

**Food Lion, Inc. and United Food and Commercial Workers Union, Local 400, AFL-CIO.** Cases 5-CA-20560 and 5-CA-20762

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND OVIATT

On February 15, 1991, Administrative Law Judge Robert W. Leiner issued the attached decision.<sup>1</sup> The Respondent filed exceptions and a supporting brief,<sup>2</sup> and the General Counsel and Charging Party filed answering briefs.

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 judges' rulings, findings,<sup>3</sup> and conclusions only to the extent consistent with this Decision and Order.<sup>4</sup>

<sup>1</sup>Judge Norman B. Zankel, who conducted the hearing in this matter, died on October 12, 1990. The case was transferred by agreement of the parties to Judge Leiner on November 23, 1990, for purposes of issuing a decision on the record as made.

<sup>2</sup>The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondent filed a partial motion to strike the General Counsel's answering brief and memorandum in support, and the General Counsel filed an opposition. Specifically, the Respondent moved to strike those portions of the General Counsel's answering brief that addressed matters that were assertedly neither decided by the judge nor raised in the Respondent's exceptions. We deny the Respondent's motion. In doing so, we first note that the Respondent excepted to the judge's conclusion that it unlawfully denied the Union access to the common areas adjacent to the Respondent's stores in question, and that the General Counsel's disparate treatment argument in his answering brief is responsive to that exception. In any event, in finding that the Respondent disparately enforced its no-solicitation policy against the union organizers in violation of Sec. 8(a)(1) of the Act, we are relying on our own review and assessment of the record evidence and controlling precedent, independent of (although in agreement with) the views of the General Counsel.

As to the other two aspects of the General Counsel's answering brief that the Respondent has moved to strike, we note, in denying that motion, that (1) the Respondent expressly excepted to the failure of Judge Leiner to rule on its April 6, 1990 second amended settlement motion and that it is expressly urging the Board now to rule on that settlement motion (which we do, *infra*); and (2) that we are finding it unnecessary to pass on whether the Respondent had an exclusory property interest in the premises in question, and that we are also not applying the accommodation of competing interests analysis set forth in *Jean Country*, 291 NLRB 11 (1988).

<sup>3</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>4</sup>The Respondent has excepted to the asserted failure of Judge Leiner in fn. 2 of his decision to rule on the Respondent's April 6, 1990 second amended settlement motion. As the record does not establish that either Judge Zankel or Judge Leiner actually ruled on the Respondent's second amended settlement motion, we shall do so.

The settlement proposal in question is not in evidence. The Respondent has attached a copy of it to its brief in support of exceptions. It provides in pertinent part, *inter alia*, that upon 1 day's advance written notice to the Respondent, no more than two union representatives would be permitted access to the

The judge found that the Respondent violated Section 8(a)(1) of the Act by (1) denying access to union representatives to the sidewalks, roadways, and parking areas adjacent to two of the Respondent's stores, thus prohibiting the union representatives from communicating with the Respondent's employees in these areas for the purpose of discussing with the employees their interest in being represented by the Union; and (2) by threatening, or causing the police to threaten, the union representatives with arrest if they remained in the above-described areas outside of the Respondent's stores.

In concluding that the Respondent violated the Act by denying access to the union representatives, the judge found that the Respondent had failed to satisfy its threshold burden under *Jean Country*, 291 NLRB 11, 13 fn. 7 (1988), of establishing that it had an exclusory property interest in the sidewalks, roadways, and parking areas adjacent to its stores to which it denied access to the union representatives.

We affirm the judge's conclusion that the Respondent violated the Act as alleged. However, we reach that conclusion not on the grounds relied on by the judge, but instead on the grounds, discussed in full below, that the Respondent disparately enforced its rules and policies regarding solicitation against the Union. Thus, we find it unnecessary to pass on the judge's discussion and analysis of whether the Respondent had an exclusory property interest in the areas from which it excluded the union representatives.

#### I. FACTS

The Respondent leases two stores near Fredericksburg, Virginia: store 419 is in the Breezewood Shopping Center and store 450 is in the Chancellor Shopping Center. The Respondent is the largest tenant in each shopping center. The Respondent shares with the other retail establishments in each shopping center a right to use all common areas, including the public roadways, sidewalks, and public parking areas in the shopping centers.

sidewalks in front of the stores, but no more than 10 feet in from either end of the buildings, for no more than 2 days per week, and for no more than 8 weeks per year. The proposal also provides that once the 16 days' maximum sidewalk access has been used in a given year, no more than two union representatives would be permitted access to the two nonhandicap parking spaces closest to the store entrances. The proposal contains a nonadmission clause and provides for the posting of a notice to employees. The Charging Party rejected this settlement proposal and the General Counsel opposes it.

The fact that both the General Counsel and the Charging Party oppose the settlement proposal weighs heavily in our determination of whether to accept the Respondent's proposed settlement agreement. This fact is particularly relevant in light of the various restrictions on union access contained in the proposal. Given these restrictions and the parties' rejection of the Respondent's proposal, we find that it would not effectuate the purposes and policies of the Act to accept the settlement agreement. See generally *Independent Stave Co.*, 287 NLRB 740 (1987). Accordingly, the Respondent's second amended settlement motion is denied.

### A. Store 419, Breezewood Shopping Center

On June 23, 1989, several union representatives and a representative of SETCA, the overseas union that represents employees of the Respondent's parent company in Belgium, visited the Respondent's Breezewood store to talk to the employees about forming a union. Store Manager Rodney Sherman told them that they could speak with employees who were not on the clock, but denied the union representatives permission to meet employees in the breakroom.

A few of the union representatives left the store to meet with three off-duty employees who were sitting on a public bench on the sidewalk in front of the store. Union Representative Willard Snow remained in the store. Sherman approached Snow and asked him to leave the store premises. Snow asked why and Sherman said it was because Snow had bothered one of the employees (who was a customer at the time). When Snow said that he was merely asking if the customer worked there, Sherman told him, "If you don't leave, I am going to call the police." Snow refused to leave, and Sherman called the Spotsylvania County Sheriff's office which dispatched a deputy to the scene. The deputy conferred with both parties. Sherman told the deputy that he wanted the union agents out of the store and off the front of the walkway. The deputy instructed the union representatives to leave the store and sidewalk. When the union representatives asked where they could stand, the deputy told them that they would "have to go out in the parking lot to the edge of the road" and he pointed "out to the roadway," to the grassy area adjacent to the highway. Union Representative Albert Faust asked what would happen if they did not leave. The deputy replied, "Well, sir, you'd probably go to jail." The union representatives agreed to leave the store and adjacent common areas.

### B. Store 450, Chancellor Shopping Center

On October 7, 1989, Union Representatives Earman and Joe went to the Respondent's Chancellor store along with four Belgian SETCA representatives. The purpose of the visit was to allow the Belgians to observe working conditions in U.S. grocery stores as compared to conditions in Belgium, as well as to talk to the employees about organizing a union.

The union representatives spoke to a few employees inside the store, but were soon met by Assistant Store Manager Jeff Buchanan, who told them that they could observe operations, but not talk to employees in the breakroom. When Earman protested, Buchanan told him that he could not solicit employees while they were working, interfere with their work, or harass them. Buchanan threatened to have Earman "escorted out of the store if he didn't quit." Buchanan called the sheriff's department, returned to the union representa-

tives, and asked them to leave the store. He told them that the police were on the way.

The union representatives were soon met by Buchanan and a Spotsylvania County deputy sheriff. The officer told Earman that Buchanan wanted him out of the store, and asked Earman and the group to leave. Earman told the deputy that the union representatives planned to wait in front of the store until the employees went to lunch or got off work. The deputy said, "No, you have to leave the property, you have to leave the premises." As Buchanan stood by, the deputy told the union representatives that they could not remain in the parking lot, that Food Lion's property extended out some 200 yards, adjacent to the highway. Earman asked if he could talk with the two employees who were sitting on the bench in front of the store or if he could use the public pay phone or soda machines on the sidewalk. The deputy again told them no, that they had to leave the property. The union representatives agreed to leave to avoid arrest.

### C. The Respondent's Policies and Practices Regarding Solicitation

The Respondent's store policy manual and corporate policy manual both state that "solicitation on store premises at any time by nonemployees is strictly prohibited." "Company premises" are defined as including (1) the inside of the store, (2) the entrance and exit areas, and (3) the sidewalk area immediately in front of the store. The policy manuals also instruct the store manager to "politely request that the individuals who are soliciting stop their activity when they are in the areas defined above." The Respondent also had a no-solicitation sign posted in the front window of its two stores in question.

The Respondent has an established procedure for groups that request permission to solicit outside its stores. Its "Procedures for Solicitation" state that permission may be granted to groups that are nonprofit, nonpartisan, or noncontroversial. Although the "Procedures for Solicitation" place limits on the number of days and frequency with which approved groups may solicit, there are no restrictions as to the number of persons engaged in solicitation nor the places they must stand.

The record establishes that the Respondent regularly permits charitable organizations to solicit, distribute, and/or sell items in front of its Breezewood and Chancellor stores. Between February and August 1989, a material time period, the Respondent granted permission to the Salvation Army, the Knights of Columbus, the Junior Chamber of Commerce, the Girl Scouts, the Lions Club, the Pan African Church, and other organi-

zations of similar nature to solicit in front of the Breezewood and/or Chancellor stores.<sup>5</sup>

In sharp contrast, the Respondent expressly instructs its store managers and supervisors that they

CAN (and SHOULD) . . . Keep non-employee union organizers off company premises. (Rather than using self-help if they resist, you should contact the local law enforcement people) [emphasis in original].

This rule has been in effect throughout the period at issue in this case.

## II. ANALYSIS AND CONCLUSIONS

In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978), the Supreme Court reiterated the principle that while an employer may not always bar nonemployee organizers from its property, its right to do so remains the general rule. But the Court continued as follows:

To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation. [Emphasis added; citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).]

In *Jean Country*, 291 NLRB 11, 12 fn. 3 (1988), the Board reaffirmed its continued adherence to the "distinct analytical view that a denial of access for Sec. 7 activity may constitute unlawful disparate treatment where, by rule or practice, a property owner permits similar activity in similar, relevant circumstances."

The Board has applied a disparate treatment analysis under similar circumstances in two recent access cases: *Ordman's Park & Shop*, 292 NLRB 953 (1989), and *D'Allessandro's, Inc.*, 292 NLRB 81 (1988). In both cases, the Board held that the employer had violated Section 8(a)(1) by denying union representatives access to the areas adjacent to the stores while granting access to other groups, individuals, and activities. Although in both cases the judges did not reach the issue of disparate treatment, the Board applied the disparate treatment analysis as an alternative to the *Jean Country* balancing of interests. We do likewise in the instant case, noting that the disparate treatment issue was fully litigated at the hearing.<sup>6</sup>

There is substantial evidence that both before and during the time that the Union sought to solicit employees on the sidewalks outside of the Respondent's stores, the adjacent common areas were regularly used

by a wide range of groups for activities unrelated to the operation of the store. And yet, on two occasions, the Union was peremptorily and singularly denied such access to engage in its organizational activity. Further, there is evidence that this disparate treatment is reflected in the Respondent's own policies. Thus, the record shows that the Respondent has an established procedure for certain groups seeking to solicit outside its store. Union activities, however, are treated differently. In light of the Respondent's express instructions to its supervisors and store managers, it is clear that the Respondent has a blanket discriminatory policy of specifically denying union organizers—but not others—access to its "premises" and of calling the police if the union representatives resist eviction.

Under these circumstances, we find that the Respondent's denial of access to the union organizers to solicit off duty employees in the common areas adjacent to the Respondent's leased premises on June 23 and October 7, 1989, constituted unlawful disparate treatment of union activities in violation of Section 8(a)(1). Accordingly, we shall modify the judge's recommended Order to reflect the discriminatory nature of these violations.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Food Lion, Inc., Fredericksburg, Virginia, 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) Discriminatorily prohibiting representatives of United Food and Commercial Workers Union, Local 400, AFL-CIO, from communicating with the Respondent's employees on the sidewalks and roadways and in the parking areas adjacent to the Respondent's premises in the Breezewood and Chancellor Shopping Centers, Fredericksburg, Virginia, and threatening representatives because of their presence on the sidewalks, roadways, and parking areas for the purpose of communicating with the Respondent's employees."

2. 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.

<sup>5</sup>The judge found that the Respondent also permitted bake sales on the sidewalks in front of the Chancellor and Breezewood stores. There is no evidence in the record to support this finding.

<sup>6</sup>We therefore find it unnecessary to engage in an analysis accommodating competing Sec. 7 and private property 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 discriminatorily prohibit representatives of United Food and Commercial Workers Union, Local 400, AFL-CIO from communicating with our employees on the sidewalks, roadways, and parking lots in front of and surrounding our stores in the Breezewood and Chancellor Shopping Centers, located in Fredericksburg, Virginia, or threaten union representatives because of their presence on the sidewalks, roadways, or adjacent parking areas for the purpose of communicating with our employees.

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.

FOOD LION, INC.

*Eileen Conway, Esq.*, for the General Counsel.  
*David H. Grigereit, Esq. (Arnold & Anderson)*, of Atlanta, Georgia, for the Respondent.  
*Carey R. Buttsavage, Esq. (Baptiste & Wilder, P.C.)*, of Washington, D.C., for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was tried on five occasions, on and between March 26 and May 29, 1990, in Fredericksburg and Stafford, Virginia, before Administrative Law Judge Norman B. Zankel<sup>1</sup> upon General Counsel's complaints, separately issued, in the cases cited in the caption. The charge in Case 5-CA-120560 was filed July 7, 1989, and served on the parties on July 10, 1989. The complaint and notice of hearing was issued on October 26, 1989. The charge in Case 5-CA-20762 was filed on October 19, 1989, and served on the parties on October 26, 1989. A first amended charge was filed and served on February 27, 1990, with a complaint and notice of hearing therein filed and served on February 28, 1990. On March 5, 1990, the Regional Director for Region 5, National Labor Relations Board, issued and served an order consolidating cases in the above matters. Respondent filed timely answers to the complaints, admitting certain allegations, denying others and denying the commission of any unfair labor practices.

