

New York's Top Court Expands Reach of Injunctions Against Unions

Claims Against Union Protests Aimed At 'Innocent Bystanders' Are Not Preempted

by **Steven M. Swirsky**

December 2008

In a significant ruling for employers and property owners, the New York Court of Appeals, in *Helmsley-Spear, Inc. v. Fishman*, recently ruled that a law suit brought by the managing agent of the Empire State Building seeking to enjoin certain “loud and disruptive” activities in connection with demonstrations that a labor union was conducting at the building, as part of a drive to unionize security guards employed by a private company, was not preempted by the National Labor Relations Act. This important decision confirms the state’s interest in protecting its citizens against disruptive and unruly conduct by unions and provides employers and other property owners with legal recourse, including the right to injunctive relief, in circumstances where state courts have, in the past, been unwilling to act.

Facts

Local 32BJ of the Service Employees International Union was attempting to organize security guards employed by Copstat Security, LLC, a private guard service that Helmsley-Spear, the Empire State Building’s managing agent, had retained to provide guards at the building. The union’s dispute was with Copstat and did not involve Helmsley-Spear or any other plaintiff in the nuisance action that eventually was filed. On 18 days, over a period of three months, the union engaged in loud, disruptive demonstrations at the Empire State Building’s entrances. The demonstrations included beating and drumming on plastic containers, metal pots and tin cans, all of which could be heard inside the building and surrounding properties. While this went on, the union passed out handbills and leaflets as an individual wearing a King Kong costume patrolled the building’s entrances.

The NLRB Charges

Copstat filed unfair labor practice charges (“ULP”) with the National Labor Relations Board (“NLRB”), alleging that the union’s actions were intended to coerce its clients to cease doing business with it and to interfere with the rights of its employees. Copstat also alleged that although the demonstrators did not carry actual picket signs, the union’s actions constituted what the NLRB has defined as “symbol picketing” in support of its campaign to pressure Copstat to recognize it as the representative of its employees and that such picketing was for the unlawful purpose of forcing Copstat to recognize the union.

The NLRB dismissed the charges because it concluded that that the union’s actions, including specifically the banging on drums and pots during its demonstrations outside the Empire State Building, did “not transform the leafleting activity into unlawful conduct” and they did not constitute picketing and that there was no evidence of the unlawful object.

The state court lawsuit and lower court

At that point, Helmsley-Spear, the building’s managing agent, and several other area business owners filed a nuisance action against the union in the New York State Supreme Court. They asked the Court to issue an injunction against the noise because of the harm it was causing to their businesses and property. The lawsuit did not seek to stop the union’s handbilling and other activities.

At a hearing on their application for an injunction, the plaintiffs presented the following: (1) videos with sound from the demonstrations; (2) evidence that the noise levels from the union’s banging and drumming exceeded that of ambient noise by 15 to 20 decibels; (3) testimony that the noise from the union’s demonstrations affected surrounding businesses causing interruptions to business, probable lost sales and headaches to workers; and (4) evidence that complaints to the police and New York City’s 311 hotline had been unsuccessful in remedying the situation.

The union urged the Court to dismiss the action on the grounds that the plaintiffs’ claims were preempted by federal labor law, because the matter arose out of the union’s efforts to organize and the matter had already been considered by the NLRB when it had investigated and dismissed Copstat’s ULP charges against the union. It also argued that the plaintiffs had failed to establish sufficient harm to warrant an injunction and that the plaintiffs had failed to comply with state labor law requirements specific to the issuance of injunctions in labor disputes.

New York Supreme Court Judge Martin Shulman found that the plaintiffs had established that the banging caused stress and business interruption and that the plaintiffs’ cause of action alleging nuisance was not preempted by federal law. Accordingly, he granted the plaintiffs’ request for an injunction. The Court did not address the application of the New York State Labor law prerequisites to issuance of

an injunction in a labor dispute; it merely concluded that if the law applied, the statutory requirements for an injunction in a labor dispute had been met.

