



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

October 8, 2015

Marcia M. Waldron Esquire
Clerk, United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia PA 19106

Re: NLRB v. Mazzara Trucking & Excavating Corporation
Board Case No. 04-CA-116883

Dear Ms. Waldron:

I am enclosing an original and five copies of the National Labor Relations Board's application for enforcement of its order in this case. Within 40 days of the Court's docketing of this application, I will file the agency record and a certified list of its contents.

Please serve a copy of this application on the Respondent, Mazzara Trucking & Excavating Corporation, whose address appears on the service list. I have served a copy of the application on each party admitted to participate in the Board proceedings, and their names and addresses also appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of any correspondence the Court sends to counsel in this case. The Board attorney

directly responsible for this case is Meredith Jason (202) 273-2945.

Very truly yours,

A handwritten signature in black ink, appearing to read "Linda Dreeben". The signature is written in a cursive style with a large initial "L".

Linda Dreeben

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

1015 Half Street, SE

Washington, D.C. 20570

(202) 273-2960

Encls.

SERVICE LIST

NLRB v. Mazzara Trucking & Excavating Corporation
Board Case No. 04-CA-116883

Alaris Health at Harbor View, Esquire 60 Park Place Suite 8 Newark, NJ 07102-5504	Respondent's Counsel
Cynthia Ringell, Esquire Janinski PC 60 Park Place Suite 8 Newark, NJ 07102-5504	Respondent's Counsel
Russell J McEwan, Esquire Littler Mendelson, PC One Newark Center 8 th Floor 1085 Raymond Blvd Newark, NJ 07102-5235	Respondent's Counsel
Mazzara Trucking & Excavating Corporation Attn: Isadoro Mazzara 3276 Jacobstown-New Egypt Road Wrightstown, NJ 08562	Respondent
Raymond G Heineman, Esquire Curtiss T. Jameson, Esquire Kroll Heineman Carton 99 Wood Avenue South, Suite 307 Metro Corporate Campus I Iselin, NJ 08830-2715	Charging Party's Counsel
Laborers Local 172 604 Bordentown Ave Trenton, NJ 08610	Charging Party
Dennis Walsh NLRB Region 4 615 Chestnut Street - 7 th Floor Philadelphia, PA 19106-4404	Regional Director

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS)
BOARD)
) Petitioner)
))
) v.)
))
MAZZARA TRUCKING &)
EXCAVATING CORPORATION)
) Respondent)

APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board hereby applies to the Court for enforcement of its Order issued against Mazzara Trucking & Excavating Corporation on April 30, 2015, in Board Case No. 04-CA-116883, reported at 362 NLRB No. 79. The Board seeks enforcement of its Order in full.

The Court has jurisdiction over this application pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(e)). Venue is proper in this Circuit because the unfair labor practices occurred in Wrightstown, New Jersey.



Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, D.C.
this 7th day of October 2015

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS)
BOARD)
 Petitioner)
))
 v.)
))
MAZZARA TRUCKING &)
EXCAVATING CORPORATION)
 Respondent)

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's application for enforcement of its order in this case is being served today by first-class mail upon the following counsel:

Alaris Health at Harbor View, Esquire
60 Park Place Suite 8
Newark, NJ 07102-5504

Cynthia Ringell, Esquire
Janinski PC
60 Park Place
Suite 8
Newark, NJ 07102-5504

Russell J McEwan, Esquire
Littler Mendelson, PC
One Newark Center 8th Floor
1085 Raymond Blvd
Newark, NJ 07102-5235



Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, D.C.
this 7th day of October 2015

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Mazzara Trucking & Excavating Corporation and
Local 172, Laborers International Union of
North America.** Case 04-CA-116883

April 30, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On May 7, 2014, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Charging Party filed exceptions, a supporting brief, and a reply brief. The Respondent filed an answering brief and a motion to reopen the record.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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,² and conclusions except as specified herein and to adopt the recommended Order.

¹ The Respondent moves to reopen the record to admit two items of evidence: (1) an April 7, 2014 finding by the Pilesgrove Joint Municipal Court against Union Organizer Jaime Machado; and (2) testimony of the lessee of a property neighboring the Green Street jobsite. We deny the motion, as the evidence sought to be adduced would not require a different result. See Sec. 102.48(d)(1) of the Board's Rules and Regulations.