The complaints allege, in substance, that Respondent violated Section 8(a)(1) of the Act at two of its shopping center

<sup>1</sup> Judge Zankel died on October 12, 1990. Upon the consent of all parties, and pursuant to 5 U.S.C. § 554(d) and Sec. 102.36 of the Board's Rules and Regulations, the associate chief administrative law judge, on November 23, 1990, transferred the matter to me for purposes of issuing a decision on the record as made.

facilities near Fredericksburg, Virginia, by refusing access to union representatives engaged in protected, concerted activities, and, in both cases, threatening union representatives with arrest for engaging in such activities.

On January 3, Respondent filed a motion, inter alia, to dismiss the complaints for failure to state a cause of action and on March 21, 1990, Judge Zankel issued an Order denying Respondent's motion.<sup>2</sup>

At the hearing, the parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to file posthearing briefs which have been carefully considered.

On the entire record, including the briefs, I make the following

## FINDINGS OF FACT

### I. RESPONDENT AS STATUTORY EMPLOYER

Respondent, a North Carolina corporation with an office and place of business in Fredericksburg, Virginia, admits that in the 12-month period ending October 1989, a representative period, in the course and conduct of its business operations, it derived gross revenues in excess of \$500,000. In the same period, Respondent admits having purchased and received at its Fredericksburg, Virginia locations and its various stores located throughout the State of Virginia, products, goods, and materials valued in excess of \$50,000 shipped directly from points located outside the State of Virginia. Respondent concedes that at all material times it has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaints allege, Respondent admits, and I find, that at all material times, United Food and Commercial Workers Union, Local 400, AFL-CIO, the Charging Party (the Union), has been and is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

The unfair labor practices alleged in this consolidated matter relate to activities at two of Respondent's retail stores,

<sup>2</sup> From time-to-time, Respondent submitted to Judge Zankel various plans and amended plans to settle these cases. The history and disposition of Respondent's various settlement plans are contained in ALJ Exhs. 1 and 2 which are part of the official record in this proceeding. On April 13, 1990, Judge Zankel issued an Order, inter alia, resuming the hearing in this consolidated matter (ALJ Exh. 2(a)). Noting therein that the Charging Party (the Union) rejected Respondent's amended settlement terms, and the General Counsel having taken no position in the matter, Judge Zankel decided to resume the hearing, complete the litigation, and to issue a decision in the consolidated matter. Respondent's offer would permit union solicitation in limited areas of the adjoining parking lot during limited hours of the day. Employees approaching the solicitors would necessarily be identified. Nevertheless, Respondent, in its brief, continues to urge the adoption of its proposed amended terms of settlement. General Counsel, in its brief, opposes the settlement and, on this record, the Union continues to oppose the settlement. There is no question that Respondent's proposed terms of settlement are not consistent with the statutory rights that would be accorded to the Union if it prevailed. Under these circumstances, particularly the possibility of repetition of similar conduct, I reject the proposed offer of settlement and continue in Judge Zankel's decision to issue a decision on the merits of this consolidated matter. See *Copper State Rubber*, 301 NLRB 138 (1991).

both situated in shopping centers near Fredericksburg in Spotsylvania County, Virginia.

The store located along Route 208 (store 419) is in the Breezewood Shopping Center; the other store (store 450) is in the Chancellor Shopping Center, located at the intersection of Virginia Routes 639 and 3. These stores, in terms of square footage, are the largest tenants in the respective shopping centers. In each shopping center, there were at least several other retail establishments, including restaurants. The landlord in each of the shopping centers maintains both sidewalks and roadways in front of and around Respondent's stores together with adjacent adjoining parking lots for customers, vendors, suppliers, invitees, and pedestrians visiting Respondent's stores and other stores in the shopping centers. The sidewalks in front of each store are approximately 152 feet long and 12 feet in width. The main entrances of the stores abut the central area of the sidewalk. At that juncture, the Breezewood store has a vestibule enclosing about 25 feet of the sidewalk at the center thereof and the main entrances. The Chancellor store has a windscreen of about the same length enclosing the sidewalk at the center. A canopy or roof covers the entire storefront sidewalk at both stores. Similarly, parcel pickup lane roadways, abutting on adjacent two-way traffic lanes, are immediately next to the sidewalks, directly in front of the store.

From the perspective of facing the store entrances or vestibules on the sidewalk immediately in front of the stores, there are two soda machines located at the left end of the sidewalk in front of each store, located approximately 8 to 10 feet from the end of the store building and co-terminus sidewalk. At both stores, there is a public coin telephone located on the sidewalk between the coke machines and the store entrances. In addition, there is a bench on the sidewalk between the telephone and the store entrance at each building. Grocery carts are stored on the right side of the sidewalk in front of both stores beginning approximately 10 to 12 feet from the respective vestibule or windscreen entrances running the length of the right storefront sidewalk.

The Union's July 7, 1989 unfair labor practice charge with respect to the Breezewood Shopping Center, alleges that "On or about June 23, 1989, and continuing thereafter," Respondent violated Section 8(a)(1) of the Act by denying union representatives reasonable access to communicate with employees and by threatening the arrest of union representatives. However, General Counsel's ensuing October 26, 1989 complaint with respect to the Breezewood Shopping Center (Case 5-CA-20560) fails to allege that any unfair labor practice occurred other than on June 23, 1989, and conspicuously omits the language, found in the charge, that the alleged unfair labor practices were "continuing thereafter." Similarly, the Union's October 1989 charge with respect to the Chancellor Shopping Center (Case 5-CA-20762) and the first amended charge (G.C. Exh. 1-H) both allege that the unfair labor practices occurred on or about October 7, 1989, "and continuing thereafter." General Counsel's February 28, 1990 complaint with respect to the Chancellor Shopping Center (Case 5-CA-0762) declares only that the alleged unfair labor practices occurred on or about October 7, 1989, and omits all reference to unfair labor practices as "continuing thereafter." On the basis of a comparison of the Union's charges with the General Counsel's complaints, I find that the unfair labor practices, if, indeed, they occurred at the two stores,

occurred only on the dates alleged in the complaints. Therefore, I need not and do not make findings with regard to the continuation of unfair labor practices; rather, the scope of this decision relates solely to the question of whether unfair labor practices occurred on the dates and at the places alleged in the complaints: with respect to the Breezewood store, on or about June 23, 1989; with respect to the Chancellor store on or about October 7, 1989.

#### The Leases at Breezewood and Chancellor Shopping Centers

Portions of the leases relating to both shopping centers are in evidence (G.C. Exhs. 3 & 4).

The respective leases, executed respectively in 1985 and 1986, both grant to the tenant (Respondent) for a period of 20 years the respective store buildings and the land on which the buildings stand, designated the "demised premises."

With regard to the respective shopping centers' interior streets, alleys, sidewalks, and parking lots, each lease contains the same language (G.C. Exh. 3; G.C. Exh. 4) (emphasis added):

Landlord hereby dedicates and grants to Tenant, its employees, agents, suppliers, customers and invitees, a *non-exclusive right* at all times *to use*, free of charge, during the term of this lease, or any extensions thereof, all the Common Areas, including parking areas, as shown on *Exhibit "A"*, which areas are acknowledged to be for use by such persons, along with others similarly entitled, for parking and for ingress and egress between the demised premises and all other portions of the shopping center and the adjoining streets, alleys and sidewalks.

Landlord covenants and agrees . . . to provide and maintain a surfaced parking area substantially as shown on Exhibit "A" . . . all of the common areas shall be adequately lighted by Landlord at its expense. Landlord covenants and agrees to operate and maintain all the Common Areas . . . and provide therefore all such services as are reasonably required [sweeping, snow removal, lighting, policing, general repair, striping].

Tenant shall have a right to install . . . two (2) soft drink dispensing machines on the sidewalk in front of Tenant's demised premises. Said soft drink dispensing machines shall be located in a place so as not to disrupt the normal flow of pedestrian traffic.

It is further understood that Tenant shall have the right to merchandise spring and summer bedding plants and vegetables on the sidewalk in front of Tenant's store during the months of March through July of each year. Tenant shall also be permitted to erect such display racks as to adequately display and hang potted plants during the aforementioned period. Said display shall be located in such a place so as not to disrupt the normal flow of pedestrian traffic along and across the *sidewalk* immediately in front of Tenant's store and shall not hinder pedestrian access between Tenant's store and any other co-tenants within the shopping center.

Landlord further . . . agrees to provide tractor trailer parking space for the *exclusive* use of Tenant at its . . . service entrances . . . [and] that Tenant shall have 24-

hour a day access for ingress and egress to the rear of the demised premises and the exclusive right to such spaces as may be needed by Tenant . . . as such service entrances are shown on Exhibit "A."<sup>3</sup>

The leases also contain covenants of quiet enjoyment and tenant obligations to pay to the landlord, as additional rent, a prorata share of the costs of "Common Area Maintenance." The additional payments in the Chancellor lease (addendum to art. 8) are based on tenant's "Gross leasable area." That area is defined as "any floor space within the shopping center, leased or owned by the Tenant." The leased area (art. 1) appears to be the 25,000 square feet in the store interior. The sidewalks and other common areas are not mentioned in this computation.

#### The Display of Respondent's Merchandise on the Storefront Sidewalks

Aside from operation of the soda machines and telephones on the sidewalks of both stores, the Respondent, pursuant to the leases, regularly displays merchandise on the sidewalks for sale. Notwithstanding that the leases proscribe the nature of the merchandise to be displayed (spring and summer bedding plants and vegetables, and hung potted plants) and further proscribe the period of the year in which such displays may occupy the sidewalks (March through July), Respondent's actual practice is to display such merchandise on the sidewalks throughout the year without objection, on this record, from the landlord, other tenants or anyone else.

For instance, in the winter months, Respondent displays firewood on the sidewalk principally on the left side of the sidewalk against the building. This leaves only a 3- to 4-foot walkway on the 12-foot sidewalk for customer traffic (R. Br. at 11; Tr. 105). In addition to firewood, Respondent displays bulk bags of mulch, pine bark nuggets, assorted trees, shrubs, and bushes. The firewood is displayed through March and the latter goods through April of each year. The displays of these materials nevertheless leave an aisle on the sidewalk for pedestrian traffic (R. Br. at 13).

General Counsel and the Union, however, observe that there are no cashiers, cash registers, or sales, or bagging of this merchandise on the sidewalks. Rather, the customers themselves load items into their cars or carts, taking the price tags to the cashier within the store. General Counsel concedes that the sidewalks are storage spaces for Respondent's displayed items notwithstanding that the storage and display

of these items constitute a "blatant breach of the terms of the lease" (G.C. Br. at 22).

Each store employs 100 employees (Tr. 340-341) and only one employee spends a brief period each day attending to these sidewalk displays and, at most, two employees are scheduled to work in the parcel pickup areas on the sidewalk and parking areas (Tr. 141-143; 159; 161; 368; 385; 412). There is no dispute, however, that these two employees regularly help customers unloading carts on the sidewalk and the pickup areas and load food parcels into automobiles.

#### The Testimony of Respondent's Witnesses Regarding its Property Rights

Rodney L. Sherman, store manager of the Breezewood store in June 1989 (Tr. 316), testified that he had conversations with Michael T. Hall, the principal of the landlord and owner of the Breezewood property, Michael T. Hall and Associates. These alleged conversations related to solicitation in the front of the store and the parking lot and related to Hall's feelings and his viewpoint (Tr. 317). Michael T. Hall did not testify in the proceeding and therefore there was no corroboration of any conversation between Sherman and Michael T. Hall.

At the beginning of his testimony, when Sherman was asked what authorization he had for excluding trespassers from the common areas, he testified that he had a letter from Michael T. Hall. The only letter in evidence from Michael T. Hall is Respondent's Exhibit 13, dated August 4, 1989, a date well after the commission of the alleged unfair labor practices (June 23, 1989) at Breezewood. When pressed by counsel for any authorization from the landlord to exclude trespassers prior to the receipt of this August 1989 letter, he testified that he had a conversation with Michael T. Hall in February 1989, shortly after he took over management of the store (Tr. 319). Although Sherman's testimony in direct examination specified that the conversation was in February (Tr. 319), on cross-examination he could not recall the specific date and would not even volunteer a month (Tr. 355). Since Respondent maintained a no-solicitation sign in the front window of the store and although Sherman had no clear recollection of the conversation (Tr. 356), Sherman testified that he asked Hall for his viewpoint on solicitation. Sherman testified that Michael T. Hall said that he did not allow it (Tr. 356-357). Nothing in this alleged conversation purported to grant landlord authorization to Respondent for the exclusion of trespassers.

