

Norquay Construction, Inc. and Thomas DeMott.
Case 28–CA–023412

April 16, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On December 6, 2011, Administrative Law Judge Lana H. Parke issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, the Respondent filed an opposition to those exceptions, and the Acting General Counsel filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision and to adopt the judge's recommended Order as modified and set forth in full below.¹

I. BACKGROUND

In 2010 and 2011, the Respondent, a general contractor in the building and construction industry, was performing work on a construction contract with the city of Phoenix to renovate the city's municipal bus station on Central Avenue (the Central Avenue Project).² The Respondent itself was nonunion, but employees of its concrete subcontractor, Progressive Concrete Works, Inc. (Progressive), were represented by a local union affiliate of the Southwest Regional Council of Carpenters (the Union). The Union's collective-bargaining agreement with Progressive provided that the Union's representatives were to have access during working hours to jobsites where Progressive employees were working, so long as they made reasonable efforts to notify Progressive of their presence on the site and did not interfere with work.

¹ There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) by ordering Union Representatives Thomas DeMott and Chuck Harrison to leave its construction jobsite. The Acting General Counsel has excepted to the judge's failure to find that the Respondent also violated Sec. 8(a)(1) by summoning security guards for the purpose of ejecting the union representatives. We find it unnecessary to pass on this exception, as the alleged violation, if found, would be fully remedied by the cease-and-desist order we provide for the unexcepted-to violation found above. For the reasons stated in her decision, we adopt the judge's finding that the Respondent did not violate Sec. 8(a)(1) by promulgating and maintaining a rule prohibiting solicitation at its construction site trailer office without an appointment.

We have modified the judge's recommended Order to more closely reflect the violations found and in keeping with the Board's standard remedial language. We have substituted a new notice to conform to the Order as modified.

² The Central Avenue Project was federally funded under the American Recovery and Reinvestment Act of 2009.

The Respondent's project manager and superintendent, Kenneth Scott Rankin, had his office in a trailer located within a fenced-off area of the construction site. In late September 2010,³ he posted a sign on the door to the trailer prohibiting solicitation without an appointment. Rankin testified that he posted this sign because, during the preceding weeks, a significant number of individuals had entered the trailer without an appointment, interrupting his work. These individuals included job seekers and agents of various companies (e.g., employee leasing agencies, equipment rental companies, would-be subcontractors, and construction materials companies). Also among the visitors were various representatives of the Union, who paid visits to Rankin in the trailer once or twice a week.

Shortly before noon on October 1, Union Representatives Thomas DeMott and Chuck Harrison entered the trailer. Although they had not made an appointment, Rankin opened the door to his office, which was situated at one end of the trailer, and motioned them in.⁴ DeMott and Harrison identified themselves as representatives of the Union and asked for subcontractor information on some of the carpentry-related work. They credibly testified that if Rankin had told them the Respondent had more subcontracting to bid out they would have given him the Union's list of area-standards contractors—i.e., signatory contractors whose employees the Union represented, and would have asked him if he would like the Union to invite those contractors to bid on the projected work. Rankin told DeMott and Harrison to look up the information in a publicly available source, complained that union representatives were "coming here" every day of the week, and told them to leave the trailer. Harrison warned that the Union could picket the site if it had a labor dispute, but DeMott added that the Union would demonstrate at a jobsite only if area-standards wages and benefits were not being paid, and that the decision to demonstrate would be made only by his and Harrison's bosses.

At this point, Rankin loudly and profanely demanded that Harrison and DeMott leave the trailer, and the two started walking towards the exit. As DeMott did so, Rankin pushed him in the back. DeMott told Rankin not to touch him and continued to the doorway. Harrison left the trailer first. Then, as DeMott was standing in the doorway steadying himself, Rankin pushed him from behind, propelling him onto the trailer landing and down the trailer's metal steps. In his fall, DeMott struck his

³ All dates hereafter are in 2010.

⁴ The judge found that Rankin was expecting the arrival of a city construction inspector at the time.

hand and neck on the railing of the trailer stairs. DeMott telephoned his supervisor, who in turn called the Phoenix police. When the police arrived, DeMott asked them to arrest Rankin for assault, which they declined to do. DeMott complained of severe musculoskeletal pain and sought treatment at a clinic later that same day. He did not work for the Union in any capacity after that day.

