

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

Advice Memorandum

DATE: June 2, 2011

TO : Frederick Calatrello, Regional Director
Region 8

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

SUBJECT: Rite Aid of Ohio 512-5012-0133-1100
Case 8-CA-39376 512-5012-6706
512-5012-6712-3300
512-5012-9200
512-5072-3900
512-5072-8500

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) of the Act by denying striking employees access to its property to picket and handbill the public. We conclude that the Employer violated Section 8(a)(1) of the Act by denying access to the striking employees.

FACTS

Rite Aid of Ohio (the Employer) operates several retail drug stores in and around Cleveland, Ohio. UFCW, Local 880 (the Union) represents a unit of approximately 200 cashiers, pharmacy technicians, and shift supervisors at six of the Employer's stores in Cuyahoga, Lake and Lorain counties. The parties' most recent collective-bargaining agreement expired on April 10, 2010. On March 14, 2011,¹ the Union called an economic strike at six of the Employer's stores.²

On March 14, striking employees, along with non-employee union representatives, entered the private property around each store, went to the sidewalk immediately adjacent to the front door of the store, and began picketing. At each store, the Employer's store

¹ All dates hereafter are in 2011, unless otherwise noted.

² The Region has determined that the Employer had the property right to evict trespassers at five of the six locations at issue here. In addition to the analysis set forth in the rest of this memorandum, we agree with the Region that the Employer violated Section 8(a)(1) because it interfered with striking employees' access at the store location at which it did not have the requisite control. See, e.g., Johnson & Hardin Co., 305 NLRB 690, 690 (1991), enfd. in relevant part 49 F.3d 237 (6th Cir. 1995).

manager or assistant manager came out and asked the individuals to move to the public sidewalk close to the street. The picketers refused to move and the Employer called local police. After the police threatened them with arrest, all of the picketers moved to the public sidewalk.

Later that morning, local law enforcement officials contacted the Employer and said that they were no longer going to preclude two pickets from returning to the sidewalk in front of the stores' doors. This was apparently in response to the Union's communication with each municipality asserting the picketers' right to be on the Employer's property. Thereafter, two striking employees from each store resumed picketing and began handbilling at the front door of their respective stores. The handbills addressed the specifics of a number of alleged Employer unfair labor practices, contrasted the details of various multi-million-dollar legal settlements and payouts to Employer officials with the Employer's attempt to cut employees' healthcare benefits, and urged customers to boycott the Employer's stores. All other striking employees from each particular store, striking employees from other stores, and non-employee Union representatives remained on the public sidewalks.

On March 17, the Employer sought state court injunctions to prohibit strikers from entering the property at the five stores where it controls the outdoor spaces. The Employer secured temporary or preliminary injunctions limiting employees' access at the three stores in Lorain and Lake counties, which are still in effect. The Employer was unable to secure an injunction in Cuyahoga County. In all three counties, the Employer's legal cases seeking permanent injunctive relief are still ongoing.

Each of the stores at issue is self-standing inside a large parking lot with entrances from commercial streets. Where the injunctions have permitted, two or three striking employees have continued to picket and handbill on the Employer's private property, either in front of the stores' main entrances or inside the parking lots at least 25 feet from the entrances. All other striking employees and non-employee Union representatives picket on the public sidewalks at the entrances to the parking lots of the Employer's stores. The picketers on the sidewalks have not attempted to distribute handbills. There is no evidence of any misconduct by the picketers and handbillers, or that they have interfered in any way with the Employer's operations.

ACTION

We conclude that the Employer violated Section 8(a)(1) of the Act by denying access to the striking employees.

