

Sears, Roebuck and Company and Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Cases 29-CA-13363 and 29-CA-13716

August 14, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On June 13, 1989, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed a brief in answer to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified, and to adopt his recommended Order as modified.

1. We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by prohibiting the Union from picketing in front of its auto centers located in the East Northport¹ and Smithtown, New York shopping centers. We find merit in the General Counsel's exceptions to the judge's failure to find that the Respondent similarly violated the Act when it prohibited picketing in front of its auto center in Hicksville, New York.

On September 30, 1987, the Union was certified as the representative of auto center employees employed by the Respondent at its East Northport, New York facility. Negotiations began in October and the Respondent presented a final contract offer in December. The employees rejected this offer on January 15, 1988,² and commenced a strike at the East Northport facility on January 21. The Union in furtherance of its economic strike at East Northport engaged in picketing on the same day at the Respondent's Smithhaven Mall and Hicksville auto center stores. At all three locations, the Union initially stationed its pickets directly in front of each auto center. At all three locations, the local police, at the Respondent's request, asked the Union to

¹The judge in his factual recitation rejected the Union's argument that the presence of snow made picketing on the sidewalks around the East Northport shopping center dangerous, observing that "a few shovels and a little muscle" could have resolved this "dilemma." We observe that this statement plays no role in the judge's analysis. Absent exceptions, we pro forma adopt the judge's finding.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by prohibiting picketing at the East Northport store, we find that the Union did not have a reasonable alternative means of communication and we do not rely on the judge's characterization that alternative means were "relatively inadequate."

²All subsequent dates are in 1988 unless otherwise indicated.

move the pickets away from each auto center to the public area around the perimeter of the shopping centers in which each auto center was located.

The Respondent's facilities at Hicksville consist of a retail store and a separate auto center situated on a parcel of land entirely owned by the Respondent which also includes a large parking area. There are no other businesses located on this property. To the west of the property is Broadway, a six-lane public road with five entrances into the lot. To the east is Bay Avenue, which has one entrance into the lot. There are sidewalks separating the parking lot from both Bay Avenue and Broadway. On January 21, the Union stationed union members who were not Sears' employees directly in front of the auto center. The police, at the Respondent's request, asked the pickets to move off the Respondent's property to the various vehicular entrances to the parking lot.

The judge found that the relocated picketing was only a few yards from where the pickets originally were located, that the move did not make any significant difference in the public's or truckdrivers' ability to see the Union's picket signs, and that many truckdrivers who were asked to honor the picket line did so. The judge also found the General Counsel had not proven that picketing on the public sidewalks adjacent to the parking lot was dangerous because of vehicular traffic. The judge concluded that the Respondent's private property interest at this location outweighed the Union's right to gain access to the property. The judge, noting that there was at this location no danger of enmeshing neutral parties in the Union's dispute with the Respondent, concluded that the Union's picketing "on the public sidewalks immediately outside the employer's premises provided a reasonably effective and undiluted alternative means of communicating with the Union's intended audience."

We do not agree with the judge's findings. In *NLRB v. Babcock & Wilcox Co.*,³ the Court declared that in cases in which the exercise of Section 7 rights comes into conflict with property rights, the Board must seek to accommodate the two. In determining whether the Union should be permitted to picket on the Respondent's property, we apply the principles of *Jean Country*,⁴ which, following *Babcock & Wilcox*, held that alternative means of communication is a factor that must be considered in every access case in which a legitimate property interest and a Section 7 right must be accommodated.⁵ "[O]ur essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of

³351 U.S. 105, 112 (1956).

⁴291 NLRB 11 (1988).

⁵Id. See also *Best Co.*, 293 NLRB 845 (1989).

impairment of the private property right if access should be granted.”⁶

The auto center at Hicksville is a freestanding facility surrounded by a parking lot located on a parcel of land owned by the Respondent. The only other business establishment at this location is a retail store operated by the Respondent. The property is, of course, held open to the general public. The Respondent maintains a posted no-solicitation, no-distribution rule which it has consistently and uniformly enforced with regard to civic and charitable causes. On these facts, we find that the Respondent has a legitimate and relatively substantial property interest.⁷

Nevertheless, we find that the Respondent’s property claim at Hicksville is not stronger than the significant Section 7 right exercised by the Union at Hicksville. The Union was engaged in a primary economic strike at the East Northport location. The Union at Hicksville sought to inform store customers and suppliers about the economic strike at East Northport and was thus engaged in conduct in support of the employees engaged in primary economic activity. Accordingly, the Hicksville picketing by the Union—the bargaining agent of the East Northport employees—was activity that is closely related to primary economic activity, which is a core Section 7 right.⁸