The judge dismissed the complaint allegations that the Respondent violated Section 8(a)(1) by Rankin's conduct in physically ejecting DeMott from the trailer and inflicting bodily injury upon him in the process. She characterized the conduct as "repugnant and inexcusable" and observed that it "may have transgressed civil or criminal laws," but concluded that it did not violate the Act. We disagree. For the reasons that follow, we find that DeMott and Harrison were engaged in Section 7 protected activity when they visited the trailer and that Rankin's physical assault of DeMott in response to that activity violated Section 8(a)(1).⁵

II. ANALYSIS

The Act protects actions by unions "in furtherance of an area-standards objective of protecting the economic terms of employment enjoyed by the employees they represent[]." *Petrochem Insulation, Inc.*, 330 NLRB 47, 49 (1999), *enfd.* 240 F.3d 26 (D.C. Cir. 2001), *cert. denied* 534 U.S. 992 (2001). The protection afforded a union in furtherance of an area-standards objective necessarily extends to its agents. Moreover, it applies regardless of whether the union involved represents the respondent's employees at the time of the relevant area-standards activity. *Id.* Here, DeMott and Harrison, as agents of the Union, entered the Respondent's trailer for the purpose of soliciting the Respondent to use area-standards contractors for future work. That activity was "undisputedly protected under Section 7." *Id.* More specifically, the union agents sought to gain work for employees of contractors with collective-bargaining relationships with the Union. This objective of expanding employment opportunities for represented employees "plainly seeks to further legitimate goals under Section 7."⁶

An employer violates Section 8(a)(1) when it interferes with area-standards activity by, among other things, harassing or physically assaulting union agents engaged in

⁵ The Acting General Counsel excepts to the judge's failure to find that the Respondent additionally violated Sec. 8(a)(1) by inflicting bodily injury on DeMott. He does not argue that exception on brief, however. Accordingly, we deem the exception waived. See Board's Rules and Regulations Sec. 102.46(b)(2); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), *enfd.* 456 F.3d 265 (1st Cir. 2006).

⁶ *J. A. Croson Co.*, 359 NLRB 19, 23 (2012) (discussing the protected nature of job targeting).

such activity. *Roger D. Hughes Drywall*, 344 NLRB 413, 415 (2005), and cases cited therein. Such actions are unlawful regardless of whether they were witnessed by any employees of the respondent employer. *Id.*⁷ Rankin's physical assault of DeMott while ejecting him from the trailer plainly was in response to his protected activity and interfered with that activity, and therefore violated Section 8(a)(1) of the Act.

In defense of its conduct, the Respondent neither contests the inherently protected character of the purpose of the agents' visit, nor argues that they engaged in any threatening behavior. Rather, the Respondent contends that its actions did not violate the Act because it had an exclusionary property interest in its trailer sufficient to justify the exclusion of DeMott and Harrison, who in any event did not comply with its lawful rule prohibiting solicitation without an appointment. We disagree.⁸ The question of the Respondent's asserted right to exclude the union representatives from the trailer is irrelevant to the disposition of this case because they were leaving the trailer at the time of the assault. Indeed, DeMott was standing at the threshold of the trailer door on his way out when Rankin pushed him down the stairs. Assuming, without finding, that the Respondent had a right to exclude the two men from its trailer pursuant to *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *Leslie Homes, Inc.*, 316 NLRB 123, 128 (1995), *affd.* 68 F.3d 71 (3d Cir. 1995), Rankin initially did not invoke that right, but instead invited the men into his trailer office. Then, when they proceeded to engage in protected activity, Rankin asserted the assumed right to exclude them, and they complied with his order to leave. Notwithstanding their compliance, Rankin assaulted DeMott as he was leaving the trailer. In these circumstances, any right to deny DeMott and Harrison access to the trailer does not constitute a defense to the 8(a)(1) violation we have found.⁹

⁷ See also *McBride Construction Co.*, 122 NLRB 1634, 1635 (1959) (employer's assault on union organizer violated Sec. 8(a)(1), even if not witnessed by employees); *Arton Studios, Inc.*, 74 NLRB 1158, 1158, 1163 (1947) (same).

⁸ No party disputes the judge's finding that the Union's collective-bargaining agreement with Progressive gave the Union access to at least some portion of the jobsite to represent Progressive's employees.

