University of Baltimore Law Forum

Volume 22
Number 3 *Spring, 1992*

Article 18

1992

Recent Developments: Lechmere. Inc. v. NLRB: Nonemployee Union Organizers May Be Barred from an Employer's Property Absent a Showing of Inaccessibility of Employees

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FTCA by relying on the plain, clear, and established meaning of the terms therein. Such a reliance may simplify the process of determining awards for lower courts in the future.

- Mike Muldowney

Lechmere, Inc. v. NLRB:
NONEMPLOYEE UNION ORGANIZERS MAY BE BARRED FROM AN EMPLOYER'S PROPERTY ABSENT A SHOWING OF INACCESSIBILITY OF EMPLOYEES.

In *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992), the Supreme Court reaffirmed its earlier interpretation of nonemployee union organizational rights, and specifically rejected a trend recently adopted by the National Labor Relations Board ("Board"). The Court held that an employer may prohibit nonemployee union organizers from entering upon its property, where reasonable access to employees may be had elsewhere. In so doing, the Court explicitly rejected the Board's application of a balancing test to determine the rights of nonemployee union organizers.

In 1987, Local 919 of the United Food and Commercial Workers Union ("Union") began a campaign aimed at organizing the non-represented employees of Lechmere, Inc., a retail store located in Newington, Connecticut. On several occasions, the union organizers entered Lechmere's parking lot without permission and began placing handbills on the cars of Lechmere's employees. On each occasion, Lechmere's manager asked the union organizers to leave company property and then removed the handbills. The union organizers continued their organizational activities and began picketing Lechmere's store from an area adjacent to the company parking lot. Through additional efforts, the Union was able to contact approximately 20% of Lechmere's employees by mail, many of whom lived in the surrounding metropolitan area.

When the Union's organizational attempts failed to yield any success, they filed an unfair labor practice charge with the Board. An administrative law judge ruled in favor of the Union and recommended, in part, that Lechmere be ordered to allow the Union onto its property. The Board affirmed this ruling and adopted the judge's recommendation, applying the analysis of its opinion in *Jean Country*, 291 N.L.R.B. 11 (1988). The United States Court of Appeals for the First Circuit denied Lechmere's petition for review and enforced the Board's order. The Supreme Court granted certiorari, reversed the judgment of the First Circuit, and denied enforcement of the Board's order.

In an opinion by Justice Thomas, the Court began its analysis by looking to the National Labor Relations Act ("Act"). The Court noted that section 7 of the Act gave employees the right to organize or join a labor union. The Court further noted that this right is protected by section 8(a)(1), which makes it an unfair labor practice for an employer to interfere or restrict the exercise of this right by employees. *Lechmere*, 112 S. Ct. at 845. As the Court pointed out, there is a "critical distinction between the organizing activities of employees . . . and nonemployees . . . ." *Id.* The Court held that the Act "confers rights only on employees, not on unions or their nonemployee organizers." *Id.* (emphasis in original). However, the Court did recognize that, under some circumstances, the Act may restrict an employer's right to exclude union organizers who are not employees.

The Court next reviewed relevant case law dealing with this issue and determined as a general rule that "an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property." *Id.* at 846 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). In addition, the Court noted that the exception to this rule was extremely narrow, and that "[t]o gain access, the union has the burden of showing that no reasonable means [of reaching] the employees exists . . ." *Lechmere*, 112 S. Ct. at 847 (quoting *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978)).

The Court concluded that the facts in this case did not justify an application of this narrow exception to the general rule that an employer may restrict nonemployee distribution of union literature on company property. *Lechmere*, 112 S. Ct. at 848. The Court held that the Union had reasonable alternative means to reach the employees, and in so finding, specifically rejected the Board's conclusion with repect to this issue. *Id.* at 848-49. The Court explained that nonemployee organizers could only compel an employer to open his property to their organizational efforts where "the location of a plant and the living quarters of the employees place the employees beyond the reach of [the Union]." *Id.* (quoting *Babcock & Wilcox*, 351 U.S. at 113). Although reaching the employees at their homes may have been "cumbersome or less-than-ideally effective," this fact did not bring the Union within the narrow inaccessibility exception enumerated in *Babcock*. *Id.*

The Court explicitly rejected the Board's application of a balancing test to this factual situation. In finding an unfair labor practice, the Board relied upon its holding in *Jean Country* where they determined that an employer's property rights could be infringed in favor of the rights of an organization. *Id.* at 849 (citing *Jean Country*, 291 N.L.R.B. 11 (1988)). This analysis, however, failed to take into consideration the distinction between the rights of employee organizers and those of nonemployee organizers. *Lechmere, 112* S. Ct. at 849. The Court decided, therefore, that the Board's application of a balancing test was inappropriate in that it was inconsistent with the Court's prior decisions. *Id.* The Court also stated that a balancing test was inap-

propriate in this case because the Act does not afford protection to nonemployee union organizers. *Id.* While conceding that the Board is entitled to judicial deference with regard to their interpretation of the Act, the Court held the Board's opinion in *Jean Country* was inconsistent with its prior decisions and, therefore, overruled.

By its decision in *Lechmere*, the Supreme Court indicated the property rights of employers will not be balanced with any organizational rights of nonemployee union organizers. Finding no specific protection for such organizers under the Act, the Court refused to succumb to the temptation of judicial activism and specifically rejected the Board's recent trend of balancing the rights of nonemployee union organizers with employer property rights. The Court held that employer property rights should only be compromised where the nonemployee union organizers can show that the employees were effectively isolated from contact due to the nature of their employment. The impact of this decision upon the withering, antiquated labor movement could be devastating, not only by its holding, but also by the present Court's indication of its unwillingness to legislate from the bench.

- Mark K. Boyer