Thereafter, Sherman was asked whether he had any *further* conversations with Michael T. Hall concerning the banning of solicitation and distribution *after* the alleged June 23, 1989 unfair labor practice incident. He testified that there was a "brief meeting prior to that date." When pressed as to any meeting with Hall before June 23, 1989 (Tr. 357), he testified that the meeting took place in Hall's office after the Union had appeared "again" and Hall merely said that he was against solicitation (Tr. 358). When it was brought to Sherman's attention that the Union had not appeared "again" before June 23, and indeed had not been at the Breezewood premises between February 1989 (Sherman's arrival at the store) and June 23, 1989 (the date of the alleged unfair labor practice), Sherman admitted that there had been no union appearance up to that time and that his conversation with Michael T. Hall was *after* June 23, 1989, when he

<sup>3</sup>Both leases refer to attached Exhibits "A." Neither lease in evidence (G.C. Exh. 3 & 4), contains such attachment. G. C. Exh. 6, a plat of the Breezewood facility and surrounding shopping center area, admitted without objection or other explanation (Tr. 30-31), was not represented as either Exhibit "A" or as representing the condition of the area at the time of the alleged unfair labor practices at Breezewood. Indeed, it appears to carry as the latest date thereon "4/11/86." Similarly, G. C. Exh. 7, an undated plat of the Chancellor store and some surrounding areas, admitted without objection, is not identified as Exhibit "A" or as representing the area on the date of the alleged unfair labor practices. In view of the findings and conclusions reached, I regard these omissions as not dispositive. I must assume, *arguendo*, that all the sidewalks and parking areas in each shopping center (except those tractor-trailer parking spaces at the rear-store service entrance specified as "exclusive" under the terms of the lease, above) are "common areas" subject to Respondent's leased "non-exclusive" rights. I shall treat separately, below, Respondent's argument of the existence of an "exclusive" right to certain parts of the sidewalks and parking lots ("working and selling areas") flowing from its doing business thereon.

had another meeting with him (Tr. 358–359). In his meeting, after the June 23 appearance of the Union, Hall again was reported to have stated that he did not permit solicitation on the property. Sherman said he agreed and requested “something in writing” relating to the matter.

As a result of this post-June 23 conversation with Michael T. Hall, the landlord sent Respondent a letter (R. Exh. 13) dated August 4, 1989, signed by Jack G. Ward, an officer of Michael T. Hall and Associates, Ltd. Jack G. Ward did not testify in the proceeding. Nevertheless, the letter stated:

Dear Mr. Sherman:

In this, and all of my centers, I prohibit solicitation and distribution in the common areas to the full extent permitted by law because it interferes with my tenants businesses. I have required people soliciting and distributing on behalf of Local 400 to leave the common areas of this center in the past just as I have required people soliciting and distributing for other purposes to leave the common areas. Under the lease, Food Lion may also exclude people who are soliciting and distributing in the common areas or you may require that I do so.

Sherman testified that in the period that he was the store manager, there were bake sales held on the sidewalk in front of the store; the Salvation Army, the Knights of Columbus and the Jay Cees, with Respondent’s permission, also appeared on the sidewalk in front of the stores soliciting donations (Tr. 361–362; 379).

Respondent has an established procedure for groups seeking to solicit outside its stores (G.C. Exh. 30) and records the names of solicitors (G.C. Exh. 29). Such procedure exists alongside no-solicitation rules forbidding solicitation, *inter alia*, on the sidewalk in front of the store (G.C. Exh. 20). The only group specifically forbidden on Respondent’s “premises” (defined in its no-solicitation rule to include the sidewalk “area immediately in front of the store,” (G.C. Exhs. 20 and 21) are “non-employee union organizers” (G.C. Exh. 22).

Sherman admitted that the outside of the store is a public thoroughfare that pedestrians can walk on without restriction (Tr. 384) and that he never had discussions with Hall regarding any authorization to exclude trespassers from areas other than the sidewalk in front of Respondent and the parking lot in front of Respondent (Tr. 324). Respondent’s witness Jerry C. Hall, an employee of Michael T. Hall and Associates, Ltd., testified that Michael T. Hall (his uncle, Tr. 672) is the sole owner of the Virginia corporation bearing his name (Tr. 656); that he is the owner of the Breezewood Shopping Center, having purchased it from the original owner—lessor, appearing on the Breezewood lease (G.C. Exh. 3; Tr. 657); that H. D. Hall (his grandfather, Tr. 672) is also associated with Respondent (Tr. 659–660); that (over a hearsay objection) H. D. Hall not only had the authority himself to exclude trespassers but had authority to permit Respondent to exclude them; and that he was aware that H. D. Hall had given such authority to Respondent because H. D. Hall had told him so (Tr. 663–664). The witness did not mention Store Manager Sherman or any other Respondent representative as the recipient of such authority.

With regard to Respondent’s right to exclude trespassers from the common areas, Jerry C. Hall testified that it was

lodged in the lease provision granting to Respondent a “non-exclusive right to use” the common areas (Tr. 666). Any verbal agreement with a tenant, according to Jerry C. Hall, is not enforceable under the lease agreement (Tr. 674).

Aside from the lease itself, in answer to a leading question (Tr. 666), Jerry C. Hall testified concerning an “understanding” relating to Respondent’s right to exclude trespassers from the common areas. He testified that the landlord was there to help the tenants in the Breezewood Shopping Center operate their business; and “if something beyond their control and within our control is done to interfere with their business, certainly we are going to help our tenant” (Tr. 666–667). No evidence was adduced concerning the Respondent agent with whom such “understanding” existed.<sup>4</sup>

Finally, Jerry C. Hall testified that H. D. Hall told him that it was he (H. D. Hall) who had called the police in June 1989, when a Food Lion representative told him that the Union was interfering with Food Lion’s customers.<sup>5</sup>

Sherman testified that after the June 23 incident, he spoke to “Dan Hall,” told him of the Union’s disruption of his customers and that he (Sherman) had called the Sheriff’s department (Tr. 787) because the Union refused to leave Respondent’s “premises” (Tr. 780). After calling the police, he went to the vestibule entrance area waiting for the sheriff to arrive (Tr. 780). Deputy Sheriff Whitney testified (Tr. 542–543) that the police dispatcher had told him only that the management needed assistance with a disturbance and that he proceeded to the store.

On the basis of (1) Store Manager Sherman’s clear lack of recollection of the events relating to any pre-June authorization from Michael T. Hall and Associates concerning Respondent’s right to exclude trespassers from the common areas including sidewalk and parking lots; (2) the failure to produce Executive Vice President Jack G. Ward (of Michael T. Hall and Associates, Ltd.) or Michael T. Hall or H. D. Hall as witnesses with regard to any pre-June 1989 authorization to Respondent; and (3) the contradictory and hearsay nature of the testimony on this point adduced from Jerry C. Hall, I conclude, contrary to Respondent’s suggestions, that there were no pre-June 1989 conversations relating to solicitation between Sherman and the landlord (or its agents); and that Sherman’s and Jerry C. Hall’s testimony, to the extent that such testimony suggests the existence of any pre-June 1989 authorization to Respondent to exclude trespassers—or any one else—from the sidewalks, parking lots, or other “common areas” of the Breezewood Shopping Center, is not credible. I conclude that, prior to June 23, 1989, contrary to Respondent’s assertions, Respondent did not receive from Michael T. Hall and Associates, Ltd., the landlord, any au-

<sup>4</sup>H. D. Hall also did not appear at the hearing to testify. Counsel for Respondent said that he was under the care of a physician, suffered various ailments and was being medicated for Parkinson’s disease (Tr. 668). There was no suggestion in the record that H. D. Hall was sufficiently incapacitated by Parkinson’s disease, by medication, or otherwise, as to not appear at the hearing.

<sup>5</sup>In subsequent testimony, Store Manager Sherman testified that he was mistaken with regard to his testimony identifying Michael T. Hall as the person with whom he had conversations concerning the landlord’s and the tenant’s right to exclude solicitors as trespassers (Tr. 785–786). Thus he testified, 2 months after his original testimony, that it was actually “Dan Hall” rather than Michael T. Hall with whom he had the conversations (Tr. 786). He also testified that he did not know who H. D. Hall was and did not know whether H. D. Hall was Dan Hall (Tr. 798).

thorization to exclude anyone from the Breezewood Shopping Center.

Furthermore, I conclude, that on the basis of uncontradicted evidence, Respondent regularly permits, under its own rules (G.C. Exhs. 30 & 30A), charitable organizations to solicit in front of its various stores (G.C. Exh. 29); and, in particular, during the period February through August 1989, permitted, among others, the Salvation Army, Knights of Columbus, the Jay Cees, and other organizations of a similar nature to solicit in front of Respondent's Breezewood store. The evidence is relevant only to the extent that it bears on the issue of how "private" Respondent regarded the sidewalk in front of its store and the adjoining parking areas.<sup>6</sup> Since Respondent does not, itself, enjoy an exclusory property interest in these "common areas," see *infra*, it is of only marginal interest to inquire into its no-solicitation rules and policies. Such rules and policies are relevant only in areas in which Respondent has an exclusory right, i.e., within its store and in its rear loading area.

#### Respondent's Solicitation Rules and Policies

The uncontradicted evidence demonstrates that Respondent permits various charitable and similar organizations to solicit in front of its stores, generally, including in front of its stores at the Chancellor and Breezewood Shopping Centers.

Respondent's employee manual (G.C. Exh. 2) (1) forbids any solicitation or distribution of literature by any persons who are not employed by Respondent in its stores, offices and distribution centers; (2) forbids solicitation by Food Lion Employees during working time or in any selling area. Distribution of literature by Food Lion employees is prohibited during working time or in any working or selling area. "Working time" does not include break periods, meal time and other specified periods during the workday when the employees are properly not engaged in performing their job duties.

Respondent's Corporate Policy Manual (G.C. Exhs. 20 & 21.) forbids solicitation "on store premises at any time" by nonemployees. Store "premises" is defined as any property that is owned or leased by Respondent and will always include the following areas: (1) the inside of the store, (2) the entrance and exit areas of the store, (3) the sidewalk area immediately in front of the store (usually under the canopy). In cases of solicitation in the parking lot, the store manager is directed to ask the solicitor to ". . . contact the landlord to secure written permission before they resume their solicitation."

In addition, Respondent has directed its supervisors and store managers that, in any event, they should "[Keep] non-employee union organizers off company premises. (Rather

<sup>6</sup>Since I conclude that Respondent's interest in the common areas (sidewalks and parking areas) does not rise to the level of an "exclusory" property interest, and thus Respondent failed of proving the "threshold" issue in *Jean Country*, *infra*, it is unnecessary to determine whether Respondent's conduct toward union solicitation manifests "disparate treatment." Compare *Thriftway Supermarket* (nonbusiness invitees allowed), 294 NLRB 173 (1989), with *Tecumseh Foodland*, 294 NLRB 486 (1989) (as sole occupant, allowed no one on property except customers). In addition, since General Counsel has not alleged that Respondent has unlawfully discriminated against the Union, I refrain from determining whether Respondent's no-solicitation rules (on their face or applied) violate the Act. In so ruling, I am nevertheless aware of Respondent's direction to its store managers concerning nonemployee union organizers on its "premises" (G.C. Exh. 22). See *Lechmere, Inc. v. NLRB*, 914 F.2d 213 fn. 9 (1st Cir. 1990), *enfg.* 295 NLRB 92 (1989).

than using self-help if they resist, you should contact the local law enforcement people.)" (Tr. 452; G.C. Exh. 22).

Lastly, the evidence shows that Respondent maintains formal "procedures for solicitations" (G.C. Exhs. 30 & 30A).

Respondent's formal procedure for scheduling solicitation outside its stores is maintained by and through an employee responsible for that scheduling (Tr. 554). The organizations permitted to solicit, according to one undated version of the procedure (G.C. Exh. 30), are limited to "non-profit" groups who are to stand outside the store. In another version, again undated (G.C. Exh. 30A), the authorization is limited to groups which are "non-profit, non-partisan, or non-controversial." In the first version, there is appended a typed-in paragraph (not appearing in the other version) which states: "The above policy applies only to those organizations that we choose. We reserve the right to disallow any organization the right to solicit in front of our stores." (G.C. Exh. 30.)

In any event, the employee in charge of receiving and authorizing solicitations is directed to send a memo to the particular store authorizing the solicitation. A copy of the same memo is sent to the person requesting authorization. There are various general limitations to the right to solicit including a frequency no more than once in 6 months, and a limitation of 2 days (except for the Salvation Army at Christmas).

Although the evidence shows that solicitation in front of the Breezewood and Chancellor Shopping stores included only the Knights of Columbus, the Salvation Army, Girl Scout Cookies, the Lion Club, and the Pan African Church, Respondent's records for other of its stores, under this policy (G.C. Exh. 29) shows that other charitable organizations which have been authorized to solicit include the Shriners, No To Drugs, the American Cancer Society, blood pressure screenings, and bake sales.<sup>7</sup>

#### The Incidents at the Breezewood Shopping Center and the Chancellor Shopping Center

##### A. *The June 23, 1989 Incident at the Breezewood Shopping Center Store (Store 419)*

On June 23, 1989, six union agents visited the Breezewood store. Michael Earman (assistant to the president; director of membership services), Belgian national, Albert Faust (general secretary of SETCA, the Union which represents employees of Respondent's parent company in Belgium), an interpreter for Faust, Willard Snow (Local 400 business representative), Burke a union photographer, and Prosten, a publication's consultant. Burke and Prosten did not at this time enter the store; Earman, Faust, Snow and the interpreter walked into the store and asked to see the manager.

Store Manager Rodney Sherman came to the front of the store. Earman handed Sherman a business card, introduced himself and the other union agents. Earman told Sherman that the union agents wanted to speak to the employees about the Union. The purpose of the Union's visit, in fact, was to identify Respondent's employees and speak to them about organization, i.e. about joining the Union (Tr. 40).

Earman told Sherman that he had a letter from Food Lion President Tom Smith giving the Union permission to enter

<sup>7</sup>For "bake sales," see *Thriftway Supermarket*, 294 NLRB 173 (1989).

the store to talk to employees, but Sherman refused to read the letter and asserted that he, rather than Tom Smith, ran the store. There is a dispute in the testimony as to whether Sherman then told the union representatives that it was all right to speak with the employees who were not on the clock rather than, as Respondent asserts, that Sherman said that in view of the no-solicitation rule, solicitation of employees could occur only on the employees' own time outside the store. As Respondent notes (Br. at 35; Tr. 773), Sherman did not define what he meant by "outside the store." There is no dispute, however, that Sherman refused to permit the union representatives to meet employees in the store "break" room. Sherman then left the union representatives who began to walk through the store.

