

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

Advice Memorandum

DATE: June 16, 2011

TO : Robert Chester, Regional Director
Region 6

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

SUBJECT: Giant Eagle, Inc. 512-0125
Case 6-CA-37086 512-5012-6772
and 512-5012-8700
United Food and Commercial Workers 530-6067-4060
Union, Local No. 23 (Giant Eagle
Markets Co.)
Cases 6-CB-11703 and 6-CB-11718

These cases were submitted for advice regarding the following issues: (1) whether the Employer violated Section 8(a)(1) and (5) by denying the Union access to the interior of its represented stores to engage in activity in furtherance of the Union's efforts to organize the Employer's nonrepresented stores; (2) whether the Employer violated Section 8(a)(1) by refusing to allow an offsite employee access to the interior of a represented store to assist the Union in its efforts to organize the Employer's nonrepresented stores; and (3) whether the Union abrogated the terms of the collective-bargaining agreements, in violation of Section 8(b)(3), by soliciting employees and distributing organizing materials inside the Employer's stores. FOIA Exemption 5 [REDACTED]

FOIA Exemption 5 [REDACTED]

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We agree with the Region that Union organizers were not privileged to enter the Employer's represented stores

1 FOIA Exemption 5 [REDACTED].

² The Region had also requested advice in Cases 6-CA-37111 6-CA-37125 regarding whether the Employer's landlord and a security provider for the landlord violated the Act in relation to the arrest of the same offsite employee and subsequent barring of access. However, those charges were withdrawn pursuant to a settlement agreement while the case was pending in Advice.

for activities other than contract administration.³ Under *Lechmere*,⁴ nonemployees, such as the nonemployee Union representatives involved here, do not have a statutory right to access an employer's property to engage in Section 7 activity except in the rare circumstances where employees are inaccessible through the usual channels.⁵ Thus, here, the Union's claim of a right of access would derive from either the collective-bargaining agreements or an established practice.

The collective-bargaining agreements have identical provisions addressing access:

Neither the Union nor its members shall engage in Union activities on the Company's time or in the Company's stores; however, for the purpose of administering the provisions of the agreement, duly authorized representatives of the Union may enter the stores covered by this Agreement during regular working hours.

By their terms, the contracts allow Union representatives access to the Employer's property only for "the purpose of administering the provisions of the agreement." Therefore, we agree with the Region that the contracts do not privilege the Union to access the Employer's represented stores in furtherance of their activities to organize the Employer's unrepresented stores.

We further agree with the Region that the Employer did not unilaterally change a past practice of permitting Union representatives unfettered access to the interior of the Employer's stores for organizing purposes. The evidence fails to establish the existence of such a past practice. An activity becomes an established past practice, and hence, a term and condition of employment, if it occurs with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a

³ The Union, United Food and Commercial Workers Union, Local No. 23, represents two bargaining units of the Employer's employees—a unit of Clerks and one of Meat & Deli workers—each having a separate collective-bargaining agreement. The relevant contract provisions are identical in each agreement.

⁴ *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

⁵ *Id.* at 533-534.

regular and consistent basis.⁶ The party asserting the existence of a past practice bears the burden of proof on the issue.⁷ Here, the Union argues that it has the right to freely traverse both the selling and non-selling areas of the store, and states that it has previously canvassed unit employees in the stores to prepare proposals for contract negotiations without meeting interference from individual store managers. However, there is no evidence that the Employer was aware of or ever previously agreed to permit access for the type of widespread activity in which the Union has recently been engaged.⁸ Because the Union has not met its burden to establish a past practice of unfettered in-store access to employees for organizing purposes, the Employer's denial of such access is not an unlawful unilateral change.

