

JMB Properties Company and Carpenters District Council of Houston & Vicinity, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 16-CA-14814

December 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On June 24, 1991, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹We agree with the judge that the Respondent did not violate the Act by prohibiting the Union from handbilling at the interior mall entrance to Dillard's department store at the Pasadena Town Square Mall, but we do so for the following reason. We find that the General Counsel failed to establish that handbilling at the three Dillard's locations where Oklahoma Installation Inc., the primary employer, was performing work was not a reasonable alternative means of communication in lieu of access to the Dillard's store in the Pasadena mall where Oklahoma Installation Inc. was neither working nor scheduled to work. *Hardee's Food Systems*, 294 NLRB 642 (1989), enf. 904 F.2d 715 (D.C. Cir. 1990). In view of this finding, it is unnecessary to pass on the judge's alternative means analysis. Because we are adopting the recommended Order dismissing the complaint, we also find it unnecessary to pass on the Respondent's cross-exceptions to the judge's evidentiary ruling in sec. C, 1 of his decision.

Tamara J. Gant, Esq., for the General Counsel.
Judith Batson Sadler, Esq. and *Charles E. Sykes, Esq.* (*Bruckner & Sykes*), of Houston, Texas, for Respondent JMB.
Victor J. Bieganowski, Esq. and *Greg Allen, Esq.* (*Bieganowski & Allen*), of Houston, Texas, for the Charging Union.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is an area standards handbilling case. The question is whether the Union's Section 7 right should prevail over the property right of a covered shopping mall, Pasadena Town Square Mall (TSM), so that the Union can handbill Dillard's retail store,

a secondary employer, at the interior mall entrance to Dillard's. Answering the question no, I dismiss the complaint.

I presided at this hearing in Houston, Texas, on April 18-19, 1991, pursuant to the December 19, 1990 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board. The complaint is based on a charge filed November 13, 1990 (and later amended), by Carpenters District Council of Houston & Vicinity, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Union, CDC, or Charging Party) against JMB Properties Company (Respondent, JMB, or Company).¹ Company's name appears as amended at the hearing (1:8).²

In the complaint, as amended at the hearing, the General Counsel alleges that Respondent JMB violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), on August 31, September 1, and November 10, 1990, by prohibiting CDC, the Union, from handbilling at the interior mall entrance of Dillard's retail store in the Pasadena Town Square Mall, Pasadena (Houston), Texas.

By its answer Respondent admits certain factual matters but denies violating the Act.

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

FINDINGS OF FACT

I. JURISDICTION

Company (Respondent JMB) is an Illinois general partnership owned by JMB Income Properties Limited X, a limited Illinois partnership. JMB provides management and security services in shopping malls, including Pasadena Town Square Mall (TSM), which is located in Pasadena, a suburb of Houston, Texas. During the past 12 months, JMB provided over \$50,000 of its services to Dillard's Inc., an enterprise engaged directly in interstate commerce. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. The labor dispute

a. Case 16-RC-9320

James R. Herd Sr. has been a business agent and organizer with the Union for about 3 years (1:51-52). Around late spring-early summer 1990, Oklahoma Installation Inc. (OKI) was performing construction work, including renovations, for certain department stores of Dillard's and Foley's in the

¹ All dates are for 1990 unless otherwise indicated.

² References to the two-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's and RX for the Respondent's.

Houston, Texas area. Herd and the Union began an organizing drive among OKI's carpenters, filing a representation petition (GCX 16) in Case 16-RC-9320 on June 22, 1990 (1:52-62).

Following a hearing on the Union's election petition, the Regional Director for NLRB Region 16, in his Decision and Direction of Election (DDE) of August 14, directed an election in a unit composed of OKI's carpenters, carpenters, helpers, and dual-function clerks employed in the Houston area (GCX 17; 1:138). As of the time of the representation hearing OKI had five jobsites in the Houston area: two stores of Foley's and three of Dillard's (GCX 17 at 3). The three Dillard's stores were those at the Galleria, Town and Country Shopping Center, and at Westwood Mall, all in Houston (GCX 17 at 3; 1:120). By the time of the election, Herd testified, work at the two Foley's jobsites had been completed, leaving only the three Dillard's jobsites. (1:35). Because of the three remaining jobsites and information that OKI would be helping to build two new Dillard's stores, the Union's campaign continued, Herd testified (1:136).

