United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 19, 2000

TO : James S. Scott, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Blackhawk-Nunn, Schuler Homes, Nicholas Lane/Innovative Lane, Innovative Lane Systems, and Innovative Steel Systems
Cases 32-CA-17703-1; 17704-1; 17705-1; 17711-1; and 17855-1

512-5012-8301
512-5012-8320-5022
512-5012-8380

These cases were submitted for advice as to whether the Employers violated Section 8(a)(1) of the Act by ordering non-employee Union organizers and, at one location, employees from other worksites of the employer being organized, to leave their premises.

FACTS

Innovative Steel Systems (Innovative) is a manufacturer and installer of steel frames and trusses for residential housing, primarily in Northern California. Nicholas Lane is a Southern California employer engaged in the same business as Innovative. Blackhawk-Nunn (Blackhawk) and Schuler Homes (Schuler) are residential housing developers with major projects in California. Blackhawk contracted with Innovative to provide and install steel trusses and frames at its residential development in Brentwood ("Summerset"), and Schuler contracted with Innovative to do this kind of work at its projects in Livermore ("Saddleback"), Hercules ("Belleterre"), Rio Vista ("Homecoming") and Pittsburg ("Americana").[1]

Beginning in May 1999,[2] representatives of Northern California Carpenters Regional Council and Carpenters Local 152 (herein collectively called the Union) began visiting the various projects where Innovative employees were working in order to organize the employees. During these

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[1] In July 1999, Innovative employees at these sites were told of a planned (but eventually failed) merger between Innovative and Nicholas Lane.

[2] All remaining dates are 1999.

early visits, Union representatives may have gone into the unfinished houses and spoken to employees about unionizing. There is no evidence, however, that management of the Employers was aware of these visits. The Union decided in September to make its organizing campaign more visible. On September 27, Union representatives solicited employees from the various projects to join a "march for dignity" that day at Blackhawk's Summerset project. The march involved Innovative employees from the various projects, as well as a number of Union representatives. The Region has concluded that the Employers committed various Section 8(a)(1) and (3) violations, unrelated to the submitted access issues at the five projects described below, before, during and after the march.

Summerset. Summerset is a large, completely gated and fenced community with resident and visitor entry provided only through a front gate monitored at all times by a guard. There is also a gated but unguarded back exit that residents open by using a code, as well as a construction entrance that is gated but left open and unmonitored during business hours. "Keep Out" signs are posted at the front entrance that also indicate that access is strictly controlled, authorization for entry is necessary, and trespassers will be prosecuted. The streets and sidewalks in the development are considered private property and have not been dedicated to the city.

The September 27 march began with Union representatives and Innovative employees gathering at a park outside of Summerset. The marchers entered the project through the main entry gate,[3] using bullhorns and chanting as they walked through both the completed and under-construction portions of the development. In sections where homes were being built, Union organizers would leave the march and enter the houses to solicit Innovative employees to join the march. During the march, Blackhawk superintendents Stover and Singh followed the marchers in a vehicle. As the marchers approached a section of completely finished and occupied houses, Stover confronted the main Union organizer and told him that they were trespassing and that he would call the police if they didn't leave. Stover told the marchers generally that they were all trespassing, that what they were doing was illegal, and that if they did not leave right then the police would be called. The marchers continued, and the police eventually stopped the march. Stover and a

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[3] It is unclear how they gained entry through the main entrance.

Blackhawk sales representative yelled to the police to get the marchers out of the development and to arrest them if necessary. After speaking with the police, the marchers agreed to leave and left, although they held a rally outside the main gate for about an hour.

The next morning, two Union representatives returned to Summerset to get Innovative employees to sign a petition. They were inside the garage space of a house under construction when Juan Rodriguez, an Innovative foreman, and Paul Godwin, the vice-president of Nicholas Lane, called a meeting of employees. Rodriguez and Godwin invited the Union representatives to stay for the meeting and they did.[4] After the meeting, however, Blackhawk superintendent Singh appeared and told the Union representatives that they would be arrested if they did not leave Summerset. The Union representatives left.

