Cafeteria Solicitation and Eliminating the Public Space Exception Under NLRB Case Law

By RyAnn McKay Hooper and Steven M. Swirsky

Navigating the standards for non-employee access to employer property under the National Labor Relations Act (Act) *should* become a little easier following the National Labor Relations Board's recent decision in *UPMC Presbyterian Hospital.*[1] The decision expressly overruled the Board's long-standing "public space exception," which allowed non-employee union organizers access to a portion of the employer's premises if it was open to the public, as long as the organizers were not disruptive and used the areas in a manner consistent with its intended use.[2] While the decision appears to have far-reaching implications, in reality, its impact is likely to be limited, given its language and the fact that organizing in modern times - thirty-seven years after the Board established the public space exception – looks very different. Organizing in a world well versed in smart-phone technology and social media presents challenges not contemplated by current Board case law.

Historical Case Law Regarding Non-Employee Access to Employer Premises

The Board decision in *NLRB v. Babcock & Wilson Company*[3] first set the standard for non-employee access to employer premises. *Babcock* recognized an employer's right to control what occurs on its property, requiring an employer to permit union solicitation by non-employee union representatives on company property in two circumstances: (1) where the union can demonstrate that employees were otherwise inaccessible (the "inaccessibility exception"), or (2) where the employer specifically discriminated against union solicitation by permitting other kinds of solicitation but not union solicitation. (the "discrimination exception").[4] A further exception emerged 1982, with the Board decision in *Montgomery Ward*.[5] That decision gave organizing campaigns a bit of a boost in creating the "public space exception" noted above, which the Board overturned in *UPMC Presbyterian Hospital*. Again, the public space exception allowed non-employee organizers access to portions of company premises open to the public, if the organizing was done in a manner consistent with the public area's use and it was not disruptive.[6]

The boost of *Montgomery Ward* was partially thwarted in 1992 with the Supreme Court holding in *Lechmere, Inc. v. NLRB*.[7] In *Lechmere* a union attempted to organize retail employees by handbilling cars parked in the employee parking area of the shopping plaza which housed the retail store targeted by the union's organizing campaign. When the store learned of the handbilling, it denied union organizers access to the parking lot.[8] This forced the union organizers to distribute their materials from a strip of public land, adjacent to the parking lot.

The Board determined in *Lechmere* that the employer violated Section 8(a)(1) of the Act by barring the union organizers' access to its public parking lot.[9] This determination was overruled by the Supreme Court, which held that an employer is not required to give non-employee union organizers access to their property under most circumstances. While the Court acknowledged that Section 7 of the Act[10] allows employees to self-organize

---

[1] 368 NLRB No. 2, published at 2019 NLRB LEXIS 346 (June 14, 2019).

[2] 2019 NLRB LEXIS 346, at **11-12, citing *Montgomery Ward & Co.,* 256 NLRB 800, 801 (1981).

[3] 351 U.S. 105 (1956).

[4] *See NLRB v. Babcock & Wilcox Co*., 315 U.S. 105, 113 (1956) (holding that nonemployee distribution of union literature in parking lot permitted because union had no other reasonable alternative channel of communication); *see also Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978) (holding nonemployee union representatives may be barred unless there is no alternative means of communication.

[5] 256 NLRB 800, 801 (1981), enfd. 692 F.2d 1115 (7th Cir. 1982).

[6] *Montgomery Ward & Co*., 256 NLRB 800, 801 (1981), enfd. 692 F2d 1115 (7th Cir. 1982).

[7] 502 U.S 527 (1992).

[8] 502 U.S. at 529.

[9] 295 NLRB. 92 (1989). A divided panel of the First Circuit denied Lechmere's petition for review and enforced the Board's order. *See* 502 U.S. at 531, citing 914 F.3d 313 (1990).

[10] Section 7 of the NLRA provides in relevant part that "employees shall have the right to self-organization, to form, join, or assist labor organizations." 29 U. S. C. § 157. Section 8(a)(1) of the Act, in turn, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." 29 U.S.C. § 158(a)(1).

(Pub. 1239)

and that is right "depends in some measure on [their] ability . . .to learn the advantages of self-organization from others,"[11] it held that Section 7 cannot compel an employer to allow for distribution of union literature by nonemployee organizers on the employer's property, unless the location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them through the usual channels.[12]

Stated differently, the *Lechmere* Court held that Section 7 of the Act only applies to non-employee union organizers where, "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels."[13] In the words of the Court:

> As we have explained, the [inaccessibility] exception to *Babcock's* rule is a narrow one. It does not apply wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective, but only where "the *location of a plant and the living quarters of the employees* place the employees *beyond the reach* of reasonable union efforts to communicate with them." Classic examples include logging camps, mining camps, and mountain resort hotels. *Babcock's* exception was crafted precisely to protect the § 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society. The union's burden of establishing such isolation is, as we have explained, "a heavy one," and one not satisfied by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication.[14]

Rejecting the notion that employees are inaccessible merely because they did not reside on the employer's premises or because they lived in a large metropolitan area, the Court found that the union failed to show that "unique obstacles" prevented its reasonable access to the employees outside of the employer's premises and, thus, rejected the Board's conclusion that the employer violated Section 8(a)(1) of the Act.[15]