⁹ Accordingly, we need not address the Acting General Counsel's contention that the judge erred in finding that the Respondent established that it possessed an exclusionary property interest in the trailer.

Peck/Jones Construction Corp., 338 NLRB 16 (2002), cited by the judge for the proposition that the ejection of DeMott and Harrison from the trailer was lawful, is distinguishable. The question presented there was whether the employer violated the Act by excluding union business agents from its construction site, despite a contractual access clause, when the agents failed to comply with the employer's reasonable, non-discriminatory security rule requiring all visitors to sign in. As stated above, the issue here is not whether the Respondent could have lawful-

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(1) by ordering Union Representatives Chuck Harrison and Thomas DeMott to leave the Central Avenue Project jobsite and by physically assaulting DeMott, we shall order the Respondent to cease and desist and to take such affirmative action as is necessary to effectuate the policies of the Act. Specifically, if it is shown in compliance proceedings that DeMott incurred medical expenses and suffered a loss of pay and benefits as a result of the unlawful assault, the Respondent shall reimburse DeMott for his medical expenses and make him whole for his lost pay and benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Reimbursement of medical expenses shall be with interest, compounded daily as prescribed in *Kentucky River Medical Center*, supra.¹⁰ Finally, we shall require the Respondent to compensate DeMott for any adverse income tax consequences of receiving his backpay in one lump sum as provided in *Latino Express, Inc.*, 359 NLRB 518 (2012).¹¹

ORDER

The National Labor Relations Board orders that the Respondent, Norquay Construction, Inc., Tempe, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully interfering with the Southwest Regional Council of Carpenters' right to enter the Central Avenue municipal bus station renovation site or any other

ly excluded DeMott and Harrison from its trailer, but whether the physical assault of DeMott as he was obeying Rankin's order to leave the trailer violated the Act.

¹⁰ The Acting General Counsel asserts that the make-whole remedy for Rankin's unlawful assault on DeMott must include backpay for any wages lost during the period of time that DeMott has been and will be unable to work as a result of injuries from the assault, and reimbursement for any out-of-pocket medical expenses he incurred as a result of such injuries. The Respondent opposes this remedy. Although we agree in principle with the Acting General Counsel, it remains unsettled whether DeMott suffered bodily injury due to the assault, as the judge did not pass on that issue. As our amended remedy indicates, we leave this issue of fact to compliance. See *Freeman Decorating Co.*, 288 NLRB 1235, 1235 fn. 2 (1988); see also *Nortech Waste*, 336 NLRB 554, 554 fn. 2 (2001).

¹¹ In part II of our decision in *Latino Express*, supra, we announced that the Board would also require the filing of a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters. 359 NLRB 518, 519. However, part II of that decision "applies only to backpay payable by a current or former employer of the discriminatee." *Id.*, slip op. at 2 fn. 10. The Respondent was not DeMott's employer, so the report-filing remedy is not applicable here.

jobsite for the purpose of representing employees under an applicable collective-bargaining agreement.

(b) Physically assaulting representatives of the Southwest Regional Council of Carpenters who are lawfully engaged in area-standards activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Thomas DeMott whole for any loss of pay and benefits that he may have suffered as a result of the physical assault on him by Kenneth Scott Rankin on or about October 1, 2010, and reimburse DeMott for any out-of-pocket medical expenses that he may have incurred as a result of the assault, in the manner set forth in the amended remedy section of this decision.

(b) Compensate DeMott for any adverse income tax consequences of receiving his backpay in one lump sum.

(c) Within 14 days after service by the Region, post at its Tempe, Arizona office, and at any office it operates in connection with the Central Avenue bus station project in Phoenix, Arizona, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or left the jobsite involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully interfere with the Southwest Regional Council of Carpenters' right to enter the Central Avenue municipal bus station renovation site or any other jobsite for the purpose of representing employees under an applicable collective-bargaining agreement.

WE WILL NOT physically assault representatives of the Southwest Regional Council of Carpenters who are lawfully engaged in area-standards activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Thomas DeMott whole, with interest, for any loss of pay and benefits that he may have suffered as a result of the physical assault on him by Kenneth Scott Rankin on or about October 1, 2010, and for any out-of-pocket medical expenses that he may have incurred as a result of the assault.