On October 6, two Union representatives arrived at Summerset to talk to some of the homeowners. Singh noticed them and said that they were in a construction zone, that there were signs posted, and that if they did not leave he would have them arrested.

Homecoming. Homecoming is also a partially completed development, with both owner-occupied homes and houses under construction. There are no fences surrounding the development and no signs forbidding trespass. A number of the streets have been dedicated to but have not yet been accepted by the city.

On September 27, Union representatives Mattis and Hart arrived at Homecoming and began walking around the jobsite. After about five minutes, Schuler superintendent Scott approached Mattis and Hart as they were standing on the lot of a house under construction where employees were working. Scott told them to stay out of the houses and that they were to remain on the sidewalks and streets. The Union representatives asserted that they were there to do "safety inspections," ignored Scott's instructions and continued to go through houses under construction and talk to employees who were working. At this point Schuler superintendent Parker appeared and told the Union representatives that if they did not leave the houses under construction and return to the sidewalks, he would call the police and have them arrested. Mattis and Hart refused, and the police were called. After consulting with the police, Mattis and Hart

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[4] The meeting involved Godwin's explaining to the employees that they were free to join the Union but that the Company did not have any plans to unionize.

agreed to stay on the sidewalks and no arrests were made. They remained at Homecoming for about an hour after that and were able to speak to employees as they went on their breaks or as the employees left the houses to obtain materials.

Americana. Americana is a large housing development, most of which is completed and owner-occupied, that is not fenced or gated. However, there is a distinct construction area of the development where new houses are being built and where there are no owner-occupied homes. There is only one street entrance to this construction zone area, and there is a temporary fence and gate at that entrance. There are no sidewalks in the construction area, and the city has not accepted any of the streets in the construction zone.

At about 8:30 a.m. on September 27, two Union representatives arrived at Americana, drove through the gate into the construction area, and began going in and out of the houses under construction and speaking to employees working there. Schuler superintendent Posey approached the Union representatives and told them that they were on private property and that they had to leave or he would call the police and have them arrested. A police officer then arrived and told them they would be arrested for disturbing the peace if they did not leave, at which point they left.

Saddleback. Saddleback is comprised of some completed, owner-occupied houses and others under construction. While all of the streets are paved and the sidewalks completed, the streets have not yet been dedicated to the city. Saddleback is not fenced, gated, or posted with "No Trespassing" signs.

On the morning of September 27, Union representatives Williams and Schager arrived at Saddleback to solicit employees to join the Summerset march. They spoke to employees taking their breaks at their trucks parked on the street, and eight employees agreed to leave with them to attend the march. There is no evidence that Innovative or Schuler was aware of the Union's presence that day. On September 28, Williams returned to the project to find out whether any of the employees who had left work to attend the march had encountered any problems upon returning to work. As Williams was walking down a driveway to speak to some employees working inside a house under construction, he was intercepted by Dan Moore, an Innovative supervisor, and a Schuler superintendent identified only as "Bruce." Moore and Bruce ordered Williams to leave Saddleback or they would have him arrested. Williams initially returned

to his truck, but then went into at least two more houses to speak to employees. Moore and Bruce confronted Williams on another driveway, and Moore told him he did not have a right to be there. In the meantime, the police were called and Bruce tried to block Williams from leaving by parking his truck behind Williams' truck and throwing lumber and other debris in front of Williams' truck. Williams managed to drive over the debris and leave Saddleback just as the police were arriving.

On September 30, Williams and Schager returned to an area of Saddleback that was under construction. Moore and John Mason, another Schuler superintendent, told them that they were trespassing and would have to leave or else they would be arrested. Moore called the police, and when they arrived, he told them he wanted the Union representatives arrested. The police made no arrests when the Union representatives agreed to remain only on the streets and sidewalks of Saddleback. The next day, Williams and Schager returned to Saddleback and stayed on the sidewalks and streets without incident.