The union appealed and the Appellate Division, First Department, vacated the injunction and dismissed the complaint, holding that the “loud drumming to publicize defendant union’s handbilling is preempted by federal law Indeed, the complained of conduct has been the subject of a ruling by the National Labor Relations Board recognizing defendant’s right to engage in such activities.”

The Court of Appeals decision

The sole issue before the New York Court of Appeals was whether the plaintiffs’ private nuisance suit was preempted by the National Labor Relations Act (“NLRA” or the “Act”). In a 4-2 decision, the Court held that the cause of action for nuisance was not preempted. As an initial matter, the Court noted that the NLRA does not contain express preemption language. The Court explained that it was guided by United States Supreme Court decisions holding that a state law will be deemed preempted if it addresses conduct that is actually or arguably protected by the NLRA, or where the conduct at issue was intentionally left unregulated by the NLRA as part of the self-help remedies available to the combatants in a labor dispute.

The Court of Appeals concluded that the issue presented to the NLRB by Copstat in the ULP charges it had filed against the union, namely whether the union had engaged in impermissible picketing and an unlawful secondary boycott activity, was distinctly different from the issue presented to the state court by Helmsley-Spear and the other plaintiffs, namely whether the drumming and related activity constituted a nuisance that could be enjoined as such under state law. It noted that the Labor Board’s decision on Copstat’s ULP charges had not addressed the question of whether the drumming was “protected activity” under the NLRA. Rather, the Court of Appeals observed that the NLRB had merely concluded that the drumming and the use of a King Kong costume had not transformed otherwise lawful leafleting into “symbol picketing,” secondary conduct directed at those doing business with Copstat or conduct otherwise violative of the NLRA. The Court recognized that even if the union’s drumming was protected activity, private nuisance claims, like state law claims for trespass, misrepresentation, breach of contract, intentional infliction of emotional distress, defamation, false arrest, false imprisonment and malicious prosecution are so deeply rooted in local feeling and responsibility that it could not be found that when Congress enacted the NLRA, that it intended to deprive the states of the power to act in response to such tortuous conduct.

The Court also concluded that conduct of a type such as the union’s drumming at its demonstrations was not an economic weapon, like a strike or walkout by a union or a lockout by an employer, which are the types of conduct addressed in the Act. Thus, the Court concluded that when Congress addressed the use of such economic weapons in the Act, it was not reserving to itself regulation with respect to other types of actions, like the union’s drumming and noise making, that were not economic

weapons of the type regulated under the NLRA.

Implications for employers

This decision will be significant for employers and others who, like the plaintiffs, find themselves being effected by a labor dispute between another company with whom they do business and a union trying to organize that company's employees. As union organizing and labor's reliance upon corporate campaigns involving demonstrations and other conduct of the type at issue in this dispute continue to increase, more innocent bystanders – neighbors, adjoining business owners, customers and such, are more and more likely to find themselves enmeshed, as third parties, in such disputes, with their own businesses, customers and staff exposed to the types of disruption the union caused here. The Court of Appeals ruling that the courts of New York have the authority to address and, where appropriate, enjoin such tortuous conduct means that businesses and individuals in the state should now have the means to seek court relief on their own in appropriate circumstances and will not be limited to relying upon the NLRB to move for injunctive relief. This decision means that the state courts should now be able to play a more significant role in protecting citizens from common law torts perpetrated by labor unions.

For more information about this Client Alert, please contact:

Steven M. Swirsky
New York
(212) 351-4640
Sswirsky@ebglaw.com

Donald S. Krueger, an Associate in the New York office, assisted with the preparation of this Client Alert.

* * *

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.-

© 2008 Epstein Becker & Green, P.C.

Attorney Advertising

ATLANTA • CHICAGO • HOUSTON • LOS ANGELES • MIAMI
NEW YORK • NEWARK • SAN FRANCISCO • STAMFORD • WASHINGTON, DC

www.ebglaw.com