² The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent did not unlawfully interfere with union representatives who sought access to the Respondent's Pilesgrove jobsite on November 8, 2014, we find it unnecessary to pass on the judge's finding that the representatives were not engaged in protected activity because we agree with the judge's alternative analysis that, assuming the union representatives' activity was protected, they lost the protection of the Act by disrupting the Respondent's work. Member Johnson would adopt the judge's decision without modification.

No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) by summoning police to interfere with Union Organizer Jaime Machado's protected concerted activity of filming alleged safety violations at the Green Street jobsite on December 3, 2014.

We find it unnecessary to pass on the judge's dismissals of the allegations that on November 22 and December 5, 2014, the Respondent violated Sec. 8(a)(1) by summoning police to interfere with union representatives filming alleged safety violations at the Green Street jobsite, because finding these additional violations would be cumulative and would not affect the remedy. Member Johnson would adopt the judge's recommendations for dismissal.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mazzara Trucking & Excavating Corporation, Wrightstown, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. April 30, 2015

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Donna Brown, Esq., for the General Counsel.
David Jasinski and Cynthia Ringell, Esqs. (Jasinski, P.C.), of
Newark, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on March 31, 2014. The complaint, as amended at the hearing (Tr. 6-8, 33-34), alleges that Respondent, a construction industry excavating contractor, violated Section 8(a)(1) of the Act on four separate occasions by interfering with nonemployee union representatives who sought access to Respondent's jobsites "in order to prevent its employees from having contact with" Charging Party Union (hereafter, the Union), notwithstanding that Respondent "did not have a legitimate property interest in the job site properties." The Respondent filed an answer denying the essential complaint allegations.¹

After the trial, the General Counsel and the Respondent filed briefs, which I have read and considered. Based on the entire record, including the testimony of the witnesses, and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation with a facility in Wrightstown, New Jersey, is engaged in performing excavation

¹ The transcript reference at p. 34, l.16 erroneously names the speaker as Judge Giannasi. The speaker was Mr. Jasinski. The transcript is corrected accordingly.

services in the construction industry. I find, as Respondent admits, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act. I further find, as Respondent also admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Background

The Union has been attempting to organize Respondent for some time. Union Organizer Jaime Machado² spoke to Respondent's owner, Isidoro Mazzara, on several occasions about using union labor after bid openings for New Jersey excavation contracts. Mazzara stated he was not interested. (Tr. 11–12, 50–51.)

In late October 2013, Machado, along with his superior, Robert DiClementi, went to Respondent's job site at the Early Childhood Center in Pilesgrove Township to "see if we [could] get a contract with [Mazzara] again." (Tr. 11–12.) Machado and DiClementi approached Respondent's foreman, Eric Yuhas, on the job and talked to him about Respondent possibly "signing a job agreement or a full collective-bargaining agreement." Yuhas said he did not think that Mazzara would do that, and, after a brief conversation, the union agents left. (Tr. 13–14.)³

The November 8 Incident at the Pilesgrove Project

Machado and DiClementi returned to the Pilesgrove jobsite on November 8, 2013, a visit that resulted in one of the complaint allegations in this case. The jobsite sits on property owned by the Pilesgrove Board of Education, where the School Board was supervising construction of a new building or buildings adjacent to an existing structure. The jobsite itself sits some 250 to 300 yards off a public street, accessible by a dirt road that runs from the public street to the jobsite. The entire area between the public street and the jobsite is a construction site, which includes not only the access road, which was to be used by vehicles connected with the construction project, but a construction trailer and a material storage area. (Tr. 18–20, 24, 77.) The area is basically a field of about 70 acres (Tr. 73); it is not fenced off (Tr. 24) or posted against trespassers (Tr. 83). Machado drove his pickup truck along the access road past a group of utility workers, who were installing utility poles on the site. (Tr. 17, 24.) He observed Respondent's heavy equipment "running behind the [existing] building." (Tr. 17.) His purpose and that of DiClementi was to talk to Mazzara. (Tr. 18, 67.)