WE WILL compensate DeMott for any adverse income tax consequences of receiving his backpay in one lump sum.

NORQUAY CONSTRUCTION, INC.

Johannes Lauterborn, Esq., for the General Counsel.
Frederick C. Miner, Esq. (Littler Mendelson, PC.), of Phoenix, Arizona, for the Respondent.
Thomas E. DeMott, of Anthem, Arizona, the Charging Party.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. Pursuant to unfair labor practice charges filed by Thomas DeMott (DeMott), an individual,¹ the Regional Director for Region 28 of the Na-

¹ DeMott at all relevant times was a representative and employee of the Southwest Regional Council of Carpenters, a labor organization.

tional Labor Relations Board (Region 28 and the Board, respectively) issued a complaint and notice of hearing (the complaint) dated May 31, 2011. The complaint alleges that Norquay Construction, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act). This case was tried in Phoenix, Arizona, on October 5 and 6, 2011.

II. ISSUES

Did Respondent Violate Section 8(a)(1) of the Act by the Following Conduct:

1. Promulgating and maintaining an overly broad and discriminatory rule prohibiting solicitation without appointment at Respondent's jobsite.
2. By the following conduct, denying representatives of the Southwest Regional Council of Carpenters, a labor organization, access to Respondent's jobsite and to employees represented by it who were performing work for employer-parties to collective-bargaining agreements with it: which employers performed services at Respondent's jobsite:
 - a. Ordering union representatives to leave Respondent's jobsite.
 - b. Physically ejecting DeMott from the Respondent's construction trailer.
 - c. Inflicting bodily injury upon DeMott by pushing him out of Respondent's construction trailer and down its stairs.
 - d. Summoning security guards to escort union representatives off Respondent's jobsite.

III. JURISDICTION

At all material times Respondent, an Arizona corporation, with an office and place of business in Tempe, Arizona (Respondent's facility), has been engaged in business as a general contractor in the building and construction industry doing commercial, industrial, and residential construction. During the 12-month period ending March 22, Respondent, in conducting its business operations, pursuant to a contract with the city of Phoenix financed by funds from the Federal American Recovery and Reinvestment Act of 2009, provided services for the city of Phoenix, Arizona, valued in excess of \$2.8 million for work on the Phoenix central bus station. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, the Southwest Regional Council of Carpenters (the Union) has been a labor organization within the meaning of Section 2(5) of the Act and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

IV. FINDINGS OF FACT

Unless otherwise explained, findings of fact are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings.

The city of Phoenix, Arizona, contracted with Respondent to renovate the city's municipal transit facility, the Phoenix central bus station (the project or the central bus station), located on Central Avenue in Phoenix (the jobsite). The project was ongoing during 2010–2011. The construction area of the jobsite was fenced pursuant to the city's project requirements, and Respondent posted "No Trespassing" signs to prevent public entry. Under Respondent's contract with Phoenix, Respondent had exclusive use of a staging area on city property, located about 300 feet south of the construction site. A tall fence, separate from the construction site fencing, surrounded the staging area, which was accessible through a 20-foot opening. In the staging area, Respondent placed a 24-by-8-foot mobile construction trailer that served as its jobsite offices (the construction trailer).

The construction trailer stood 4–5 feet off the ground. The trailer's 3-foot wide entry door was accessible by a metal stairway parallel to and abutting the trailer. The stairway had four stairs rising to a metal landing measuring approximately 3 by 4 feet positioned immediately in front of the doorway. The stairway landing was not flush with the trailer door, requiring an approximately 3-inch step up for entry to the trailer.² Metal bars surrounded the stairway perimeters, providing hand railings for the stairs and landing and restricting the trailer door from opening outward more than 90 degrees. On the side of the trailer at the foot of the stairway, Respondent posted a company banner identifying the trailer as the offices of Norquay Construction and setting out its Tempe address and telephone and FAX numbers.

Respondent contracted with various subcontractors, including Progressive Concrete Works, Inc. (Progressive Concrete) to perform work on the project. In October 2010 Progressive Concrete employed 12 workers at the jobsite. Progressive Concrete was signatory to a collective-bargaining agreement (Progressive Concrete CBA) with the Southwest Regional Council of Carpenters (the Union).³ Respondent was not signatory to any collective-bargaining agreement with the Union.