Union representatives then approached employees and spoke with them concerning their wages, hours, and other terms and conditions of employment. There is a dispute whether some or all of these employees were on their work time and whether they stopped working during the conversations. In any event, Union Agent Earman asked for the schedule of employee lunchbreaks and Sherman refused to give it to him. When Earman then asked how he was supposed to find out when the employees were going to be on work breaks, Sherman told him that that was his problem.

After Sherman followed Earman and Faust through the store for a period, the union agents left the store and spoke to employees who were outside the store. Union Agent Snow remained in the store for a period of time and Sherman heard him speak to an employee regarding another person in the store: whether that other person was a Food Lion employee. At this point Sherman approached Snow and told him to leave the store. Snow asked why and Sherman said it was because Snow had bothered one of his employees (who was a customer). When Snow said that he was merely asking if the customer worked there, Sherman told him that: "If you don't leave, I am going to call the police."<sup>8</sup>

When Deputy Sheriff Whitney arrived, Sherman told him that he was having trouble with the union representatives. Whitney then asked to hear both sides of the story and got the Union's side first (Tr. 543). When Whitney asked the Union to produce the letter allegedly permitting the Union to enter the store, the Union did not have it. After the Union requested the officer to declare what the Union's rights were and asked what would happen if they did not leave (would

they go to jail?), officer Whitney told them that they probably would (Tr. 544). Sherman told the sheriff that he wanted the union agents out of the store and off the front of the walkway (Tr. 544). When the union agents then asked Whitney where they could remain under the Virginia State Code (sec. 40.1-53) (Tr. 543), Whitney told the union agents that they would "have to go out to the edge of the road" by which Whitney says he meant in the parking lot (Tr. 544). When the union agents asked specifically where they were supposed to lawfully station themselves, Whitney told them that they could not be in the store, on the sidewalk, in the driveway, but some place further out. Whitney states that he could have said that they would have to be "on the edge of the highway, meaning that there is like a grass section, that they could be anywhere out in there" (Tr. 545). He further testified that he had been told by the commonwealth attorney that under Virginia law, they could go to the parking lot or to the edge of the parking lot (Tr. 54).

On cross-examination, Officer Whitney was asked whether he told the union agents whether they could go anywhere on the parking lot when they asked where they could stand (Tr. 550). He answered that he told them that they could "go out in the parking lot to the edge of the road." Officer Whitney then added that what the union agents interpreted "the edge" and what he himself interpreted could be two different interpretations. Finally, officer Whitney testified that he pointed "out to the roadway" (Tr. 550) and stated that the Union could not be in the store, on the sidewalk, in the driveway or in the handicapped parking areas. In particular, however, Officer Whitney denied that he told the union agents that they could go "anywhere else" (other than the above sites, (Tr. 550-551). He testified he did not actually say that but pointed out to the parking lot (Tr. 551).

Store Manager Sherman, however, testified that Deputy Sheriff Whitney pointed towards Route 208 in terms of where the union agents could station themselves (Tr. 788).

Union Agent Earman credibly testified that Officer Whitney suggested that the "higher ups" in both the Union and Respondent work out the problem of where the union agents could station themselves; but for purposes of Sherman's complaint that day, Earman recalls that Officer Whitney said that Respondent wanted the Union off the company's premises and they would have to leave or he would arrest them (Tr. 473). At this point, the union agents asked Whitney what he considered to be the company's "premises" and asked where the Union should go (Tr. 473). Whitney said that these "premises run all the way out to the highway" and Whitney pointed to the highway that was in front of the shopping center (Tr. 474). The union agents then agreed to leave and left. There is thus a discrepancy between the testimony of the sheriff on one hand, and Sherman's and Earman's on the other.

Notwithstanding my inclination to fully credit the testimony of the disinterested deputy sheriff, Whitney, I conclude that, since Sherman's and Earman's testimony is mutually corroborative, what Officer Whitney actually said (as Sherman and Earman testified) was to tell the union agents that they had to go out toward the highway on the grassy knoll, pointing to Route 208 which is the main highway abutting the shopping center. This effectively excluded the union agents from the sidewalk in front of the store (152 feet) and all of the parking areas and roads in front of the store. As-

<sup>8</sup>There is considerable testimony in the record relating to Sherman observing Snow speaking to an employee, Myrtle Minor. Sherman testified that Snow, attempting to approach Minor, "came barging through" and bumped into a customer (Tr. 779). The marginal significance of the alleged incident is that Respondent appears to argue that it might expect similar union conduct if the Union were permitted to solicit on the sidewalks outside the store. If the matter was significant, I would discredit Sherman's testimony. Sherman not only admitted that no customer filed any complaint about being bumped, but when employee Minor herself testified, Respondent failed to ask her about the bumping incident (Tr. 724-725). Sherman, in addition, did not accuse Snow at the time of the event of bumping into anyone. Rather, as Snow himself testified, denying any bumping, Sherman asked him to leave because Snow had allegedly bothered one of his employees [Myrtle Minor] who was a customer in the store. It was because of such "bothering" of Minor that Sherman said he was going to call the police (Tr. 973). Of greater importance, Deputy Sheriff Whitney testified, under examination by Respondent, that Sherman told him that the union agents were in the store, *disturbing the employees, but not the customers* (Tr. 549). Under these circumstances, I conclude that there was no bumping incident. Furthermore, I conclude that even if there were such a bumping incident, Sherman considered it so trivial as not to have reported it to Deputy Whitney when he arrived.

suming, arguendo, that ambiguity lurked in Deputy Whitney's area proscription, it was backed by a threat of arrest. Hence, the union agents might well be apprehensive of inferring a broad interpretation of where they could solicit based on Whitney's hand gestures or verbal admonitions.

*B. The October 7, 1989 Incident at the Chancellor Shopping Center Store*

In the late morning of October 7, 1989, Union Representatives Earman, Joe, Burke, and Belgian SETCA Representatives Frissen, DeVos, Gillardin, and Vandeveldt entered Respondent's store (#450) in the Chancellor Shopping Center near Fredericksburg, Virginia, to inspect working conditions and to organize the employees. Like the Breezewood Shopping Center Store, Respondent's Chancellor Center Store, one of the largest tenants in the Chancellor Shopping Center, is located in a "strip shopping center" where there are various other food stores, sandwich shops, and restaurants. Like the Breezewood Store, the sidewalk in front of the Chancellor Store is about 152 feet long with a 12-foot sidewalk and a canopy or roof covering the sidewalk.<sup>9</sup> Adjacent to the sidewalk at the Chancellor store is a similar two-way street and parcel pickup lane running the length of the sidewalk directly in front of the store. Like the Breezewood store, there are two soda machines toward the left end of the sidewalk in front of the store and a telephone located on the sidewalk between the soda machines and the store entrance. There is also a bench on the sidewalk between the telephone and the store entrance.

As above noted, the leases at both stores are essentially the same with the demised premises being the building and land on which the building stands, together with a "non-exclusive right" at all times to use "all the Common Areas, including parking areas." The common areas, again, are for the use of the tenants (including their employees, suppliers, customers, invitees, and other persons "similarly entitled") for parking and for egress and ingress. The streets, alleys, and sidewalks of the shopping center are defined as part of the common areas (G.C. Exh. 4, par. 8). Both leases provide that it is the landlord's obligation not only to keep and maintain the common areas in good condition but to police the common areas (G.C. Exh. 3 at 9; G.C. Exh. 4, par. 14 at 9).

When, in the morning of Saturday, October 7, 1989, Local 400 representatives entered Respondent's store 450, Assistant Store Manager Jeff Buchannan learned of their presence from an employee and introduced himself to one of the Belgians. One of them asked for permission to look around the store and talk to the employees in the breakroom. Buchannan said that he was free to look around the store but that the breakroom was available only to Respondent's employees (Tr. 945-946). Customers overheard conversations by the union organizers (Tr. 948).

Union organizers spoke to a clerk in the produce department (Knuttson), asking him what he thought about the

Union (Tr. 949). Buchannan told Earman that he could not solicit employees while they were working, interfere with their work, or harass them. One of the union representatives said he would wait to speak to employees when they went to lunch.

The union organizers remained in the store, made some purchases, continued to speak to employees at work, Earman insisting that the Union had a right to be in the store. Buchannan left the group, telephoned the Sheriff's Department, returned to the group and asked them to leave the store. He told them that the police were on their way (Tr. 951-952).

When the sheriff's deputy arrived, he and Buchannan approached the group in the store. The officer told Earman that Buchannan wanted him out of the store and asked Earman and the group to leave (Tr. 953). When Earman insisted that he had the right to remain (stating that Respondent had been unsuccessful in another store in evicting the Union), the deputy sheriff told him that he was now in a different county and asked him to leave before he had to arrest him (Tr. 953). The group of organizers then followed the deputy out to his car. They asked if they could stand on the sidewalk and talk to employees or customers on the sidewalk (Tr. 954) and said that they would wait in front of the store until employees went to lunch, or were through with work, so that they could talk to them about the Union. The deputy said: "No, you have to leave the property, you have to leave the premises" (Tr. 485).

At this point, Assistant Manager Buchannan came out of the store and stood with the group while they spoke to the deputy sheriff through his car window. The sheriff told the union organizers that they could not stand on the parking lot to talk to people and that Food Lion's parking lot property was [described by a rectangle running] from the corners of the building to the road "all the way to the Roy Rogers' restaurant down at the highway perhaps 200 yards away" (Tr. 485). The deputy, in the presence of Assistant Store Manager Buchannan, told them that if they stood in that forbidden area he would place them under arrest (Tr. 954). When the union organizers asked the deputy sheriff if they could talk to employees who would be sitting on the sidewalk bench out in front of the store, the deputy told them that they could not do so but would have to leave the property (Tr. 486). The union organizers then asked him if they could use the public pay phone or the public soda machines in front of the store. He answered that they would still be in the forbidden area and that they could not do so (Tr. 486; 954). The union agents then talked among themselves, agreed to leave, but told the police officer that they thought that he was violating the National Labor Relations Act in directing them to leave. They said that they did not want to be arrested (Tr. 486).

Buchannan then spoke with two employees, apparently eating lunch while sitting on the bench outside the store (Tr. 486), who asked him what was going on. He told them that it was "all over"; and that the police asked union agents to leave or they would be arrested (Tr. 955). Buchannan testified that it was he who asked the sheriff to remove the union representatives from the sidewalk because he considered the sidewalk to be a working area and a sales area (Tr. 965-966). He further testified that he was not aware that the

<sup>9</sup>The architectural "plat" of a section of the Chancellor Shopping Center (Tr. 686; R. Exh. 16(A)) shows that the 152 foot sidewalk in front of Respondent's store is contiguous with sidewalks in front of two other stores which flank Respondent's store. The contiguous sidewalk in front of one of the flanking stores (building E) appears to be 250 feet long; that of the other flanking store, 77 feet long (building C). Building "B's" sidewalk, 109 feet long, contiguously joins Building "C's" sidewalk. Thus, flanking the 152-foot sidewalk in front of Respondent's store are contiguous sidewalks of other tenants on one side of 250 feet; on the other, a total of 186 feet.

union agents were engaged in any activity on the sidewalk that day (Tr. 966-967). Respondent argues that since the union agent tried to solicit employees who were working in the store and had allegedly blocked customers from buying merchandise in the store by their physical presence and by their speaking to customers, Buchanan reasonably assumed that the union agents were likely to do the same thing on the sidewalk (R. Br. at 48) and observes that there was no evidence that the union representatives provided any assurances to the contrary. Buchanan testified, however, that he was not aware of any union interference with customers until after the deputy sheriff had "dispersed the union people" (Tr. 966-967).

Salem Properties is the lessor of the Chancellor Shopping Center store. Its marketing director, Jim Ostrander, testified that he sees to it that there is a good relationship with the tenants. In answer to Respondent's question as to whether he was familiar with the "leasing arrangement" between the lessor and Respondent, he testified that the "leasing arrangement" is the "lease agreement," which is the "lease document" (Tr. 679-680). In answer to Respondent's further question of whether "the leasing arrangement . . . consists of anything more than the lease document itself," Ostrander did not understand the question (Tr. 680). Insofar as any practice or understanding goes under the lease, he testified that the common practice was for the lessor and the individual tenants to recognize a responsibility and authority to make sure that the area is a "good place to shop." In particular, his job was to "watch over and to enforce the lease document" (Tr. 680).

It may be recalled that Jerry C. Hall, an official of Michael T. Hall & Associates, the lessor of Respondent's Breezewood Center store, testified that the "leasing arrangement" between the lessor and Respondent went beyond the written lease: it included not only the legally binding document of the lease but also included what he described as a "standard property management procedures for our centers that are normally worked on a case-by-case basis" (Tr. 665). When pressed for anything in the "lease arrangement" which would permit Respondent to exclude trespassers from the common areas, Hall identified only the lease provision relating to Respondent's "nonexclusive" rights (Tr. 665-666). When further pressed for any "understanding," aside from the lease itself, relating to any Respondent right to exclude trespassers from the common areas, Hall stated that the *landlord* was present to help all the tenants operate their businesses and if something *beyond their control* and *within the landlord's control* is done to interfere with their business, then the *landlord* is going to help the tenant to conduct its business in a normal manner (Tr. 666-667).

Finally, Jerry C. Hall had testified that under the Breezewood lease agreement between Michael T. Hall & Associates and Respondent, which permitted Respondent to display and sell merchandise on the sidewalks, the landlord would have no objection if Respondent blocked the sidewalk off completely with its items displayed for sale on the sidewalk (Tr. 675-676). Indeed, he testified that the landlord would enforce this lease clause (G.C. Exh. 3 at 6) forbidding Respondent from obstructing the sidewalk in front of its premises only if there was a complaint from another tenant (Tr. 676). There was no evidence that this interpretation of

the lease was ever otherwise communicated to Respondent, whether before or after the June 23 incident.