With regard to the availability to the Union of alternative means of communicating its message, we agree with the General Counsel that picketing at the perimeter entrances to the shopping center was dangerous. The evidence shows that the pickets at this location encountered the same problems as did the pickets at East Northport and Smithhaven Mall. The speed limit on the public roads surrounding the shopping center is 35 miles per hour. When drivers slowed down to read the picket signs, there were a number of near collisions.⁹ Attempts to distribute handbills to passengers while running alongside moving vehicles subjected both pickets and drivers to risk. We conclude that the record supports a finding that requiring the picketing to be carried on at the perimeter of the parking area subjected persons and vehicles to unreasonable risk.

We also agree with the General Counsel that picketing at the perimeter entrances to the shopping center

was ineffective. The record shows that when drivers stopped their cars on the Respondent’s property to speak to pickets, the Respondent’s security guards threatened to remove the pickets.

We conclude that the picketing at the vehicular entrances to the parking lot “was generally ineffective and dangerous owing to the difficulty of reading the picket signs under existing traffic speed and safety conditions.”¹⁰ Under these circumstances, the General Counsel has shown that there were no reasonable alternative means available to the Union to communicate its message. To permit the Union access to the Respondent’s property to communicate its message effectively to its intended audience would mean only a modest impairment of the Respondent’s property rights. Accordingly, we find that the Respondent’s refusal to permit the Union to picket in front of its auto center at Hicksville violated Section 8(a)(1) of the Act.

2. The judge found that the Respondent did not violate the Act when it prohibited the Union from distributing organizational literature at its East Northport retail store because there was a reasonable alternative available to the Union to communicate with the retail store employees, namely, the auto center employees already represented by the Union. We find it unnecessary to rely on the judge’s reasoning that the already represented auto center employees, without more, furnished a reasonable alternative means of communication.¹¹ Under the applicable test, the burden is on the General Counsel to show that the Union lacked such a means of communication; and for the reasons set forth below, we agree that the General Counsel failed to carry that burden.

The Union represented the auto center employees at the East Northport facility. On September 19, a union organizer and union members who were not Sears’ employees attempted to organize the retail store employees at the same location. The union agents stationed themselves in front of the employee entrance to the retail store and handed out organizational literature to persons identified as the Respondent’s retail store employees. When the police informed the union agents that they could not remain on the Respondent’s property, they moved to the vehicular entrances of the shopping center. Finding this attempt at distribution of its literature to be ineffective, the Union abandoned its efforts.

We agree with the judge that the Respondent has a legitimate property interest at the East Northport location. In contrast, the Union, through its organizational

⁶ *Jean Country*, supra at 14.

⁷ See *Best Co.*, supra.

⁸ That Sec. 7 activity undertaken in furtherance of an economic strike occurred at a separate Sears location with pickets who were not employed by the Respondent, although a factor to be considered, does not significantly diminish the strength of the Sec. 7 right being asserted by the Union since the primary employer, Sears, was on the Hicksville site. *Mooreville IGA Foodliner*, 284 NLRB 1055, 1058 (1987), enf. 858 F.2d 1285 (7th Cir. 1988), and *W. S. Butterfield Theaters*, 292 NLRB 30 (1988).

⁹ The judge determined that the testimony regarding accidents which almost happened was “vague” and noted that “if the streets were so dangerous,” the parties “could have obtained public records or other information from the appropriate governmental agencies showing to what extent, if any, accidents have occurred in the past.” We disavow any suggestion that the parties are required to prove accidents occurred to establish evidence of dangerous conditions.

¹⁰ *Target Stores*, 292 NLRB 933, 935 (1989).