We also conclude that the Employer did not violate the Act by denying an offsite employee access to the interior of one of the Employer's stores for organizing purposes. In contrast to non-employees, the Board has construed Section 7 to give offsite employees a nonderivative right of access to their Employer's property. Thus, although an employer has heightened private property concerns when offsite employees seek access to its property (as opposed to onsite, off-duty employees), on balance, the Section 7 rights of offsite employees entitle them to access to the outside, nonworking areas of an employer's property, except

⁶ *Eugene Iovine, Inc.*, 353 NLRB 400 (2008) (decision of two-member Board), *aff'd.* by *Eugene Iovine, Inc.*, 356 NLRB No. 134 (April 2011); *Sunoco, Inc.*, 349 NLRB 240, 244 (2007), *citing Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003).

⁷ *Eugene Iovine, Inc.*, 353 NLRB at 400.

⁸ Although the Union claims a practice of canvassing unit employees in-store in furtherance of the collective-bargaining process, its recent activities have been larger in scale and with the purpose of organizing non-represented Giant Eagle employees working at locations other than the represented stores. For example, the Union has conducted "shop-ins" with the assistance of area religious and community organizations; in-store mass distribution of rally pins, stickers, and flyers to unit employees; and multi-representative store visits which the Employer characterizes as "store invasions." To the extent that the Employer may have previously permitted in-store access to Union representatives without interference, those prior activities vary considerably from the Union's more recent organizing activities.

where the employer's denial of access is justified by business reasons.⁹ As to interior areas, extant Board law does not provide such a right.¹⁰ Here, an offsite employee sought access to the interior areas of one of the Employer's stores. As mentioned above, the collective-bargaining agreements provide that "neither the Union nor its members shall engage in Union activities. . . in the Company's stores." (Emphasis added.) Because the Board does not recognize a statutory right of offsite employees to enter the interior of the Employer's stores for Section 7 activity, and because the collective-bargaining agreements do not grant such a right, the Employer acted lawfully when it denied the offsite employee access to the interior of its represented stores to engage in activities in furtherance of the Union's efforts to organize the Employer's nonrepresented stores.

We also agree with the Region that the Union did not abrogate the terms of the collective-bargaining agreements in violation of Section 8(b)(3) by engaging in in-store solicitation and distribution of organizing materials. Although, as discussed above, we agree that the collective-bargaining agreements did not provide the Union with unlimited access to the interior of the Employer's stores, we also agree that the Union's interpretation of the contracts as permitting such access was not entirely unreasonable.¹¹

⁹ *ITT Industries, Inc.*, 341 NLRB 937, 938-941 (2004) (applying the balancing test articulated in *Hillhaven Highland House*); *Hillhaven Highland House*, 336 NLRB 646, 648 (2001) (establishing a balancing test between the property interests of an employer and the Section 7 organizational rights of offsite employees).

¹⁰ In *Hudson Oxygen Therapy Sales*, the Board appeared to suggest that off-duty employees have a right of access to the non-working areas inside of an employer's premises. 264 NLRB 61 (1982). However, the Board has never relied on that holding to analyze off-duty employee rights to access interior non-working areas of an employer's facility. And, although not expressly overruling *Hudson Oxygen*, a recent Board decision clearly suggests that off-duty employees have a right of access only to outside areas. *Crowne Plaza Hotel*, 352 NLRB 382, 385 (2008). Since off-duty employees enjoy a greater right of access to their employer's property than offsite employees, *Crowne Plaza* similarly suggests that offsite employees enjoy no right of access to the interior of an employer's property.

¹¹ *NCR Corp.*, 271 NLRB 1212, 1213 (1984).

Finally, since we have concluded that there is no merit to the allegations that the Employer unilaterally changed an established past practice regarding Union access to its stores, or that it unlawfully refused to allow an offsite employee access to the interior of the Employer's store to engage in Section 7 activity, the Region should FOIA Exemption 5 [REDACTED] dismiss the charge, absent withdrawal. The Region should also dismiss, absent withdrawal, the charge alleging that the Union violated Section 8(b)(3).

B.J.K.

[REDACTED]

[REDACTED]