On the other hand, Jim Ostrander, representing lessor at the Chancellor Shopping Center, testified that while Respondent displayed its merchandise on the sidewalk in front of the store all of the time (Tr. 684), on a couple of occasions, he asked Respondent to make sure that there was always a passageway on the sidewalks from store-to-store (Tr. 684-685).

Lastly, it might be noted that Jerry C. Hall testified that Michael T. Hall & Associates did not give permission (contrary to the lease) for Respondent to display its merchandise on the sidewalk throughout the year (Tr. 675). On the other hand, Ostrander testified that at the Chancellor Store, Salem properties never objected to the presence of sale items on the sidewalk even though displayed throughout the year (Tr. 68).

## Discussion and Conclusions

### Preliminary Statement

As will be seen hereafter, I conclude that, as a *prima facie* matter, the General Counsel has proved that the union organizers in both the June 23 and October 7, 1989 incidents, were engaged in protected concerted activities within the meaning of Section 7 of the Act; and that their being excluded from the sidewalks and adjacent parking areas in both shopping centers, and their being threatened with arrest by the police if they failed to avoid those areas, violated Section 8(a)(1) of the Act.

Respondent interposed at least five defenses. The first defense, focusing on their activities within the stores, was that the union agents were not engaged in protected concerted activities. In substance, I concluded that absent more specific evidence of linkage of in-store and potential out-store activities, Respondent's argument that the in-store activity was so obstructive and undermining of its in-store business activities, as to be unprotected or illegal under the Act is essentially irrelevant. The allegations of the complaints and General Counsel's positions at the hearing and in brief focused entirely on the exclusion of the union agents from the adjacent sidewalks and parking areas, not on the in-store activities. Alternatively, the events within the store, such as alleged blocking of aisles, bumping, talking to customers and employees, if they occurred, were not of such gravity as to require that the union agents be banned from soliciting in any common areas outside the store.

Respondent makes two sets of further arguments in defense. The first set of arguments is premised on the theory that, regardless of the lease or other basis showing Respondent possessing, in itself, an "exclusory" right to eject the union organizers from the sidewalks and parking areas in the shopping centers, Respondent actually acted "in conjunction" with the landlords and had the landlords' rights to eject the union organizers. The two arguments supporting this theory are: (1) that Respondent had the express authority, derived from express oral agreements with the respective landlords, to eject trespassers from the sidewalks and parking areas adjoining the respective stores; and (2) that even if it did not have such express authority, the landlords nevertheless ratified the acts of Respondent expelling or causing the expulsion of the union organizers thereby granting to Re-

spondent the “exclusory” right, ab initio, to eject the union organizers.

Alternatively, Respondent presents a further set of two related arguments, both based on the theory that Respondent, as tenant under the identical leases herein, itself possessed a property interest amounting to an “exclusory” right to eject the union organizers from the sidewalks and parking areas because: (3) the identical terms of the leases, themselves, give rise to a common-law easement in the sidewalks and parking areas which, under the law of the State of Virginia, is a sufficient exclusory property interest to meet the threshold issue presented in *Jean Country*, infra, the invasion of which should be protected by permitting Respondent to cause the lawful ejection of the union organizers; and (4) in any event, the adjoining sidewalk and parking areas, “working and selling areas” of Respondent to the same degree as the inside areas of the leased stores, should be made subject to the same legal protection accorded to lawful nonsolicitation rules Respondent maintains against solicitation inside its leasehold, thus permitting Respondent to eject the union organizers from such sidewalk and parking lot “working and selling” areas.

Lastly, as a controlling factor, it must be recalled that adjudication of interests of the parties rests almost exclusively on the events of the particular days in question. Thus, the facts of June 23 and October 7, 1989, are frozen and it is those facts which are the subject of adjudication rather than the facts as they may appear as the parties engage in further jockeying for position in the union’s attempt to organize Respondent’s employees. See *Lechmere, Inc. v. NLRB*, 914 F.2d 313 (1st Cir. 1990).

The consolidated complaints allege violations of Section 8(a)(1) of the Act occurring separately at two stores; on June 23, 1989, at the Breezewood Shopping Center; on October 7, 1989, at the Chancellor Shopping Center. The complaints do not allege violation of the Act because of any Respondent misconduct involving union activities within the stores; rather, the complaints allege violation of Section 8(a)(1) of the Act by Respondent’s refusal to permit union representatives to engage in organizational activities, including solicitation and distribution, on the common areas adjacent to Respondent’s facilities at both stores. In addition, the General Counsel alleges a further violation of Section 8(a)(1) because of the Respondent’s twice causing the sheriff in Spotsylvania County to threaten the arrest of the union organizers for engaging in protected organizational activities.

We are here concerned solely with the competition, under Sections 7 and 8(a)(1) of the National Labor Relations Act, as amended, between the Union’s right to organize Respondent’s employees, using nonemployee organizers, and Respondent’s right to use areas adjacent to its stores for business purposes untrammelled by the incursion—perhaps trespass—of nonemployee union organizers on these adjoining sidewalks and parking lots.

The events of June 23 and October 27, 1989, at the two stores, are part of an ongoing struggle between the union and Respondent, each jockeying for position in the Union’s attempt to organize Respondent’s employees. This type of ongoing competitive effort is not uncommon at the present time. See *Lechmere, Inc. v. NLRB*, supra. Indeed, as Respondent notes, the Union has engaged in a consumer boycott campaign against Respondent beginning in late 1985,

through handbilling, radio, newspaper, and billboard advertisements urging consumers not to shop at Respondent’s stores. In the Fredericksburg area, in particular, the Union used billboard advertising and handbilling and, in 1987, handbilled in the parking lot directly across from the Breezewood store outside its front entrance.

Although *Lechmere, Inc. v. NLRB*, supra, is an accurate recent restatement and collection of Supreme Court and other authority analyzing, in the presence of varying factual situations, the resolutions of respective rights of parties competing under Section 8(a)(1) in organizational (and other) efforts at union communication on private property, the Board’s present standards, to which I am bound, resolving the rights of labor organizations to enter upon private property within shopping centers, appears in *Jean Country*, 291 NLRB 11 (1988), and its progeny.

As the court observes in *Lechmere, Inc., v. NLRB*, supra, Board, in *Jean Country*, noted that there is “a spectrum of Section 7 rights and private property rights and . . . the place of a particular right in that spectrum might affect the outcome of a [given] case,” *Jean Country*, supra. Among the Board’s essential concerns is “the degree of impairment of the private property right if access should be granted.” There can be no question that *Jean Country* specifically concluded that availability of reasonable alternative means to permitting the intrusion of private property rights was to be a factor considered in every access case, *Jean Country*, supra at 13. In particular, the Board stated that its overruling of the *Fairmont Hotel* doctrine focused on the statement in that case that in some cases, the alternative means factor *must* be sometimes excluded. See *Jean Country*, supra at 11 fn. 2.

At the same time, the Board, in *Jean Country*, supra at 13 fn. 7, held that there is an initial burden on the party claiming an unlawfully invaded property right to show what its interest in the property is. The Board specifically concluded that a party has “no right to object on the basis of other persons’ property interest; and an employer’s . . . objections to having union pickets outside its establishment does not in itself rise to the level of a property interest.” Thereafter, in *Jean Country*, the Board, in analyzing the facts before it, declared that it must first examine whether the Respondent had a “genuine interest” in the property from which it was seeking to exclude the union’s organizational and recognitional picketing.

Almost a year after the Board issued *Jean Country*, a further gloss on the resolution of competing rights appeared in *Giant Food Stores*, 295 NLRB 330 (1989). In that case, the Board further refined the *Jean Country* requirement of its making a threshold inquiry into the shopping center store’s “genuine interest” in the property from which it sought to exclude a union engaged in area standards picketing.<sup>10</sup> The

<sup>10</sup> Area standards picketing, while protected activity under Sec. 7 of the Act, appears to be one of the weaker forms of union activity protected under Sec. 7. See *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 207 fn. 42 (1975); Accord: *Giant Food Stores*, supra. On the other hand, the Supreme Court was “careful to note,” as the court observed in *Lechmere, Inc. v. NLRB*, supra, that the right to organize without employer interference is a heartier Sec. 7 right, standing at “the very core” of the Act, *Sears, Roebuck v. Carpenters*, supra at 206 fn. 42; *Lechmere, Inc. v. NLRB*, supra. To the extent that the court in *Sears, Roebuck v. Carpenters*, also stated, at 205–206 fn. 41; *Lechmere, Inc. v. NLRB*, supra at 93 fn. 5, that the right to trespass for organizational purposes has generally been denied except in cases involving unique obstacles to nontrespassory methods of communication with the employees,

*Continued*

inquiry required a threshold determination of whether, as a preliminary matter, the employer could establish that it had “any exclusory property interest” in the area from which it would exclude the Union. *Giant Food Stores*, supra. In short, because the store owner in that case, acting without the aid and support of the shopping mall owner, failed to show that it “had an exclusory property interest” in the areas where the protected picketing and handbilling occurred, the Board concluded that the store tenant violated the Act when it caused the local police to move the picket away from shopping center parking areas. The Board, having determined that no “exclusory” property interest was proved, found it unnecessary to reach the question of whether the union was obliged to prove that no reasonable alternative means of communicating with its desired audience existed. I conclude that “alternative means” proof is required only after threshold proof that an exclusory property right (of the lessee store) was invaded.

In *Giant Food Stores*, supra, the landlord (Easton), as in the instant case, granted the tenant a 20-year lease of the store in the shopping center. The Board found that the lease provided only that the store was leased “. . . together with the right to the nonexclusive use, in common with others, of all such automobile parking areas, driveways, footways and other facilities . . . designed for common use.” The Board further found that the lease provided:

Landlord shall construct . . . the parking areas . . . approaches, entrances, exits, sidewalks, [and] roadways . . . all hereinafter referred to as “common areas,” “common facilities,” or “public areas,” for the reasonable operation of the Shopping Center and Tenants business in the Demised Premises, all of which Tenant, its customers, employees and all those having business with it, are hereby granted the right to use and enjoy, in common with other tenants, their customers, employees and those having business with them. Landlord shall keep and maintain the foregoing in good repair and condition and reasonably free of snow, ice, refuse and other obstructions.

In finding, as above noted, that the lessee-tenant, as a threshold issue, failed to establish an exclusory property interest in the *sidewalk in front of the store* or in the shopping center parking areas where the picketing and handbilling occurred, *Giant Food Stores*, supra, the Board observed that the lease granted to the tenant-lessee merely a “nonexclusive” right to “use” the common areas. The Board further observed that the lease specifically provided that it was the landlord (Easton) who was obligated to maintain the common areas and keep them free of obstructions, *Giant Food Stores*, supra. In relying on the *failure* of any proof that (a)

that assertion was bottomed on the facts in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). In *Babcock & Wilcox Co.*, as the court noted in *Lechmere, Inc. v. NLRB*, supra, the employer was a manufacturer which owned and operated a plant within a fenced 100-acre tract from which the public was excluded. The Supreme Court held that nonemployee union organizers did not enjoy the same status as employees and could be excluded from the employer’s private property if reasonable efforts by the union, through other available channels of communication, would have enabled it to reach the work force with its organizational message. As will be seen hereafter, in the instant case, the Respondent store-lessee owns no property, does not operate in a remote fenced location, encourages the entry of the public on the parking lots and sidewalks and is forbidden to block pedestrian passage on the sidewalks.

the tenant had an “exclusory” property interest in the areas from which it excluded the Union engaged in the weak Section 7 right of area standards picketing; and (b) the landlord participated in the demand for the removal of the pickets, the Board concluded that the tenant violated the Act when it caused the police to remove the pickets from the parking lot adjacent to the store, supra.

As a prima facie matter, therefore, I would find that the instant facts are substantially controlled by the Board’s disposition of similar facts and circumstances in *Giant Food Stores*, 295 NLRB 330 (1989), noting only that in the instant case the Section 7 activity is the “core right,” *Sears, Roebuck v. Carpenters*, supra, of organizational activity while in *Giant Food Stores*, the Board found a 8(a)(1) violation even where the weak Section 7 right it protected was merely area standards picketing. If the rule in *Giant Food Stores* is applied here, as I find, it applies a fortiori.

In *Giant Food Stores*, supra, the Board found that the “non-exclusive right to use” common areas did not give rise to an exclusory property interest in the sidewalk in front of the Giant Store or in the shopping center parking areas. In the instant case, the landlord granted, in the case of both stores, a similar “non-exclusive right . . . to use . . . all the Common Areas, including parking areas as shown on Exhibit “A”<sup>11</sup> which areas are acknowledged to be for use by such persons, along with others similarly entitled for parking and for ingress and egress, between the demised premises and all of the portions of the shopping center and the adjoining streets, alleys and sidewalks. In addition, as in *Giant Food Stores*, supra, it is the landlord who “covenants and agrees to operate and maintain all the common areas . . . and provide therefore all such services as are reasonably required including, but without limitation, cleaning and sweeping, snow and ice removal, lighting, policing” (G.C. Exhs. 3 & 4; at 6 at both leases; the Breezewood and Chancellor lessees are identical in this respect). Moreover, in terms of the weakening of Respondent’s property rights, not only was the adjoining sidewalk area and parking area open to the public (unlike the fenced area in *NLRB v. Babcock & Wilcox*, supra,) but, as in *Jean Country*, supra, Respondent here did not wholly restrict the use of the sidewalk and parking area property to its immediate commercial goals. Thus, the Respondent here permitted (and indeed utilized a centralized formal method at all of its stores for authorizing and keeping track of) the use of the adjacent sidewalks and parking areas for various charitable purposes without charging a rental fee therefore or even requiring the posting of insurance, maintenance or property bonds. Compare *Jean Country*, supra.

