

The Access of Off-Duty Contractor Employees to Private Property: A New Rule by the NLRB

Earlier this year, the National Labor Relations Board announced that it intended to conduct administrative rule-making concerning standards for access to an employer's private property. Shortly thereafter, in *University of Pittsburgh Medical Center*, the Board overturned nearly four decades of precedent that held that non-employee union organizers cannot be denied access to cafeterias and restaurants open to the public. Continuing their focus on union activity on an employer's private property, on August 23, 2019, in *Bexar County Performing Arts Center Foundation (Bexar)*, a 3-1 majority of the Board overturned Obama-Board precedent that allowed off-duty employees of an onsite contractor who worked regularly on the private property of another employer to access the owner's property to engage in union activity.

In *Bexar*, the employer owned and operated the Tobin Center, a regional arts center in San Antonio, Texas. The Tobin Center houses three resident companies: the Symphony, Ballet San Antonio, and Opera San Antonio. These companies have a licensor-licensee relationship with Bexar that permits them to use the Tobin Center for a certain number of rehearsals and performances. The Symphony musicians are represented by Local 23, American Federation of Musicians. While the Symphony used the Tobin Center for a high percentage of their rehearsals and performances, they also perform at other venues throughout San Antonio.

The Ballet San Antonio used both live music performed by the Symphony and recorded music at its ballets. To raise awareness among Ballet San Antonio patrons about the use of recorded music and its inferior quality to the music performed by the Symphony musicians, the union and some sympathizers distributed leaflets to the patrons of the ballet during a ballet performance at the Tobin Center that used recorded music. The leaflets criticized the use of recorded music and asked the patrons to demand live music. When the union passed out the leaflets on Bexar's private property, they were removed by security personnel and San Antonio police to a public space across the street where they were ultimately successful in passing out several hundred leaflets.

In concluding that the Tobin Center's action were lawful, the Board majority overturned prior Obama-Board precedent (*New York New York Hotel & Casino* and *Simon DeBartolo Group*) concluding that those cases contravened several founding principles articulated by the Supreme Court in *Lechmere, Inc. v. NLRB* as to off-duty employees of an onsite contractor by granting non-employees of the property owner the same access rights as the property owner's own employees. The majority further observed the Supreme Court in *Lechmere* made a critical distinction "of substance" between employees and non-employees' access rights to the owner's private property. Thus, the Board majority concluded that "although contractor employees, unlike non-employees, are not complete strangers to the property, their diminished contact with the owner and its property should reasonably correspond to lesser rights of access to the property when off duty than the property owner's own employees enjoy."

Finally the majority was critical of prior Obama-Board precedent in that it repudiated earlier Board precedent that held that off-duty contractor employees must work "regularly" and "exclusively" on the owner's property to enjoy greater access rights than non-employees. In this regard, the majority held "we will consider contractor employees to work regularly on the owner's property only if the contractor regularly conducts business or performs services there. In addition we will consider contractor employees to work exclusively on the owner's property if they perform all their work for that contractor on the property." Based on the above, the Board majority fashioned a new rule holding "that a property owner may exclude from its property off-duty contractor employees seeking access to the property to engage in protected rights unless (i) those employees work both regularly and exclusively on the property, and (ii) the property owner fails to show that they (the



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employees) have one or more reasonable non-trespassory alternative means to communicate their message.”

As to the requirement that there be no reasonable alternative means to communicate their message, the majority noted that Supreme Court precedent supports that test when non-employees of the owner are seeking access to the property. The majority also pointed out that Supreme Court has recognized that access to private property to communicate with the general public is a weaker right than if access is sought to communicate with employees who work on the property. Applying those principles, the majority held that when off-duty contractor employees seek access to the owner’s property to communicate with the general public, the owner may exclude those contractor employees if they can effectively communicate their message through other means “which may include newspapers, radio, television, billboards, and other media” and “in certain instances such alternative means could include social media, blogs, and websites.” Applying this new standard, the majority found that the Symphony employees did not work at the Tobin exclusively since they also played at other venues. In addition, the Symphony employees did not regularly work at the Tobin because their Symphony itself did not regularly conduct business or performances there. Further the majority held even if the Symphony employees work regular and exclusively at the Tobin there were reasonable alternative means to get their message to the general public. Thus, the Tobin Center’s right to remove them was upheld.

This decision will have far-reaching implications. It impacts not only the Symphony musicians but custodial or housekeeping employees who work at multiple buildings, none of which are owned by their employer. It also affects employees of a food service contractor who work regularly and exclusively on the property of a business providing food service to the owner’s customers. These off-duty employees will no longer have access to the owner’s property to communicate with the public about their working conditions because, as the dissent points out, the showing of reasonable alternative means “as the majority interprets it, is easy to make.”
