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NLRB

In deciding whether to allow union organizers access to work sites, the National Labor Relations Board has long balanced employers' property rights with union rights under federal labor law. In this BNA Insights article, management attorneys Adam Dougherty and Jacquelyn Thompson of FordHarrison review the history of off-duty access and the development of board decisions that they say have tipped this balancing test toward employees.

Until either the appellate courts or the board starts to give more weight to employers' private property rights, it will be very difficult for employers to prohibit off-duty access, the authors conclude. It appears that if employers want an off-duty access policy in the current labor law climate, they should either ban reentry for all purposes or allow unfettered access, they say.

NLRB's Continuing Expansion of Off-Duty Access Rights

BY ADAM DOUGHERTY AND JACQUELYN THOMPSON

The National Labor Relations Board has long balanced employers' property rights with union rights under federal labor law in determining whether to allow union organizers access to work sites. The case law has developed over the last 60 years with the U.S. Supreme Court limiting access, and then the board gradually expanding it.

Recent decisions from the NLRB have reinforced the notion that the board continuously gives more weight to employees' access rights than to employers' property rights. This article reviews the history of off-duty access and the development of board decisions that have tipped this balancing test toward employees.

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History

The National Labor Relations Act defines the rights of employees to organize and to bargain collectively with their employers through representatives of their own choosing.[1] The rights of employees are principally set forth in Section 7 of the NLRA, which states that employees shall have the right ". . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

Section 8(a)(1) of the NLRA creates a broad prohibition on employer interference with its employees' union rights. The act forbids an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Any prohibited interference by an employer with the rights of employees to organize, to form, join, or assist a labor organization, to bargain collectively, to engage in other concerted activi-

[1] 29 U.S.C. §§ 151-169 (2013).

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ties for mutual aid or protection, or to refrain from any or all of these activities, constitutes a violation of this section.

In recent years, employers increasingly have been found to violate Section 8(a)(1) by attempting to limit employees' off-duty access to work areas.

Defining Workspace.

The U.S. Supreme Court long ago ruled that employees could organize on an employer's property while on non-work time, subject to certain limitations. In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 16 LRRM 620 (1945), the Court weighed the employer's management rights and the need to maintain order and discipline in the workplace against the employees' rights under the act. The Court held that when an employee is not on work time, his time is his own, and he can engage in union solicitation activity even though he is on the employer's property.

Applying *Republic Aviation*, the board limited the right to hand out union literature in work areas to prevent the hazard to production from potential littering of the premises.[2] However, the board made a distinction between distribution of literature and oral solicitation, the latter of which does not create the hazard associated with handing out pamphlets. Thus, employers could limit an employee's distribution of literature to non-work areas. Through subsequent decisions, the board continued to refine employee and union access rights on an employer's property, ushering in an era during which the board increasingly allowed employees access to distribute union information at the work site.

Limitations on Access for Non-Employees.

A decade after its landmark decision in *Republic Aviation*, the U.S. Supreme Court again addressed off-duty access, holding that the scope of Section 7 rights depends on one's status as an employee or non-employee.

In a unanimous decision, the Court severely limited non-employees' off-duty access. In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 38 LRRM 2001 (1956), non-employee union organizers were distributing union literature on employer-owned parking lots. The Court overturned the board, finding that the refusal of the employers to permit distribution of union literature by non-employee union organizers on company-owned parking lots did not unreasonably impede their employees' right to self-organization.

The Court reasoned that the locations of both the working and living areas of the employees did not place the employees beyond the reach of reasonable efforts of the unions to communicate with them by other means. The Court acknowledged that non-employee union organizers had a ''derivative'' right to discuss unionization with employees but that right is not expressly protected by the act. However, an employee's direct right to discuss unionization is superior to this derivative right of non-employees.

Thus, according to the Court, an employer may validly protect his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other non-employee distribution.

The Court reiterated that ''[t]he Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available.''

In *Babcock*, the Court focused on the difference in access between employees and non-employees. The Court admonished the board for not focusing on the material difference between solicitation for self-organization by employees, as in *Republic Aviation*, and solicitation by non-employees. Although the Court specifically mentioned the employers' rights to exclude non-employees from their properties, it did not define these property rights, nor did it explain its decision to separate employee rights from non-employee rights.