The Progressive Concrete CBA provided for union-representative access to company jobsites during working hours upon reasonable effort to advise Progressive Concrete of union-representative presence and without interference with work. In the case of a secured access jobsite, such as the project, the Progressive Concrete CBA provided that where persons entering the project had to be checked through a guarded gate or similar situation, Progressive Concrete was to make arrangements for union representatives to enter the project. No evidence was adduced that the Union asked Progressive Concrete to make, or that Progressive Concrete made, any arrangements for union representatives to enter the jobsite or that union representatives visited Progressive Concrete employees on the jobsite.

² The step up estimation is based on photographs of the trailer taken on October 1.

³ The employees of two other subcontractors worked at the jobsite in October 2010; those subcontractors were not signatory to contracts with the Union.

From August 2010 to August 2011, Kenneth Scott Rankin (Rankin) served as Respondent's superintendent and project manager, utilizing the construction trailer served as his administrative center. It contained two office areas: a rear area where Rankin's office was situated and a front or lobby area, out of which the trailer's entry door opened.

During August 2010, significant numbers of solicitors called at the construction trailer.⁴ Among the visitors were various representatives of the Union who came weekly to the construction trailer and engaged Rankin in desultory conversation for 15–20 minutes per visit. In September, union representative visits increased. Rankin thought the stream of visitors to the construction trailer wasted his time. In late September, Rankin posted on the entry door the following sign to which was affixed his business card containing his email address and his company cell phone number:

NO
HIRING
ON-SITE
ABSOLUTELY NO
SOLICITATION
W/O
APPOINTMENT

On October 1, 2010, the Union assigned Representatives DeMott and Chuck Harrison (Harrison) the routine job of visiting assigned construction jobsites to speak to the respective general contractors. The Union gave the representatives "profiles" of the jobs they were to visit. Each profile named the jobsite general contractor and listed known subcontractors working the jobsite. A profile's purpose was to aid union representatives in discussing contract concerns with represented subcontractor employees and/or to promote union interest among unrepresented subcontractor employees. The representatives also carried listings of various union-signatory contractors, which the representatives were expected to give to general contractors to advise them of area-standards contractors available to meet a construction project's subcontracting needs. One of the October 1 profiles assigned to DeMott and Harrison named Respondent as the general contractor on the central bus station jobsite and its concrete subcontractor, Progressive Concrete, as a signatory company.

On the morning of October 1, 2010, 12 employees of Progressive Concrete were at the jobsite running a concrete pour. At about 11:30 a.m., without having made an appointment, Union Representatives DeMott and Harrison arrived at the Respondent's jobsite and went directly to the construction trailer. DeMott and Harrison intended to find out from Rankin what if any subcontracting work the Company had yet to bid out. If Rankin told them he planned to hold future subcontract bidding, the representatives planned to give Rankin the prepared listing of area-standards contractors and to ask him if he

⁴ Solicitors included representatives of labor companies, rental equipment companies, contract-seeking subcontractors, and construction materials companies. Employment seekers frequently sought interviews with Rankin at the construction trailer.

would like the Union to invite them to bid on the projected work.⁵

Rankin, DeMott, and Harrison testified of the events that occurred after DeMott and Harrison arrived at the construction trailer. I found both DeMott and Harrison to be candid, reliable, and mainly corroborative witnesses. Much of Rankin's testimony was essentially consistent with that of DeMott and Harrison, but where Rankin's testimony differs materially from that of DeMott and Harrison, I credit DeMott and Harrison except as otherwise noted. The following account is a reasonable amalgamation of the credible testimony of DeMott and Harrison.

Upon reaching the trailer, DeMott with Harrison behind him climbed the stairway, knocked at, and then opened, the unlocked entry door. Two children watching television inside the trailer pointed to the rear area. Just then Rankin, who was working a half day and expecting the arrival of a Phoenix construction inspector, opened the door from his office and before the representatives could identify themselves, motioned them into his office. DeMott walked to the door of the office and said they would like to ask Rankin a couple of questions. Rankin invited them into his office. DeMott and Harrison identified themselves as representatives of the Union and said they were looking for subcontractor information on some of the carpentry-related crafts. Rankin said, "If you want any information on this jobsite, you can look it up on the Dodge Reports."⁶ Rankin told DeMott and Harrison, "You [representatives from the Union] are coming here Monday, Tuesday, Wednesday, Thursday, Friday, Saturday, Sunday." He pointed out that the notice on the trailer door asked visitors or solicitors to make an appointment. Rankin said he was trying to get some work done and told them to leave the trailer.

