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A recent Second Circuit decision reinforces the right of employers in the Second Circuit to exclude nonemployee union organizers from their premises, with narrow exceptions, and provides a good reminder to all employers and property owners about NLRA discrimination standards applicable to nonemployee union organizers seeking property access.

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## Labor Management

A Littler Mendelson Newsletter

### The Second Circuit Reinforces the Right of Property Owners to Exclude Nonemployee Union Organizers from Their Premises

By Jennifer L. Mora and C. Scott Williams

On July 18, 2008, the U.S. Court of Appeals for the Second Circuit issued a favorable decision for private property owners who wish to prevent nonemployee union organizers from accessing their property. In *Salmon Run Shopping Center LLC v. National Labor Relations Board*, No. 06-4961 (2d Cir. July 18, 2008), the court refused to enforce a National Labor Relations Board order requiring a private shopping mall to allow nonemployee union organizers to distribute to mall patrons literature critical of a mall tenant.

The National Labor Relations Act (NLRA) generally allows property owners to prohibit nonemployee union organizers from soliciting and distributing on their property, provided they do so in a non-discriminatory manner consistent with their state law property rights. According to the Second Circuit, there was no evidence that the mall allowed another union access to convey a similar message about the mall's tenants nor, more importantly, was there evidence that the mall allowed the targeted tenant to explain to mall customers its decision to use a nonunion contractor. For these reasons, the court refused to accept the NLRB's finding that the mall discriminated against the union by denying access.

Although a property owner's right to deny outsiders access to its property is not absolute, the Second Circuit's decision confirms that absent proof of discriminatory motive or application, property owners may continue to rely on their state property rights to deny access to nonemployee union organizers without violating the NLRA. The decision also provides property owners located in the Second Circuit (covering New York,

Connecticut, and Vermont) guidance in an area of the law where the NLRB and other circuit courts have struggled to determine what constitutes "discrimination" in denying access.

#### Background

Salmon Run Shopping Center is a shopping mall in Watertown, New York. During a two-month period, the local Carpenters' Union requested permission from the property owner to hand out literature in the mall to protest one of the mall tenant's use of a nonunion contractor to remodel its store. Although the mall never asked the union about the nature of its proposed communication, the mall ultimately denied the union's request both because the mall believed the union was a "profit organization" and because it did not satisfy the mall's "community action program" requirements. Under that policy, the mall welcomed civic and charitable organizations to solicit and distribute literature inside the mall if the activity increased foot traffic at the mall and enhanced the mall's image in the community. Although Salmon Run previously allowed charitable organizations, such as the Boy Scouts and the American Cancer Society, to solicit mall customers and to distribute materials, the mall had rejected applications from a political campaign and from applicants that it decided would not benefit the mall or would compete with mall tenants.

#### The NLRB's Decision

The NLRB found that the mall discriminated against the union and violated the NLRA by denying the union permission to distribute

literature inside the mall.<sup>1</sup> In doing so, the NLRB cited two Supreme Court decisions that address the right of nonemployee union organizers to access an employer's premises to engage in Section 7 activities.<sup>2</sup> In these cases, the Supreme Court held that an employer-property owner generally could exclude nonemployee union organizers from its premises except in two limited circumstances: (1) where there is no reasonable alternative means of accessing the targeted employees (the "inaccessibility" exception); and (2) where the employer discriminates against the union by allowing other distribution (the "discrimination" exception). Relying on the "discrimination" exception, the NLRB concluded that Salmon Road discriminatorily denied the union access. The NLRB reached that decision largely because: (1) the union was a labor organization; and (2) the mall had not provided a consistent explanation for its denial of the union's request for access and never asked the union what message it wanted to convey or to whom it wanted to distribute literature. Salmon Run appealed the NLRB's decision to the Second Circuit.

## The Second Circuit's Decision

In its analysis, the Second Circuit explained that, except in very limited situations, the NLRA grants employees the right to engage in organizational activities on their employer's premises in nonworking areas during nonworking hours. No such obligation is owed to nonemployees. But if a property owner denies access to a union where there is no other reasonable means of communicating with employees or if the property owner discriminatorily denies access, property rights may bend to rights under the NLRA. In those circumstances, nonemployee organizers may be entitled to access for labor-related activities.