Almost 40 years after *Babcock*, the Supreme Court attempted to define the limitations on non-employee organizer access under the act. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 139 LRRM 2225 (1992), the Court reiterated that Section 7 of the act does not apply to non-employee union organizers except when ''the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels.'' The Court stated it was improper even to begin a balancing test with regard to Section 7 and private property rights unless ''reasonable access to employees is infeasible.''

Lechmere operated a retail store located in a shopping center and was also part owner of the plaza's parking lot. In a campaign to organize Lechmere employees, non-employee union organizers placed handbills on the windshields of cars parked in the employees' part of the parking lot. Lechmere then denied the organizers access to the lot. The union filed an unfair labor practice charge, alleging that Lechmere had violated the NLRA by barring the organizers from its property. An administrative law judge ruled in the union's favor, the board affirmed, and the U.S. Court of Appeals for the First Circuit enforced the board's order.

In reversing the board and the First Circuit, the Supreme Court, relying on *Babcock*, held that an employer cannot be compelled to allow non-employee organizers onto its property. The Court found that because the union failed to establish the existence of any ''unique obstacles'' that frustrated access to Lechmere's employees, the board erred in concluding that Lechmere committed an unfair labor practice by barring the non-employee organizers from its property. While *Babcock* and *Lechmere* are still good law, their application has become murky over whether to treat workers as ''employees'' or ''non-employees.''

Tri-County Medical Doctrine

Increasing Access.

Although the U.S. Supreme Court resisted increasing non-employee access, the board has been much more lenient in interpreting the right for employee access. In *Tri-County Medical Center*, 222 N.L.R.B. 1089, 91 LRRM 1323 (1976), the NLRB developed a three-part test to determine the validity of an employer's off-duty

[2] *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 625, 51 LRRM 1110 (1962).

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access policy. The board found such policies to be lawful only if the policy: (1) limits access solely to the interior of the facility and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the facility for any purpose and not just to those engaging in union activity.

The first prong of the test recognizes the employer's interest in controlling employee activity in working areas because of its potential effects on production. The second prong balances the strength of the employer's legitimate interest. The board believes that unless the employer clearly tells its employees about the policy, the employer's interests will likely not outweigh the employee's. Finally, the third prong looks to the neutrality of the policy, as applied for *any* purpose.

Over the past 35 years, the board has made it increasingly difficult for employers to draft an off-duty access policy that passes the *Tri-County* test because the board has gradually placed more focus on the third prong than the other two prongs.

Contrast Between Employees and Non-Employees.

In 2011, the NLRB adopted a new standard to determine whether off-duty employees of contractors can access non-working areas of property to disseminate handbills. In *New York New York, LLC*, the board found that a Las Vegas casino violated the act by prohibiting off-duty employees of restaurant contractors inside the casino from distributing handbills on casino property.[3]

Ark Las Vegas Restaurant Corp. contracted to provide food service to guests and customers of New York New York. Ark's employees, who worked on the New York New York premises but were not New York New York employees, began a campaign for union representation. In support of unionization, off-duty Ark employees distributed handbills to the casino's customers at the casino's main entrance and entrances of the restaurants. New York New York asked the contractor's employees to leave, and when they refused, had the employees escorted off the property. The union's subsequent unfair-labor-practice charge alleged that New York New York violated section 8(a)(1) by prohibiting the Ark employees from distributing handbills on its premises.

In its decision, the board did not strictly apply either *Republic Aviation* or *Lechmere*. Instead, the NLRB created a new access standard to reflect the specific status of workers protected under the NLRA who are not employees of the property owner. The board claimed it struck ''an accommodation between the contractor employees' rights under Federal labor law and the property owner's state-law property rights and legitimate managerial interests.''

The board first addressed whether Ark's off-duty employees were afforded Section 7 protections of an ''employee'' under the NLRA. Ark employees were not New York New York employees, but its contractor regularly employed them on New York New York's property. The board found that the Ark employees are statutorily protected employees, and New York New York is a covered employer that under certain circumstances can violate Ark's employees' rights.