¹¹ It is unclear whether the Respondent has rules that would prevent auto center employees from soliciting retail store employees during mealtimes or overlapping breaktimes, if any. Compare *Sahara Tahoe Hotel*, 292 NLRB 812 (1989) (finding handbilling by off-duty employees not a reasonable means of communication because the employer had disrupted such handbilling when it occurred).

solicitations, was asserting the Section 7 right of employees to organize, a right “at the ‘very core’ of the interests the National Labor Relations Act seeks to protect.”¹²

The Supreme Court’s seminal decision in *Babcock & Wilcox*, supra, concerned organizational activity. In that case, the Court not only formulated the balancing test between property rights and the employees’ statutory rights that, as the Board in *Jean Country* acknowledged, still must inform every decision concerning the access of nonemployees to private property in the interest of exercising Section 7 rights. It also determined that, in the circumstances there, the General Counsel had failed to carry his burden of showing that the union lacked a reasonable alternative means of communication with employees of the plant it sought to organize, where a “large percentage” of employees lived in “small, well-settled communities” near the plant, and the union could communicate with them through “the usual methods of imparting information,” i.e., mailings, telephone calls, home visits, and chance meetings on a town street. *Babcock & Wilcox*, 351 U.S. at 113. See also 351 U.S. at 107 fn. 1. The Court noted that the union had, in fact, contacted more than 100 out of the 500 employees in this manner.

The circumstances in *Babcock & Wilcox*—employees in close-knit communities living near a manufacturing plant with an exterior entrance that permitted observers to identify those who entered there as plant employees—are not, however, necessarily identical to the circumstances of an organizational campaign directed at an employer located in a shopping mall in a modern suburban area. *Lechmere, Inc. v. NLRB*, 914 F.2d 313 (1st Cir. 1990), enf. 295 NLRB 92 (1989). Thus, in *Lechmere*, supra, where the union was attempting to organize employees of a retail appliance store located in a suburban mall with 13 other establishments, the Board found that the General Counsel carried the burden of showing that the union had no reasonable means of communication with the employees other than access to the property. Specifically, the General Counsel has shown that the union—after exercising due diligence (trying to pick employees’ cars out of the cars on the mall parking lot, taking down the license numbers, and obtaining names and addresses through the state motor vehicle registry)—was able to identify only a small portion of the store’s employees. *Id.* 295 NLRB 92 at 93. See also *Emery Realty*, supra at 374 (union organizer made numerous fruitless efforts to identify work force of hotel located in large multistory office complex).

In the present case, by contrast, the record fails to show that reasonable alternative means were not available. In fact, the Union conducted two meetings with

retail store employees off the East Northport premises, which indicates that the Union had access to some of the targeted employees. In the absence of any indication that this access was somewhat limited, the General Counsel has failed to show a lack of alternative means. The General Counsel has therefore not presented evidence that would sufficiently distinguish this case from *Babcock & Wilcox*. Accordingly, we shall dismiss this allegation of the complaint for failure of proof on the part of the General Counsel.

AMENDED CONCLUSION OF LAW

The Respondent violated Section 8(a)(1) of the Act by prohibiting representatives of the Union from engaging in peaceful picketing and handbilling in front of the auto centers at East Northport, Smithtown, and Hicksville, New York, and causing the police to assist in the removal of such representatives from the Respondent’s property.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sears, Roebuck and Company, East Northport, Smithtown, and Hicksville, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

“(a) Prohibiting representatives of Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO from engaging in peaceful picketing and handbilling in front of the auto centers at East Northport, Smithtown, and Hicksville, New York, and causing the police to assist in the removal of such representatives from the Respondent’s property, as long as that activity is conducted by a reasonable number of persons and not unduly interfere with the normal use of facilities or operations of businesses not associated with the Respondent.”

2. Substitute the following for paragraph 2(a).

“(a) Post at its facilities at East Northport, Smithtown, and Hicksville, New York, copies of the attached notice marked “Appendix.”¹³ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Re-

¹² *Emery Realty*, 286 NLRB 372, 373 (1987), enf. 863 F.2d 1259 (6th Cir. 1988).

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

spondent to ensure that the notices are not altered, defaced, or covered by any other material.”

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit representatives of Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO from engaging in peaceful picketing and handbilling in front of the auto centers at East Northport, Smithtown, and Hicksville, New York, and WE WILL NOT cause the police to assist in the removal of such representatives from our property, as long as the Union's activity is conducted by a reasonable number of persons and does not unduly interfere with the normal use of facilities or operations of businesses not associated with us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SEARS, ROEBUCK & CO.

April M. Wexler, for the General Counsel.

Thomas P. Schnitzler (Jackson, Lewis, Schnitzler & Krupman), of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on March 6 and 7, 1989. The charge in Case 29-CA-13363 was filed on January 21, 1988, and the charge in Case 29-CA-13716 was filed on September 30, 1988.¹ The complaint was issued on November 30, 1988.