The election was held on September 11 among a unit of some 20 eligible voters. The Union lost by a substantial number of the valid votes counted. Because there were 36 challenged ballots, however, NLRB Region 16, by order of September 27, 1990, directed a hearing on the challenged ballots (GCX 18).

Business Agent Herd testified that he was not aware of OKI's having done any work at the Pasadena Town Square Mall (TSM) (1:120). However, Herd also testified that the Union had information, a report (GCX 13) from the Dodge Corporation, that Dillard's at TSM was scheduled to have some remodeling (1:53-62).

b. The handbills at Dillard's—Pasadena TSM

In a moment I shall describe the Pasadena TSM. Our focus in this case is on handbilling which the Union did at the interior mall entrance to the Dillard's store at TSM on August 31 and November 10, 1990. On those dates, the complaint alleges, JMB unlawfully restricted the Union's handbilling efforts at TSM.

The parties stipulated (GCX 3; 1:7-8) that on August 31 and November 10 the Union distributed (as I describe later in more detail) three handbills. As neither the stipulation nor the evidence suggests otherwise, I interpret the stipulation to mean that copies of each of the three handbills were distributed on both dates. For convenience of discussion, I designate them as HB1, HB2, and HB3. The first two have borders depicting American flags and begin, in large capitals with stars and stripes, "ATTENTION FELLOW-CITIZENS." Two paragraphs of text follow on HB1 and HB2, with the text differing on HB1 from that on HB2. Then follows, centered, "DO NOT PATRONIZE DILLARD'S," with the first three words printed with stars and stripes. Although the exhibits in evidence are black and white photocopies, the different shades suggest that the originals were in color. The Union's label is shown at the bottom left.

Aside from the Union's label, the printed portion of HB1 reads:³

³I show the Union's name in regular case because, although in all capitals on the handbill, it is in light print and smaller than the large, bold capitals of the headings.

ATTENTION
FELLOW-CITIZENS

By patronizing this establishment we have afforded the owner the need to remodel. In remodeling, the owner has selected OKLAHOMA INSTALLATION who does not hire local workers. Rather, they find it necessary to bring in workers from out of town, further eroding the already overburdened tax structure of our great city, destroying the job stability and security of HOUSTON.

Spend your money with establishments that help you and your community to be more prosperous . . . not those that award construction contracts to contractors that do not provide jobs to our own people.

DO NOT
PATRONIZE
DILLARD'S

Westwood Mall Galleria Mall

Town and Country Mall

THANK YOU FOR YOUR
COOPERATION

Carpenters District Council of Houston
2600 Hamilton Houston Texas 77004

(Label) BE AMERICAN
BUY AMERICAN

The only differences in HB2 from HB1 are in the two paragraphs of text. In HB2 they read:

By patronizing this establishment we have afforded the owner the need to remodel. In remodeling, the owner has selected OKLAHOMA INSTALLATION who does not carry health insurance for their employees. This undermines the already overburdened public health services, and overtaxes the standard of living in this area.

Spend your money with establishments that help you and your community to be more prosperous . . . not those that award construction contracts to contractors that do not provide HEALTH CARE to workers.

HB3 is a bit different. The first statement is in large capitals, the second in smaller capitals, and the third is mostly in regular case. That is followed by the Dillard's name in a circle (and centered on the page) with a cross-through line (meaning No), situated above a do not patronize request. Toward the bottom the Union's label appears on both sides. Thus (without the labels and without the "No" cross-through symbol, and again showing the Union's name in regular case):

WILL THE PUBLIC PAY HIGHER TAXES
AND HEALTH CARE COST

CONSTRUCTION WORKERS REMODELING DILLARD STORES DO NOT RECEIVE HEALTH INSURANCE

To meet the burden of providing health care to uninsured workers employed by OKLAHOMA INSULATION at the Westwood Mall DILLARD'S. YOUR TAXES and HEALTH INSURANCE RATES may go UP

(DILLARD'S/NO)

PLEASE DO NOT PATRONIZE DILLARD'S

Let DILLARD'S know that hiring contractors who undermine important work standards, such as health insurance for workers IS NOT GOOD BUSINESS

Carpenters District Council of Houston
2600 Hamilton, Houston Texas 77004
(713) 654-1018

(Label) BE AMERICAN (Label)

BUY AMERICAN

LOOK FOR THE LABEL

MADE IN AMERICA

2. Pasadena Town Square Mall

a. Management

Stipulations (GCX 3) and admitted pleadings establish, as earlier mentioned, that JMB manages, and provides security for, Pasadena TSM. The record does not disclose who owns TSM and the land on which the building sits.