While *Lechmere* did not expressly overrule the public space exception, it did make it easier for employers to close the loophole created by that exception by adjusting their non-solicitation policies to prohibit all types of solicitation on company premises. The *Lechmere* holding glossed over initial pronouncements of the public space exception, which required the organizing activity to be non-disruptive nature. Instead, *Lechmere* focused on whether the union had reasonable access to employees outside of the company premises and whether the company treated all solicitations in the same manner. The Court held, in particular, that an employer did not have to open any space – public or otherwise – to non-employee organizers where inaccessibility to employees or disparate enforcement of a non-solicitation policy was not at play.[16]

Courts of appeals interpreted and applied *Montgomery Ward* in different ways after *Lechmere*, with the United States Court of Appeals for the District of Columbia taking the stance that *Lechmere* effectively overruled the public space exception.[17] Despite the new case law ushered in by *Lechmere*, the public space exception still existed on the books and was recognized by the Board until the recent holding in *UPMC Presbyterian Hospital*.[18] As the Board stated in *UPMC Presbyterian Hospital*, "[w]e agree with the judicial criticism of extant precedent permitting nonemployee union representatives to gain access to public areas on private property in contravention of *Babcock's* principles."[19]

The Board's 2019 *UPMC* Holding

In *UPMC Presbyterian Hospital*, a hospital security guard removed two non-employee union organizers from the hospital cafeteria. The organizers were sitting with at least six (6) employees at two tables, eating lunch, and discussing union organizing campaign matters. The Hospital cafeteria, which was on the eleventh (11th) floor of the hospital building was open to the public.[20] The Union organizers had distributed union pamphlets and pins while meeting with employees in the cafeteria. The security guard approached the union organizers, asked

---

[11] 502 U.S. at 532, citing *Babcock,* 351 U.S. at 113.

[12] 502 U.S. at 539.

[13] 502 U.S. at 539.

[14] 502 U.S. at 539-40 (internal citations omitted; emphasis added).

[15] 502 U.S. at 540.

[16] 502 U.S. at 540-41.

[17] *See also Farm Fresh, Inc.*, 326 NLRB 997 (1998), review granted in part, enforcement granted in part *UFCW Local 400 v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000) (holding *Lechmere* effectively overruled *Montgomery Ward & Co.* by holding that an employer's prohibition of non-disruptive solicitation of off duty employees in a public snack bar location on the employer's premises was permissible because there was no showing of a disparate application of a no-solicitation policy).

[18] 368 NLRB No. 2, 2019 NLRB LEXIS 346 (June 14, 2019).

[19] 2019 NLRB LEXIS 346, at *15.

[20] 2019 NLRB LEXIS 346, at *5.

them to present identification, and proceeded to eject them from the cafeteria.

The Union later filed unfair labor practice charges alleging *inter alia* that both the guard's ejection of the union representatives and the request to present identification were unlawful. The record at hearing suggested the employer frequently ejected individual participating in various types of solicitations from the cafeteria and that union solicitation was not treated disparately. After an unfair labor practice hearing, the Administrative Law Judge (ALJ) concluded that the employer had committed three violations of Section 8(a)(1) of the National Labor Relations Act (Act). Reversing the ALJ, the Board majority found that removal of the non-employee union organizers was consistent with the hospital's prior practice of enforcing its non-solicitation policy and that the security guard's request for the non-employee union organizers to produce identification did not violate the Act.[21]

In reaching this 3-1 split decision, the Board majority (Ring, Emanuel, Kaplan) reviewed the Supreme Court's decision in *NLRB v. Babcock and Wilcox Co*.[22] which permitted the solicitation of employees by a non-employee union representatives on company premises *only* where the union can demonstrate that employees were otherwise inaccessible, or where the employer specifically discriminated against union solicitation, permitting other kinds of solicitation on company property. The Board in *UPMC* restored the original *Babcock* standard, only rejecting what it considered "the public space exception detour" which expanded the *Babcock* rules for access. The Board also reaffirmed that an employer may enforce rules and practices which protect its property interests, so long as the practices neither violate the Act nor fall within the *Babcock* exceptions.[23]

What Does UPMC Mean for Employers?

Practically speaking, this holding is not likely to have a significant impact on how most employer's approach union organization and non-solicitation given the fact that so few employers' facilities have areas that are otherwise open to the public and the fact that in most instances union organizers will have numerous other opportunities and means to reach workers they are seeking to organize. The language of the *UPMC Presbyterian Hospital* decision does, however, present as employer friendly, affirming that an employer has no duty to allow the nonemployee union representatives use of the employer's facility for organizational activities, even if the activity is not disruptive. Despite this language, under the *Babcock* standard, discriminatory enforcement of an employer's non-solicitation policy – rather than the existence of a public space exception – has always been the greatest risk and surefire way to draw an unfair labor practice charge.[24] It is notable that the hospital in the *UPMC Presbyterian Hospital* decision had a well-drafted non-solicitation policy and that it consistently uniformly enforced its non-solicitation policy. The hospital did not enforce its policy more onerously against union solicitation over other forms of solicitation which occurred in its public spaces.[25]

The *UPMC Presbyterian Hospital* decision does not preclude solicitation in public spaces by *employee* organizers.[26] Section 7 of the Act grants employees the right to discuss mutual aid and protection and organizing, and further to pass union materials out and solicit employees in their off-duty time. Further, the presence and use of union salts – individuals who apply for and obtain employment with an employer for the purpose of organizing employees from the inside – is still common in construction and other industries. Once a salt is hired, the general rights afforded an employee organizer apply.