Mazzara was operating an excavator, and, when he saw the

pickup truck, he drove within 30 to 50 feet of it and stopped. (Tr. 18–19, 22–23, 67, GC Exh. 2.) Mazzara got out of his machine, approached the pickup truck, and asked what Machado was doing on the job. Machado said he came there to talk to Mazzara and "try to work something out." (Tr. 18.) Mazzara replied that he was nonunion and he was going to call the police because the union officials were trespassing. Machado said there were no signs on the property prohibiting trespassers. (Tr. 18–19.) Machado then raised the issue of another Respondent jobsite and goaded Mazzara with an unexplained and cryptic question, "where did you bury the trash at?" (Tr. 67–68.) According to DiClementi, at that point, Mazzara became "more aggravated" and repeated that he was going to call the police. Machado replied that he and DiClementi would be waiting for them. (Tr. 68.) Machado then drove the pickup truck down the access road and off the jobsite. He parked the truck across the public street that adjoined the construction site, in order to wait for the police. (Tr. 19, 68.)

Shortly thereafter, several police officers arrived. They first went to the jobsite to talk to Mazzara. They then approached Machado and DiClementi at their parked pickup truck. Machado told the officers that he and DiClementi went on the jobsite to speak with Mazzara and "try to work out an agreement for his workers." (Tr. 19.) After some discussion, the officers arrested Machado and DiClementi, placed them in handcuffs, brought them to a police station, and booked them, after Mazzara filed a formal complaint against them. (Tr. 20–21, 69–70.) The complaint charges that Machado and DiClementi engaged in disorderly conduct by making or causing to be made "a communication or communications, in any manner likely to cause annoyance or alarm, specifically by arriving the victim's jobsite and making harassing statements towards him." (GC Exhs. 3 and 12.) The police report on the matter fixes the time of the incident at 11:08 a.m. It states that, upon investigation, the officers determined that Machado and DiClementi were harassing Mazzara because they refused to leave the jobsite. According to the report, Machado and DiClementi claimed that they did not have to leave the jobsite because they were protesting that Mazzara was a nonunion contractor. (GC Exh. 3a.) The criminal complaint is still pending before a local court. (Tr. 25.)

Frank Rizzo is employed by the Woodstown/Pilesgrove Board of Education. He was responsible for overseeing the Early Childhood Education Center construction project. He testified that, although it was a public construction project as opposed to a private project, the site was not open generally to the public. There is always danger on construction projects and contractors were required to carry insurance against injury. According to Rizzo, if he or his subordinates found individuals on the site who were not part of the construction process, "we would ask them to leave." (Tr. 76–77.)

The contract between Respondent and the School Board provides that the contractor was to "take every precaution against injuries to persons or damage to property," and "in case of any emergency which threatens loss of injury or property and/or safety of life, the Contractor is required to act as he sees fit." The contractor is also charged with notifying "the Engineer thereof immediately thereafter." (R. Exh. 1 and Tr. 78–80.)

² Machado described himself as an organizer employed by Laborers' Eastern Region Organizing Fund. (Tr. 10.)

³ Machado subsequently spoke to Yuhas, perhaps on several occasions, including in places outside Respondent's work sites, and arranged for him to leave Respondent's employ to take a job with a union contractor. Machado also spoke to two or three other employees of Respondent, either at their homes or on their telephones, in an apparent attempt to garner support for the Union. He obtained their home addresses from certified payrolls, presumably for work on public projects, and their phone numbers from Yuhas. (Tr. 27–28, 48, 51–54, 56–57, 58–59, 64.)

Mazzara followed the requirements of the contract and called Rizzo after his confrontation with Machado and DiClementi. (Tr. 80.) Mazzara told Rizzo what had happened and Rizzo told Mazzara that he did “the right thing.” (Tr. 81.)

The Green Street Project

From about November 2013 until at least the early part of 2014, Respondent performed work on Green Street, a residential area in Woodstown Township, New Jersey.⁴ It was a public job, presumably under a contract with the Township, to replace water and sewer pipes beneath the public street. Parts of the public street and adjacent sidewalks constituted the jobsite or work areas. They were blocked off with traffic cones. Indeed, the entire construction area was set off by barricades, directed by the Township. Signs were posted at the barricades stating, “Sidewalks Closed, Local Traffic Only.” (Tr. 28–33, 41, 86.) Respondent usually had 3 or 4 workers on the site, including a backhoe operator, Matt Tuck, who apparently replaced Eric Yuhas as foreman. Union representatives visited the site on numerous occasions (Tr. 39–40, 71, 86, 88), but only 3 are mentioned in the complaint, as amended: the visits of November 22, December 3 and 5, 2013.

