

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

DATE: December 19, 2016

TO: Mori Rubin, Regional Director  
Region 31

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

SUBJECT: Black Hand Cinema, LLC  
Case 31-CA-171862

512-5012  
512-5012-0133-0000  
512-5012-1725-1133  
512-5012-1725-2200  
512-5012-6712-6700  
512-5012-8300-0000

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) of the Act when it instructed Union Representatives, who were attempting to obtain recognition from the Employer, to leave a parking lot that the Employer had been authorized to use for the day under a license agreement with the property owner. It also seeks advice as to whether the Employer violated Section 8(a)(1) when it called the police to detain a Union Representative after an alleged assault and battery involving the Representative and a Union member on the lot.

We conclude that although the Employer did not have the right to exclude the Union Representatives from the parking lot based on the license agreement with the lot owner, under *Mazzara Trucking & Excavation Corp.*,<sup>1</sup> the Representatives lost the protection of the Act upon entering the parking lot by disrupting production and getting into a physical altercation with an employee while (b) (6), (b) (7)(C) was working. We also conclude that the Employer did not violate the Act by calling the police in response to the alleged assault and battery at its worksite because there is insufficient evidence that the Employer lacked a reasonable concern for reporting the activity or that the Employer reported the activity with an unlawful motive. Accordingly, the Region should dismiss these allegations, absent withdrawal.

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<sup>1</sup> 362 NLRB No. 79 (Apr. 30, 2015).

**FACTS**

Teamsters Local 399 (“the Union”) represents studio transportation drivers in the motion picture industry near Los Angeles, California. It claims that, because of the short production schedules of commercial and music video shoots, it is common practice in the industry for the Union to go to production sites and demand recognition from employers on the spot. On March 5, 2016,<sup>2</sup> Union Representative 1 received an email from a member of another motion-picture-industry union notifying [REDACTED] that Black Hand Cinema, LLC (“the Employer”), a commercial and music video production company, would begin shooting a commercial in downtown Los Angeles the following day. The Employer had a permit to shoot a commercial on a city street and an agreement to use a nearby parking lot for crew parking, catering, and motorhome trailers.

The agreement between the Employer and the parking lot owner refers to the owner as the “Licensor.” It grants to the Employer “the right through [Employer’s] employees, personnel, agents, contractors and suppliers, to enter upon the premises with vehicles, equipment, sets and facilities required during the course of production of the motion picture by [Employer] for the purpose of parking and storing same, and to remain thereon for a period of 1 day.” The Employer paid “consideration for the rights herein granted,” which gave it the “full parking lot (with one lane for through traffic left open) & 65 cars in the adjacent garage.” In the agreement, the parking lot owner “represents and warrants that Licensor carries general liability and all other insurance reasonably necessary covering the premises and its use” and “warrants and represents that the right to use and occupy the Premises is under the exclusive control of Licensor . . . .” The agreement also states that “Licensor agrees that [the Employer] may assign this Agreement and its rights.”

The parking lot owner advertises its business as specializing “in running small, attendant-style parking lots and garages in Downtown Los Angeles.” It also states that it “presently operates multiple ‘niche’ parking properties in Downtown Los Angeles” and has a special webpage dedicated to the use of lots for film production.

On March 6, at approximately 7:00 AM, Union Representative 1 went to the Employer’s production location outside the parking lot. [REDACTED] approached three drivers—one of whom was a Union member—gave them business cards, and stated that [REDACTED] wanted to organize the Employer’s employees. Union Representative 2 arrived at 8:00 AM and soon after both representatives entered the parking lot. The Representatives noticed that the production trailer and catering truck had emblems identifying them as Union companies.

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<sup>2</sup> All dates are in 2016.