Belleterre. Belleterre is a partially completed development that is not fenced or gated, and until at least September 27, was not posted with "No Trespassing" signs.[5] Model homes and a sales office are located at the beginning of Belleterre. Occupied houses are on one side of the model homes, and houses are being constructed in front of the model homes. The streets have not yet been accepted by the city and thus are still private property.

On September 27, Union representatives Howard and Berg arrived at Belleterre around 10:00 a.m. and parked in front of the model homes. As they approached a house under construction, Innovative foreman Sullivan met them and told them they had to leave or be arrested. Howard and Berg did not leave but instead began walking toward some employees who were taking their break outside a house under construction. Sullivan repeated his statement that they would have to leave or be arrested. Howard and Berg ignored Sullivan and began talking to the employees. Then Schuler superintendent Prentice approached and told them twice that they were trespassing and would be arrested. Howard and Berg left Belleterre shortly thereafter.

ACTION

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[5] It appears that sometime after September 27 a sign was posted in the area where new homes are being built that states "Keep Out, Construction Zone."

We conclude that complaint should issue, absent settlement, alleging that Innovative and/or Schuler violated Section 8(a)(1) by excluding Union organizers from the streets and sidewalks of the Saddleback and Belleterre developments, supporting that improper exclusion by threats of arrest for trespassing, and by physically hampering the lawful movements of a Union representative at Saddleback. We further conclude, however, for the reasons set forth below, that the allegations of unlawful restrictions of Union activity at the Homecoming and Americana projects should be dismissed, absent withdrawal. Finally, we conclude that the if the Region determines that the Employer unlawfully removed off-duty Innovative employees from Summerset when they were attempting to communicate with Innovative employees, then the Region should also allege this as a violation of Section 8(a)(1). However, the Summerset allegation regarding denial of access to non-employees should be dismissed, absent withdrawal.

In Lechmere, Inc. v. NLRB,[6] the Supreme Court held that, except in narrow circumstances, "Section 7 guarantees do not authorize *trespasses* by non-employee organizers." (Emphasis added.) However, an employer violates Section 8(a)(1) if it interferes with nontrespassory Section 7 activity. Thus, as a threshold matter, in order to assert a Lechmere privilege, an employer must have a sufficient property interest to exclude others and make the union's presence on the property a "trespass."[7] Since real property rights are generally created by state rather than federal law, we must look to the law of California to determine the nature and extent of the Employers' property interests.

1. Defining the property interests under California law

California recognizes only a weak property interest in privately owned spaces that have taken on a public character. The limitation on the rights of owners of such property has two independent foundations: state constitutional freedom of speech guarantees[8] and state labor law and policy.[9]

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[6] 502 U.S. 527, 537 (1992).

[7] See, e.g., Bristol Farms, 311 NLRB 437, 438-439 (1993); Johnson & Hardin Co., 305 NLRB 690, 690 (1991), enfd. in pertinent part 49 F.3d 237 (6th Cir. 1995).

[8] Robins v. Pruneyard, 153 Cal.Rptr. 854 (1979), affd. 447 U.S. 74 (1980).

A. Constitutional parameters of union access rights.

In Robins v. Pruneyard, supra, the California Supreme Court held, and the United States Supreme Court affirmed, that the State of California was permitted to provide greater constitutional protections for speech than provided in the First Amendment, and had in fact established such protections in Article 1, Section 2 of the state constitution.[10] Under California's broader constitutional guarantee, the court found that a shopping center did not have a right to expel high school students soliciting signatures for a petition in its privately-owned central courtyard.

In defining the breadth of the state constitutional speech protection, the Pruneyard court relied on Schwartz-Torrance v. Bakery & Con. Workers Union, supra, and In re Lane,[11] cases involving the First Amendment rights of union pickets/handbillers outside business establishments, as testifying to the "strength of 'liberty of speech' in this state."[12] In Schwartz-Torrance, the California Supreme

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[9] Sears v. San Diego District Council of Carpenters, 158 Cal.Rptr. 370 (1979), cert. den. 447 U.S. 935 (1980); In re Catalano, 171 Cal.Rptr. 667 (1981); Schwartz-Torrance v. Bakery & Con. Workers Union, 40 Cal.Rptr. 233 (1964), cert. den. 380 U.S. 906 (1965).