The November 22 Incident

On the afternoon of November 22, during working time, Machado and DiClementi visited the jobsite. They parked their vehicle nearby on a public street and proceeded to the work site, along the sidewalk. According to Machado, the union representatives wanted to “check on” the job site and document possible safety violations. Machado testified that contractors who do not follow proper safety practices make it unfair for competitors who do. (Tr. 28.) In that connection, Machado carried with him a video and voice recorder, which he used, to film what transpired and to make comments. (Tr. 29.) This video recording and the video recordings of two other Green Street visits listed in the complaint were received in evidence (GC Exhs. 6, 7, 8, and 9), although those recordings do not capture the entirety of the visits of the union officials (Tr. 86).⁵

Machado walked toward the work area, filming and commenting as he approached the work area. He noticed two employees in a trench that he viewed improperly supported and unsafe. According to Machado, as he approached, the employees “came running out of the trench.” (Tr. 29.) He made no attempt to talk to the employees. But Tuck, the backhoe operator, left his machine, walked past Machado and went to a nearby gas station where he had parked his vehicle and made a telephone call, probably to Mazzara. When Tuck returned to the work area, he and Machado exchanged words, including a statement by Machado that Tuck should get a “real job.” This was a reference to Tuck’s predecessor, Yuhas, who left Respondent to take a job with a union contractor. (Tr. 29–30, 54–

56, 88.) At some point, Tuck told Machado to leave the jobsite, but Machado did not leave. The police were called and officers came to the job site. They talked with both Machado and Tuck, but made no arrests and left. (Tr. 28–32, 38.)⁶

Later, on November 26, Mazzara filed a complaint against Machado, alleging that Machado was “harassing my men giving them a hard time using foul language talking down to them causing them to stop working. Try to force them to leave job. Men were scared to death in fear of getting harmed.” (GC Exh. 5.) Still later, Machado received a summons from the Mid-Salem Municipal Court to appear in response to the complaint. (GC Exh. 4.) According to Machado, this case is also pending. (Tr. 38.)

The December 3 Incident

On December 3, Machado returned to the Green Street jobsite with 3 other union representatives. He parked his vehicle outside the construction work area where traffic cones blocked access. He walked alone to a residence overlooking Respondent’s work area and received the homeowner’s approval to film the work area from the homeowner’s porch. (Tr. 41–42, 44.) He filmed workers in a trench, as well as Mazzara, who was, on this occasion, also present and working on the site. The filming was done on work time. Mazzara was close enough to Machado for the latter to hear Mazzara say to one of his employees, “he’s not supposed to be here,” referring to Machado. Mazzara or one of his employees was seen making a phone call, and, a few minutes later, after Machado had exited the home where he was filming, the police appeared. An officer asked if Machado had been on the work site and he replied that he had not, stating that he was in a nearby house with the owner’s permission. (Tr. 43–44, GC Exh. 8.) After confirming Machado’s story with the homeowner, the officer spoke to Mazzara, then returned to speak to Machado, telling him that he did not do anything wrong. The officer then left. (Tr. 43–44.)

There was no arrest on this occasion and Mazzara did not file a complaint against Machado. But a police report was filed by Officer Ryan DeFalco, who arrived on the scene at 1:13 p.m. and left at 1:57 p.m. The report basically confirms the above account and also confirms that the officer was satisfied that Machado did not enter a construction zone, as alleged by Mazzara. (GC Exh. 9.)

The December 5 Incident

On December 5, Machado again visited the Green Street jobsite. This time he came with DiClementi and another union representative. After parking outside the construction area, the union officials walked up the public sidewalk to a trench in which Respondent’s employees were working. Again this was during work time and again Machado was video recording the scene. Machado testified that, once one of the workers left the trench and walked away, he, Machado, stepped onto the pavement and “hung [his] camera over” the trench to film it. One of Respondent’s employees was still in the trench. (Tr. 45–46.) After filming for 4 or 5 minutes, Machado and his associates walked back toward the entrance to the construction area and

⁴ The job was not yet completed at the time of the hearing in this case. (Tr. 85.)