In operating TSM, Lutz Berger is JMB's general manager. Tommy E. Wetuski is the operations supervisor or manager. During the relevant time, D. J. Daniel, J. Johnson, A. J. Szulanczyk, and Israel Torres were security guards and admitted agents of JMB. At all relevant time, JMB controlled and managed the mall area at the interior entrance to Dillard's.

B. Geography and layout

A suburb of Houston, Pasadena lies about 12 miles (center to center) southeast of Houston (1:54-55). A covered and enclosed mall (1:57), Pasadena TSM lies within the city limits of Pasadena. (1:133). The shopping center property is adjacent to the intersection of Southmore and South Tatar Streets. South Tatar runs north and south, with Southmore running east and west (GCX 20; 1:55; 2:227). Each street has a speed limit of 35 miles per hour and four lanes (two in each direction), with Southmore having a turning lane. The parking spaces surrounding the TSM are common rather than assigned to specific stores (1:55:56).

A general floor plan or diagram of TSM, with the stores numbered, is in evidence (GCXs 15, 20), along with a more detailed plan (RX 12) showing the square footage. The total leasable area of the mall is 226,177 square feet, and the property has 3327 vehicle parking spaces (RX 12). By my count, there are 92 retail stores listed as mall stores (GCX 20). The mall has two "anchor" stores, Dillard's at one end and Foley's at the other (1:54). The mall has a single level (2:257). As one faces the layout plans (GCXs 15, 20; RX 12), Dillard's is at the left and Foley's at the right. The Fo-

ley's end is on the Southmore side of the property and Dillard's sits off the Tartar street side. The mall apparently is built at something of a northwest to southeast diagonal on the property (1:56, 94) so that Dillard's is not directly north, although it generally is at the north end of the mall and Foley's at the south end.

It is unclear from the record how the property is otherwise bounded except that Harris Street is on one side (2:227). A Houston city map shows that Harris runs east and west above the property. It is not clear whether TSM adjoins Harris Street. Perhaps not, for Business Agent Herd testified that he did not think a vehicle could enter the TSM parking lot from that (north) end (1:94-95). I infer from the record that there is no east entrance to the parking lot either. I therefore find that all vehicle entrances to the TSM parking lot are from Tartar on the west (left side of the TSM layout) or from Southmore on the south (right side of the layout). The number of street entrances is not given in the record. However, sidewalks (public, apparently) abut Tarter and Southmore (2:227).

Tommy E. Wetuski has been the operations supervisor or operations manager at TSM since TSM opened in March 1982 (2:218, 243; GCX 3 at 2). Wetuski testified (2:230-231) that at each vehicle entrance to the parking lot there is posted, and has been from the beginning, a sign (RXs 10, 11) with a restriction reading (1:205-206):

NOTICE TO THE PUBLIC

The Property Comprising
Pasadena Town Square
Is Private Property.
Solicitation Or Distribution
Of Handbills Or Littering Is
Absolutely PROHIBITED On This
Property.

Written Permission Must Be Obtained From
The Management Office To Use This Property
For Any And All Activities Other Than Shopping

The Parking Area Provided By Pasadena Town Square
Is Intended Only For The Use Of Customers,
Employees, Invitees, And Bona Fide Delivery Vehicles.
No Overnight Parking.
All Others Will Be Removed At The
Expense Of The Owner.

Pasadena Town Square

Wetuski further testified, without contradiction, that JMB strictly enforces the posted restriction and has never permitted any exceptions, not even for charities or for children selling candy (2:231, 254). Charities and other nonprofit organizations are allowed, after application, to hold meetings, parties, and weddings, but no fund raisers, in the community room situated behind the TSM office, but their activities are restricted to that room (2:255-256, 260-261).

Dillard's has three entrances to the outside plus a customer pickup. Customers, however, cannot enter the store through the customer pickup (1:56, 144-145; 2:227). Foley's has the same number of outside entrances (1:46), making a total of six outside entrances for customers from the two anchor stores. Palais Royal, listed as a "family apparel" store (GCX 20), a medium size store (1:56, 146), has one outside en-

trance for customers (1:146). Customers also may enter the mall building at four independent entrances (two on each side of the building), two of those being toward the Dillard's end and two situated closer to the Foley's end. (GCX 15; 1:93, 121, 144-145). On the layout plan (GCX 15, 20) these independent entrances are designated by solid triangles. Hence, these are the four triangle entrances.