The Representatives were then approached by the Employer's (b) (6), (b) (7)(C) and a private security guard. The (b) (6), (b) (7)(C) asked, "Can I help you?" The Representatives say that they tried to explain that they had a right to be in the lot to talk with their members, but the (b) (6), (b) (7)(C) told them that it was private property and that they had to leave immediately. As the security guard walked toward the two Representatives, Representative 1 said that there was no such thing as criminal trespass in labor disputes. The security guard then physically blocked Representative 1 as (b) (6), (b) (7)(C) tried to approach the catering truck. While Representative 1 stopped, Representative 2 continued toward the truck. Then Representative 1 tried to get to the catering truck by bypassing the security guard.

According to the Employer, Representative 2 tried to push (b) (6), (b) (7)(C) way past security personnel and made physical contact with them with (b) (6), (b) (7)(C) chest and arms. The (b) (6), (b) (7)(C) also claims that (b) (6), (b) (7)(C) tried to speak calmly with Representative 2, but (b) (6), (b) (7)(C) yelled in (b) (6), (b) (7)(C) face in a threatening way, saying that (b) (6), (b) (7)(C) could go wherever (b) (6), (b) (7)(C) wants and that (b) (6), (b) (7)(C) could not stop (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) also purportedly yelled, "Sit back and watch what happens and learn."

According to a catering truck employee, who is also a Union member, sometime after 8:00 AM Representative 2 instructed (b) (6), (b) (7)(C) to stop serving food and to leave the area because the Employer did not have a contract with the Union. The employee did so. The owner of the catering truck company, also a Union member, confirmed that Representative 1 or 2 instructed (b) (6), (b) (7)(C) by phone to "close the catering doors" and so (b) (6), (b) (7)(C) called (b) (6), (b) (7)(C) workers on the jobsite to cease catering services.

Representative 2 then got into a physical altercation with the Employer's (b) (6), (b) (7)(C) or (b) (6), (b) (7)(C) on the site, who is also a Union member. There is a dispute of fact as to who first made physical contact. According to Representative 1, the (b) (6), (b) (7)(C) began yelling at and then pushed Representative 2. According to the (b) (6), (b) (7)(C), Representative 1 approached the (b) (6), (b) (7)(C), began yelling at (b) (6), (b) (7)(C) and the crew in close proximity, and then banged into and shoved the (b) (6), (b) (7)(C). The Union also claims that after the (b) (6), (b) (7)(C) first pushed Representative 2, five or six security guards restrained the (b) (6), (b) (7)(C) while Representative 2 stood back. According to a police report, the security guard who separated them stated that "both [Representative 2] and [the (b) (6), (b) (7)(C)] closed the distance between each other and began to push each other."

The Employer's (b) (6), (b) (7)(C), who identified (b) (6), (b) (7)(C) as "(b) (6), (b) (7)(C)" then spoke to the Representatives and told them that (b) (6), (b) (7)(C) would not sign a Union contract, that Union benefits were extortion, and that (b) (6), (b) (7)(C) already paid 22% over standard wages. Representative 2 then said "we're done here," and told Representative 1 to pull all Union members from the location.

At this point, Los Angeles Police Department officers arrived at the scene. The (b) (6), (b) (7)(C) pointed to Representative 2 and said (b) (6) had attacked the (b) (6), (b) (7)(C). The police officers then handcuffed Representative 2 in the presence of employees, walked (b) (6), (b) (7) to the street, and told Representative 1 to stand back. According to the police report (reporting simple assault and battery), the (b) (6), (b) (7)(C) said that Representative 2 “approached (b) (6), (b) (7) and began to yell at (b) (6), (b) (7),” demanded that (b) (6), (b) (7) “exit the worksite because [the Employer] was not yet represented by a union,” and “then bumped his stomach against [the (b) (6), (b) (7)(C)] stomach.” It appears that the (b) (6), (b) (7)(C) refused to press charges or sign the police report, which also states that Representative 2 and the (b) (6), (b) (7)(C) “began to have a normal conversation with each other. They resolved their issues with one another without any further altercation.”

After the police released Representative 2 from custody, (b) (6), (b) (7) told Representative 1 that they should pull all Union members from the production site. However, Representative 1 said that the situation had escalated too much and that they should not do anything else that day. Around this time, the catering truck was instructed to serve food again.

