Legal Update Article

Access to Private Property: Labor Board Rules Girl Scout Cookies and Union Protesters are Different

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Labor Relations

A nonemployee's solicitation for charitable or civic causes on an employer's property is not the equivalent of a nonemployee union representative's engaging in a protest soliciting customers to boycott an employer or in union organizing on the property, the National Labor Relations Board (NLRB) has held. *Kroger Limited Partnership*, 368 NLRB No. 64 (Sept. 6, 2019).

The NLRB's decision changes, to a more employer-friendly standard, the Board's test to determine whether an employer, in violation of the National Labor Relations Act (NLRA), discriminatorily denies nonemployee union agents access to private property. It reverses *Sandusky Mall Co.,* 329 NLRB 618 (1999), and "other Board decisions to the extent they adopt a similarly broad interpretation of [the U.S. Supreme Court's decision in] *Babcock*'s discrimination exception." Chairman John Ring and Members Marvin Kaplan and William Emanuel were in the majority. Member Lauren McFerran dissented.

Under the NLRB's new standard, an employer discriminates against nonemployee activities when it treats activities that are "similar in nature" differently. The decision expressly holds that union protests or organizing activities are not comparable to charitable, civic, or other commercial activities.

The decision applies retroactively to all pending cases that raise the issue decided in *Kroger.*

Board's Prior Standard and Judicial Criticism of It

In *Babcock,* the Supreme Court held that an employer has a property right to exclude union agents from its premises. 351 U.S. 105 (1956). However, the Supreme Court recognized two exceptions to the employer's property right:

1. Where there is an inability by the union to access employees by other reasonable means; and
2. Where property rights are enforced discriminatorily (which was the exception at issue in *Kroger).*

In *Sandusky Mall,* the Board, broadly interpreting the second *Babcock* exception, held that an employer could not deny nonemployee union solicitation if the employer allowed "substantial civic, charitable, and promotional activities." Under that standard, an employer had to determine whether the charitable or civic activity it permitted on its property was "substantial" before deciding whether it had to permit access to a union representative.

The U.S. Court of Appeals for the Sixth Circuit refused to enforce *Sandusky Mall,* finding that charitable solicitations on employer property are not similar to union solicitations. Subsequently, the Second, Fourth, Seventh, and Ninth Circuits also rejected the Board's reliance on *Sandusky Mall.*

In *Kroger,* the NLRB even noted that it was "unaware of a single case where a court has affirmed a Board decision finding that an employer discriminated against nonemployee union agents seeking to engage in protest activities … because the employer granted access to other nonemployees to engage in charitable, civic, or commercial activities."

Facts in *Kroger*

In *Kroger,* the employer operated a unionized grocery store and shared a parking lot with other commercial tenants. The commercial landlord gave the company the authority to remove anyone from the parking lot for soliciting. The employer had permitted Girl Scouts to sell cookies on its property. The Lions Club, Salvation Army, and groups promoting breast cancer awareness also were permitted to solicit donations. However, the employer did not permit religious groups to solicit membership in the shared parking lot.

The employer planned to close the grocery store and offered its employees reassignments at other unionized stores, but not at nonunionized stores. To protest the reassignment options, nonemployee union agents entered the employer's parking lot and solicited customers to sign a petition stating they would not shop at other nonunion stores operated by the employer.

The employer asked the union agents to leave the parking lot, but they would not leave until the police peacefully escorted them off the property.

Unfair Labor Practice Charge and ALJ's Decision

The union filed an unfair labor practice charge alleging the employer discriminatorily denied the union access to the employer's facility. The administrative law judge (ALJ) found that, under *Sandusky Mall,* the employer had an undisputed property right to exclude the individuals from its leased property, but that the employer had discriminated against the union because it permitted charitable and other civic organizations access to solicit donations and sell items for several weeks each year, but denied access to the union.

NLRB Decision

The Board overruled *Sandusky Mall* for several reasons. First, the Board ruled that *Sandusky Mall* inappropriately expanded the discrimination exception, and there was "no principal of property law or policy of the Act" to support it. Second, the Board noted that U.S. Courts of Appeals have consistently failed to enforce the *Sandusky Mall* discrimination exception holding. Third, the NLRB ruled the Board's broad interpretation of *Sandusky Mall* conflicts with the U.S. Supreme Court's decisions in *Lechmere Sales* and *Babcock,* which "emphasize that the role of nonemployees in the maintenance of workers' organizational rights is sufficiently fulfilled, in all but the rarest circumstances, through non-trespassory means of communication."

Ultimately, the Board held:

> an employer discriminates within the meaning of the *Babcock* discrimination exception when it treats nonemployee activities that are similar in nature disparately, and … the Board may not find discrimination when the nonemployee activities permitted by an employer on its property are not similar in nature to those that are prohibited.

The Board held that protest and boycott activities are not sufficiently similar in nature to

charitable, civic, or commercial activities to warrant a finding of discrimination based on disparate treatment of such conduct, regardless of the amount of charitable, civic, or commercial activities permitted. It also held an employer may ban nonemployee access for union organizing activities as long as it also bans comparable organizational activities by non-labor groups.

The Board dismissed the complaint against Kroger.

What the Decision Means for Employers

Employers lawfully may permit their local Girl Scouts to sell cookies and the Salvation Army to seek donations without worrying that nonemployee union representatives also must be allowed on their property. The NLRA protects an employer's property right to exclude union protesters or organizers, as long as representatives of other organizations also are excluded from engaging in the same activities as the protesters or organizers.

Employees who seek to engage in protected concerted activity are not affected. They are subject only to an employer's lawful solicitation, distribution, or access rules and legitimate interest in maintaining production and discipline.

If you have any questions about this decision or the NLRB (or Girl Scout cookies), please contact a Jackson Lewis attorney.