As a prima facie matter, therefore, I find that the rule of *Giant Food Stores*, supra, applies a fortiori, to the instant facts. I conclude that Respondent violated Section 8(a)(1) of the Act by excluding nonemployee organizers from engaging in solicitation of Respondent’s employees on the sidewalks in front of, and in the roadways and parking lots adjacent to, Respondent’s leased premises at both stores. I would predi-

<sup>11</sup> Again, neither of the lessees in evidence (G.C. Exhs. 3 & 4) contain the referred-to “Exhibit A.” Since the referred-to Exhibit A does not grant to Respondent an exclusory interest (except in the rear unloading area), the fact that there is no attached “Exhibit A” is not a serious impediment to disposing of the instant case as it would be if there had been an exclusory interest noted in such omitted exhibit in the sidewalks and parking lots. Compare *Giant Food Stores*, supra at fn. 8.

cate that conclusion on the finding that Respondent has failed to meet its threshold obligation to prove an exclusory right of property in the sidewalks, roadways, and adjoining parking areas. In the same vein, I would conclude, as in *Giant Food Stores*, supra, and *Polly Drummond Thriftway*, 292 NLRB 331 (1989), that on such findings, it becomes unnecessary to reach or decide the question of the availability and efficacy of alternative means of communication by the Union with the employees whom it sought to organize. That analysis appears to be required only where there is some substantial (i.e., “exclusory”) employer property right being invaded so as to bring into play the *Babcock Wilcox*, supra, “alternative means” requirement. In short, in the presence here of the strong organizational Section 7 right, and in the absence of any employer exclusory property right, there is no need to reach or analyze an alternative means of communication because there is a wholly insufficient competing employer property right in the sidewalks, roadways, parking lots (all “common areas” under the landlord’s sole dominion) against which to measure the invasion of the strong Section 7 right.

#### Defenses

In resisting this prima facie violation, the Respondent makes several arguments.

#### Alleged Unprotected or Unlawful Conduct

Its first argument (R. Br. at 53 et seq.) is that the complaints should be dismissed because the Union engaged in either unprotected or unlawful conduct. Hence, Respondent argues that if the Union, at both stores, was not engaged in protected Section 7 activity, the Respondent’s conduct in causing the union organizers to be excluded from the sidewalks and parking areas does not constitute an 8(a)(1) violation. To the extent that this argument rests on evidence pertaining to the Union’s activity inside Respondent’s stores, the evidence is essentially irrelevant to the allegations of the complaint, and to the General Counsel’s and the Union’s position both in brief and at the hearing. Respondent’s brief concedes the absence of “in-store” complaint allegations (R. Br. at 83). To the extent that organization and solicitation of employees were attempted by the Union’s agents inside the stores, there is no question that such activity is not ordinarily protected by Section 7 of the Act and may be forbidden by Respondent, e.g., *May Department Stores Co.*, 59 NLRB 976 (1944), *enfd.* as modified 154 F.2d 533 (8th Cir. 1946), *cert. denied* 329 U.S. 725 (1946). Organizational solicitation in working and selling areas within the store reasonably tends to disrupt the employer’s business and is therefore considered activity which is unprotected by Section 7 of the Act. It is for that very reason that Respondent’s extensive analysis of union organizers soliciting off-duty and on-duty employees in sales areas within the store is essentially irrelevant. In addition, there is no credible evidence to support an inference that Respondent could reasonably expect union misconduct outside the store on the sidewalks and parking lots.

The conduct complained of in the complaint is Respondent’s exclusion of the union organizers from sidewalks and parking areas *outside* the stores. To the extent that Respondent, in similar vein, urges that the union agents inside the store bumped into at least one customer within the store, I

have already disposed of that matter and, in any event, do not credit Store Manager Sherman’s testimony of such occurrence. It was not important enough, if indeed it occurred, to report it to the police. Even were I to credit the occurrence of the bumping, there is no suggestion in the evidence that any such bumping was other than inadvertent. Respondent’s attempt to make this instance of alleged bumping into a scud missile attack misses the mark. The evidence fails to demonstrate that any such conduct was of such a character as to render the bumping to be an assault or a battery. The only significance which I can fathom for Respondent’s suggestion that the Union’s activities within the stores were unprotected or unlawful is a desire to project the Union’s in-store conduct as a prelude to expected conduct outside the store. Since the Union’s in-store conduct, whether bumping, temporarily blocking the aisles, or indeed putting a hand on a customer’s shoulder (also not shown to be an intentional or disrespectful act), if credited, are of a minimal character, they do not support a foundation for misconduct Respondent might expect if the Union were permitted to solicit and organize among Respondent’s employees on the sidewalks and in the parking areas adjacent the store. In such circumstances, I decline to recommend that dismissal of the complaints because union agents’ in-store conduct was allegedly unprotected or unlawful.

To the extent that Respondent argues, further, that the Union attempted to solicit employees in front of the soda machines on the sidewalk outside the store at the Breezewood Shopping Center; and that such solicitation has the same legal effect as solicitation inside the store because the sidewalks and parking areas outside of the store are “working and selling areas,” such argument engages what seems to be Respondent’s principal defensive position. Respondent argues that the sidewalks and the parking areas adjacent thereto (used by customers, vendors, its baggers, other personnel), and the general public are the legal equivalent of the internal portions of the store and are therefore subject to the same legal protection from union solicitation and organization as working areas inside the store. This position, of course, eliminates any obligation to establish a Respondent “exclusory” property right in the sidewalks or parking areas which are “common” areas under the leases. Rather, the sidewalks have become inside areas. Respondent desires the conclusion that where it lawfully sells (or displays) its merchandise becomes the legal equivalent of its internal, leased space and subject to the same freedom from solicitation under its lawful “no-solicitation” rules which bind its employees and the Union. This argument will be separately discussed, below.

#### Respondent acted with the Landlords’ express authority

Secondly, Respondent argues that the evidence shows that it had express authority from its landlords, in both cases, thereby exercising the landlords’ rights to exclude the union organizers from the adjacent sidewalks and parking areas. Thus, Respondent sought to adduce evidence to show agreements with both landlords, *prior* to the time of its particular acts of exclusion, to eject union organizers from the sidewalks and parking areas. There was no such credible evidence.

With regard to the Breezewood Shopping Center (the incident of June 23, 1989), Respondent stated (Tr. 316) that it

was prepared to show that Respondent had authority from the owner of the shopping center to exclude trespassers from the common areas at the Breezewood store; and that this authority was derived not only from the lease<sup>12</sup> but, from express landlord authorization to Respondent to exclude trespassers from the common areas (Tr. 316). The witnesses on whom Respondent relied were principally its Breezewood store manager, Rodney L. Sherman, and Jerry C. Hall, an agent of Michael T. Hall and Associates, Ltd. whose authority related inter alia, to the negotiation and administration of leases (Tr. 655–656). Again, Michael T. Hall, himself, is the owner of the Breezewood Shopping Center (Tr. 656). He is the uncle of witness Jerry C. Hall.

The question to be resolved is whether Respondent's causing the ejection of the union organizers from the sidewalks and parking areas adjoining its leased Breezewood store was its action alone or whether it was acting with the authority of the landlord, Michael T. Hall and Associates. If the latter, then Respondent was arguably acting with the landlord's authority over the "common areas" which include the sidewalk, roadways, and parking areas. Under such conditions, the Union's Section 7 statutory right to organize Respondent's employees would collide with a truly formidable property interest, meeting the standard of "exclusory property interest" in the sidewalks and parking areas in front of Respondent's store within the meaning of *Giant Food Stores*, and *Polly Drummond Thriftway*, 295 NLRB 330 (1989), supra.

On this first question, whether Respondent, at the Breezewood store, acted with the authority of the landlord, as above noted, it relied on the testimony of Jerry C. Hall and Rodney Sherman. Their testimony on this issue is unacceptable because of problems including veracity.

1. The testimony of Store Manager Rodney C. Sherman on the existence of prior authority from the landlord to evict the union organizers

Sherman testified that he had conversations, particularly with Michael T. Hall, owner of the Breezewood Shopping Center, regarding Respondent's right to exclude trespassers from the common area (Tr. 317); that these conversations related to solicitation in the parking lot and in front of the store (Tr. 317); that the authorization from the landlord to Respondent to evict trespassers from the sidewalk and parking lot took the form of a letter from Michael T. Hall;<sup>13</sup> and, that prior to receipt of the letter, he had a brief meeting with Michael T. Hall himself concerning this matter (Tr. 318–319). He testified, particularly, of a February meeting, the brief meeting in which he introduced himself to Michael T. Hall and reviewed "quite a few things at that point in time" (Tr. 319). Although Sherman testified that he had discussions with Michael T. Hall, himself, regarding the exclusion of trespassers, there was no credible testimony or other evidence that (a) there were any such conversations in February, or at any time prior to the June 23, 1989, incident in which (b) anyone from the Michael T. Hall Associates organization

orally, or in writing, authorized Respondent to exclude trespassers from any portion of the sidewalks or common areas or anywhere else.

On cross-examination, although Sherman testified to the existence of this February 1989 conversation with Michael T. Hall (Tr. 355), and although he testified that they spoke about "a variety of things" in this brief meeting (Tr. 355), including solicitation (Tr. 356), he at first testified that he could not remember the conversation and could not "quote the conversation verbatim" (Tr. 356). When then pressed to state his best recollection of the conversation (Tr. 356), Sherman testified that Michael T. Hall said, on the subject of solicitation: ". . . he [Michael T. Hall] said he does not allow it. . . . He finally testified that, in essence, that was the whole conversation. Regarding further meetings with Michael T. Hall concerning solicitation, before the June 23 incident, he first testified that the meeting was in Michael T. Hall's office before the June 23 incident (Tr. 357). But he then testified that at the time of that meeting, the "union people were out, again" (Tr. 358). Although he first insisted that this meeting occurred prior to June 23 (Tr. 358), he ultimately admitted that it did not occur prior to June 23, 1989, because it occurred only after the "union people" were out there (Tr. 358). He insisted only that there was a meeting after June 23, 1989, with Michael T. Hall (Tr. 359).

Any view of Sherman's testimony with regard to authorization from the landlord prior to the June 23 incident, despite leading and suggestive questions from counsel on direct examination, demonstrates that there was no evidence of any such authorization flowing from the landlord to Respondent to evict anybody from any area. The most that can be said of any such conversation, concerning solicitation prior to the June 23 incident, is that Sherman inquired of Michael T. Hall's own viewpoint on the subject of solicitation (Tr. 356) and that he received it: Michael T. Hall told him that he does not allow solicitation (Tr. 356–357). The landlord's letter of August 4, 1989, arguably a potential ratification could hardly constitute prior authorization for an action of the previous June. In short, Store Manager Sherman's testimony fails to show any authorization from the landlord, prior to the June 23, 1989 incident, to evict anybody from any area whatsoever.

2. The testimony of Jerry C. Hall

Jerry C. Hall, an agent of Michael T. Hall and Associates, Ltd., testified that he himself met with Food Line representatives on a rather frequent basis (Tr. 671–673). He neither named the persons with whom he met nor the dates or approximate dates on which these meetings occurred. His testimony related principally to conversations he had with his grandfather, H. D. Hall.<sup>14</sup> The conversation between Jerry C. Hall and his grandfather, H. D. Hall, related to conversations that his grandfather allegedly had with Respondent's store manager, Rodney Sherman.<sup>15</sup>

<sup>14</sup> The witness, Jerry C. Hall, is the nephew of Michael T. Hall and the grandson of H. D. Hall (Tr. 672).

<sup>12</sup> Again, it is the landlord, under the lease, who has dominion and control over the "common areas." The tenant's leasehold rights to use the common area along with similar co-tenants' rights do not describe an "exclusory" right in the tenant. *Giant Food Stores*, 295 NLRB 330 (1989).

<sup>13</sup> The only relevant letter in evidence is the August 4 from Michael T. Hall & Associates. That letter could hardly be authority for a June 23 act. See infra.

<sup>15</sup> Neither Michael T. Hall nor H. D. Hall appeared as a witness in this proceeding. According to Jerry C. Hall's testimony, H. D. Hall is a principal in Michael T. Hall & Associates and is engaged in day-to-day management of the Breezewood Shopping Center (Tr. 659–660). Jerry C. Hall testified that part of his own job was to act as a conduit in the actions of H. T. Hall and the Breezewood Center (Tr. 659). The failure of H. D. Hall to testify is not fully documented in the record. Counsel for Respondent stated that H. D. Hall

It is apparent, as General Counsel argues, that substantially all of Jerry C. Hall's testimony regarding what H. D. Hall told him of H. D. Hall's conversations with Store Manager Sherman is merely hearsay. Furthermore, this testimony, admitted over particular objection (Tr. 669), was received on the theory that Judge Zankel believed that he could "evaluate" the testimony. Especially in view of Store Manager Sherman's wholly unreliable testimony regarding when he spoke to anyone in the Hall organization, and then as to which representative of the Hall organization he spoke with concerning authority allegedly granted to Respondent to evict the union organizers from the sidewalk and the parking areas, and in view of Jerry C. Hall's failure to identify any representative of Respondent with whom he spoke; and in view of the failure of H. D. Hall to appear at this hearing notwithstanding inadequate medical excuse therefore (in the absence of a physician's certificate and in the absence of even a claim that he was so far incapacitated as to be unable to testify), I do not give weight to Jerry C. Hall's hearsay testimony of conversations apparently with H. D. Hall, his grandfather.