In essence, the complaint alleged as follows:

1. That the Union, which had been certified by the Board on September 30, 1987, and after bargaining with the Employer, commenced an economic strike and picketing at the stores and auto center facilities of the Respondent at locations in East Northport, Hicksville, and Smithhaven Mall, all in New York. Such picketing was commenced in the parking lot areas owned by the Respondent.

2. That on January 21, the Respondent, with the assistance of the police, ordered and caused the Union to remove its pickets to the public streets surrounding the parking lot and/or mall areas where the Respondent's stores were located.

3. That on September 19, the Union commenced organizing activities by handing out literature near the main entrance of the Respondent's store located at the East Northport Mall.

4. That on September 19, the Respondent prevented and prohibited the Union from engaging in the activity described in paragraph 3 and forced its agents to engage in such activity on the public streets outside the mall's parking lot.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

The Union, on September 30, 1987, was certified by the Board as the exclusive collective-bargaining representative of the auto center employees of Sears located at East Northport. In October 1987, negotiations commenced between the parties and on December 30, 1987, the Respondent made a "final offer" to the Union. This offer was rejected by the employees on January 15, 1988, and on January 21, the Union commenced a strike against the Employer.

In connection with the strike, the Union engaged in picketing at the auto center in East Northport where the bargaining unit employees worked. Additionally, the Union commenced picketing the Respondent at two other locations, one being at a store located in Hicksville, New York, and the other at a Sears auto center located in the middle of a large shopping mall in Smithhaven, New York. In all these instances, the picketing was directed essentially at Sears' customers and at drivers making deliveries to the Sears stores. Basically, the picket signs used were addressed to the public and notified whoever chose to read them that the Union was engaged in a strike for wages, job security, and fringe benefits.

At East Northport, the Respondent has a two-story retail store and an attached auto center which is located to the south of the main store. Both facilities (which are attached), are part of a relatively small suburban mall with a larger area set aside for parking. In addition to the Respondent's facilities, there also are located in the mall a CVS drug store, a jewelry store, a shoe store, two fast food restaurants, an insurance agency, and a savings bank. The entire mall area, including the parking lot is owned by the Respondent. To the north of the parking area is Jericho Turnpike where there are

¹ All dates are 1988 unless otherwise indicated.

two entrances to the mall's parking lot. To the east is Larkfield Road which has one entrance to the lot. On the south border there is land owned by someone else and there is a fence but no street which divides the properties. To the west there is a lumberyard owned by another establishment.

Jericho Turnpike is a four-lane road, from which there are two vehicular entrances to the mall's parking lot on the north side of the Sears facility. Between the parking lot and Jericho Turnpike there is a sidewalk and a grassy area or berm. There are no traffic lights at these entrances and at one entrance there is a stop sign but only for outgoing traffic. The other entrance to the mall's parking lot is located on Larkfield Road. Unlike the entrances on Jericho Turnpike, there is a four-way traffic light at the Larkfield Road entrance. On the road leading from Larkfield Road to the mall is an island which extends down towards the main entrance of the Sears store. Adjacent to Larkfield Road, running alongside the parking lot, is a grassy berm and a 4-foot-wide sidewalk. It appears that the distance from the Larkfield Road entrance to Sears' main entrance is about 500 to 600 feet. In order to approach the entrance to the auto center from Larkfield Road by vehicle, requires traveling about another 200 feet around to the southern end of the Sears building.

On the first day of the strike, January 21, the Union, at the East Northport mall, placed its pickets in front of the auto center where they could easily communicate with people bringing in their cars for service. Also, the Union placed a van it owned (and used as a mobile office), in that part of the parking lot immediately adjacent to the auto center.

After picketing for about 3 hours in the manner described above, the Union was notified by the police department that Sears wanted the pickets off its property. After some discussion, the Union was required to remove its pickets from the parking lot and to move its van to a spot within the parking lot further away from the auto center and closer to Larkfield Road. From that time to the end of the strike on February 11, the Union's picketing activity was confined to the perimeter of the mall's parking lot on Jericho Turnpike and Larkfield Road.

The Union asserts that picketing on Jericho Turnpike and Larkfield Road was dangerous because of inadequate lighting and the fact that snow was on the sidewalks thereby causing the pickets to walk on the heavily trafficked streets. I find this argument unpersuasive and I note that a few shovels and a little muscle could easily have resolved this "dilemma." More persuasive is the Union's contention that being forced to picket at the vehicular entrances to the mall's parking lot, meant that it could not target Sears' customers, and that the opportunity for communication with moving cars was negligible at best. It also was contended that in the past Sears allowed other groups to use the parking lot for activities. Nevertheless, this was credibly denied by Sears' management who testified that they barred such activity whenever it came to their attention.