⁵ Machado either brought or sought to bring his evidence of alleged safety violations to the attention of the Occupational Safety and Health Administration (OSHA), a police officer and someone he identified as an inspector on the Green Street job (Tr. 31, 44–45, 46–47, GC Exh. 11).

⁶ There was apparently no police report on this incident; at least none was offered or placed in evidence.

encountered someone he identified as an inspector. Machado engaged in a discussion with the inspector, telling the inspector that, in his view, there were safety issues on the job, including the way the sidewalks and roadways were closed down. (Tr. 46.) At that point, a police officer, presumably called by an agent of Respondent, approached Machado. According to Machado, the officer asked if he or any of the other union representatives threatened the employees. Machado denied he or the others had done so, and, after speaking to Respondent's foreman, the officer left the area. (Tr. 46–47, GC Exh. 10.)

Here again, there was no arrest and no complaint was filed. There was, however, a police report, prepared by an officer named Mattson, who arrived on the scene at 11:35 a.m. and left at 12 noon. The report (GC Exh. 11) states as follows:

Mazzara Construction advised that union representatives were impeding workers. Upon arrival spoke with union personnel who were not in the immediate work area and were speaking with engineer from Remington & Vernick. Both parties advised they were having a discussion over safety concerns. Spoke with heavy equipment operator who advised that prior to my arrival union personnel were to (sic) close to the opening of the road and were creating a distraction for workers. I did not observe this take place.

I advised union reps to stay away from active work area and they advised they would comply and were preparing to leave the site.

Tuck's Testimony about the Visits to the Green Street Job

Respondent's foreman on the Green Street job, Matt Tuck, offered credible testimony, not seriously challenged on cross-examination, about how he viewed the visits generally of the union officials to the job site. His testimony, in pertinent part, is as follows (Tr. 87–88):

[T]hey were trying to get our attention . . . They were trying to draw our attention away from what we were doing. We were trying to . . . put the sewer main or the water main and they would always try and draw our attention away from the task that we were—we had that day. They would always . . . try and pull us away from—you know, to slow us down or make a mistake so someone got hurt or something.

My men are supposed to be there, and I know who they are. Now anyone else standing around is, kind of, a distraction to be honest with you.

Based on my viewing of the video recordings of Machado's job visits, his testimony and that of DiClementi, and, in all the circumstances, I conclude that Tuck's testimony described above is an accurate assessment of the visits of the union officials on November 22 and December 5. The visit of December 3 is on somewhat of a different footing because Machado did not actually enter the job site or the work area. He filmed entirely from the porch overlooking the jobsite at a private home whose owner gave him permission to be there. Nor did Tuck testify specifically about the December 3 incident.

B. Discussion and Analysis

Section 8(a)(1) of the Act prohibits employers from restraining, coercing or interfering with employees exercising rights guaranteed under Section 7 of the Act. Section 7 protects concerted activity by employees who seek to band together "to improve terms and conditions of employment or otherwise improve their lot as employees through channels [even] outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Employees may engage in concerted protected activity at the work place during nonwork time, absent special circumstances such as interference with production or discipline. *Id.* at 557; and *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 fn. 10 (1945). Short of a protected strike or work stoppage, such activity should not halt or interfere with work. The phrase "[w]orking time is for work" is a "long-accepted maxim of labor relations." *Our Way Inc.*, 268 NLRB 394 (1983).

Unions have derivative Section 7 rights, based on their status as employee representatives or as entities seeking to represent employees. While those rights most often involve efforts to reach or organize employees, they also include other efforts such as publicizing labor disputes and protecting area standards. See *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 29–30 (D.C. Cir. 2001), cert. denied 534 U.S. 992 (2001); *Venetian Casino Resort v. NLRB*, 484 F.3d 601, 608–610 (D.C. Cir. 2007), cert. denied 552 U.S. 1257 (2008); *Tradesmen International v. NLRB*, 275 F.3d 1137, 1142–1144 (D.C. Cir. 2007); and *NLRB v. Roundy's*, 674 F.3d 638, 649–650 (7th Cir. 2012), enfg. 356 NLRB No. 27 (2010). But, like employees engaged in concerted protected activity, nonemployee organizers or representatives may be restricted to prevent interference with an employer's work or the work of its employees.