Were I to give any weight to Jerry C. Hall's testimony, I would agree with General Counsel that it is directly contradicted by Store Manager Sherman's testimony and the testimony of Deputy Sheriff Whitney. For instance, part of the testimony of Jerry C. Hall was that H. D. Hall told him that, after a Respondent representative contacted him, on or about June 23, 1989, concerning interference with Respondent's business by union representatives, he (H. D. Hall) had called the police in order to prevent these persons from interfering with Respondent's business and to vacate the premises (Tr. 668-669). When Store Manager Sherman was recalled to testify on May 4, 1989, he testified that after June 23, 1989, apparently immediately thereafter, he spoke with "Dan Hall" (Tr. 787), describing the action he took: "I had called the sheriff's department. The sheriff's department came down"). Sherman testified that he explained the whole situation to Dan Hall (Tr. 787). According to Store Manager Sherman, H. D. Hall told him that it was "fine, no problem" and that H. D. Hall was "in agreement with everything that I had done and in support of everything that I had done." (Tr. 787). The General Counsel comments adversely on the disparity between the testimony: that Sherman testified that he had called the sheriff's department, and J. C. Hall's testimony that his grandfather told him that his grandfather himself had called. I agree with General Counsel that there is a disparity in the testimony. Of course, Jerry C. Hall might be truthfully relaying his grandfather's statement notwith-

---

was at his home in Louisa, Virginia, under the care of a physician, being medicated for Parkinson's disease, which medication commenced the day before the reopened hearing on May 4, 1990 (Tr. 668). There was no suggestion that H. D. Hall's present Parkinson's disease, or the medication therefore, had so incapacitated him so as to make him unable to testify at the proceeding. Thus, there was no certificate from a physician advising against such testimony nor was there even a claim that H. D. Hall was unable to testify. This matter becomes particularly significant because of Store Manager Sherman's later testimony, when recalled later in this proceeding, in May 1989, that he had not actually had conversations with Michael T. Hall. Rather, he testified that, between his original testimony in March 1989, and his resumed testimony in May 1989, he discovered that he had spoken to "Dan Hall" (Tr. 786). Although General Counsel appears to make much of the question as to whether H. D. Hall is actually "Dan Hall" (G.C. Br. at 16), there is a suggestion in the record that H. D. Hall is actually Dan Hall (Tr. 663). Again, neither senior Hall testified.

standing that the grandfather was enlarging and dramatizing his own participation in the event by asserting that he himself called the police rather than truthfully reporting that Store Manager Sherman had told him that it was Sherman who had actually called the police. The absence of H. D. Hall from the witness stand for cross-examination is the foundation of the weakness of hearsay reports of his statements.

Of greater gravity, in rejecting Jerry C. Hall's hearsay testimony (regarding an effort to show that the landlord was acting *in conjunction with* Respondent in causing the eviction of the union organizers) is the testimony of Spotsylvania County Deputy Sheriff Dean Whitney. Whitney testified that his police dispatcher told him that the "management" needed assistance with a disturbance at the store (Tr. 542). While it is arguable that "management" might mean a phone call from the management of Michael T. Hall and Associates, Ltd., rather than the management of Food Lion, Inc., it appears to me that the clear context of Officer Whitney's testimony was that "management" referred to management of the store (Tr. 542). There is no suggestion in Whitney's or Sherman's testimony that Whitney heard that the Hall organization was the source of the call for assistance; nor is there any testimony that the dispatcher told him that there were two calls or that the owner of the shopping center was involved. For the above reasons, I reject the hearsay testimony of Jerry C. Hall and do not credit the assertion that H. D. Hall telephoned the police when a Food Lion representative told him of the disturbances in June 1989 (Tr. 668-669).

I therefore conclude, on the basis of the record before me, that there is no credible evidence to support the Respondent's assertion that prior to or at the time of Respondent's June 23, 1989 eviction (through the agency of the police) of the union organizers from the sidewalks, roadways and parking areas adjoining Respondent's store in the Breezewood Shopping Center, that it was acting in conjunction with or with the authority of Michael T. Hall & Associates, Ltd., the landlord. On the contrary, I conclude that it was acting alone; that it alone caused the police to evict the union organizers from the sidewalk adjoining Respondent's store and from the parking areas adjacent thereto. On such a finding, I continue in my conclusion that Respondent was acting without an exclusory property interest under the terms of the lease or by virtue of any express or implied authority derived from the landlord. Having caused the police to evict the union organizers who were engaged in protected Section 7 activity at the time and lawfully could occupy the sidewalk, internal roadways and adjacent parking areas, and restricting their presence to places outside thereof, Respondent violated Section 8(a)(1) of the Act as alleged.

#### a. Ratification

Having failed to demonstrate "exclusory" rights under the lease or adduce credible evidence to show prior or contemporaneous landlord authorization to exclude anyone from the common areas, Respondent asserts that, in any event, both landlords, after the respective June 23 and October 7 incidents, ratified Respondent's acts in causing the exclusion of the union organizers.

Respondent notes that at the Breezewood store, Store Manager Rodney Sherman met with someone from the Michael T. Hall & Associates management (it is, of course, ob-

scure with whom he met, whether it was Michael T. Hall himself or “Dan” Hall, compare: Tr. 359 with Tr. 787); that he told this representative that he had called the sheriff’s department because of the “disruption of the customers” (Tr. 787); and that this representative of the landlord told him that he was in agreement with everything that he [Sherman] had done and supported what he had done (Tr. 787). By its letter of August 4, 1989, to Respondent, Michael T. Hall & Associates eliminated any ambiguity concerning Respondent’s right to exclude solicitors in the common areas by affirming such right (R. Exh. 13). I conclude that, as Respondent contends, the landlord thereby ratified Respondent June 23 action at the Breezewood store.

There was a parallel occurrence at the Chancellor Shopping Center store immediately after the October 7, 1989 incident. Jim Ostrander, representative of the landlord, Salem properties, testified that shortly after the October 7, 1989 incident, an otherwise unidentified Food Lion representative telephoned and told him that “some people” had been bothering Respondent’s employees and customers and that Respondent had asked the former to leave. In response, Jim Ostrander told the Food Lion caller that “if they became a nuisance, I’m glad you did. We appreciated . . .” (Tr. 681). The caller apparently failed to describe the area from which the intruders had been asked to leave (Tr. 682).

While Michael T. Hall & Associates, after June 23, affirmed, in writing (on August 4) Respondent’s right to exclude trespassers from the common areas at the Breezewood store (R. Exh. 13), there is no writing in evidence to suggest any approbation of Respondent’s conduct by Salem properties at the Chancellor store. Rather, Jim Ostrander told the unidentified Food Lion caller that he was glad of Respondent’s conduct “. . . if they became a nuisance.” There was no showing that the union agents were “a nuisance” outside the store and on the sidewalk. Nevertheless, as Respondent urges (R. Br. at 93), Ostrander testified that Respondent’s no-solicitation policy (extending not only to solicitation inside the store but at the entrance and exit areas of the store and the sidewalk area immediately in front of the store, under the canopy over the entire front sidewalk area; (G.C. Exh. 20.)), was consistent with Food Lion’s authority under the “leasing arrangement” (Tr. 683) and was “consistent with everything we’ve done with Food Lion and all our tenants” (Tr. 683). Under such circumstances, I conclude that Salem Properties affirmed and ratified Respondent’s conduct of October 7, 1989, as Respondent urges.

Respondent suggests, from its theory of ratification, that the landlords’ (the principals’) ratifications somehow exonerates the Respondent (tenant-agent) from the tenant’s otherwise unlawful acts.

In support of this alleged exoneration, Respondent cites *Electrical Workers Local 3 IBEW (Ericson Telecommunications)*, 257 NLRB 1358, 1369 (1981). In that case, there is a strong dictum that a later union authorization of a prior employee refusal to work constituted ratification of the employee conduct, thereby binding the union (principal) for the acts of its agents (employees). The Union was thus in violation of Section 8(b)(4)(i) and (ii) of the Act. In concluding that, under the law of Agency, the union’s ratification of its members’ prior act bound the Union, the administrative law judge cited, as authority, the Restatement of Agency (Restatement 2d, Agency § 82):

A principal [the Union] may ratify the Acts of the agents [the employees] by affirming the prior acts which did not bind the principal when done. Such ratification has the same effect as though the acts of the agent were originally authorized. [Emphasis added.]

From the above indented citation in the Restatement of Agency, Respondent jumps to the conclusion that the words “originally authorized” exonerate Respondent, as the agent, from its otherwise unlawful acts because of the principal’s ratification. Respondent’s argument, of course, misconstrues both the rule presented in the case and the citation from the Restatement. That case holds, and the Restatement confirms, that the Union (the principal) by its subsequent ratification became inculpated by the acts of the erstwhile legal strangers (the employees) who had become its agents by the ratification. Thus, the case merely affirms the rule that subsequent ratification by the principal inculpates the principal. Nowhere in that case, nor in the cited Restatement paragraph, does it suggest that the agent is exonerated. The words “originally authorized” appearing in the Restatement merely declare that the subsequent ratification has the effect of creating an agency in the employees by which the principal is inculpated. The underscoring in the above-indented quotation from the Restatement of Agency notes that the prior acts of the agent originally did not bind the principal. By the ratification, the principal is bound. Nothing of exonerating the agent. In short, in the present case, any ratification by landlords Salem Properties and Michael T. Hall & Associates of prior acts by the tenant-agent [Respondent] would inculpate the principals rather than exonerate the agents.

b. *Respondent’s alleged common-law easement as an “exclusory” property right*

As above noted, the above prior arguments relate to the issues of whether (1) Respondent had prior oral or other authorization from the landlords to exclude and (2) whether subsequent landlord ratification would exonerate Respondent from otherwise illegal tenant acts. Again, these arguments were premised on the theory that Respondent, itself, did not have the authority or right to exclude the union organizers; rather, those arguments relied on delegated authority of the landlords’ property interest to create, under the law, an exclusory right in the tenant sufficient to lawfully eject the union organizers and thereby meet the threshold property requirement in *Jean Country*, 291 NLRB 11 (1988).<sup>16</sup>

These next Respondent arguments proceed on the premise, however, that Respondent, itself, has a sufficient property interest under the lease or, alternatively, under a “lease arrangement” (including oral and/or written side agreements with the landlord) to create an exclusory interest in Respondent alone.

Respondent states that the leases at both stores, containing identical provisions relating to its rights in the common areas, demonstrate that the landlords have granted to Respondent “an easement” in the sidewalks, internal roads and parking lots (R. Br. at 89). Respondent derives this easement from the language of the leases (G.C. Exh. 3 at 5; G.C. Exh.

<sup>16</sup>By establishing such an exclusory property right, Respondent would at least then be entitled to a weighing of a property right against the Union’s competing Sec. 7 right sufficient to bring into play the Union’s obligation to prove no adequate alternate means of communication.

4 at 5.) whereby the landlord grants to the tenant, its employees, agents, suppliers, customers, and invitees, “a nonexclusive right . . . to use . . . all the common areas, including parking area, as shown on Exhibit A [in fact, as noted, there is no Exhibit A attached to either of the leases] which areas are . . . for use by such persons, along with other similarly entitled, for parking and for ingress and egress between the demised premises and all other portions of the shopping center and the adjoining streets, alleys and sidewalks.” (Emphasis added.) Respondent urges that under the law of the State of Virginia, a lease agreement which grants to specified tenants the right to use the landlord’s property for specified purposes, such as parking, is considered an easement (R. Br. at 90), *Bunn v. Offutt*, 216 Va. 681; see also *Bayless Investment & Trading Co. v. Bekins Moving & Storage Co.*, 26 Ariz. App. 265 (1976). Respondent, quoting the court in *Bunn v. Offutt*, notes that the court stated:

Easements correspond to the servitude of the civil law and consist (1) of privileges on the part of one person to use the land of another . . . in a particular manner and for a particular purpose . . . . The easement further involves the right of freedom in its exercise from interference by the owner . . . or other persons.

Respondent, citing 28 C.J.S., Easements, sec. 103, notes that a right of action exists against a mere stranger who uses or intrudes upon the easement, for as to such persons, the rights of the owner are exclusive.

Respondent also notes that in *Bayless Investment & Trading Co. v. Bekins Moving & Storage Co.*, supra, the court stated:

In our opinion the effect of the parking area provisions in the 1950 agreement . . . was to grant to Bekins a parking easement for the non-exclusive use of its customers, business patrons and visitors.

Respondent observes that the court found that this property right, a nonexclusive easement, nevertheless granted an enforceable property interest:

Were it not for the existence of plaintiff’s equitable defenses, plaintiff has presented a classic case calling for the assistance of equity for the purpose of preventing the continuous obstruction of an easement. [Emphasis added.]

It appears to me, however, that there are at least three impediments which Respondent’s argument of “common law easement” fails to overcome. It must be assumed that Respondent’s urging of the existence of “common law easement,” in the common areas (including the sidewalk outside the store and the adjacent roadways and parking areas) is tantamount to an assertion that Respondent’s nonexclusive right to use the common areas amounts to a property interest of sufficient weight to be described under *Jean Country*, supra, *Giant Food Stores*, 295 NLRB 330 (1989), as an “exclusory” property interest in those areas.

(a) In the first place, the Board has already established that a lease, granting to a shopping center tenant a “non-exclusive right to use” common areas, in the presence of the landlord’s obligation, as here, to not only maintain the common areas and keep them free of ice and snow, but to actually

police them (G.C. Exh. 3 at 6; G.C. Exh. 4 at 6) fails to establish “any exclusory property interest in the sidewalk in front of the . . . store or in the shopping center parking areas,” *Giant Food Stores*, supra. On such Board precedent, alone, I would be obliged to reject Respondent’s argument that its nonexclusive “easement” in the sidewalks, roadways, and parking areas constituted the necessary “exclusory property interest” in such areas within the meaning and threshold requirement of the Act.