In Tri-County Medical Center,³ the Board held that an employer cannot deny off-duty employees access to engage in protected conduct in outside non-work areas of its property, absent legitimate business reasons. Under the Tri-County standard, an employer may promulgate a rule restricting employee access to the employer's facility, but:

such a rule 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 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 non-working areas will be found invalid.⁴

While employee appeals to the public are clearly protected by Section 7,⁵ the Board held in Providence Hospital⁶ that Tri-County did not apply to employees' appeals to the public on employer property. Thus, in Providence Hospital, a unit of nurses bargaining for a successor contract planned to engage in picketing and handbilling near the entrance to their employer's facility to support their bargaining position.⁷ The employer restricted the nurses' activities to the public areas near the two driveway entrances to the hospital rather than the private sidewalk in front of the main building.⁸ The Board held that the employer did not violate Section 8(a)(1) by

³ 222 NLRB 1089 (1976).

⁴ Tri-County, 222 NLRB at 1089.

⁵ See, e.g., NCR Corp., 313 NLRB 574, 576 (1993) ("employees have a statutorily protected right to solicit sympathy, if not support, from the general public").

⁶ 285 NLRB 320 (1987).

⁷ 285 NLRB at 320.

⁸ Id., at 321.

denying access to the picketers, distinguishing Tri-County on the basis that the employees in Providence Hospital were targeting a public audience, rather than attempting to communicate with their coworkers, as in Tri-County.⁹ Applying Fairmont Hotel,¹⁰ which set forth the then-current formulation of the Babcock & Wilcox balancing test for non-employee access rights,¹¹ the Board concluded that the employer had lawfully denied access to the picketers because the public areas near the driveway entrances provided them with reasonable alternative means of communicating their message to the public.¹² The Board did not explain why it applied Babcock & Wilcox, which involved the more limited access rights of non-employees, rather than Tri-County and Republic Aviation,¹³ which give greater rights to employees.

For several years, while the Board did not expressly overrule Providence Hospital, it was unclear whether that case's distinction based on employees' target audiences was the appropriate legal standard or not. For example, in Stanford Hospital & Clinics v. NLRB, the D.C. Circuit noted that "neither this court nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and solicitation of nonemployees."¹⁴ And in Town and Country Supermarkets,¹⁵ the Board found that an employer violated Section 8(a)(1) by denying employees' Republic Aviation right to picket and handbill the public on the employer's property.

Recently, however, the Board appears to have resolved this uncertainty and made it clear that Providence Hospital

⁹ Id., at 322, n.8.

¹⁰ 282 NLRB 139 (1986).

¹¹ NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (requiring accommodation of Section 7 and property rights with "as little destruction of one as is consistent with the maintenance of the other" in case involving access rights of non-employee union organizers).

¹² Providence Hospital, 285 NLRB at 322.

¹³ Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-98 (1945).

¹⁴ 325 F.3d 334, 343 (D.C. Cir. 2003), cert. denied 540 U.S. 1104 (2004).

¹⁵ 340 NLRB 1410, 1413-14 (2004).

can no longer be considered viable. In New York New York Hotel & Casino,¹⁶ on remand from the D.C. Circuit, the Board unequivocally repudiated any distinction based on employees' intended target audience. New York New York involved employee handbilling in support of an organizing campaign. The employees worked for a separate restaurant employer within the New York New York hotel and casino. In order to reach their intended audience, the employee handbillers positioned themselves on the casino's private property directly in front of two of the restaurants inside the hotel. The casino had the police remove the employee handbillers.¹⁷ The Board held that such conduct violated the Act.¹⁸

Significantly, in New York New York, the D.C. Circuit had specifically asked the Board to decide if there was any consequence to the fact that Ark employees were communicating to customers, rather than other Ark employees.¹⁹ In answer to that question, the NLRB stated:

[W]hat matters here is less the intended audience of the [] employees than that the [] employees were exercising their own rights under Section 7 in organizing on their own behalf.²⁰

In so finding, the Board quoted the language of Stanford Hospital, supra, finding no substantive distinction between solicitation of fellow employees and solicitation of non-employees, and it approvingly cited Santa Fe Hotel & Casino,²¹ which found that an employer unlawfully prohibited

¹⁶ 356 NLRB No. 119 (2011).

¹⁷ Id., slip op. at 1-2.

¹⁸ Id., slip op. at 14.