The entire incident took place over the course of the hour after Representative 2 arrived at the location.

### ACTION

We conclude that although the Employer improperly instructed the Union Representatives to leave the parking lot based on its license agreement with the lot owner, it did not violate Section 8(a)(1) where, upon entering the property, the Union Representatives disrupted production and got into a physical altercation with an employee while (b) (6), (b) (7) was working. We also conclude that the Employer did not violate the Act by calling the police in response to the alleged assault and battery at its worksite because there is insufficient evidence that the Employer lacked a reasonable concern for reporting the activity or that the Employer reported the activity with an unlawful motive.

#### **I. The Employer Did Not Violate Section 8(a)(1) by Denying Access to the Union Representatives When It Instructed Them to Leave the Parking Lot.**

We conclude below that even though the Employer did not have the right to exclude the Union Representatives from the parking lot under California state law, the Representatives nonetheless lost the protection of the Act because of their disruptive and unpeaceful behavior during worktime. Thus, the Employer did not violate Section 8(a)(1) by instructing the Representatives to leave the property.

Under *Lechmere, Inc.*, an employer may lawfully bar non-employee union representatives from property over which it has an exclusionary right unless employees are inaccessible through normal channels.<sup>3</sup> An employer violates Section 8(a)(1), however, by barring union representatives from property as to which it lacks a right to exclude.<sup>4</sup> To determine whether an employer has an exclusionary property interest in the first place, “the Board examines relevant record evidence—including the language of a lease or other pertinent agreement—in conjunction with the law of the state in which the property is located.”<sup>5</sup> If state law does not create an exclusionary property interest, *Lechmere* and the laws and cases that create exceptions to its holding are inapplicable.<sup>6</sup> However, an employer does not violate Section 8(a)(1) by denying access to union representatives who lose the protection of the Act by disrupting work or production during worktime.<sup>7</sup>

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<sup>3</sup> 502 U.S. 527, 537 (1992).

<sup>4</sup> See *Polly Drummond Thriftway*, 292 NLRB 331, 332–33 (1989), *enfd. mem.* 882 F.2d 512 (3d Cir. 1989); *Barkus Bakery*, 282 NLRB 351, 352–54 (1986), *enfd. mem. sub nom. NLRB v. Caress Bake Shop*, 833 F.2d 306 (3d Cir. 1987).

<sup>5</sup> *Wild Oats Markets, Inc.*, 336 NLRB 179, 180 (2001); see also *Glendale Associates, Ltd.*, 335 NLRB 27, 27–28 (2001) (“The Board looks to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives . . . because it is State law, not the Act, that creates and defines the employer’s property interest.”), *enfd.* 347 F.3d 1145 (2003); *Food For Less*, 318 NLRB 646, 649 (1995) (“In determining whether an adequate property interest has been shown, it is appropriate to look not only to relevant documentary and other evidence on record but to the relevant state law.”), *enfd. in relevant part*, 95 F.3d 733 (8th Cir. 1996); *Bristol Farms*, 311 NLRB 437, 438 (1993).

<sup>6</sup> The Union argues that California state law provides additional protection against trespass actions for labor activity. See Cal. Pen. Code §§ 552.2, 602; *Fashion Valley mall, LLC v. NLRB*, 42 Cal. 4th 850 (2007); *In re Catalano*, 29 Cal. 3d 1 (1981); *Schwartz-Torrance Inv. Corp. v. Bakery & Confection Workers’ Union Local No. 31*, 61 Cal. 2d. 766 (1964). However, because we find that the Employer lacked an exclusionary property right over the parking lot, there is no reason to consider whether state law created exceptions to *Lechmere*.

<sup>7</sup> See *Mazzara Trucking*, 362 NLRB No. 79, slip op. at 1 n.2, 5.