Second, the board decided whether to treat the Ark employees as equivalent to New York New York employees, to whom *Republic Aviation* would apply, or non-employees, to whom *Lechmere* would apply. The board rejected both tests, although it found that the contractor's employees were much more closely related to New York New York employees than non-employees. Instead, the board created a new statutorily protected category. The board stated that property owners may exclude contractors' off-duty employees only when ''the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason . . . .''

The NLRB acknowledged that there may be circumstances in which property owners could ''impose reasonable, narrowly tailored restrictions on access when demonstrably necessary,'' but it declined to expound on how any of those potential limitations might be lawful under its new test.

In his dissent in *New York New York*, board Member Hayes noted, as he had in other access cases, that the NLRB was dismissive of private property rights. In his view, the *Babcock* balancing test was appropriate, because it involves non-employees of the property owner. Although he agreed that New York New York unlawfully excluded Ark employees under these specific circumstances, he said the majority's new test represents no real accommodation of competing interests. Instead, he said contractor employees' rights to engage in organization activity will trump the property owner's rights every time, subject only to the undefined narrowly tailored restrictions alluded to by the majority.

Rapid Expansion of Access.

Since the first inauguration of President Obama in 2009, the board has decided numerous cases invalidating employers' off-duty no-access rules because of ''exceptions.'' In late 2011 and 2012, the NLRB issued a trilogy of cases that greatly expanded off-duty access rights. These decisions have made it increasingly difficult for employers to limit access by off-duty employees. All three began with and expanded the reasoning of the *Tri-County* test.

The recent expansion began in December 2011 with *St. John's Health Center*, 357 N.L.R.B. No. 170, 192 LRRM 1249 (2011) (08 DLR A-1, 1/12/12). In *St. John's*, the board found that the hospital's off-duty access policy violated the act. The policy prohibited off-duty employees from accessing the building of the hospital, except ''to attend Health center sponsored events, such as retirement parties and baby showers.'' An investigation into the application of the policy found that the hospital routinely allowed employers on the premises for assorted reasons but enforced the policy against off-duty employees who were there for the purpose of campaigning on behalf of the union.

The ALJ found that the policy violated the second prong of the *Tri-County* test because it was not clearly disseminated until after it was enforced. Based on that, the ALJ did not require St. John's to rescind the policy but only to provide notice prior to enforcement. The board took a more punitive stance and ordered the employer to rescind its policy. The board briefly acknowledged that the employer has a private property interest, but it nonetheless held that the policy was presumptively unlawful under *Republic Aviation* because it did

[3] *New York New York, LLC*, 356 N.L.R.B. No. 119, 190 LRRM 1185 (2011) (59 DLR A-1, 3/28/11).

not uniformly prohibit access by off-duty employees seeking entry for any reason. According to the board, the employer was ''telling its employees you may not enter the premises after your shift except when we say you can.''

Similarly, in *Sodexo America LLC*, 358 N.L.R.B. No. 79 193 LRRM 1129 (2012) (129 DLR AA-1, 7/5/12), the NLRB found that a hospital's no-access policy violated Section 8(a)(1) of the Act. The hospital's policy stated, ''[o]ff-duty employees are not allowed to enter or reenter the interior of the Hospital or any other work area outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business.'' The ALJ found that the hospital did not violate the act. However, the board reversed, finding that the ''hospital-related business'' exception provided management with the same unfettered discretion to decide access as in *St. John's*.

Less than three months after deciding *Sodexo*, the board again expanded employees' rights to off-duty access. In *Marriott International, Inc. d/b/a J.W. Marriott Los Angeles at L.A. Live*, 359 N.L.R.B. No. 8194 LRRM 1065 (2012) (129 DLR AA-1, 7/5/12), the NLRB invalidated an access policy that stated that ''circumstances may arise'' when employees are permitted to return to interior areas of the property while off-duty. Those employees must obtain manager approval prior to returning to the property. The policy clarified that it did not apply to the parking lot or other outside working areas. The board held that this policy was unlawful because employees could reasonably conclude that they were required to disclose the nature of the activity for which they sought access, leading to a chilling effect on employees engaging in activity protected by the act.

