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The NLRB has created a new category of access rights for employees of a contractor working on another's property, finding that a property owner violated the NLRA by prohibiting the onsite contractor's off-duty employees from accessing the property to engage in lawful union organizing activity.

Board Draws New Access Standard for Onsite Contractor Employees

By Jeffrey Kauffman and Kathryn Siegel

On March 25, 2011, the National Labor Relations Board issued a decision with potentially broad ramifications for employers involved in service contract arrangements. In *New York New York, LLC, d/b/a New York New York Hotel & Casino*, 356 NLRB No. 119, the Board considered issues arising from actions by off-duty employees of an onsite food service contractor seeking access to the hotel and casino property where they worked in order to handbill in connection with their union organizing activity. Addressing the "broader legal and policy questions raised by the factual pattern" involved, the Board held in a 3 to 1 decision that such off-duty contractor employees have a *new type of access right* based on the location where they are regularly employed. The Board majority stated: "we seek to establish an access standard that reflects the specific status of the [contractor] employees as protected employees who are not employees of the property owner, but who are regularly employed on the property." Under the new access standard, the Board found that the property owner did not have sufficient property or managerial interests to prohibit its contractor's employees' off-duty access to its property and consequently violated Section 8(a)(1) of the National Labor Relations Act.

In declaring this new access standard, the Board rejected arguments calling for an "either/or" result based on traditional categories. The Board thus declined to treat onsite contractor employees as equivalent to non-employee organizers, on the one hand, or as equivalent to employees of the property owner, on the other hand. The Board's willingness to establish a new access standard based on a particular fact pattern after a broad review of policy issues and decades of Supreme Court precedent suggests that this decision may not be limited to the narrow issue decided, but could have broad ramifications. *New York New York* also continues the recent trend by the current Board to develop new approaches to "protected concerted activity," given that the standards involving access rights directly affect when and where such activity can take place and what actions employers may or may not take regarding such activity.

Facts

The circumstances underlying the case began in 1997. New York New York Hotel & Casino (NYNY) engaged a subcontractor, Ark Las Vegas Restaurant Corporation (Ark),

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to provide food services for guests and customers on site at the casino and hotel property owned by NYNY. Ark ran three sit-down restaurants, a food court, banquet catering, hotel room services, and the dining room used by casino and other contractor employees. Ark employed approximately 900 persons to conduct these operations. In 1997-98, Ark employees sought representation by the same union that already represented some hotel and casino employees. On three occasions, Ark employees entered the casino property while off-duty to distribute handbills. The handbills sought customer and public support for the Ark employees' organizing efforts. The handbills were distributed at the sidewalk and driveway, just outside the casino's main entrance, and in areas immediately in front of two restaurants that Ark operated on NYNY's property. NYNY summoned the police, which issued citations and escorted the handbillers off the property. The incidents resulted in unfair labor practice charges against NYNY, which alleged that it violated the Act by the actions it took to stop the handbillers' activities.

Case History

The Board issued its initial decisions in 2001, finding that NYNY violated Section 8(a)(1) of the NLRA.[1] On appeal, the U.S. Court of Appeals for the D.C. Circuit denied enforcement and remanded the cases,[2] with directions that the Board reconsider a number of issues, including the impact of *Lechmere*,[3] a 1992 decision in which the U.S. Supreme Court held that "non-employee organizers" are entitled to access private property *only* when they have no other reasonable alternative location from which to communicate their message. Following a 2007 oral argument and call for briefs, a Board majority, comprised of Chairman Liebman and Members Becker and Pearce, again held that Section 8(a)(1) was violated, this time based on new rationale.

Majority Decision

In its decision, the Board majority concluded that the factual scenario concerned a category of employee whose access rights had not previously been determined by the courts. The new category involves employees who work for a contractor and are regularly employed on property that is owned by another employer.

The Board first concluded that an employer may violate Section 8(a)(1) by actions "affecting employees who do not stand in an immediate employer/employee relationship." As a logical consequence, the Board found that the contractor's employees were statutorily protected as employees generally, and that the casino could violate their statutory rights under Section 7 of the NLRA even though it was not their employer.

Next, the Board rejected the suggestion that the contractor employees must fit into either the category of "employees" (with full access rights) or "non-employee union organizers" (with highly restricted access rights) vis-à-vis the property owner. Rather, the Board established a new standard to accommodate both the employees' Section 7 rights and the property owner employer's property rights and managerial interests. The Board held that off-duty employees of a contractor who are regularly employed on the property in work that is integral to the owner's business may be prohibited from organizational handbilling only where the property 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, including, but not limited to, the need to maintain production and discipline."

The Board expressly rejected application of the Supreme Court's "reasonable alternative means" test, concluding that it applies to non-employee union organizers only. The Board found that the onsite contractor employees were distinguishable from non-employees because the contractor employees sought to exercise their own Section 7 rights at their own workplace, whereas non-employee union organizers seek only to exercise "derivative" Section 7 rights of the employees being organized. The Board was careful, however, to not go so far as to permit the broad access for contractor employees that would be allowed under *Republic Aviation*[4] for employees of the property owner.

The Dissenting View

Member Hayes dissented in part. While he would have found a violation as to the restrictions on handbilling near the main entrance, he disagreed with the majority's finding of violations in the actions to stop handbilling inside the hotel/casino facility at the entrances to the

restaurants. Member Hayes disagreed with the "elaborate analysis" used by the majority, because "they end up in the same place and for the same reasons" as the Board's 2001 decision. The dissent also disagreed with the "balancing approach" used by the majority. Member Hayes stated the Board's new approach in favor of contractor employees "gives far too much weight to the locus of their work, far too little weight both to their lack of an employment relationship with the property owner and to the property interests of that owner, and no weight at all to whether reasonable alternative means exist for communicating the organizational message to the employees' intended audience."

Conclusion

Property owners must be extremely careful when considering what, if anything, may be done to regulate or restrict access rights of contractor employees who are regularly employed on site. Property owners with onsite contractors should re-evaluate all of their rules and policies regarding conduct on the property and access to the site by off-duty employees, non-employees and their contractor's employees. Such rules and policies may need to be modified in light of the Board's *New York New York* decision.

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[1] 334 NLRB 762 (2001) and 334 NLRB 772 (2001).

[2] *New York New York LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002).

[3] *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

[4] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).