

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

## Advice Memorandum

DATE: December 15, 2015

TO: Charles L. Posner, Regional Director  
Region 5

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

SUBJECT: Kroger Mid-Atlantic  
Case 05-CA-155160

512-5012  
512-5012-1725-2200  
512-5012-6712-6700  
512-5012-8380-8700

The Region submitted this case for advice on whether the Employer had a property interest in the parking lot outside its grocery store that entitled it to evict a nonemployee Union official collecting petition signatures from customers in connection with a labor dispute. We conclude that although the Employer held only a non-exclusive easement over the parking lot under its lease, the lease language authorizing it to enforce the landlord's no-solicitation policy would have made the Employer an "agent" for purposes of Virginia's trespass law entitled to eject the official had the policy been enforced in a non-discriminatory manner. However, because the Region has concluded that the Employer discriminatorily enforced the no-solicitation policy, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1).

### FACTS

Kroger Mid-Atlantic (the "Employer") is a division of Kroger's supermarket stores, which included Store 538 in Portsmouth Virginia. On May 22, 2000, the Employer assumed the 1997 lease of the Portsmouth property with Sterling Creek Commons, LLP (the "Landlord") through an asset purchase. Store 538 was located in a strip shopping center. According to the lease, the Employer shared a right of easement to the common parking lot with the five other co-tenants. The Employer had no responsibilities with respect to the parking lot but had the right to enforce the Landlord's no-solicitation policy under Section 10 of the lease. Section 10 of the lease provided, in relevant part:

To the extent not prohibited by applicable laws, the Parking Areas and Common Facilities shall be subject to a uniform “no solicitation/ no loitering” rule, pursuant to which all soliciting, loitering, handbilling and picketing for any cause or purpose whatsoever shall be prohibited within the Parking Areas and Common Facilities. Either Landlord or Tenant may enforce said uniform “no solicitation/ no loitering” rule, to the extent it can be done in a lawful manner, by excluding or removing persons engaged in soliciting, loitering, handbilling, or picketing from the Parking Areas and Common Facilities or by otherwise lawfully enforcing said rule. Tenant shall have the right, coupled with an interest, and is hereby expressly authorized by Landlord to enforce in a lawful manner said uniform “no solicitation/ no loitering” rule within the Parking Areas and Common facilities. . . .

The Employer’s employees had been represented by United Food and Commercial Workers Union Local 400 (the “Union”) for over 16 years. In March 2015,<sup>1</sup> the Employer announced that it would close Store 538 on April 11, and that employees could transfer to stores 25 miles away but not to either of the two nonunion stores located within four miles of Store 538. In response, employees circulated a petition among themselves opposing this decision. And on April 2, a Union official began collecting customer signatures on a petition in the parking lot in front of Store 538. The petition stated that the customers would not shop at the other local Kroger stores unless the Employer allowed the employees to transfer there with full pay and benefits.

After two hours, the Employer’s Store Manager and Human Resources Coordinator approached the Union official, and showed him a letter from the Landlord reiterating the relevant portions of Section 10 of the lease providing that the Employer was authorized to enforce the no-solicitation policy (the “Letter”).<sup>2</sup> The managers then asked him to leave the premises. The Store Manager explained that he could continue to collect signatures on public property, such as on the adjacent street corner. The Union official called his supervisor, who instructed him to continue collecting signatures in the parking lot, and the managers returned to the store.

Shortly thereafter, an employee told the Union official that the managers were calling the police. About 40 minutes later, the police arrived and went into the store.

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<sup>1</sup> All dates hereinafter are in 2015 unless otherwise noted.

<sup>2</sup> The Employer asserted that the Letter was received on March 25, 2014. The Region determined that there is insufficient evidence to establish that the Employer solicited the Letter.

They came out holding the Letter and asked the Union official to leave the parking lot. The Union official complied.

On June 30, the Union filed an amended charge alleging, *inter alia*, that the Employer maintained and enforced a discriminatory and overbroad no-solicitation policy and unlawfully threatened to arrest the Union official for engaging in lawful concerted activities in the parking lot.

### ACTION

We conclude that the lease language authorizing the Employer to enforce the landlord's no-solicitation policy would have made the Employer an "agent" of the property owner for purposes of Virginia's trespass law had it not been for the Employer's discriminatory treatment of the Union official.