In support of its strike at East Northport, the Union also engaged in picketing at the Smithhaven Mall on January 21. This was carried out by nonemployee union members. Picketing at this location was carried out initially in front of the Sears auto center. However, on the request of Sears, the police informed the Union that it would have to remove its

pickets from this area and move to public streets on the perimeter of the mall. The Union complied.

The Smithhaven Mall is a much larger and more complex facility than the mall at East Northport. In its design and structure it is a massive suburban shopping center which operates almost like a small downtown city center accessible almost exclusively by automobile. The entire facility, including parking lots is located on a 93-acre parcel of land on which there are at least 200 retail stores. Sears owns 20 of the acres at the northern end where it has a retail store and a separately standing auto center. In the middle of the parcel is a mall with a large number of smaller retail establishments and the mall is flanked on the east by Macy's and on the west by Abraham and Strauss. On the northern border is a two-lane street, which has an entrance leading directly to the Sears retail store. That street runs to the east where it intersects, at a traffic light, with New Moscheles Road which runs south along the eastern border of the mall's parking lots. There is an entrance to the mall parking area on New Moscheles Road leading directly to the Macy's parcel. On the southern border is Middle County Road and on the western border is Alexander Avenue which has an entrance leading directly to Abraham and Strauss. There is also an inner perimeter road which circles the 93-acre parcel and it is obvious that a driver entering into any of the entrances could easily visit any of the major stores and any number of the smaller establishments within the mall. Indeed, as an average citizen, one appreciates how these shopping malls have become the suburban substitutes for town centers and are places where many people come to browse, to shop, to exercise, or simply to pass the time of day.

Also picketed on January 21, was a Sears auto center located in Hicksville, New York. At this location there is a Sears retail store and a separate auto center located on a parcel of land owned by the Respondent. Unlike the other two locations described above, this facility is not located within a mall and there are no other business establishments on the property. The store and the auto center are situated on a piece of property which includes a large parking area. To the west is Broadway (Route 107), to the north is Nevada Street, to the east is Bay Avenue, and to the south is property owned by someone else. On Broadway, which is a six-lane road having a 35-mile-per-hour speed limit, there are five entrances to the Sears parking lot. There is also an entrance on Bay Avenue. Both Bay Avenue and Broadway have sidewalks that separate the Sears parking lot from the streets.

About an hour after the picketing began in front of the Hicksville auto center (in the parking lot area owned by Sears), the pickets were asked to leave by Sears' security people. Somewhat later in the day, the Union was notified by the Nassau County Police (at the Respondent's request), that the pickets would have to get off Sears' property and move to the public sidewalks. The Union complied. In so doing, I note that this entailed moving the pickets a very short distance from where they were situated initially. Thus, rather than being inside the parking lot, the pickets now were stationed (among other places), at the entrance closest to the auto center and only a few yards from where they first began. I also note that after moving, the pickets at Hicksville were successful in talking to truckdrivers, some of whom honored the picket line and refused to make delivery to the Respondent.

Although the General Counsel claimed that picketing on the sidewalk on Broadway was dangerous due to traffic conditions, that contention was not particularly persuasive to me. In this regard, I note that there is a sidewalk, there is lighting, there is a 35-mile-per-hour speed limit and there was no other convincing evidence of danger.

After the strike was over, the Union, on September 19, 1988, commenced a campaign to organize the retail store employees of the Respondent at East Northport. In this respect, nonemployee union representatives stationed themselves at the employee entrance to the store, which is immediately adjacent to the store's main public entrance. At this location, informational flyers were given to any persons who wore a name tag identifying themselves as a Sears employee. Other people were approached, asked if they worked for Sears, and, if they replied affirmatively, were also tendered a flyer.

About 8:30 a.m. the Company's management told union organizer Perry Baron that she could not remain on the property and that she would have to leave "like the last time." Thereafter, the union people stationed themselves at the Larkfield Road entrance and at the main Jericho Turnpike entrance where they handed out leaflets to drivers who were entering the mall's parking areas. Many of the recipients of the leaflets were customers, not Sears' employees. Some people thought the flyers were advertising a sale, not exactly the message intended. After this first day, the Union ceased its activity.