Harrison told Rankin that if they had a labor dispute, the Union could picket the job. DeMott, however, assured Rankin that the Union would demonstrate at the jobsite only if a contractor there was not paying area-standard wages and benefits and such a decision would only be made by his and Harrison's bosses. Loudly and profanely, Rankin demanded the two representatives leave the trailer. Harrison reiterated that the representatives were just looking for subcontractor information, but Rankin repeatedly ordered them out of his trailer.

Harrison urged DeMott to leave and walked toward the exit. DeMott followed, telling Rankin, "We have a federal right to be on the project."⁷ As DeMott moved toward the exit, Rankin pushed him in the back. DeMott told Rankin not to touch him and continued to the doorway. At the door, DeMott steadied himself on the doorframe before stepping onto the stairway

⁵ Harrison testified that another purpose of the October 1 visit was to get information about Progressive Concrete and that the representatives usually checked in with the superintendent before going onto a jobsite.

⁶ The Dodge Reports were nationwide area listings of construction work to enable contractors to bid on construction jobs but did not provide the names of subcontractors on specific projects.

⁷ DeMott testified that he added, "We should be able to talk to the workers." Harrison did not corroborate this statement, which is incongruous with the subcontractor-focus of the interchange. I do not, therefore, credit DeMott's testimony that he said anything about talking to any workers.

landing. As DeMott steadied himself, Rankin grasped his upper right arm from behind and, pushing him hard in the middle of his upper back, propelled him onto the landing and down the stairs.⁸ During the fall, DeMott struck his neck and hand on the railing. Rankin called to two city of Phoenix security guards, saying he needed help and telling one of them he wanted to make sure the two representatives got off the property.

There is no evidence the security guards did anything to encourage DeMott and Harrison to leave the jobsite, and the two did not, in fact, leave the property. DeMott telephoned his supervisor who in turn called the police. DeMott retrieved his camera from his car and took pictures. When the police arrived, DeMott asked the police to arrest Rankin for assault, which they declined to do.

Immediately following his fall on October 1, 2010, DeMott experienced severe musculoskeletal pain, and later that day sought treatment at an urgent care facility.⁹ In the following weeks, DeMott filed a claim with the California Department of Workers' Compensation (DWC), pursuant to which he received additional medical treatment, including physical therapy. DeMott did not work again in any capacity after October 1, 2010. In early February 2011, DeMott's DWC claim was denied, and he was released to return to work with no physical limitations. Shortly thereafter, the Union informed DeMott that it had no position available for him.

V. DISCUSSION

The Board requires general construction contractors to grant union representatives access to jobsites to enable the Union to carry out representational duties owed to a unionized subcontractor's employees pursuant to the access provisions of a labor agreement between the subcontractor and a union. The Board reasons that the general contractor, "by soliciting other employers to perform work at the jobsite, 'invited' subcontractors . . . onto the jobsite, and thus subjected its 'property rights' to the [u]nion's contractual 'access' rights with those subcontractors." *CDK Contracting Co.*, 308 NLRB 1117 (1992). See also *Wol-gast Corp. v. NLRB*, 349 F.3d 250 (6th Cir. 2003), enfg. 334 NLRB 203 (2001); *Ambrose Electric*, 330 NLRB 78 (1999). In *Swardson Painting Co.*, 340 NLRB 179, 179-180 (2003), the Board admonished:

An employer who denies nonemployee union representatives access to private property for purposes related to the exercise

⁸ Rankin testified that DeMott, with fists clenched at his side, "squared off . . . in an aggressive stance." Rankin grasped the back of DeMott's upper arm and forearm and escorted him to the doorway. From the ground facing the entry door, Harrison told Rankin he was just a f—ing a—hole, and Rankin released his hold on DeMott. Rankin believed that DeMott intentionally fell. I do not accept Rankin's testimony.