An employer may prohibit Section 7 activity by nonemployee union representatives on its property so long as there are reasonable alternative channels of communication that will enable the union to convey its message, and the employer does not discriminate against the union by allowing others to solicit on its property.<sup>3</sup> However, where there is no conflict between the exercise of Section 7 rights and private property rights because the Employer does not possess a property interest sufficient to make the union's presence a "trespass," the denial of access violates Section 8(a)(1).<sup>4</sup> Thus, in *Indio Grocery Outlet*, the Board reaffirmed the longstanding precedent holding that "in cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representatives, an interest which *entitled* it to exclude individuals from the property."<sup>5</sup> If the employer fails to meet its

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<sup>3</sup> See, e.g., *Wild Oats Community Markets*, 336 NLRB 179, 180 (2001), citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

<sup>4</sup> See, e.g., *id.* (employer with non-exclusive easement over strip-mall parking lot lacked property right to exclude nonemployee union representatives handbilling and picketing there); *Bristol Farms*, 311 NLRB 437,438 (1993) (employer had no authority to expel nonemployee union agents handbilling on the sidewalk outside the store, and would not have under California law even if the employer had complete ownership of the sidewalk).

<sup>5</sup> 323 NLRB 1138, 1141 (1997) (emphasis in original) (citations omitted) (holding that employer who leased a stand-alone store had no right under California law to exclude

burden, there is no actual conflict between private property rights and Section 7 rights, and the employer's ejection of nonemployees violates Section 8(a)(1).<sup>6</sup>

To determine whether an employer has the requisite property interest to meet this threshold burden, the Board looks to the language of the lease or other agreement and relevant state law.<sup>7</sup> In most cases, non-exclusive easements do not trigger sufficient property rights under various state laws to eject union organizers.<sup>8</sup>

The current trespass law in Virginia provides, *inter alia*, that a person shall be guilty of a Class 1 misdemeanor if:

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nonemployee union representatives from walkway and parking lot in front of the store), *enforced sub. nom., NLRB v. Calkins*, 187 F.3d 1080 (9<sup>th</sup> Cir. 1999).

<sup>6</sup> See, e.g., *Roundy's Inc. v. NLRB*, 674 F.3d 638, 650 (7<sup>th</sup> Cir. 2012) (enforcing Board determination that employer who held non-exclusive easements over common areas in front of its stores, including sidewalks and parking lots, lacked a property right under Wisconsin law to exclude nonemployee union handbillers from those areas); *Bristol Farms*, 311 NLRB at 438.

<sup>7</sup> See *Wild Oats Community Markets*, 336 NLRB at 180, citing *Food for Less*, 318 NLRB 646, 649 (1995), *enforced in relevant part sub. nom., O'Neil's Markets v. NLRB*, 95 F.3d 733 (8<sup>th</sup> Cir. 1996).

<sup>8</sup> See, e.g., *Best Yet Market*, 339 NLRB 860, 864 (2003) (employer had no authority under New York law to eject nonemployee union organizer and pickets from parking lot because it merely held a non-exclusive easement); *Food For Less*, 318 NLRB at 649-50 (employer had no authority under Missouri law to eject nonemployee handbillers from parking lot because it merely held a non-exclusive easement); *Johnson & Hardin Co.*, 305 NLRB 690, 690 (1991) (employer had no authority under Ohio law to expel union organizers passing out literature on the end of the company driveway because it had no right to control the property under its easement), *enforced in relevant part*, 49 F.3d 237 (6<sup>th</sup> Cir. 1995); *Giant Food Stores*, 295 NLRB 330, 330-333 (1989) (employer had no authority under Pennsylvania law to eject nonemployee union pickets from the parking lot or sidewalk in front of its store because it had a non-exclusive right to use those areas, rather than an exclusory property interest). *But see Weis Markets, Inc. v. NLRB*, 265 F.3d 239, 246-47 (4<sup>th</sup> Cir. 2001) (employer who had a non-exclusive easement over parcel pick-up area, sidewalks, and parking areas lawfully evicted nonemployee union organizers from those areas under Pennsylvania law).

any [such] person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian, or the agent of such person, or other person lawfully in charge thereof . . . .<sup>9</sup>

The previous statutory language governing trespass was amended in 2011 to add an “agent” as a person with authority to eject trespassers.<sup>10</sup>

An agency relationship is created “where the agent possesses either actual or apparent authority to act on the principal’s behalf[.]”<sup>11</sup> According to the Restatement (Third) of Agency § 2.01:

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.<sup>12</sup>

“Express authority” is the term often used to describe actual authority that the principal “has stated in very specific or detailed language.”<sup>13</sup>

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<sup>9</sup> Va. Code Ann. § 18.2-119, effective July 1, 2011.

<sup>10</sup> See *United Food and Commercial Workers International Union, Local 400 v. NLRB*, 222 F.3d 1030, 1035-1038 (D.C. Cir. 2000) (applying the prior version of Virginia Code § 18.2-119 to hold that an employer who had a non-exclusive easement over the sidewalk in front of the store was not a “custodian” or “other person lawfully in charge” authorized to eject nonemployee union organizers despite the employer’s obligation to clean and maintain the sidewalk).

<sup>11</sup> See *Wal-Mart Stores*, 350 NLRB 879, 884 (2007) (holding management trainee had actual authority to seize union flyers from an employee and employer therefore violated Section 8(a)(1)).