Instead of using one of the traditional standards for "discrimination" that the NLRB and various other federal appellate courts apply, the Second Circuit fashioned a new, stricter standard (in favor of employers) for determining whether a property owner discriminated against a labor organization by prohibiting access to its property. Specifically, in order to prove that a property owner has discriminatorily excluded a union from its premises, one must show that the property owner treated the union seeking

to communicate its message less favorably than another individual or group communicating *on that same subject*. This standard clearly favors employers, as it would permit employers to allow many groups to conduct solicitation on the employer's property without allowing access for union activity.

## Implications for Employers and Property Owners in the Second Circuit

The Second Circuit's holding in *Salmon Run* is good news for property owners in Connecticut, New York, and Vermont, because it reinforces the long-standing general rule that they have a right to exclude nonemployee union organizers from their premises, except in two narrow situations. Property owners should be aware, however, that the Second Circuit takes a narrower view of the discrimination exception than the NLRB and most other circuit courts, which have struggled with the meaning of that exception. By comparison, the Sixth Circuit (covering Kentucky, Michigan, Ohio, and Tennessee) requires a showing that the property owner favored one union's message over another union's message or permitted an employer to disseminate its own public message while barring a union from doing so.<sup>3</sup> The Tenth Circuit (covering Colorado, Kansas, New Mexico, Utah, and Wyoming) and the D.C. Circuit focus on the context of the message rather than the content of the message, or the identity of the message-bearer, as the Sixth Circuit does.<sup>4</sup> The Fourth Circuit (covering Maryland, North Carolina, South Carolina, Virginia, and West Virginia) has stated that the discrimination exception does not even apply to nonemployee union organizers who seek access to engage in non-organizational activities.<sup>5</sup> Finally, the NLRB and the Seventh Circuit (covering Illinois, Indiana, and Wisconsin) currently view discrimination as "disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status."<sup>6</sup> This standard, now applicable to nonemployee union organizers' access rights outside of the Second, Fourth, Sixth, Tenth and D.C. Circuits, focuses on both the context and the content of the message and its relationship to Section 7 activities.

Property owners also must be mindful of state laws that may further restrict their ability

to deny a union access for solicitation and distribution activities on their property. For example, in 2007, the California Supreme Court ruled in *Fashion Valley Mall v. National Labor Relations Board* that a private mall violated a union's free speech rights under the California Constitution by denying access because the union planned to advocate a boycott of one of the stores in the mall.<sup>7</sup> Thus, in California, it is unlawful for a private shopping mall to regulate the content of a union's message regardless of whether the message is inconsistent with the mall's business purposes and even though the message may harm the mall's business interests. The California Supreme Court noted, however, that a shopping mall may lawfully implement content-neutral time, place, and manner regulations of labor-related speech on its property.

Given the different standards applied by the courts of appeal and the NLRB for determining whether a property owner has discriminatorily denied access to nonemployee union organizers under the NLRA, the U.S. Supreme Court may be asked to clarify (again) the access rights of those individuals. Despite the different definitions of discrimination, consistent application and enforcement of access policies is an employer's first line of defense against a charge that a property owner has discriminatorily denied access to nonemployee union organizers.

We suggest that employers and property owners consider the following practical steps:

- Review your property access policy. These policies should articulate the standards for granting or denying access to outside groups. If you do not have a written policy and instead deal with requests on an ad hoc basis, or if your policy does not state the reasons why you will grant or deny a request, you may be asking for trouble.
- In states that recognize free speech rights at shopping malls, like California, ensure that policies do not preclude access to outside groups based on the content of the intended message.
- Publish the access policy to any outsider requesting access to your property and request sufficient information from the would-be solicitor so that you can apply the terms of your policy to the request.

- Communicate your decision granting or denying access to the requestor in a timely manner.
- Track all requests by outside groups and your response to those requests. Documenting your history of even-handed application of the policy will help to demonstrate the legitimacy of your decisions to deny access to your property.
- Speak with experienced labor counsel about nonemployee union organizers' access rights generally and about drafting an access policy if you do not already have one.

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<sup>1</sup> *Salmon Run Shopping Center*, 348 N.L.R.B. No. 31 (2006).

<sup>2</sup> *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

<sup>3</sup> *Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 686 (6th Cir. 2001).

<sup>4</sup> *Four B Corp. v. NLRB*, 163 F.3d 1177, 1183 (10th Cir. 1998); *Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996).

<sup>5</sup> *Be-Lo Stores v. NLRB*, 126 F.3d 268, 284 (4th Cir. 1997).

<sup>6</sup> *The Register-Guard*, 351 N.L.R.B. No. 70, slip op. at 13 (2007); *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995).

<sup>7</sup> 69 Cal. Rptr. 3d 288 (2007).