⁹ At the time of the fall, DeMott had existing back and hip problems, having had prior neck surgery with a 70-day work absence. Notwithstanding his continuing back impairment, DeMott resumed work with the Union with no physical restrictions and continued to perform his usual and customary work for the Union until October 1, 2010. Between May 2009 and October 2010, DeMott received seven injections to his back and hip, the last of which was administered on September 10, 2010.

of employees' Section 7 rights bears a threshold burden of establishing that, at the time it denied access, it had a property interest that entitled it to exclude individuals from the property [citations omitted]. If the employer fails to meet this threshold burden, there is no actual conflict between private property rights and Section 7 rights, and its actions therefore will be found to violate Section 8(a)(1) of the Act.

Absent a showing of an exclusionary property interest, analysis under *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992), is not required.¹⁰

Even where a general contractor, having subjected its property rights to a union's contractual access rights with subcontractors, has no exclusionary property interest in its jobsites, a union's right of access is not without limitation. A contractor has a right to require union representatives to submit to reasonable and nondiscriminatory restrictions, such as not interfering with employees' work or having to check in at a jobsite office. *Ambrose Electric*, supra at 78; *Peck/Jones Construction Corp.*, 338 NLRB 16 (2002), citing *Wolgast Corp.*, 334 NLRB 203 (2001) (union agents were not entitled to enforce their contractual access right when they failed to follow general contractor's reasonable and nondiscriminatory sign-in rule).

The facts in this case prompt discussion of two issues the Board has considered in construction jobsite access cases: (1) whether on October 1, 2010, Respondent had an exclusionary property interest in the central bus jobsite and/or its construction trailer that permitted Respondent to restrict access to the jobsite and/or the construction trailer, (2) whether DeMott and Harrison accessed the construction trailer on October 1, 2010, for a purpose related to the exercise of employees' Section 7 rights, and (3) assuming no exclusionary property interest existed, whether Respondent had nonetheless set reasonable and nondiscriminatory restrictions on access to its construction trailer that the Union was obligated to follow.

Inasmuch as Respondent invited Progressive Concrete to perform work at the central bus jobsite, it subjected any arguable property rights in the jobsite to the Union's contractual access rights with Progressive Concrete. Respondent has not, therefore, met its threshold burden of showing an exclusionary property interest in the central bus jobsite where Progressive Concrete employees were working. Consequently, Respondent could not lawfully restrict representatives of the Union from accessing the jobsite to visit or otherwise to provide representational services to Progressive Concrete's employees.

While Respondent had no exclusionary property interest in the construction area of the central bus jobsite where invited subcontractors worked, it does not automatically follow that Respondent had no exclusionary property interest in any other part or component of the jobsite. By contract, the city of Phoenix allowed Respondent the exclusive use of a staging area at the jobsite, in which area Respondent placed its construction

trailer and administrative office. There is no evidence that Progressive Concrete or any other subcontractor was invited to perform work in the staging area, particularly at or in the construction trailer. In those circumstances, Respondent has shown that it had an exclusionary property interest in its construction trailer. Since jobsite employees were not inaccessible by virtue of Respondent's exercising its exclusionary property interest in its construction trailer, Respondent was free to deny, nondiscriminatorily, access to the trailer.

Even assuming Respondent had not established an exclusionary property interest in the construction trailer, the Union's contractual right of access was not without limitation, as noted above. Access could properly be limited to purposes relating to represented employees' Section 7 rights and be circumscribed by reasonable and nondiscriminatory restrictions.

There is no evidence that DeMott and/or Harrison's purpose in visiting Respondent's trailer on October 1 related to the exercise of employees' Section 7 rights. It is clear that DeMott and Harrison's objective in visiting the trailer was to glean from Rankin information about Respondent's subcontracting plans. As followup, the two representatives intended to present to Rankin a prepared list of area-standards subcontractors and to encourage him to select from the list when filling any subcontractor openings. That objective did not relate to the exercise of employees' Section 7 rights and did not, therefore, provide any Section 7-protected basis for accessing the trailer.¹¹

DeMott testified that one purpose of visiting the trailer was to extend Respondent the courtesy of checking in with the construction supervisor before talking to Progressive Concrete employees. If union representatives were required to check in at the construction trailer before entering the jobsite to provide representational services, then accessing the trailer would be related to the exercise of employees' Section 7 rights. But there is no evidence of any such check in requirement.¹² Moreover, any courtesy check in could have been easily accomplished by observing the constraints posted on the trailer and telephoning Rankin at his posted cell phone number. The no-solicitation notice posted on the trailer entry door simply restricted solicitation without appointment. The notice was nondiscriminatory on its face, and there is no evidence it was applied discriminatorily or that its conditions were unreasonable. The notice merely required all persons who wanted to meet with Rankin to make appointments, the scheduling for which Rankin made himself readily available by posting his cell phone number.