[10] In affirming Pruneyard, the U.S. Supreme Court held that this kind of limitation on property rights did not amount to an unconstitutional "taking" of the shopping center's property under the Fifth and Fourteenth Amendments.

[11] 79 Cal.Rptr. 729 (1969).

[12] 153 Cal.Rptr. at 859. Although Schwartz-Torrance and In re Lane relied extensively on a union's federal First Amendment rights set forth in Food Emp. U. Local 590 v. Logan Valley, 391 U.S. 308 (1968), which the Supreme Court later reversed in Lloyd v. Tanner, 407 U.S. 551 (1972), and Hudgens v. NLRB, 424 U.S. 507 (1976), the Pruneyard court found that "the fact that those cases cited federal law which subsequently took a divergent course does not diminish their usefulness as precedent". 153 Cal.Rptr. at 859. More recent California cases have continued to cite

Court prohibited the owner of a strip-shopping mall from preventing union organizers from picketing in front of a bakery in the mall. Under the court's balancing test, the union's substantial free speech rights, in the context of state labor relations law, outweighed the owner's property rights "worn thin by public usage."[13] In In re Lane, the California Supreme Court enjoined the owner of a large, freestanding supermarket from excluding from the sidewalk in front of the store individuals peacefully distributing handbills concerning a labor dispute. Although the case differed from Schwartz-Torrance in that the sidewalk served only one store, the court maintained that "when a business establishment invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public," the private ownership of the sidewalk does not prevent the exercise of First Amendment privileges at or near the establishment's entrance.[14]

Although the court in Pruneyard emphasized the public forum-like aspects of shopping centers, and specifically noted that it was not considering "the property or privacy rights of . . . the proprietor of a modest retail establishment,"[15] subsequent decisions by California appellate courts have shed light on how state freedom of speech guarantees and property rights are to be weighed in such settings. Thus, in a series of cases involving anti-abortion protests outside medical centers providing abortion services, California courts rather than holding that Pruneyard was limited to shopping centers, distinguished it and set forth a comprehensive analysis to determine whether the property at issue constitutes a "public forum" for the purpose of exercising free speech rights.[16]

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these cases approvingly. See, e.g., Sears, 158 Cal.Rptr. at 376.

[13] 40 Cal.Rptr. at 238.

[14] 79 Cal.Rptr. at 733.

[15] 153 Cal.Rptr. at 860.

[16] See Planned Parenthood v. Wilson, 282 Cal.Rptr. 760 (Cal.App. 4 Dist. 1991); Allred v. Shawley, 284 Cal.Rptr. 140 (Cal.App. 4 Dist. 1991); Family Planning Alternatives, Inc. v. Pruner, 15 Cal.Rptr. 2d 316 (Cal.App. 4 Dist. 1992); Planned Parenthood v. Williams, 16 Cal.Rptr. 2d 540 (Cal.App. 1 Dist. 1993), affd. 30 Cal.Rptr. 2d 629 (1994),

In Family Planning Alternatives, Inc. v. Pruner, supra, the court drew upon the factors relied upon in prior abortion clinic cases,[17] and adopted a four-part test for determining whether clinic owners or their landlords could exclude protesters from their property. First, the Pruner court reviewed the nature, purposes, and primary uses of the property to distinguish it from a large retail establishment where members of the public "congregate, relax, visit, seek out entertainment, browse and shop for personal, household or general business merchandise."[18] As in every other medical center case, the offices in Pruner offered professional, personal services to specific clientele, and the property was for use only by individuals with specific business purposes - i.e., clients, tenants, and employees. Unlike the large supermarket in In re Lane whose goods attracted the whole community, the court found the specialized services offered at the medical center attracted only a "small subset of the local citizenry."[19]

Second, the court found that the nature of the public invitation was restricted. Signs posted at each entrance restricted parking to tenants, employees, and clients.[20] In addition, the implied invitation to use the clinic property did not extend to the "entire buying public in general" like a supermarket but rather to a "mainly prearranged

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remanded 115 S.Ct. 413 (1994); Allred v. Harris, 18 Cal.Rptr. 2d 530 (Cal.App. 4 Dist. 1993); Feminist Women's Health Center v. Blythe, 22 Cal.Rptr. 2d 184 (Cal.App. 3 Dist. 1993), remanded 114 S.Ct. 2776 (1994), affd. 39 Cal.Rptr. 2d 189 (Cal.App. 3 Dist. 1995).