The board further stated that the policy was unlawful because it gave managers absolute discretion to grant or deny access for any reason, ''including to discriminate against or discourage Section 7 activity.'' The NLRB seemed to reason that, because the policy may allow discrimination at some point in the future, it is currently overbroad, and thus, unlawful.

Board Member Hayes was the lone dissenter in all three cases. In rejecting the board's ''all or nothing'' approach, Hayes observed that nothing in *Tri-County* mandates off-duty access at all times in order to be lawful. He further argued that although the board referenced the possibility of special circumstances where an employer's policy may allow off-duty access, this concept was ''illusory and of no practical benefit to employers seeking guidance in this area.''

In summary, in less than a year, the board invalidated policies that had barred off-duty employees' access to the employers' facilities except for ''employer sponsored events,'' ''hospital-related business,'' and certain ''circumstances.'' Based on these three decisions, the NLRB suggested that an off-duty access policy with any exceptions will risk being found unlawful under Section 8(a)(1). Therefore, employers essentially have to ban access for all purposes or have no access policy at all, which does not seem consistent with the three-part test enunciated in *Tri-County Medical Center, Inc.*

Recent Developments

Continued Restraint of Private Property Rights.

Building on the trilogy of decisions discussed above, the board has continued to expand access to employers' properties. Recently, the NLRB held that a nonunionized employer violated the NLRA when one of its managers ejected non-employee union agents from the employer's trailer on a construction site and in the process assaulted and injured one of the union's agents.[4] The non-union general contractor was managing a construction project, and employees of its concrete subcontractor were unionized. After being interrupted repeatedly by both union and nonunion solicitors, the construction company's manager had posted a sign on his office door prohibiting solicitation without an appointment. The ALJ found that the representatives were not engaged in Section 7 activity, and even if they were, the manager could lawfully oust them from the trailer, because the company had an exclusionary property interest. She further held that while pushing the representative may have been an unlawful act, it was not specifically an unfair labor practice under the NLRA.

The board reversed the decision, concluding that the representatives were engaged in Section 7 activity. In finding a Section 8(a)(1) violation, the board held that the company's right to exclude the union representatives was irrelevant because the representatives were leaving at the time of the assault. Interestingly, instead of issuing the traditional cease and desist order, the board ordered the tort-like remedies of lost pay and benefits for the assaulted representative missing work at the union and reimbursement for medical expenses related to his injuries, remedies that mirror those normally reserved for various civil and criminal law violations.

The board also recently held that termination of employees for violating a provision of the employee handbook prohibiting distribution of literature was an unfair labor practice. In *Remington Lodging and Hospitality, LLC d/b/a Sheraton Anchorage*, 359 N.L.R.B. No. 95, 195 LRRM 1436 (2013) (81 DLR A-3, 4/26/13), a hotel terminated four employees for distributing flyers at the hotel's entrances about the union's boycott of the hotel. The employees were off-duty but on the hotel's private property.

Remington argued that the employees violated the company's employee handbook, which prohibited distribution of literature in guest areas or work areas. The board relied on *Martin Lutheran Memorial Home, Inc. d/b/a Lutheran Heritage Village Livonia*'s, 343 N.L.R.B. No. 75, 176 LRRM 1044 (2004) (228 DLR A-1, 11/29/04), two-step test to determine whether the employer's handbook violated the NLRA. First, if the rule explicitly restricts protected activity, it is unlawful. Second, if the rule does not explicitly restrict protected activity, it is still unlawful if: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The board first found that the employees were clearly engaging in protected concerted activity when violating the handbook, so their discharges were ''intertwined with the union and the protected concerted activity.'' Therefore, a violation could be found based on this causal link alone.

Then, citing *Republic Aviation* and *Babcock*, the board restated that the NLRA guarantees employees the

[4] *Norquay Constr., Inc.*, 359 N.L.R.B. No. 93, 195 LRRM 1253 (2013) (74 DLR AA-1, 4/17/13).