In relation to the organizing activity at the East Northport store, I note that by this time, the Union was ensconced as the representative of Sears' auto center employees. I also note that although the auto center employees worked in a separate building, they could use a common cafeteria area made available to all Sears' employees. Moreover, there was no rule prohibiting union solicitations by employees.

I note that Sears, at all three stores, had posted notices to the public which prohibited solicitations or distributions of handbills and circulars without prior permission.

III. ANALYSIS

The problem of balancing an employer's property rights with the rights of employees to engage in collective action pursuant to Section 7 of the Act, is one which, over the years, has given rise to a fair number of vexatious cases. This problem has to some degree been made more acute with the invention of suburban shopping malls which are generally accessible only by automobile and which, in some cases (such as the Smithhaven Mall), can take on many of the characteristics of the public areas within cities or towns.

In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), nonemployee union organizers were barred by the company from handing out leaflets to employees in the company's parking lot. In that case, the plant was a manufacturing facility located on a 100-acre tract of land. About 40 percent of the company's 500 employees lived in a town a mile away and more than 90 percent drove to work and parked in the company lot. Because of traffic conditions, the Board found that union organizers could not safely distribute leaflets to employees as they entered or left the parking area. The Court, rejected the Board's conclusion that the company had to permit access to its property, and stated:

It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. . . . This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if 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, the employer must allow the union to approach his employees on his property. No such conditions are shown in these records. [Citations omitted.]

In *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Supreme Court dealt with the balance between private property interests and employees' interest in conducting an economic strike in a shopping mall. Unlike the facts of *Babcock & Wilcox*, supra, this case involved a situation where employees (as opposed to nonemployees), were engaged in an economic strike against Butler Shoe Company, which had a store in a shopping center owned by Hudgens. The pickets were told that they were trespassing and warned that unless they left, they would be arrested. The Court decided that the issue of whether an employer violated Section 8(a)(1) of the Act, by threatening the arrest of pickets, was to be governed by the National Labor Relations Act and not by First Amendment considerations. The Court's majority stated, inter alia

Both *Central Hardware* [407 U.S. 539], and *Babcock & Wilcox* involved organizational activity carried on by nonemployees on the employers' property. The context of the Section 7 activity in the present case was different in several respects which may or may not be relevant in striking the proper balance. First, it involved lawful economic strike activity rather than organizational ac-

tivity. . . . Second, the Section 7 activity here was carried on by Butler's employees [albeit not employees of its shopping center store], not by outsiders. . . . Third, the property interests impinged upon in this case were not those of the employer against whom the Section 7 activity was directed, but of another.

The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of Section 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights and private property rights asserted in any given context. [Citations omitted.]

Most recently the Board, made a major restatement in this area of the law. This was in *Jean Country*, 291 NLRB 11 (1988), where the Board held that the employers (including the shopping center owner), violated the Act by barring non-employees from engaging in picketing within a shopping mall for the purpose of notifying the public that Jean Country did not pay wages and benefits in accordance with "area standards." The Board stated:

We read *Babcock & Wilcox* as indicating that the General Counsel bears the initial burden on the alternative means factor, i.e., that the General Counsel must show that without access to the property, those seeking to exercise the right in question have no reasonable means of communicating with the audience that exercise of that right entails. . . . This does not necessarily mean that, in order to show that ostensible alternative means of reaching a relevant audience are not reasonable alternatives, the General Counsel must show that the party engaging in the Section 7 conduct actually attempted those means and found them futile. What is required is simply a clear showing, based on objective considerations rather than subjective impressions, that reasonably effective alternative means were unavailable in the circumstances. In some contexts, the attempt must in fact have been made to support an objective conclusion that an asserted alternative is not reasonable, although in others the unreasonableness of the asserted alternative may be clear without such an attempt. . . . We note however that, generally, it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact. . . .

Because the Supreme Court in *Hudgens* indicated that there is a "spectrum" of Section 7 rights and private property rights and that the place of a particular right in that spectrum might affect the outcome of a case, we are not free to assume that every Section 7 right is of equal weight

Factors that may be relevant to assessing the weight of property rights include, but are not limited to, the use to which the property is put, the restrictions, if any that are imposed on public access to the property, and the property's relative size and openness. . . . Factors that may be relevant to the consideration of a Section 7 right in any given case include, but are not limited to, the nature to the right, the identity of the employer

to which the right is directly related [e.g., the employer with whom a union has a primary dispute], the relationship of the employer or other target to the property to which access is sought, the identity of the audience to which the communications . . . are directed, and the manner in which the activity related to that right is carried out. Factors that may be relevant to the assessment of alternative means include, but are not limited to, the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and, most significantly, the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message.