[17] Allred v. Shawley, 284 Cal.Rptr. 140 and Planned Parenthood v. Wilson, 16 Cal.Rptr. 316.

[18] Planned Parenthood v. Wilson, 282 Cal.Rptr. at 767.

[19] Pruner, 15 Cal.Rptr. 2d at 324.

[20] Id. See also Allred v. Harris, 18 Cal.Rptr. at 534 (parking lot signs read "Patient Parking Only" and "No Trespassing"); Wilson, 282 Cal. Rptr. at 767 (each lot labeled "tenants" or "patients" and no space for public parking); Feminist Women's Health Center v. Blythe, 39 Cal.Rptr. 2d. at 198 (parking lot signs state reserved for use of tenants and customers and that trespassers will be prosecuted).

clientele" for services which were not "essential to all community members."[21]

Third, the court found that the protesters' activity disrupted and interfered with the usual business undertaken on the property. The abortion protesters impeded ingress and egress to the offices and actually had the "avowed purpose" to interfere with the clinic's business.[22] Further, finding that the protesters upset the clinic's clients and interfered with their privacy rights, the court distinguished In re Lane, where there was no inherent privacy dimension in the transactions at the grocery store, and the store's customers were not likely to be upset by the materials being distributed.[23]

Finally, the court assessed the relationship of the speech to the property and the availability of alternative sites for the protesters. Although the speech was arguably related to one use of the property, the court determined that the protesters had a reasonable alternative channel of communication on the public sidewalk 100 to 150 feet away from the main entrance of the offices, since the protesters' message could be seen and heard from the clinic parking lot.[24] The court concluded that, in contrast to In re Lane, where the owner's "mere title" could not defeat free speech rights, the restricted public invitation, the

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[21] Pruner, 15 Cal.Rptr. at 324, quoting Allred v. Shawley, 284 Cal. Rptr. at 146.

[22] Pruner, 15 Cal.Rptr. at 324. See also Wilson, 282 Cal.Rptr. 760 (protesters harassed, aggressively approached, chased, and impeded the ingress and egress of clients into the lot).

[23] Pruner, 15 Cal. Rptr. at 326. See also Allred v. Shawley, 284 Cal.Rptr. at 148 ("in addition to property and business interests of the center, we have each woman's constitutional right to privacy"); Wilson, 282 Cal.Rptr. at 762 (protesters had been enjoined from "menacing, molesting, harassing, or interfering with Planned Parenthood's clients and employees").

[24] Pruner, 15 Cal. Rptr. at 326-27. See Wilson, 282 Cal. Rptr. 760 (protesters allowed on public sidewalk immediately in front of building); Allred v. Shawley, 284 Cal.Rptr. 140 (protesters allowed on sidewalk 32 feet away from lobby of building).

obstruction of ingress and egress, and the clients' privacy considerations outweighed the protesters' free speech rights.[25] With regard to the nature of the "public invitation," another California appeals court, applying Pruner, upheld as reasonable the restriction of antiabortion activities from the parking lot of a small medical center that housed an abortion clinic notwithstanding the presence in the building of a pharmacy that was open to the general public.[26] The court stated that given the small size of the building and parking lot, the presence of the pharmacy did not "chang[e] the basic nature of the medical building as 'a modest retail establishment.'"[27]

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[25] Pruner, 15 Cal.Rptr. 2d at 326.

[26] Blythe, 39 Cal.Rptr. 2d. at 198.

[27] Ibid., quoting Pruneyard, 153 Cal.Rptr. at 592.

