREIN, UNDER PENALTIES PROVIDED IN  
SECTION 3503 OF THE PENNSYLVANIA CRIME CODE OF 1972

The Teamsters Local 628 (the Union) represents a unit of Chas. Levy Company drivers who work at a facility in the Greenfield Corporate Center. The Union is attempting to organize Levy's warehouse employees who work at that same facility. At 4:00 p.m. on September 27, 2005, 4-8 Union organizers entered the Center and stood near the intersection of Colonial Village Lane and Old Homestead Lane. These roads are both public with each having a 50 foot wide right of way. The Union organizers proceeded to hand out flyers to passing cars, signaling the drivers to turn down a dead end street in order to receive the literature. Shortly after 4:00 p.m., a High Associates executive approached the Union agents and informed them that the location where they were standing was private property but that they could stand on the concrete drainage area at the intersection.<sup>2</sup> The Union then relocated to the concrete drainage area and continued distributing handbills.

At about 4:40 p.m. Police Officer Werner arrived at the intersection, responding to a call placed by Chas. Levy Company claiming that the Union was interfering with traffic. The officer determined that the Union was not blocking traffic. While the officer was speaking with the Union, a second representative of High Associates approached him. The representative requested that the officer direct the Union to leave because it was not

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<sup>2</sup> High Associates maintains that its executive only informed the Union that the agents were standing on private property and they should move to the public road and check with the police to determine if there were any restrictions on activities on public roads.

welcome on the property. The Union agents informed the officer that they had spoken with another High Associates executive earlier in the hour and were told that they were allowed on the concrete drainage area. The Union left the property at approximately 5:00 p.m. In a subsequent meeting with the officer, a High Associates representative reiterated that the Union representatives were not permitted anywhere on High's property.

#### ACTION

We conclude that High Associates did not possess a sufficient property interest to exclude the Union from distributing handbills, as the drainage area where the handbillers were stationed is public property. We also conclude, in the event that the drainage area is found to be private property, that there was an insufficient property interest to exclude the Union because the organizers did not commit trespass under Pennsylvania law where the property was open to the public and not adequately posted against the Union's activities.

An employer's right to exclude union representatives engaged in Section 7 activity from its private property is controlled by Lechmere, Inc. v. NLRB.<sup>3</sup> In Lechmere, the Court found that, except in narrow circumstances, "...Section 7 guarantees do not authorize trespasses by nonemployee organizers."<sup>4</sup> Conversely, conduct which would not constitute a "trespass" is not controlled by Lechmere, and an employer violates Section 8(a)(1) if it interferes with nontrespassory Section 7 activity. In a number of cases since Lechmere, the Board has held that an employer must have a property interest under state law sufficient to make the union's presence on the property a "trespass" before it can lawfully assert a Lechmere privilege to exclude union handbillers.<sup>5</sup>

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<sup>3</sup> 502 U.S. 527 (1992).

<sup>4</sup> Id. at 538.

<sup>5</sup> Mr.Z's Food Mart, 325 NLRB No. 162 (1998); Great American, 322 NLRB 17, 20-21 (1996); Food For Less, 318 NLRB 646, 649 (1995), enfd. in relevant part sub nom. O'Neil's Markets v. NLRB, 95 F.3d 733, 153 LRRM 2291 (8<sup>th</sup> Cir. 1996); Payless Drug Stores, 311 NLRB 678 (1993); Bristol Farms, 311 NLRB 437, 438 (1993).