¹⁹ Id., slip op. at 9.

²⁰ Ibid. The Board majority also expressly disagreed with Member Hayes' dissent for giving lesser weight to employees' right to communicate with the public, stating that "[t]he dissent would create an entirely new hierarchy of rights resting . . . on the manner of their exercise (self-organization via communication with other employees v. seeking support from consumers or the general public)." Id., slip op. at 9, n.32.

²¹ 331 NLRB 723, 728-729 (2000).

employees from handbilling customers at the employer's entrances.²²

Since New York New York made clear that any distinction based solely on employees' target audience is no longer valid, Tri-County, rather than Providence Hospital, sets forth the applicable standard. Under Tri-County, as discussed above, an employer may not deny employees entry to parking lots and other outside non-working areas, unless justified by business reasons.²³

Applying Tri-County, we agree with the Region that the Employer here clearly had no such business reasons for denying access to striking employees to picket and handbill at the store entrances, and consequently that the Employer acted unlawfully when it did so. There is no evidence of any misconduct by the picketers and handbillers, or that they interfered in any way with the Employer's operations. Indeed, the Employer's objections to the employees' presence have been limited to general claims of property rights and objections to the strikers' protected economic strike/boycott message. Accordingly, we conclude that the Employer violated Section 8(a)(1) of the Act by denying striking employees access to its store entrances to picket and handbill the public.

Contrary to the Employer's argument, this conclusion is not inconsistent with Quietflex Mfg. Co.²⁴ In Quietflex, 83 unrepresented employees walked off the job, gathered in the employer's parking lot, and made various demands, vowing to stay until all of their demands were met. The employer offered to meet with the employees and made a "reasonable effort to respond to the issues," including by immediately agreeing to correct one of the problems cited by the employees. After 12 hours and a warning that the employees needed to either go back to work or leave the premises, the employer discharged the protesters. The Board majority found that the employer had not violated the Act, emphasizing that the employees had successfully made their demands known, that the employer had a full opportunity to respond, and that allowing the employees to continue to assemble in the parking lot "served no immediate protected employee interest and unduly interfered

²² 356 NLRB No. 119, slip op. at 9.

²³ 222 NLRB at 1089.

²⁴ 344 NLRB 1055 (2005).

with the Respondent's [employer's] right to control the use of its own premises."²⁵

In the instant case, none of these considerations apply. In stark contrast, the striking employees here can only exercise their Section 7 right to communicate with the Employer's customers on an ongoing basis, as new customers arrive at any time during the Employer's business hours. Thus, unlike in Quietflex, the striking employees' right to communicate here must be as strong from the time the store opens until it closes. Moreover, while the employer in Quietflex apparently did not have use of its parking lot during the employees' mass occupation of it, there has been no contention here that the Employer and its customers have not had the full use of the parking lots and been able to come and go unimpeded by the picketers/handbillers. Hence, the Board's decision in Quietflex is distinguishable from this case.

Finally, we additionally conclude that, even if Tri-County did not apply to employee picketing and handbilling directed at the public, the Employer violated the Act in the instant case under the balancing test set forth in Jean Country.²⁶ In Jean Country, the Board held that an employer violated Section 8(a)(1) by refusing to permit non-employee picketing on private property in front of its store located in a large shopping mall. In so holding, the Board stated:

in all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process.²⁷

The critical significance of reasonable alternatives means can be seen, for example, in W.S. Butterfield Theaters, Inc.,²⁸ where the Board held that an employer violated Section 8(a)(1) by interfering with a union's picketing and handbilling on its property. There, the

²⁵ Id., at 1056.

²⁶ 291 NLRB 11 (1988).

²⁷ Id., at 14.