B. Union access under California labor policy.

California courts further prohibit the exclusion of handbillers and other persons engaged in union activity as a matter of state labor law and policy. In Sears, supra, the California Supreme Court held that, under the Moscone Act (Cal. Code of Civ. Proc. section 527.3), which prohibits injunctions against persons involved in picketing "not involving fraud, violence or breach of the peace" at "any place where any person or persons may lawfully be," the employer could not evict pickets protesting Sears' refusal to adhere to a master carpentry agreement from the privately-owned sidewalk surrounding its store. The court first found that, independent of any constitutional right, the State of California could by statute or judicial decision permit union activity on private property as a matter of state labor law.[28] The court then interpreted the Moscone Act as insulating from the court's injunctive power all union activity declared to be lawful under prior California decisions, including Schwartz-Torrance and In re Lane.[29]

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[28] 158 Cal.Rptr. at 376-377. Indeed, the court expressly declined to decide whether the picketing was also protected under California's constitution as interpreted in the then-recently issued Pruneyard decision. Id. at 377, n. 5. See also Schwartz-Torrance, 40 Cal.Rptr. at 234, where the court had found that the union's strong interest in picketing rested both upon constitutional principles protecting free speech and upon state policy favoring concerted activities of employees.

[29] Thus, since Schwartz-Torrance and In re Lane had established the legality of peaceful union picketing on private sidewalks outside a store, the court concluded that the State Legislature had now codified this rule into its labor statutes. 158 Cal.Rptr. at 379 ("[i]n commanding the courts to construe [Moscone Act's anti-injunction provisions] in accord with 'existing law governing labor disputes,' the Legislature . . . intended the courts to continue to follow the principles of California labor law extant at the time of the enactment of [the Moscone Act]"). The court also noted that California trespass statutes exempt "lawful" union activity from the definition of criminal trespass. 158 Cal.Rptr. at 379 n.9. See also In re Catalano, 171 Cal.Rptr. at 670 n.4 (union representatives could not be convicted of violating

Regarding the scope of the Moscone Act, the court noted that the phrase "any place where any person or persons may lawfully be" was undefined by the statute and that "a strict reading might appear to authorize picketing in the aisles of the Sears store or even in the private offices of its executives." 158 Cal.Rptr. at 375. Although the court found it unnecessary to define the phrase in order to resolve the case before it, it recognized that "at some such point even peaceful picketing might represent so intrusive an invasion of Sears' use of its property as to compel judicial intervention." Ibid. And, while the California courts have upheld injunctions under the Moscone Act where the labor activity in question has involved "fraud, violence or breach of the peace,"[30] we are unaware of a single Moscone Act case in which peaceful labor activity on private property has been enjoined on the basis that the property interest in issue outweighed the State's labor policy interest in allowing the labor activity to continue. Nor are there any cases arising under the Moscone Act holding that peaceful labor conduct can be subject to time, place or manner restrictions.

2. Analysis of Conduct in the Instant Cases

A. Summerset, Homecoming and Americana.

1. Pruneyard Analysis

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trespass laws for entering jobsite to "investigate the safety of working conditions;" statute specifically exempts such lawful union activity as well as activities "for the purpose of engaging in any organizational effort").

[30] See, e.g., International Molders and Allied Workers Union, Local 164 v. Superior Court (Lodi Iron Works, Inc.), 138 Cal.Rptr. 794, 799-800 (Cal.App. 3 Dist. 1977) (upholding injunction limiting numbers of pickets and requiring them to remain 20 feet from foundry entrances and exits where union engaged in mass picketing, threats of violence and interfered with access and freedom of movement); M Restaurants, Inc. v. San Francisco Local Joint Executive Board of Culinary Workers, etc., 177 Cal.Rptr. 690, 693-694, 700 (Cal.App. 1 Dist. 1982) (injunction limiting number and spacing of pickets upheld where organizational picket-line on sidewalk outside restaurant in congested tourist area became intimidating, violent and obstructed access to restaurant).

Summerset.