Moreover, nonemployee union organizers or representatives who engage in concerted protected activity are subject to far greater restrictions with respect to their right to access private property than employees. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Metropolitan District Council of Carpenters v. NLRB*, 68 F.3d 71, 73–74 (3d Cir. 1995); and *Roundy's*, above, 674 F.3d at 649. Generally, absent discrimination, an employer need not permit nonemployee union representatives on its property unless there are no adequate alternative means to reach employees. *Lechmere*, above, 502 U.S. at 538–540, citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Nor do union claims of protected concerted activity preempt state trespass laws. *Metropolitan District Council of Carpenters*, above, 68 F.3d at 74, citing authorities. But, in order to justify ousting nonemployee union representatives engaging in concerted protected activity, an employer has the burden of establishing that its property rights or interests permit it to exclude them. See *Roundy's*, above, 674 F.3d at 650–651 (an employer's easement does not amount to an exclusionary right under applicable state law). And nonemployee representatives may not be excluded from public areas so long as they are engaged in protected concerted activity. *Roger D. Hughes Drywall*, 344 NLRB 413, 414–415 (2005), and cases there cited.

Unlawful interference with protected concerted activity may take many forms, but, in the context of employer exclusion of nonemployee union representatives, calling the police or having

union representatives removed or arrested by police counts as such interference. See *Roundy's*, above, 356 NLRB No. 27 at slip op. 2, ALJ slip op. 9–11, 14, enf.d., 674 F.3d at 655; and *Roger D. Hughes Drywall*, above, 344 NLRB at 415. But see *Venetian Casino Resort*, above, 484 F.3d at 610–614 (employer's actions in attempting to effectuate a citizen's arrest and broadcasting a no-trespass message constituted unlawful interference with protected concerted activity, but issue of summoning police is remanded to determine whether summoning police in the circumstances of that case amounted to petitioning government under the Supreme Court's *Noerr-Pennington* doctrine).

With these principles in mind, I now turn to the four specific instances in the complaint where the General Counsel alleges that the Respondent interfered with protected concerted activity in violation of Section 8(a)(1) of the Act.

The Pilesgrove Allegation

Contrary to the relevant complaint allegation dealing with the November 8 incident at the Pilesgrove jobsite, Respondent did nothing to prevent Machado and DiClementi from "having contact with employees." Indeed, it is clear from the testimony of both Machado and DiClementi that the union representatives did not come on the jobsite to speak to employees. They wanted only to talk to Mazzara about signing a contract with the Union. It is also clear that Mazzara did not want to work with the Union and did not want to discuss the matter. I am unaware of any cases that establish a Section 7 right for nonemployee union representatives to go onto a jobsite in order to convince an employer to sign a union contract, especially when, as here, the employer does not want to discuss the matter. Nor does the General Counsel's brief cite any such cases. There were, in any event, other less intrusive ways to talk to or communicate with an employer with whom the Union wanted a relationship. The union representatives had already asked for Mazzara's support and were firmly rejected. He did not want anything to do with the Union.⁷

Even if it could be determined that there were a protected Section 7 right for the union officials to come on to the jobsite to talk with Mazzara, they forfeited that right by interfering with Respondent's work during work time, thus rendering their intrusion unprotected. Mazzara was operating an excavator when Machado and DiClementi confronted him on the jobsite. They certainly did not leave when they received a predictable refusal by Mazzara to recognize the Union or even talk to them about the subject. Mazzara could justifiably feel harassed when the union officials refused his request that they leave and when Machado goaded him with a cryptic reference to another job, asking where he had "buried" the trash.

Nor, in the circumstances, was Mazzara without authority to eject the union representatives from the jobsite. The Pilesgrove jobsite is not the equivalent of a public square or other public areas where protests or demonstrations are normally protected. Indeed, neither of the cases cited by the General Counsel in

⁷ To the extent that the Union wanted to communicate with Respondent's employees, the evidence shows that it did so by other means. See fn. 3 above.

support of the notion that Mazzara was without authority to oust the union representatives from the Pilesgrove jobsite (Br. 14) involve, as here, a publicly owned site that is also a construction area.⁸

It is clear from Rizzo's testimony that the public and those not connected with the construction project were not permitted on the jobsite, in part because construction sites are dangerous places. Mazzara was authorized by the contract between him and the School Board to act as he saw "fit" when presented with potential interlopers. And if that contract language did not explicitly authorize him to eject those interfering with his work, it implicitly did so. In any event, Rizzo's uncontradicted testimony made clear that he, on behalf of the public owner of the construction site property, ratified Mazzara's actions in making sure that the union officials were ejected from the property, even if it meant calling the police. In these circumstances, I shall dismiss the complaint allegations dealing with the Pilesgrove jobsite.