Although we have identified the foregoing factors within categories labeled "property rights," "Section 7 rights," and "alternative means," these categories are not entirely distinct and self-contained. . . .

Accordingly, in all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process. In the final analysis however, there is no simple formula that will immediately determine the result in every case. . . . For example, denial of access will more likely be found unlawful when property is open to the general public that when a more private character has been maintained. . . . [Citations omitted.]

Picketing at East Northport in January 1988

Initially noted is that Sears owns the property consisting of its retail store, its auto center, the mall, and the surrounding parking lot area. Therefore under *Jean Country* its conduct vis-a-vis the union's activity at this location was based on a legitimate property interest. Further, the evidence establishes that the property was posted with rules against public solicitations and distributions that have been enforced in a nondiscriminatory manner. Cf. *Ordman's Park & Shop*, 292 NLRB 953 (1989), where the Board held that Respondents had violated the Act when they allowed organizations to use the premises but discriminated against union activity.

The Union's initial conduct at East Northport consisted of picketing in furtherance of its bargaining posture with the Company. Thus, the Union's activity was primary economic activity constituting a "core Section 7 right," (i.e., the right to bargain collectively). Further that activity was engaged in, for the most part, by Respondent's employees who worked at the auto center. That is, a majority of the people who commenced picketing on January 21, 1988, were employed by the Respondent. (The testimony was that of about 40 pickets present, 30 were employees of Sears and 10 were not.)

The Union's picketing at East Northport was initiated in front of the Respondent's auto center, away from the Respondent's retail store entrance and away from the other establishments in the mall. Accordingly, the picketing was carried out in a manner to reach most effectively the targeted

audience (customers of the auto center), while avoiding enmeshing any of the neutrals located on the overall property.

When the Union was required by the police, at the request of the Respondent, to move its pickets to the public streets on the periphery of the mall's parking lot, it seems to me that its means of communicating with its intended audience was drastically reduced. At these locations it could briefly brandish picket signs or attempt to hand out leaflets as cars entered and passed through the entrances while driving toward the stores.

In balancing the private property rights versus the Section 7 rights, it seems to me that the Respondent's property interest would suffer only a modest impairment if access had been granted to the Union. On the other hand, it is my opinion that the Union's interest in primary picketing at the immediate location of the primary dispute outweighed the Company's property interest. This is especially true, given the fact that most of the pickets were employees of the Company; the alternative means of communication to the intended audience was relatively inadequate; and the picketing on the public streets would have to some degree enmeshed the other establishments at the mall. *W. S. Butterfield Theatres*, 292 NLRB 30 (1988); *Sahara Tahoe Hotel*, 292 NLRB 812 (1989).

Leafletting at East Northport—September 1988

The Union on September 19, 1988, by organizer Perry Baron and three other members (who were not employees of Sears), arrived at the employee entrance to the Sears retail store about 8 a.m. where they began to hand out leaflets to Respondent's employees. The purpose of the Union's activity was to organize employees of the Company and the intended audience did not include members of the general public. The activity was carried out in the parking lot in front of the store near the main entrance, which is immediately adjacent to the employee entrance. This went on for about 15 minutes until the Union's representatives were told by Sears' management that they could not remain on private property. Thereafter, for some part of the day the Union's representatives distributed leaflets to people in cars as they entered the parking lot at the entrances on Larkfield Road and Jericho Turnpike.

The evidence as to this incident discloses that although the employees of the Sears auto center, who are represented by the Union, do not generally have contact with the Respondent's retail store employees, they can and sometimes eat at the Company's cafeteria located in the store. Moreover, there is no rule prohibiting employee solicitation or distribution of union literature. Also, nothing would prevent, represented employees from going to the timeclock area and writing down the names of the store employees, thereby providing the Union with alternative means of communicating its organizational message to them.

In my opinion, the situation here is decidedly different from the picketing that occurred in January and February 1988. It seems to me that in this case, there was a reasonable alternative available to the Union in communicating with its intended audience, namely the employees of the Respondent's retail store. Thus, the Union represented a group of the Respondent's employees in the adjacent auto center and those employees had access to the retail store employees in the cafeteria and elsewhere during breaktimes. Further, there

was no prohibition by the Employer against employee union solicitation or distribution. The facts are therefore distinguishable from those in *Sahara Tahoe Hotel*, supra, where the Board held that exclusion of nonemployees was violative of the Act despite the employer's argument that the union could have communicated to represented employees by using off-duty employees. In that case, however, the argument was rejected because the employer had also denied access to off-duty employees for handbilling purposes, at the time of the alleged violations.