Unlike the other more open-to-the-public developments in these cases, the nature of the public invitation to Summerset is clearly restricted. As described above, it is a completely gated and fenced community. Resident and visitor entry is provided only through a front gate monitored at all times by a guard, although there is also a construction entrance that is gated but left open and unmonitored during business hours. There are "Keep Out" signs posted at the front entrance that also indicate that access is strictly controlled, authorization for entry is necessary, and trespassers will be prosecuted. Although there may have been some inconsistent monitoring of the access restrictions on the development, including among other things the failure to monitor the construction entrance during business hours, this fact alone does not justify treating the development as public in nature. Moreover, the nonemployee protesters and Union representatives have reasonable alternative sites for communicating their message *i.e.*, outside and in front of the main gate.

Thus, we conclude that Blackhawk did not violate the Act by threatening to have non-employee Union representatives arrested for engaging in the September 27 march on private property, or by directing non-employee Union representatives to leave the development on September 27, 28 and October 6 and threatening to call the police to have them arrested if they did not do so.

However, as to Innovative employees from other jobsites who came to Summerset for the September 27 march, we conclude that they should be accorded the access rights of off-duty employees under Republic Aviation Corporation[31] rather than non-employees under Lechmere.[32] In Tri-County Medical Center,[33] the Board concluded that where off-duty employees seek to communicate with other employees, an employer can not lawfully bar them access to parking lots, gates and other outside nonworking areas, except where

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[31] Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), reh'g denied 325 U.S. 894.

[32] See Postal Service, 318 NLRB 466 (1995).

[33] 222 NLRB 1089 (1976).

justified by business reasons.[34] Similarly, the off-duty Innovative employees who did not work at Summerset had the Section 7 right to communicate about organizing with other Innovative employees on private property at Summerset where the employees were not actually working (i.e. the construction entrance or sidewalk next to the construction site).[35] Therefore, the Region should determine if the off-duty employees were denied access to these areas on September 27 when they were attempting to communicate with employees, as opposed to the public, and if so, issue an Section 8(a)(1) complaint.

Homecoming. We agree with the Region that Schuler was privileged to ban the non-employee Union organizers from the unfinished houses and the lots on which the employees were working given that they permitted the organizers to remain on the sidewalks and streets. Although the streets and sidewalks of the development may be like the "public forum" in Pruneyard, there is no invitation to the public to use or enter the houses or lots on which construction is in progress. Rather, Schuler's invitation to these work areas extended only to its construction employees. This situation is clearly distinguishable from cases where the public is invited to "congregate, relax, visit, or seek out entertainment," or even the medical clinic cases where the property was at least open to a somewhat limited public use. Moreover, by permitting the Union representatives to remain on the development's sidewalks and streets, Schuler was providing a reasonable alternative site for communicating with employees. Therefore, we conclude that under these circumstances, Schuler could lawfully exclude the Union organizers as trespassers or threaten to have them arrested.

Americana. We also agree with the Region that Schuler could lawfully ban the Union representatives from the fenced-in construction area at Americana and threaten to have them arrested for trespassing. The construction area was gated, fenced, and distinct from other completed and owner-occupied areas of the development. There were no occupied homes or sidewalks in the area. Thus, there was no general invitation to the public to enter the area so as to deprive the Employer of a right to exclude the Union representatives under California constitutional law. In addition, the Union appears to have had a reasonable

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[34] Compare Providence Hospital, 285 NLRB 320, 322 n.6 (1987) (in absence of disparate treatment, no right to access where off-duty employees seek to communicate with the public).

[35] See Postal Service, 318 NLRB at 466.

alternative site for communicating with the employees there, i.e., outside the entry gate to the construction area.