Regardless of this existing dispositive Board precedent, however, it is clear that in the instant case, Respondent’s nonexclusive easement, itself, is so limited, by terms of the leases, as to not amount to an exclusory interest. There is no question that, under the leases, the sidewalks, internal roadways and parking areas are “common areas” over which the landlords maintain, inter alia, the police power and other repair and maintenance obligations (G.C. Exh. 3 at 6; G.C. Exh. 4 at 6) and in which Respondent has a mere nonexclusive right “to use” along with its invitees, customers, suppliers, etc. This same right, as I understand it, Respondent concedes was given to the other tenants in the shopping center.

Although the common areas mentioned in the leases are described on an “Exhibit A” which is nowhere attached to either lease, I must and do assume, arguendo, that all the shopping center parking lots, internal roadways and sidewalks are “Common Areas” within the lease. That was the assumption in this litigation as I understand it. With regard to Respondent’s right under the leases to assert dominion in the common areas, Respondent was given the right to install two sidewalk soft drink machines, a sidewalk bench and phone and to merchandise spring and summer bedding plants and vegetables on the sidewalks in front of the store during the months March through July (regardless that Respondent merchandised these products throughout the year) provided, however, in both cases, that the soft drink machines, telephone, and the plants and vegetables “shall be located . . . so as not to disrupt the normal flow of pedestrian traffic”; (and in the case of the bedding plants and vegetables) “so as not to disrupt the normal flow of pedestrian traffic along and across the sidewalk immediately in front of tenant’s store and shall not hinder pedestrian access between Tenant’s store and any other co-tenants within the shopping center.” Thus, Respondent, under the lease, was forbidden to “hinder pedestrian access” between tenants store and those of any other co-tenants within the shopping center. It is clear, on this record, that the public was invited to the shopping center as customers and that “pedestrian access” related to public access along the sidewalks adjoining Respondent’s leasehold stores. There is no suggestion, in the lease, or in other practice, that Respondent could so conduct itself as to obstruct the ingress and egress of pedestrian use of the roadways, parking lots, and sidewalks.

It appears to me, therefore, that the terms of the leases themselves specifically withhold from Respondent the use of the parking lots, roadways, and sidewalks so as to impede pedestrian traffic thereon notwithstanding the grant to install bench soft drink machines, the bench, the telephone, and to display and/or sell vegetables and plants. Those areas of the sidewalk, reserved by the leases to pedestrian access and traffic, therefore, are wholly outside any Respondent property right amounting to an exclusory right. To the extent of its

obligation to refrain from interfering with parking lot and sidewalk pedestrian traffic, at least, Respondent has no exclusory right on the sidewalks in front of its stores or in the common parking areas. Failing to have an exclusory right on such sidewalks and parking areas, Respondent had no "exclusory right" to eject the union organizers therefrom based upon any common law easement that it might have had. That "easement" was limited by the very grant contained in the lease so as not to include the pathways on the sidewalk and parking lots. In the exclusion of union organizers from a property in which the landlord prohibited tenant interference or obstruction, Respondent may not argue that it had a property right rising to the level of an "exclusory right" in that property so as to eject the union organizers. It had no exclusory right at all in such pathways. Thus, I find that Respondent's "easement" in no way contained an exclusory property right in the sidewalk and parking lot areas (over which the landlord retains dominion under the lease "police power") and where the landlords forbid obstruction. Testimony of J. C. Hall that the landlord would not object to Respondent blocking the entire sidewalk has little persuasiveness since that position, on this record, was not communicated to Respondent before the June 23 event and contravenes the express terms of the lease.

In any event, the authority cited by Respondent, particularly *Bayless Investment & Trading Co. v. Bekins Moving & Storage Co.*, supra, appears to suggest that Respondent's equitable right in a nonexclusive easement arises only from the "continuous obstruction" of such easement. There is no proof on this record that Respondent gave the union organizers any opportunity, respectively on June 23 and October 7, to obstruct the sidewalk, roadways, or parking areas much less to be the subject of "continuous obstruction" of the nonexclusive easement. For, in the cited authority, the court's equity jurisdiction to assist in the prevention of "continuous obstruction" of the nonexclusive easement, arose only with "continuous obstruction." In the instant case, with regard to the common areas, there was neither obstruction nor continuous obstruction nor the threat thereof on the record made.

For these reasons, it seems to me that Respondent's argument, that its nonexclusive right to use the sidewalks and parking lots, though limited even further by the terms of the leases prohibiting obstruction, gave it a property right sufficient to eject the union organizers from the sidewalks and parking lots must fail. In reaching this conclusion, I further conclude, that on the theory of common law easement, Respondent failed to meet the threshold requirement of a showing of an "exclusory property interest" within the meaning of the Board's gloss on *Jean Country*, 291 NLRB 11 (1988), as noted in *Giant Food Stores*, supra. In sum, contrary to Respondent's argument (R. Br. at 95), since the union organizers were excluded by the police from everywhere on the sidewalks and parking lots outside Respondent's leased store, including pedestrian pathways over which Respondent was forbidden by the leases to obstruct or interfere, the union agents would not interfere with or obstruct Respondent's nonexclusive easement because the terms of the easement, under the lease, did not, in the first place, even include those pedestrian access areas. Moreover, as above indicated, again contrary to Respondent's argument, assuming, arguendo, that Respondent indeed had a "legitimate property interest" in such areas (R. Br. at 95.) there was no showing, of inter-

ference with the easement. The police action removed the organizers before interference might occur. Under authority cited by Respondent, it is only with continuous obstruction of the easement that a "legitimate property interest" arises to such a level as to become an exclusory interest involving the court's equity jurisdiction.

Lastly, we reach Respondent's ultimate argument regarding its possession of an exclusory right in the sidewalks and parking area. It asserts that it had such right because of the character of the sidewalk and parking lot as a "working and selling area." The record is replete with proof that Respondent maintains, throughout the year regardless of the lease, in both shopping centers, the soda dispensing machines, the public telephone and particularly the vegetables, plants, mulch and shrub merchandise on the sidewalk, and abutting the wall of the store in front of the leased premises. Other parts of the sidewalk are not obstructed except for the existence of the public telephone, the soda machines, and the bench on the sidewalk. Respondent maintains a 3- to 4-foot passageway on the sidewalk between the rows of plants and vegetables and other produce (such as mulch, bark, and similar vegetable-type products) which it displays on the sidewalks. Moreover, there is uncontradicted evidence that Respondent's baggers assist the loading of merchandise from the sidewalk and adjoining car lanes into cars and that, from time-to-time, Respondent's vendors, parked in common areas near the sidewalk, use the front entrances of Respondent's stores in the unloading and delivery of their merchandise into Respondent's stores. Again, on the other hand, large areas of the parking lot are not devoted to Respondent's working or selling areas and large areas of the sidewalk even in front of Respondent's stores, remote from the central entrance areas, near the soda machines and pay phone, are free from active merchandising notwithstanding that they are used for storage on the sidewalks of shopping carts. Lastly, the leases themselves, requiring freedom from pedestrian sidewalk obstruction, prevent such free areas from becoming a "working and selling area."

Respondent argues (R. Br. at 96) that it "has precisely the same interest in preventing disruption of its business with regard to the sidewalk as it does with respect to the interior sales area due to customer shopping and conducting related activities on the sidewalk, the relationship between employees and customers, and the work performed by employees on the sidewalk." Respondent therefore argues that regardless of the lease, it has extended its dominion over the sidewalk and adjacent common areas because they have become Respondent's "selling and working areas."

In addition, Respondent points to the narrow passageway that it has left on the sidewalk in the plant and vegetable areas and notes that the very narrowness would lead to obstruction of its business entrance if the Union was permitted to solicit in those areas because of contact with Respondent's customers and solicitation of its employees.

It is actually unnecessary to reach or analyze Respondent's ultimate position. For, at the Breezewood store, the dispositive testimony on this point appears in response to Respondent's questioning of its Breezewood store manager, Rodney Sherman, concerning the area from which Respondent caused the police to ban and exclude the union representatives (Tr. 788):

[Sheriff] Whitney pointed towards the street, meaning route 208, as far as leaving, I recall that. He went like this, you need to leave you know, like that.

Q. Do you recall any other discussion concerning the areas where they were or were not permitted to remain?

A. No, sir, I don't.

At the Chancellor Shopping Center store, after the deputy sheriff told the employees that they could not remain inside the store, the union organizers asked if they could stand on the sidewalk in front of the store and talk to employees. The deputy, in the assistant store manager's presence, told them they could not (R. Br. at 48; Tr. 954). When the union organizers asked the deputy sheriff if they could buy a soda from the public soda machine or use the public phone on the storefront sidewalk, he told them they could not. When they asked him where they could stand, the deputy told them that they were proscribed, in substance, from the rectangular area encompassing the length of the sidewalk in front of Respondent's store to the access road at the highway which abuts the furthest reaches of the Food Lion parking lot. Outside of those areas, the deputy told the union organizers they were welcome (R. Br. at 48).

For purposes of determining the existence of a 8(a)(1) violation, the above uncontroverted evidence is sufficient. Respondent caused the union organizers to be banned from the entire sidewalk in front of the store, all roadways and all of the parking areas. Respondent can hardly contend that all such areas are "working and selling" areas. These areas, in any event, are the "common areas," property over which, under the leases, the landlords exercise dominion and in which, under the leases and in practice, Respondent is forbidden to obstruct pedestrian traffic and has no "exclusory" property right. I conclude that by so doing at both stores, Respondent violated Section 8(a)(1) of the Act, as alleged, *Jean Country*, supra, on the specific dates alleged, *Giant Food Stores*, supra.

For remedial purposes, in particular, I further specifically conclude that Respondent's above statutory violation encompasses all portions of the sidewalks in front of its stores which remain "common areas" in which Respondent has no exclusory right, i.e., property which, under the leases, remains under the landlords' dominion and which Respondent, under the leases, is forbidden to obstruct pedestrian traffic. Respondent's fears, on this record, that union solicitors on the sidewalks, roadways (where Respondent's employees place grocery packages into customers' automobiles) and parking areas may interfere with its business operations (the narrow sidewalk aisles between the vegetable and plant merchandise) are essentially moot. Respondent acted before any evidence of such outside interference could occur. The Union's conduct inside the store was either unproven (bumping a customer), legally insignificant (touching a customer's shoulder) or insufficient to support an anticipatory out-of-store ban (blocking aisles) on the Union's "common area" (sidewalk, roadway, and parking lot) right of solicitation.

To the extent that Respondent's fear of such union solicitation interference may prove justified, it will have immediate access to the courts of the State of Virginia for injunctive relief cf. *Bunn v. Offutt*, supra; *Bayless Investment & Trading Co. v. Bekins Moving & Storage Co.*, 26 Ariz. App.

265 (1976), and to the general police power of the State of Virginia.

Finally, Respondent argues (R. Br. at 97) that even where evidence of substantial selling and work on the sidewalk is absent, the Board has recognized that the property interest of a supermarket tenant (located in a strip center) in its storefront sidewalk is substantial, citing *Red Food Stores*, 296 NLRB 450 (1989), *Sentry Markets*, 296 NLRB 40 (1989), and *Mountain Country Food Store*, 292 NLRB 967 (1989). Those cases are readily distinguishable. In those cases, the stores, in question, had explicit fee or leasehold property interests in the sidewalks and parking lots themselves.

On the foregoing findings of fact, the briefs, and the entire record, I state the following

#### CONCLUSIONS OF LAW

1. Jurisdiction is properly asserted in this proceeding.
2. The Union is a statutory labor organization.
3. Through its actions as set forth and found in sec. III, above, Respondent has interfered with, restrained, and coerced employees in the exercise of their rights to organize under Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.
4. The unfair labor practices, above, have affected and do affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent violated the Act as above-described, I shall recommend that Respondent be required to cease and desist from the violation found or similar violations, to permit access by the Union to all common areas, the areas in which Respondent does not have an exclusory property interest, found or similar violations, to permit access by the Union to all common areas, the areas in which Respondent does not have an exclusory property interest, including the sidewalks in which Respondent does not have an exclusory property interest, including the sidewalks in which pedestrian traffic is permitted and where the leases forbid Respondent obstruction (Tr. 383-385). Respondent shall not interfere with the Union's right to solicit and organize Respondent's employees in areas outside its store in which Respondent has no exclusory interest, areas in which Respondent's no-solicitation rules can not lawfully apply to union agents. This in no way limits or proscribes Respondent's right to lawfully control the activities of *its* employees on worktime and in work areas. Any alleged unlawful union interference, in common areas, with Respondent's employees at work must wait another day. Respondent will also be required to post a notice as is usual in these circumstances. Following the remedial provisions in *Polly Drummond Thriftway*, 292 NLRB 331 (1989), and *Giant Food Stores*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>17</sup>

<sup>17</sup>If 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.

## ORDER

The Respondent, Food Lion, Inc., Fredricksburg, Virginia, and its officers, agents, representatives, and assigns, shall

## 1. Cease and desist from

(a) Prohibiting representatives of United Food and Commercial Workers Union, Local 400, AFL-CIO (the Union), from engaging in communication with Respondent's employees on the sidewalks, roadways, and in the parking areas adjacent thereto in the Breezewood and Chancellor Shopping Centers, Fredericksburg, Virginia; or causing the police to threaten such representatives with arrest because of their presence on said sidewalks, roadways, and parking areas for the purpose of communicating with Respondent's employees in such areas 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 the sidewalks and parking areas or operation of businesses not associated with Respondent's stores.

(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 stores in the Breezewood and Chancellor Shopping Centers, Fredericksburg, Virginia, copies of the attached notice marked "Appendix."<sup>18</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on 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.

---

<sup>18</sup>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."