**A. The Employer did not have an exclusionary property interest under California state law that would have permitted it to lawfully bar the Union Representatives from the parking lot.**

The Employer asserts that it had a “lease” on the parking lot which gave it a right to exclude non-employee union representatives. Based on the labels and substantive terms of the agreement, we conclude that the Employer had a license to use the parking lot, not a lease. Under California state law, “a licensee . . . cannot maintain an action in trespass or ejectment. . . .”<sup>8</sup> Rather, a license only grants “express or implied authority from the owner to perform an act or acts upon property.”<sup>9</sup> Thus, the Employer did not have the right to bar the Union Representatives from the lot.

In the agreement, the parking lot owner refers to itself as the “Licensor,” not the “Lessor.” While the terms and labels used in an agreement are not dispositive,<sup>10</sup> they are considered first<sup>11</sup> and are treated as evidence weighing in favor of the kind of agreement they denote.<sup>12</sup> Here, the labels of the parties’ agreement clearly denote a license.

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<sup>8</sup> *Nahas v. Local 905, Retail Clerks Assn.*, 144 Cal. App. 2d 808, 821 (1956) (holding that a licensee does not have a right to exclude others from property over which it has a license rather than a lease), *disapproved of by Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, Local No. 31*, 61 Cal. 2d 766 (1964). The court in *Schwartz-Torrance* nullified dicta in *Nahas* suggesting that an employer with a leasehold could necessarily enjoin trespass on its property in a labor dispute. See *Schwartz-Torrance Inv. Corp.*, 61 Cal. 2d at 773 (rejecting the *Nahas* court’s “intimation” that a shopping center lessor could sue to enjoin labor picketing on its property under California state law).

<sup>9</sup> *Golden W. Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11, 36 (1994). As a licensee, the Employer could “maintain an action to enjoin or to redress a violation of his right to exercise the license,” but this does not include a right to exclude. *Nahas*, 144 Cal. App. 2d. at 821.

<sup>10</sup> See *Golden W. Baseball Co.*, 25 Cal. App. 4th at 31.

<sup>11</sup> See *San Jose Parking, Inc. v. Superior Court*, 110 Cal. App. 4th 1321, 1327–28 (2003), *as modified on denial of reh'g* (Aug. 28, 2003) (finding that the express terms of an agreement are analyzed first to determine whether an agreement is a lease or a license).

<sup>12</sup> See *Golden W. Baseball Co.*, 25 Cal. App. 4th at 31 (citing *Darr v. Lone Star Industries, Inc.*, 94 Cal. App. 3d 895, 900 (1979) (stating that labels and terms used in

Moreover, the substantive terms of the parties' agreement further support finding that it is a license. California state law is clear that a lease is distinguishable from a license in that the former "gives exclusive possession of the premises against all the world, including the owner . . ." whereas the latter "merely confers a privilege of occupancy under the owner."<sup>13</sup> When "a right of exclusive possession in the grantee, exclusive to the landlord as well as others" is absent, "the agreement spells a license rather than a lease."<sup>14</sup> Here, the agreement does not grant the Employer the right to exclude others from the property, let alone the parking lot owner. Rather, it grants the Employer the right, through its "employees, personnel, agents, contractors, and suppliers, to enter upon the premises with vehicles, equipment, sets and facilities required during the course of the production . . . for the purpose of parking and storing the same, and to remain thereon for a period of 1 day . . ." Put simply, it expressly grants a right of entry and use but not a right to exclude, which indicates that the agreement is a license and not a lease.

Further bolstering the conclusion that the agreement is a license that did not create an exclusionary property interest is the requirement that the Employer must leave open one lane for through traffic. In the context of parking lots, the requirement that the party in possession leave open a thoroughfare for other customers is weighed in favor of finding a license rather than a lease, for this implies that the licensor still maintains control over the property in a way that is inconsistent with the right to exclude that would be created by a lease.<sup>15</sup> Indeed, there is no evidence here that the parking lot owner transferred its right to operate the parking lot to the Employer during production. On its website, the parking lot owner

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an agreement are weighed as evidence of it being a particular type of legal instrument but are not dispositive).