2. Moscone Act

As discussed above, the Moscone act prohibits peaceful picketing at "any place where any person or persons may lawfully be," which has been interpreted to include places where union activity would be lawful under California caselaw. We conclude that the Union did not have a right of access under the Moscone Act to the Summerset development, the houses and lots under construction at Homecoming or the designated construction area of Americana. These places do not fall within the coverage of the Moscone Act because they are neither places where the public may generally be, nor where California law has declared that labor law considerations outweigh private property rights. Summerset, which was gated, fenced and guarded, was in no way open to public use as were the private sidewalks in Sears. Thus, this was not a place where the Union marchers could "lawfully be." Moreover, property rights in privately owned interior spaces that have not taken on the characteristics of a public forum have never been subjected to Moscone Act restrictions. We consider the houses and lots on which construction is in progress, as well as the designated construction area in Americana, clearly analogous to the interior spaces discussed in Sears. There the Court, in dicta, expressly questioned the applicability of the Moscone Act principles to conduct in the "aisles of the . . . store" or "private offices of its executives." The Sears Court suggested that under different facts, the State's labor policy interests in such interior working spaces might not outweigh the private property interest.[36]

B. Saddleback and Belleterre.

For the reasons discussed above with regard to the "interior" spaces of Homecoming, the Employers were arguably privileged to exclude the Union from the individual houses under construction and the lots in the Saddleback and Belleterre developments. However, we conclude that California would not permit Schuler and/or Innovative to exclude the Union organizers from the entire developments because the Union organizers' constitutional freedom of speech rights outweigh the Employers' property interest in the streets and sidewalks outside the particular jobsites. These sidewalks and streets front suburban developments where homes are being offered for

[36] 158 Cal.Rptr. at 375.

sale to the general public. Saddleback and Belleterre are more like large retail establishments open to both the general public and construction workers than they are like a clinic offering specialized services needed by only a "small subset of the local citizenry." The public was free to use the streets and sidewalks, and the Employers had not posted signs restricting access to or parking on the property, required pre-arranged appointments, or otherwise limited their invitation to visit the property to less than the entire public in general. Nor did the Employers provide the kind of professional and intimate services found especially vulnerable to interference in the abortion clinic cases. Finally, the Union's activities were peaceful and did not block the ingress and egress of employees, homeowners, or customers into the developments.

Even if California courts would not consider these sidewalks and streets so open to the public that constitutional free speech rights outweigh property interests, they would prohibit the exclusion of the Union representatives as a matter of state labor law and policy, as codified in the Moscone Act. The Union's conduct was at all times peaceful, and the sidewalks and streets of the development arguably constitute "any place where any person or persons may lawfully be." Although both Schwartz-Torrance and In re Lane involved picketing in front of stores, the court's balancing of the union's need to peacefully picket "at the most effective point of persuasion" against a property right "worn thin by public usage" would yield the same result with regard to union activity outside a housing development construction site.[37] Thus, the Sears court's determination to allow peaceful picketing on the employer's external property did not depend on whether the sidewalk constituted a "public forum" where members of the public could congregate generally to exercise their free speech rights. Rather, the court found that the California legislature had determined, as a matter of state labor law, that the rights of property owners to the exterior areas surrounding business establishments must be subordinated to the rights of persons engaging in peaceful labor activities directed at those establishments.[38]

Accordingly, since Schuler and/or Innovative did not possess a property interest sufficient under state law to exclude individuals from the sidewalks and streets in these developments, they violated Section 8(a)(1) by summoning

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[37] Sears, 158 Cal.Rptr. at 376.

[38] Id. at 378.

the police to remove and arrest the Union representatives. Additionally, in the Saddleback case, the Region should allege that the Employers violated Section 8(a)(1) by attempting to block the Union representative from leaving the development so that he could be arrested.

Conclusion

Based upon the foregoing, the Region should dismiss, absent withdrawal, the allegations regarding unlawful restrictions of Union activity at the Homecoming and Americana projects, and issue complaint, absent settlement, alleging that the Employer unlawfully ejected Union organizers from its exterior premises (the streets and sidewalks) and supported that improper exclusion by threats of arrest for trespassing at Saddleback and Belleterre. If the Region determines that the Employer unlawfully removed off-duty Innovative employees from Summerset when they were attempting to communicate with Innovative employees, then the Region should also allege this as a violation of Section 8(a)(1); however, the denial of access to non-employees at Summerset was lawful.

B.J.K.