Picketing at the Smithhaven Mall

Unlike the East Northport Mall which is quite modest in size, the Smithhaven Mall is of a completely different magnitude. The entire property is 93 acres, of which Sears owns and occupies 20 acres. In addition to the Sears retail store and separate auto center, there is Macy's store, an Abraham & Strauss store, plus over 200 smaller retail establishments. It appears that access to the stores and the mall is primarily by automobile and there is a gigantic parking lot surrounding the shopping area. Access to the stores, including the Sears' facilities may be made through a variety of entrances on the various public roads surrounding the property. Although witness for the Respondent testified that most Sears' customers entered from the northern entrance, it seems to me that this testimony was speculative at best.

It seems to me that all the reasons for finding a violation in relation to the Respondent's action of forcing the Union at East Northport to do its picketing on the perimeter of the parking lot, are applicable in spades to the situation at the Smithhaven Mall. As I see no reason to repeat my analysis, I shall conclude that Respondent violated Section 8(a)(1) of the Act by precluding the Union from engaging in primary picketing in front of its auto center within the Smithhaven Mall. See also *Mountain Country Food Store*, 292 NLRB 967 (1989); *Target Stores*, 292 NLRB 933 (1989); *D'Alessandro's, Inc.*, 292 NLRB 81 (1988).

Picketing at Hicksville

In furtherance of its economic strike against Sears, the Union also set up pickets, by nonemployees, in front of a Sears auto center in Hicksville, New York. Here too, the pickets were initially established in the parking lot immediately in front of the auto center. However, unlike the other two facilities described above, the Sears retail store and its auto center are on property owned and exclusively used by the Respondent. That is, there are no other business establishments sharing the property, and in this respect, the property is more similar to a normal industrial setting.

At some point during the day and after the picketing commenced, the Union was ordered by the Company to leave its property and the Union complied. It thereupon set up pickets at various entrances to the parking lot including the entrance nearest to the auto center. At this entrance, the Union's pickets were basically the same distance from the auto center as when they began their picketing inside the parking lot. In short, being forced to the perimeter, simply did not make any significant difference in this situation insofar as the ability of the public or truckdrivers to see the Union's picket signs. Indeed, the evidence shows that during the period of the strike,

truckdrivers were asked to honor the picket line and that many did so.

The General Counsel asserted that picketing on the public sidewalks on the streets adjacent to the parking lot was dangerous because of vehicular traffic. In my opinion, she did not prove this assertion. The fact is that each of the streets where pickets were posted were uncurved, lighted, and had normal sidewalks between the roads and the parking lot. On Route 107 the posted speed limit is 35 miles per hour. Although the General Counsel's witness gave vague testimony as to accidents which almost happened, the evidence discloses no accidents on these roads, either during the time of the picketing or at any other times. (Presumably, if these streets were so dangerous, the General Counsel or the Union could have obtained public records or other information from the appropriate governmental agencies showing to what extent, if any, accidents have occurred in the past.)

In my opinion, the Respondent's private property interests at Hicksville, outweigh the Union's right to have access to the Respondent's property to engage in picketing activity. At this facility, where there is no danger of enmeshing neutral persons, it seems to me that the Union's activity on the public sidewalks immediately outside the Employer's premises, provided a reasonably effective and undiluted alternative means of communicating with the Union's intended audience. I therefore shall recommend that the complaint to the extent that it alleges conduct at this location, be dismissed.

CONCLUSIONS OF LAW

1. By prohibiting the Union from engaging in primary economic picketing at Respondent's East Northport and Smithhaven Mall auto centers in January and February 1988, and by causing the police to demand that the Union remove such pickets from the parking lot areas in front of the auto centers, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The Respondent has not violated the Act in any other manner encompassed by the complaints.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Sears, Roebuck and Company, East Northport, Smithtown, and Hicksville, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting representatives of Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO from engaging in peaceful informational picketing and handbilling in front of the auto centers at the East Northport and Smithhaven Malls, and causing the police to assist in the removal of such representatives from the Respondent's property, as long as that activity is conducted by a reasonable number of persons and does not unduly interfere with the normal use of facilities or operations of businesses not associated with the Respondent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facilities in Smithhaven and East Northport, New York, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the act not specifically found.

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."