<sup>13</sup> 42 Cal. Jur. 3d Landlord and Tenant § 9 Licensor and Licensee.

<sup>14</sup> *Id.*; see also *O'Shea v. Claude C. Wood Co.*, 97 Cal. App. 3d 903, 909 (1979) ("If the contract gives exclusive possession of the premises against all the world, including the owner, it is a lease. If it merely confers a privilege to occupy under the owner it is a license."); *Nahas*, 144 Cal. App. 2d at 821; *Kaiser Co. v. Reid*, 30 Cal. 2d 610, 619–20 (1947).

<sup>15</sup> See *San Jose Parking, Inc.*, 110 Cal. App. 4th at 1328 (finding the requirement in an agreement that a parking lot "must provide reasonable access for pedestrian customers of the adjacent property owners" weighs against it being considered a lease); see also *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal. App. 4th 1004, 1040–41 (2009).

describes itself as specializing “in *running* small, attendant-style parking lots and garages in Downtown Los Angeles,” including that it “presently *operates* multiple ‘niche’ parking properties” in that area.<sup>16</sup> The parking lot owner has a special webpage dedicated to licensing its lots for film production,<sup>17</sup> suggesting that such agreements are a normal part of its operations. Consistent with these representations about the nature of the owner’s business, the parties’ agreement states that “the right to use and occupy the Premises is under the exclusive control of Licensor.” In sum, the parking lot owner still exercised control over the parking lot and the Employer’s rights under the agreement fell short of a lease with an exclusionary property interest.<sup>18</sup> Thus, under California state law, the license did not give the Employer the right to exclude Union Representatives from the property.

**B. Because the Union Representatives lost the protection of the Act by disrupting production during worktime and not acting peacefully during their visit, the Employer did not violate Section 8(a)(1) by denying them access to its worksite.**

In *Mazzara Trucking & Excavation Corp.*, the Board affirmed an ALJ decision that two union representatives lost the protection of the Act by entering a jobsite and disrupting production during worktime.<sup>19</sup> There, the employer-owner was operating an excavator when two union representatives confronted [REDACTED] and refused to leave the jobsite even after being told that the employer would not recognize or talk about the

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<sup>16</sup> *About Us*, PARAGONPARKINGLA.COM, <http://paragonparkingla.com/about-us/> (last visited Nov. 8, 2016) (emphasis added).

<sup>17</sup> *Film Parking*, PARAGONPARKINGLA.COM, <http://paragonparkingla.com/film-parking/> (last visited Nov. 8, 2016).

<sup>18</sup> Other evidence also weighs against the agreement being a lease. In *Golden W. Baseball Co.*, a California Court of Appeal provided additional indicia of a lease, including “provisions prohibiting assignment and requiring [the leasee] to carry property insurance” and the recording of the property interest. 25 Cal. App. 4th at 31. Here, there is a provision allowing for assignment, no requirement that the Employer carry insurance for the property, and there is no evidence that the interest was recorded.

<sup>19</sup> 362 NLRB No. 79, slip op. at 1, n.2.

union.<sup>20</sup> Their primary purpose for entering the jobsite was not to speak to employees but to get the employer to sign a contract.<sup>21</sup>

Here, the facts are very similar to those in *Mazzara*. The two Representatives came onto the jobsite for the express purpose of having the Employer sign a Union contract for its employees. Upon arriving, they almost immediately instructed subcontractor employees to shut down the catering truck servicing the site. Representative 2 then got into a physical altercation with the (b) (6), (b) (7)(C) while (b) (6), (b) (7)(C) was overseeing production activities in the parking lot. They then insisted on speaking with the Employer's (b) (6), (b) (7)(C) who is apparently the Employer's (b) (6), (b) (7)(C) (b) (6), (b) (7)(C), during production and were told that (b) (6), (b) (7)(C) would not recognize the Union. And while there is a dispute of fact as to who initiated the altercation between Representative 2 and the (b) (6), (b) (7)(C), there is no dispute that the altercation caused a disruption on the worksite and that the Union was not peaceful during its visit. Thus, even though the Employer was not authorized under its license initially to instruct the Representatives to leave and incorrectly asserted the right to exclude the Representatives, it did not violate the Act because the Representatives, upon their arrival, lost the protection of the Act through their disruptive, unpeaceful actions, which were part of their effort to force the Employer to sign a contract with the Union.<sup>22</sup>