Even more notably, the *UPMC Presbyterian Hospital* case does not impact the special circumstance acknowledged by the Board for off-duty contractor access to solicit employees in public spaces inside a related business. In *New York-New York Hotel and Casino v. NLRB*, a restaurant was operated by a contractor, located inside the hotel and casino.[27] The restaurant contractor employees sought

[21] The Board did however find a violation where the security guard sought identification from the employees meeting with the non-employee union representatives present. The Board held this action chilled Section 7 activity.

[22] 351 U.S. 105, 112 (1956).

[23] 2019 NLRB LEXIS 346, at *17.

[24] *See K-Mart Corp.*, 313 NLRB 50, 58 (1993) (holding the Employer violated Section 8(a)(1) by asking the police to remove non-employee handbillers while permitting the Salvation Army and donation seekers for religious organization to solicit in front of the store on the same day).

[25] 2019 NLRB LEXIS 346, at *7.

[26] *First Healthcare Corp.*, 336 NLRB 646 (2001), review denied, enforcement granted by 344 F.3d 523 (6th Cir. 2003).

[27] *New York New York Hotel & Casino*, 356 NLRB 907, 911 (2011), enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 568 U.S. 1244 (2013).

to distribute union materials to restaurant employees and customers of the restaurant at its entrance of the restaurant inside the public area of the hotel and casino. The Board held that the hotel and casino could not bar the contractor employees from solicitation because they were unable to show that the activity of the subcontractor's employees significantly interfered with the hotel's use of the property or another legitimate business reason to justify the exclusion.[28] This retail sub-contractor exception is analogous to the *Montgomery Ward* public space exception the Board recently eliminated.

Finally, organizing is no longer limited to face-to-face solicitation. The techniques unions employ for organizing have changed drastically from the time of the *Babcock* and *Lechmere* decisions. Union organizers now commonly access employees through the use of email and social media, in spaces such as Facebook and LinkedIn, where employees often identify where they work and employers have no proprietary interest in preventing Union solicitation or contact. Only time will tell how the Board will address the ever-expanding universe of public spaces.

Steven M. Swirsky is a Member in the Employment, Labor & Workforce Management and Health Care & Life Sciences practices, in the New York office of Epstein Becker Green. He is a member of the firm's Board of Directors and Co-Chair of the firm's Labor Management Relations practice group. RyAnn McKay Hooper is an Associate in the Employment, Labor & Workforce Management practice, in the New York office of Epstein Becker Green.

RECENT DEVELOPMENTS

ADA

There Was a Genuine Issue of Material Fact As To Whether Realtor Association Offered An Auxiliary Aid or Service That Would Provide Effective Communication to Plaintiff

Tauscher v. Phoenix Bd. of Realtors, Inc., 2019 U.S. App. LEXIS 22180 (9th Cir. July 25, 2019)

Mark Tauscher was a profoundly deaf individual who was a licensed real estate salesperson in Arizona. Tauscher filed a lawsuit against the Phoenix Association of Realtors ("PAR"), alleging that PAR did not comply with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, and the Arizonans with Disabilities Act ("AzDA"), A.R.S. §§ 41-1492 to 41-1492.12. Tauscher alleged that PAR failed to comply with federal and state laws when it denied Tauscher's requests for an American Sign Language ("ASL") interpreter at continuing education courses. The United States District Court for the District of Arizona held that PAR's obligations under the ADA were satisfied when it engaged in a dialogue with Tauscher about his request for an ASL interpreter, and PAR was relieved from any further obligations under the ADA because Tauscher had refused to discuss any measures other than an ASL interpreter. The district court granted summary judgment to PAR. Tauscher appealed and the Ninth Circuit reversed the district court's judgment.

The court noted that Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." The court stated that under the applicable regulations, a public accommodation has an obligation to "take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services" [28 C.F.R. § 36.303(a)]. The court further stated that a public accommodation is relieved of this obligation only if it "can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense."

According to Tauscher, PAR failed to discharge its ADA obligations because it failed to provide an ASL interpreter. The court stated that the regulations did not require PAR to provide the specific aid or service requested by Tauscher; the regulations make clear that "the ultimate decision as to what measures to take rests with the public accommodation," so long as the measures provide effective communication [28 C.F.R. § 36.303(c)(1)(ii)]. However, the court agreed with Tauscher that there was a genuine issue of material fact as to whether PAR offered an auxiliary aid or service that would provide effective communication to Tauscher.

[28] 356 NLRB at 911.