The Green Street Allegations

As in the Pilesgrove allegation, there is no record support for the General Counsel's contention that Respondent prevented the union representative from communicating with employees on the Green Street job because the union representatives never attempted to communicate with the employees. Machado's clearly stated intent was to video record alleged safety violations. It is this activity that the General Counsel asserts amounts to protected concerted activity (Br. 17). Although it is not the type of protected concerted activity by unions that permeates the NLRB and appellate court case reports, I recognize the Union's concerns. Union representatives were entitled to publicize and bring to the attention of both employees and the general public alleged safety violations by an employer who, in Machado's view, was willing to cut corners to save money. Those alleged safety violations might well harm employees and put other employers, perhaps union employers, at a competitive disadvantage. The Union was entitled to document and publicize these alleged safety violations as they involve working conditions protected by Section 7. Divorced from its location and interference with work, the Union's protest against alleged safety violations is comparable to union handbilling that protests failure of an employer to pay area standard wages, the very concerted protected activity involved in the *Roundy's* case, cited above. See also *Petrochem Insulation, Inc.*, 330 NLRB 47, 49–50 (1999), enforced at 240 F.3d 26, cited above (protests involving safety and health issues are protected).

Thus, I find that, as an initial matter, Machado's video recording of alleged safety violations amounted to concerted protected activity, notwithstanding that neither he nor his associates actually talked to or wanted to talk to employees. Alt-

⁸ Thus, in *Hanover Concrete Co.*, 241 NLRB 936, 937 (1979), a former employee was unlawfully ordered to leave a public road near the employer's plant. And, in *Harco Asphalt Paving, Inc.*, 353 NLRB 661 (2008), a two-member Board case with no precedential value, it is unclear whether the protected activity took place on a public street or simply on property in which the employer had no exclusionary interest. But, in any case, there was no work being performed in that area. (Id. at 665.)

though the complaint spoke in terms of communicating with employees in its conclusory paragraph, it also set forth in one of its descriptive paragraphs that “Machado was filming what he believed to be safety violations.” In any event, the issue of what Machado was doing on the Green Street jobsite was fully litigated.

Nevertheless, I find that, at least on November 22 and December 5, the conduct of Machado and his fellow union representatives lost the protection of the Act because it was unduly intrusive. It constituted an invasion of restricted work space and interfered with the work of Respondent’s employees on work time. Tuck’s uncontradicted testimony establishes that the Township, on whose public property the construction was taking place, authorized barriers precluding people who did not live or have business in the area from entering the construction area. In this respect, the restriction was authorized by the public entity that “owned” the property and it was for the benefit of Respondent, who can be said to have been the agent of the Township in restricting access.⁹

The union representatives violated that restriction on November 22 and December 5. Indeed, the video evidence of the November 22 visit clearly shows that Machado was within several feet of the trench he was filming, well within the restricted zone. And on December 5, he himself testified that he went on the pavement and reached his video recorder over the trench. In both cases, employees were working in the trench and they left their work site when approached by Machado. The backhoe operator also stopped working. Thus, Machado’s filming and his presence, even after he was asked to leave, interfered with the work of employees during work time. Such activity would not insulate employees from restrictions under the time honored rule that “working time is for work.” And it should likewise not insulate Machado and his associates here. I therefore find that their activity at the Green Street worksite on November 22 and December 5 was unprotected and I shall dismiss those allegations in the complaint.¹⁰

Machado’s conduct on December 3 is different. He was filming alleged safety violations from the vantage point of a private residence, whose owner had given him permission to be there. Although Mazzara, who was present on the job and apparently close enough to observe Machado, was obviously perturbed, he had no right to interfere with or restrain Machado’s Section 7 activity from where he was filming. Any interference with work was negligible since Machado did not physically come into a work area. His filming was the equivalent of using a long zoom camera lens from afar, with no physical invasion of the work area. Thus, unlike his activity on November 22 and December 5, Machado’s filming on this occasion did not lose

⁹ Calling the police who represent the public entity that “owned” the property was a reasonable way to enforce the restriction.