## II. The Employer Did Not Violate Section 8(a)(1) by Calling the Police.

Generally, an employer may call the police on parties engaging in labor-related activity when “the employer is motivated by some reasonable concern, such as public safety or interference with legally protected interests.”<sup>23</sup> Even if the police ultimately

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<sup>20</sup> *Id.*, slip op. at 5.

<sup>21</sup> *Id.*

<sup>22</sup> While the physical altercation between Representative 2 and the (b) (6), (b) (7)(C) was highly disruptive and hence ran afoul of *Mazzara*, violent or tortious acts are also not protected Section 7 activities. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962) (stating that the “normal categories of unprotected concerted activities” are “those that are unlawful, violent or in breach of contract”); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257–58 (1939) (“There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land.”).

<sup>23</sup> *Nations Rent, Inc.*, 342 NLRB 179, 181 (2004) (finding that the respondent’s “reasonable concern that the pickets were trespassing on its property, monitoring a police scanner, and following employees home . . . fully justified the . . . involvement

decide that under the circumstances it is unwarranted to take action, “[s]o long as the employer is acting on the basis of a reasonable concern, Section 8(a)(1) is not violated . . . .”<sup>24</sup>

In this case, the Employer called the police during the March 6 incident to report an assault and battery. There is no dispute that Union Representative 2 and the (b) (6), (b) (7)(C) got into a confrontation involving physical contact and yelling. Evidence does not suggest that the Employer called the police to report a labor dispute or even to report a trespass.<sup>25</sup> Because it is reasonable for the Employer to be concerned over assault and battery at its worksite, it did not violate Section 8(a)(1) by calling the police. Furthermore, even though the (b) (6), (b) (7)(C) never pressed charges against Representative 2, the witnesses, police report, and party position statements agree that a physical confrontation occurred on the worksite. Therefore, the Employer’s reasonable concern for calling the police is not undermined by that nonoccurrence.<sup>26</sup>

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of the police.”); *see also Great American*, 322 NLRB 17, 21 (1996) (finding that an employer was justified in calling the police on handbillers for causing a traffic back up and impeding on customers’ entry into the employer’s parking lot). *Cf. Greenbrier*, 340 NLRB 819, 820 (2003) (finding that the respondent violated the Act by calling the police because it had “shown no legally protected injury at the hands of the picketers and no judicially cognizable interest in procuring enforcement of the traffic laws” or any other “reasonable basis” for calling the police), *enf. denied sub nom., CSX Hotels, Inc. v. NLRB*, 377 F.3d 394 (4th Cir. 2004).

<sup>24</sup> *Nations Rent, Inc.*, 342 NLRB at 181.

<sup>25</sup> *Cf. Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2007) (calling the police in response to a labor dispute, without evidence of “threats or violence” or other reasonable concern violated the Act).

<sup>26</sup> Because the Employer had a reasonable concern for calling the police to report an assault and battery, there is no reason to reach the question of whether, without a reasonable concern, the Employer might have been protected by the *Noerr-Pennington* doctrine if it had directly petitioned the government to take a particular course of action. *See Venetian Casino Resort, LLC v. NLRB*, 793 F.3d 85, 90 (D.C. Cir 2015) (holding that an employer who called the police on picketers was protected under the *Noerr-Pennington* doctrine and was not liable under the NLRA, even though the district attorney had told the employer that (b) (6), (b) (7)(D) would not enforce trespass laws against the picketers).

For the reasons stated above, the Region should dismiss the charge, absent withdrawal.

/s/  
B.J.K.

ADV.31-CA-171862.Response.BlackHandCinemaLLC (b) (6), (b) (7)