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right to distribute union literature on their employers' premises during non-work time in non-work areas. The NLRB pointed out that when combined with the employee handbook provision confining employees to their immediate work areas, the rules could be interpreted as a full prohibition of engaging in union solicitation and distribution in non-work areas on the company property during non-work time. Consequently, the rule was unlawful.

Expansion of Restrictions to Employers' Policies.

Even within the last several months, the board has actively expanded off-duty access. In January 2014, the board held that a refinery unlawfully, in view of its previous practice, denied the union use of the company's property to hold an organizing event.[5] The refinery had routinely permitted the union, which represented a small unit of crane operators, and at least four other ''in-house'' unions that represented existing units, to hold their monthly membership meetings in a building on the company's property. The company objected when the union sought to use the property for an organizing event for some of the company's unrepresented employees. The board held that the company engaged in unlawful discrimination by drawing a distinction between the union's organizing event and other union activity.

The board also recently determined that an orally promulgated restriction on meetings with union representatives violated Section 8(a)(1).[6] During a safety meeting, the company told its mechanics that they could not meet with the union on facility property, but instead had to meet with them off property and on their own time. The board interpreted the new restriction as prohibiting employees from meetings on all property, including the parking lots and other non-work areas. Therefore, the overly broad rule restricted the employees' Section 7 rights and violated the act.

Furthermore, the board recently held another off-duty access rule invalid under *Tri-County* and *JW Marriott*.[7] The rule prohibited employees from remaining on the premises after their shift unless previously authorized by their supervisor. The board held that policy contained an exception that was indefinite in scope—prior management approval—and provided the employer with unlimited discretion. Thus, it was, not surprisingly, invalid.

What Employers Should Do:

Effect of *Noel Canning*.

In June 2014, the Supreme Court held that all actions taken by the NLRB between January 2012 and August 2013 were invalid. In *NLRB v. Noel Canning*, 134 S. Ct. 2550, 199 LRRM 2685 (2014) (123 DLR AA-1, 6/26/14), the Supreme Court found that the recess appointments President Obama made to the NLRB in January 2012 were invalid because they occurred during a three-day Senate break, which was not long enough to trigger his recess appointment power. The impact of the ruling was to deprive the board of the quorum of the three validly appointed members necessary to conduct official business. In the absence of such a quorum, the NLRB may not take any official action.

The Senate did not officially confirm a full quorum until Aug. 4, 2013. Thus, the board must reconsider all decisions issued between January 2012 and August 2013 unless they are otherwise settled. *Sodexo* and *JW Marriott* were decided during that time period. Technically, they are not valid decisions but in practicality, both decisions were based on *St. John's*, which was decided with a full quorum.

The board has officially set aside both *Norquay* and *Remington* in the wake of *Noel Canning*. Nevertheless, it appears doubtful that either decision will be overturned permanently because the current board, with its full quorum, has already invalidated several off-duty access policies. Further, *St. John's* is still controlling, and recent decisions have reiterated the expansion of the *Tri-County* test. Moreover, the term of board Member Hayes, the lone dissenter in the *St. John's*/*Sodexo*/*JW Marriott* trilogy, expired Dec. 16, 2012. At this point, it appears that the board will continue to favor employees' access rights over employers' property rights.

Conclusion

Under the current board composition, a no-access policy that allows for any exception runs the risk of being found invalid under Section 8(a)(1) of the act. Certainly, any policy that allows for managerial discretion will violate the act under current law. Until either the appellate courts or the board starts to give more weight to employers' private property rights, it will be very difficult for employers to prohibit off-duty access. It appears that if employers want an off-duty access policy in the current labor law climate, they either need to ban reentry for all purposes or allow unfettered access.

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[5] *Phillips 66 (Sweeny Refinery)*, 360 N.L.R.B. No. 26, 198 LRRM 1164 (2014).

[6] *First Transit, Inc.*, 360 N.L.R.B. No. 72, 199 LRRM 1107 (2014) (64 DLR AA-1, 4/3/14).

[7] *Am. Baptist Homes of the West d/b/a Piedmont Gardens*, 360 N.L.R.B. No. 100, 199 LRRM 1341 (2014) (86 DLR A-1, 5/5/14).