Here, the local township zoning manager has confirmed that the roads at the intersection where the Union was distributing handbills are public roads and that each road has a 50 foot wide right of way. The concrete drainage area in question directly abuts the public roads and is likely encompassed in the right of way. However, as the zoning manager conceded, to properly determine if the drainage area is on public property, the land must be surveyed. If it is confirmed that this is public property, High Associates did not have a sufficient property interest in the concrete drainage area to assert a Lechmere privilege.<sup>6</sup>

The Board's recent decision in Nation's Rent<sup>7</sup> is not to the contrary. In Nation's Rent the Board held that an employer without a property interest may lawfully seek to have the police take action against pickets where the employer is motivated by a reasonable concern, such as traffic tie-ups or public safety, even if the police decide that taking action against the pickets is unwarranted.<sup>8</sup> Here, the violation does not rest on summoning the police. That action was taken by Chas. Levy Company and is not alleged to be unlawful. Rather, the violation is High Associate's assertion to the police and the Union that the Union should be barred from its property. High Associates made no reference to safety or other concerns, and has not since contended that it was concerned about traffic or public safety. Therefore, Nation's Rent is inapposite.

In the alternative, in the event that the concrete drainage area is determined to be private property, we conclude that High Associates had insufficient property interest to exclude the Union because under Pennsylvania law, the Union was not trespassing. In Pennsylvania, an individual commits the offense of defiant trespass where that individual "enters or remains in any place as to which notice against trespass is given by: i) actual communication to the actor; or ii) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders ..."<sup>9</sup> A statutory defense to a trespass action exists where "the premises were at the time

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<sup>6</sup> See, Great American, supra.

<sup>7</sup> 342 NLRB No. 19 (2004).

<sup>8</sup> Id. at slip. op. 4.

<sup>9</sup> 18 Pa. Cons. Stat. Ann. § 3503(b) (West 2002).

open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises."<sup>10</sup> Thus, a property owner whose property is open to the public may assert a trespass against peaceful handbilling, but only if it first establishes conditions restricting the use of the property. The conditions must be publicized and unambiguously communicate what the property owner considers to be prohibited activity and the geographic parameters to which those conditions apply.

For instance, in Coatesville Development Co. v. Food & Commercial Workers Local 1357,<sup>11</sup> a Pennsylvania court declined to enjoin a union from picketing and handbilling on a private sidewalk and parking lot immediately outside a supermarket. The court found that the union had not trespassed on the company's property because the only posting against trespass was inside the store's vestibule and it stated only that "solicitation and distribution" were prohibited "on company premises."<sup>12</sup> The court acknowledged that, although the property was clearly open to the public, the company could restrict the use of the property; however, the restriction did not state unequivocally that picketing was prohibited and did not make it clear that the prohibition extended to the store's parking lots and sidewalks.<sup>13</sup>

Similarly, here, the Greenfield Corporate Center is held open to the public. The business park houses not only commercial and industrial businesses, but several retail business, walking trails, an exercise circuit, a park and a pavilion that are all open to the general public. Signs are posted throughout the Greenfield Corporate Center announcing the park hours and the prohibition of skateboarding and other "unauthorized uses" of the park and trespassing. These signs, however, do not restrict the use of the property with the specificity required by Coatesville - i.e. they do not specifically prohibit distribution or solicitation and are ambiguous as to the time periods and geographic boundaries to which the

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<sup>10</sup> 18 Pa. Cons. Stat. Ann. § 3503(c) (West 2002).

<sup>11</sup> 542 A.2d 1380 (Pa. Super. Ct. 1988).

<sup>12</sup> Id. at 1384-1385.

<sup>13</sup> Ibid.

prohibitions apply.<sup>14</sup> Accordingly, as in Coatesville, High Properties' conditions for access to a business park open to the general public were not clearly communicated to the Union organizers, and the Union was entitled to handbill there.

In view of the strong arguments above and the absence of clear evidence that High Associates discriminatorily permitted access to other organizations participating in the same type of solicitation and distribution activity, we find it unnecessary to consider the Region's alternative discrimination allegation.

For the foregoing reasons, complaint should issue, absent settlement.

B.J.K.

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<sup>14</sup> For example, the statement "trespassing is prohibited," when read in context, would appear to apply only to the park (not the roads or other areas) and only to the hours between 9:00 p.m. and sunrise, when the park would not be open.