¹⁰ On this point, the General Counsel cites cases in support of the proposition that union representatives who engage in protected concerted activity on public property may not be excluded from that property (Br. 16–17). But those cases are inapposite. None of the cases involve, as here, public property that also constituted construction areas. Nor did they involve, as here, interference with an employer’s work in such construction area, which rendered any concerted activity there unprotected.

the protection of the Act.¹¹

Even though there was no arrest or criminal complaint, Respondent’s summoning of police on December 3 amounted to unlawful conduct, particularly since the police investigation confirmed that Machado was lawfully on private property with the consent of the owner when he was engaged in protected Section 7 activity. It is settled that the test of interference, restraint and coercion under Section 8(a)(1) does not turn on the employer’s motive or on whether the coercion succeeded or failed; the test is whether the employer engaged in “conduct which, it may reasonably be said, tends to interfere with the free exercise” of Section 7 rights. *NLRB v. Illinois Tool Works*, 153 F.2d. 811, 816 (7th Cir. 1946). And see *Medcare Associates, Inc.*, 330 NLRB 935, 940 fn. 17 (2000).

Here, it is clear that Respondent’s action in calling the police had the tendency to restrain Machado. Indeed, that was likely Mazzara’s intent and his conduct had its intended effect: Machado left the porch where he was filming when he heard Mazzara say that he, Machado, did not belong where he was and when Machado realized that someone, at Mazzara’s behest, appeared to be calling the police. I find that Machado was interrupted in his protected filming, and prematurely left the place where he could justifiably have continued his protected concerted activity. Moreover, the experience of having to deal with a police investigation when he was properly engaging in protected concerted activity on this occasion would inhibit any future protected concerted activity of the same type on his part. I therefore find that, by calling the police to stop, or at least investigate, Machado’s protected filming on December 3, Respondent violated Section 8(a)(1) of the Act. See *Roundy’s*, cited above, 356 NLRB No. 27 at slip op. 2 and ALJ slip op. 9–11, 14.

CONCLUSIONS OF LAW

1. By summoning police to interfere with Union Organizer Jaime Machado’s protected concerted activity outside the Green Street jobsite on December 3, 2014, Respondent violated Section 8(a)(1) of the Act.
2. The above violation is an unfair labor practice within the meaning of the Act.
3. Respondent has not violated the Act in any other respect.

REMEDY

Having found that Respondent committed an unfair labor practice, I shall order it to cease and desist from such conduct and take certain affirmative action designed to effectuate the policies of the Act by posting an appropriate notice. See the Board’s order in *Roundy’s*, cited above, 356 NLRB No. 27 at slip op. 2.

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended¹²

¹¹ Contrary to Respondent’s contention (Br. 12, 25–26), there is no evidence that, on this occasion, Machado “harassed and intimidated” employees. Mazzara did not testify at all in this case and Tuck’s testimony on the Green Street visits is very general. Tuck does not specifically mention the December 3 incident.

¹² If no exceptions are filed, as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recom-

ORDER

The Respondent, Mazzara Trucking & Excavating Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Summoning police to interfere with union representatives filming alleged safety violations or engaging in other protected concerted activity from locations where they have authority to be present.

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

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

(a) Within 14 days after service by the Region, post, at its facility in Wrightstown, New Jersey, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 4, 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, the notices shall be distributed electronically, such as email, posting on an intranet or an internal site, and/or other electronic means, if the Respondent customarily communicates with 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and all former employees employed by the Respondent at any time since November 12, 2013.

(b) Within 21 days after service by the Region, file with the Regional Director 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.

IT IS FURTHER ORDERED that the complaint is dismissed inso-

mended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

¹³ 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."

far as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 7, 2014.

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 on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT summon police to interfere with union representatives filming alleged safety violations or engaging in other protected concerted activity from locations where they have authority to be present.

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

MAZZARA TRUCKING & EXCAVATING CORPORATION

The Administrative Law Judge's decision can be found at www.nlr.gov/case/04-CA-116883 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