²⁸ 292 NLRB 30 (1988).

employer maintained a free-standing movie theater in a large parking lot, and the union's activity was intended to publicize its primary economic dispute with the employer.²⁹ Most importantly, the Board found that picketing and handbilling near the entrance to the parking lot was not a reasonable alternative to allowing the union closer to the theater's entrances, because it would be unsafe and the union would not be able to effectively communicate its message to its intended audience.³⁰

Similarly, in Best Co.,³¹ the Board found a Section 8(a)(1) violation where unions handbilled the employer's stores to protest the employer's use of nonunion contractors in its remodeling work. The Board concluded there that the employer's property rights were legitimate and relatively substantial, but would only suffer minor impairment if the union were granted access, as the handbilling was peaceful and resulted in only minimal interference with the employer's business.³² The Board found that the union's Section 7 right to engage in area standards handbilling, while not on the strong end of the Section 7 spectrum, was also worthy of protection against substantial impairment.³³ The Board's decision primarily rested on the lack of reasonably effective alternative means, as the Board found that handbilling from the public property near the parking lot entrances to employer's stores would be unsafe and ineffective. Indeed, the Board made it clear that it will presume the existence of safety hazards at a parking lot entrance that is on a commercial street without traffic controls, where the speed limit is 25 miles per hour or more.³⁴

In the instant case, as in Butterfield and Best, the Employer has a relatively substantial property interest at these free-standing stores, although the stores are open to the public generally and there is no evidence that the Union's picketing and handbilling would interfere with the Employer's operations. As in Butterfield, the striking employees' Section 7 right is particularly strong, as their

²⁹ Id., at 32-33.

³⁰ Id., at 33.

³¹ 293 NLRB 845 (1989).

³² Id., at 846.

³³ Id., at 846-847.

³⁴ Id., at 847.

picketing and handbilling is core primary economic strike activity.³⁵ Most significantly, as in Butterfield and Best, picketing and handbilling on the public sidewalk at the entrances to the Employer's parking lots is not a reasonably effective alternative. The handbills are an essential part of the striking employees' message, and it would be unsafe and infeasible to give handbills to drivers and passengers as they turn off of commercial streets. In this regard, the Union's handbills addressed the specifics of a number of alleged Employer unfair labor practices, detailed various multi-million-dollar legal settlements and payouts to Employer officials. Additionally, they contrasted them with the Employer's attempt to cut employees' healthcare benefits, and urged customers to boycott the Employer's stores. This multi-part message could not be adequately conveyed on picket signs.³⁶ Therefore, we conclude that the striking employees were entitled to access for their picketing and handbilling on the Employer's private property.³⁷

Accordingly, the Region should issue, absent settlement, a Section 8(a)(1) complaint regarding the Employer's denial of access to striking employees.³⁸ **Ex. 5**

³⁵ See also, e.g., Scott Hudgens, 230 NLRB 414, 416 (1977) ("economic activity deserves at least equal deference [as organizational activity] and the fact that the picketing here was in support of an economic strike does not warrant denying it the same measure of protection afforded to organizational picketing").

³⁶ See, e.g., Butterfield, 292 NLRB at 36 ("[t]he ability to handbill along with picketing is important in communicating the intended message"); Mountain Country Food Store, 292 NLRB 967, 969 (1989), enf. denied on other grounds 931 F.2d 21 (8th Cir. 1991) ("in view of the detailed nature of the Union's message . . . the information could not be fully contained on a picket sign").

³⁷ **Ex. 5**



³⁸ We note that this violation only applies to striking employees themselves -- the Employer may lawfully deny access to non-employees. Thus, we agree with the Region

Ex. 5 [REDACTED]

B.J.K.

that any complaint should not allege the Employer's initial conduct on the first morning of the strike, when it denied access to a group of Union picketers which included non-employees. See, e.g., Nations Rent, 342 NRLB 179, 181 (2004) (employer may lawfully summon police when "motivated by some reasonable concern, such as public safety or interference with legally protected interests"). In addition, as the first picketing incident was not accompanied by handbilling, the foregoing Jean Country analysis would not encompass that conduct. After the first day, however, the only individuals who sought access to the Employer's property were striking employees seeking to picket and handbill, and no such Employer defenses apply.

39 Ex. 5 [REDACTED]

40 Ex. 5 [REDACTED]