<sup>12</sup> See also *Elevator Constructors, Local 2 (Kone, Inc.)*, 349 NLRB 1207, 1209 (2007) (“It is well established that[] actual authority refers to the power of an agent to act on his principal’s behalf when that power is created by the principal’s manifestation to him”).

<sup>13</sup> Restatement (Third) of Agency § 2.01, Comment b.

Under Virginia law, the principal's power of control is the determining factor of whether an agency relationship exists.<sup>14</sup> The "question is not whether the party exercises control over the agent, but whether he has it."<sup>15</sup>

In this case, Section 10 of the lease, as repeated in the Letter, clearly gave the Employer express authority to enforce the Landlord's no-solicitation rule in the parking lot, provided that it did so lawfully. Under Section 10, the Employer had a "right, coupled with an interest," and was "expressly authorized by Landlord to enforce in a lawful manner said uniform 'no solicitation/ no loitering' rule within the Parking Areas...." Thus, even though the Employer held only a non-exclusive easement over the parking lot, under Virginia law the Employer would have been an "agent" of the Landlord with authority to remove trespassers who violated the landlord's no-solicitation policy. This authority was sufficient to satisfy the Employer's threshold burden to exclude the Union official from the property, provided that it did so lawfully.

The Union argues that no agency relationship was created here for two reasons. First, the Union asserts that the lease did not create a duty to act subject to the landlord's control and instead merely gave the Employer permission to exercise its own discretion concerning whether to enforce the non-solicitation policy. However, an agent is not a robot of the principal.<sup>16</sup> Rather, "a person may be an agent although the principal lacks the right to control the . . . agent's exercise of professional judgment."<sup>17</sup> The agent simply must exercise that discretion within its fiduciary duty of loyalty to the principal.<sup>18</sup>

Second, the Union argues that the lease did not create an agency relationship because excluding solicitors primarily benefited the Employer. However, agency law

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<sup>14</sup> See, e.g., *First American Title Insurance Co. v. First Alliance Title, Inc.*, 718 F. Supp. 2d 669, 678 (E.D. Va. 2010) (citations omitted), *aff'd*, 491 F. App'x 371, 2012 WL 3195888 (4<sup>th</sup> Cir. 2012).

<sup>15</sup> *Id.* at 678, citing *Butterworth v. Integrated Resources Equity Corp.*, 680 F. Supp. 784, 789 (E.D. Va. 1988).

<sup>16</sup> See Restatement (Third) of Agency § 1.01, Comment f(1) ("A principal's control over an agent will as a practical matter be incomplete because no agent is an automaton who mindlessly but perfectly executes commands").

<sup>17</sup> Restatement (Third) of Agency § 1.01, Comment c.

<sup>18</sup> See, e.g., Restatement (Third) of Agency § 1.01, Comment e.

recognizes that an agent may also serve its own interests when acting within the scope of agency where, as here, the agency created is “coupled with an interest.” An agency “coupled with an interest” is:

an interest, not amounting to a property or estate in a business, but still an interest in the continued existence of the power or authority to act with reference to such business . . . because the agent . . . [is] looking to the exercise of the power as a means of . . . protection.<sup>19</sup>

Although the general rule is that an agency relationship is revocable at any time by the principal, an agency “coupled with an interest” is not because of the agent’s self-interest in the subject matter of the agency.<sup>20</sup> Indeed, an agency coupled with an interest is irrevocable because “the agent’s work is, in part, to protect its *own* interest in the property it is managing – which means the agency is not only for the benefit of the principal, but also for the agent.”<sup>21</sup> Accordingly, the agency relationship here, which is “coupled with an interest” under the terms of the lease, lawfully contemplated that the Employer would act in its own interest in enforcing the no-solicitation policy.

Although we conclude that the Employer had a sufficient property interest under state law to eject the Union official had it done so lawfully, the Region has concluded that the Employer enforced the landlord’s no-solicitation rule in a discriminatory manner. Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1).

/s/  
B.J.K.

ADV.05-CA-155160.Response.Kroger (b) (6), (b) (7)

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<sup>19</sup> *Peacock v. American Agronomics Corp.*, 422 So. 2d 55, 58 (Fla. Dist. Ct. App. 1982), quoting *Bowling v. National Convoy & Trucking Co.*, 101 Fla. 634, 135 So. 51 (1931).

<sup>20</sup> See, e.g., *FHR TB, LLC v. TB Isle Resort, LP*, 865 F. Supp. 2d 1172, 1203 (S.D. Fla. 2011) (collecting cases).

<sup>21</sup> *Id.* at 1196. See also *Pacific Landmark Hotel Ltd. v. Marriott Hotels, Inc.*, 19 Cal. App. 4th 615, 625 (Cal. Ct. App. 1993) (“For an agency to be coupled with an interest the agent must have a ‘specific, present and coexisting’ beneficial interest in the subject matter of the agency. The agency must be created for the benefit of the agent. . . .”) (citations omitted).