¹¹ *Wolgast Corp.*, 334 NLRB 203 (2001), cited by the General Counsel is inapposite. In *Wolgast*, the union accessed the jobsite generally, i.e., the actual location where represented employees worked, in order to investigate a safety complaint lodged by a union member jobsite worker; both the location and the purpose were clearly linked to Sec. 7 protections.

¹² The General Counsel argues that sec. 2620 of the Union's agreement with Progressive Concrete required the Union "to make every reasonable effort to advise the contractor or his representative of his presence on the project." That provision clearly applies to the contractor, Progressive Concrete; the agreement is silent as to any obligation owed the general contractor.

¹⁰ *Lechmere* holds that where access to an employer's private property is sought by nonemployee union organizers seeking to exercise Sec. 7 rights "derivatively," the threshold question is whether the employees are otherwise inaccessible. *Id.* at 537-538. Only if an inaccessibility showing is made must employee Sec. 7 rights and employer property rights be balanced. *Id.* at 538.

Here, Respondent had an exclusionary property interest in its construction trailer, which, particularly given the purpose and circumstances of DeMott and Harrison's October 1, 2010 visit, permitted Respondent to deny them access. Alternatively, Respondent set reasonable and nondiscriminatory restrictions on DeMott and Harrison's access to its construction trailer, the failure to follow which lost the two representatives access entitlement. Because DeMott and Harrison made no effort to schedule a visit before entering the construction trailer, they cannot claim that their ejection from it violated their contractual right of access. See *Peck/Jones Construction Corp.*, supra at 17. Under either scenario, Respondent could properly bar DeMott and Harrison from the trailer. In these circumstances, while Rankin's violent expulsion of DeMott from the construction trailer was repugnant and inexcusable and while it may have transgressed civil or criminal laws, it did not violate the Act.

The complaint alleges that Respondent promulgated and maintained an overly broad and discriminatory rule prohibiting solicitation at Respondent's jobsite without appointment. The only evidence of any such rule is the no-solicitation sign posted on the construction trailer. The no-solicitation sign, which I have found set reasonable and nondiscriminatory limitations on solicitation, cannot, of itself, prove the allegation. No evidence was adduced that the no-solicitation notice was posted anywhere at the jobsite other than at the trailer, and there is no evidence Respondent required appointments for solicitations conducted on the jobsite generally. Further, no evidence was adduced that the construction trailer served as a gateway to the jobsite, thereby compelling jobsite-visit screening through the trailer. Finally, a reasonable reading of the notice justifies an inference that it applied only to individuals seeking to meet with occupants of the construction trailer.

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by ordering the union representatives off the jobsite. The evidence shows that after Rankin forcibly expelled DeMott from the construction trailer, he told a security guard to make sure the two union representatives got off the property. It

is reasonable to infer that Rankin's order encompassed the entire jobsite and not just the trailer from which the representatives had already been removed. As already discussed, the Union had an access right to the jobsite, with which access right Rankin's order interfered. Although no employee was present to hear Rankin's order, the Board holds to the principle that acts of unions and their agents can be protected under the Act. *Golden Stevedoring Co.*, 335 NLRB 410, 414 (2001), citations omitted. As the Board observed, it would be "curious and myopic" to hold otherwise, for a contrary interpretation would mean that "conduct that is protected when engaged in by . . . employees . . . would lose its protection if engaged in by the employees' union on their behalf." *BE & K Construction Co.*, 329 NLRB 717, 724 (1999), *enfd.* 246 F.3d 619 (6th Cir. 2001). It is immaterial that the security guard failed to execute Rankin's order. Accordingly, I find that when Rankin directed a security guard to escort DeMott and Harrison off the jobsite, Respondent violated Section 8(a)(1).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by ordering union representatives to leave a construction jobsite in which it had no exclusionary property interest.
4. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to post appropriate notices in the manner set forth hereafter.

[Recommended Order omitted from publication.]