Entrance to the many specialty stores at TSM is from inside the mall (1:145), and there is one inside entrance (from the mall) to Dillard's (1:57) and one to Foley's. At least some of the shoppers enter an outside entrance at Dillard's or Foley's, walk through that store, proceed through the mall, and enter the other anchor store to shop (1:140-141). Some shop at one anchor store, then get in their cars and drive around to the other end, park, and shop at that end of TSM. (2:250). Still others enter through one of the four triangle entrances to the mall (1:141).

The record does not disclose the number of shoppers visiting TSM on a typical day, nor the number of customers, or potential customers, entering Dillard's on a typical day. August 31, 1990, was a Friday, and November 10 and 17 were Saturdays. Whether TSM was busy or less than crowded on those dates, no doubt such days were busier at TSM than the usual Monday or Tuesday.

There is dispute between Herd and Wetuski concerning whether most shoppers enter Dillard's through its three outside entrances or from the inside entrance where the store opens to the mall interior. From his three visits to TSM, and the general experience of Herd in visiting malls, Herd testified that a majority of TSM's shoppers enter either through the four independent entrances to the mall building or through Foley's three outside entrances (1:141-142). Thus, in Herd's opinion most of Dillard's shoppers enter through the inside (mall) entrance to Dillard's.

Wetuski, in contrast, estimates that 90 percent of Dillard's shoppers enter through its three outside doors. Wetuski bases this on employee parking reports made every Christmas and from his general observation in his daily walks through TSM. He concedes he has never made a formal, written survey, nor watched every customer from parking to entry in order to establish percentages. (2:226-227, 245-251). As the testimony of both witnesses appears based in large measure on generalized observations rather than specific studies, I find that substantial percentages of the persons entering Dillard's enter through the store's three outside doors and also from the inside, or mall, entrance.

As we see later, testimony refers to sidewalks at the outside entrances to Dillard's. These are to be distinguished from the public sidewalks running alongside Tatar and Southmore Streets. Photographs in evidence show the sidewalks leading to the three outside entrances to Dillard's (RX 2, east; RX 3, north; RX 4, west). One photograph (RX 1) gives a good view of Dillard's inside entrance (viewed from the left from inside the mall, 1:187; 2:219), and a second (RX 13) gives a view of a concrete planter box several feet in front of Dillard's inside entrance (2:222).

B. *Handbilling Restricted*

1. Introduction

Turn now to the handbilling events. As a preface, I should mention that, with two exceptions, the material facts are un-

disputed. The first exception is the question whether security guard D. J. Daniel told James Herd, the Union's business agent, that he could not handbill anywhere on the property, including the parking lot. The second exception is the question whether the Union's conduct on November 10 was peaceful or disruptive. On this disputed point the parties, to some extent, rely on a videotape taken that date by the Union at the interior mall entrance to Dillard's.

2. August 31, 1990

a. *Pleadings*

As amended at the hearing (1:6-7), complaint paragraph 10 alleges that about August 31 JMB, acting through security guard D. J. Daniel, informed Business Agent James Herd that he could not continue handbilling at Dillard's interior mall entrance because JMB did not allow any handbilling in the mall. Paragraph 11 alleges that, on the same date, General Manager Lutz Berger threatened Union Agent James Herd with arrest if he continued such handbilling, and stated that handbilling was not allowed inside the mall. Paragraph 12 alleges that on the same date security guard Daniel also told Union Agent John Tohara that he could not handbill at the interior mall entrance to Dillard's. By these acts, conclusory paragraph 15 alleges, JMB violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1). JMB denies the allegations.

b. *Facts*

Notwithstanding JMB'S pleadings denial, the parties stipulated (GCX 3 at 2-3) to several of the critical facts. The parties stipulated that on August 31 James Herd and John Tohara distributed the three leaflets, which I described earlier, at the interior mall entrance to Dillard's. The parties further stipulated:

Respondent, acting through D. J. Daniel, on or about August 31, 1990, informed Union Agent James Herd that he could not distribute the leaflets attached as Exhibit A [the three handbills I described earlier] at the interior mall entrance to the Dillard's retail store.

And:

Respondent, acting through Lutz Berger, on or about August 31, 1990, threatened James Herd with arrest if he continued to distribute the leaflets attached as Exhibit A at the interior mall entrance to the Dillard's retail store.

Neither General Manager Berger nor security guard Daniel testified. Copies of written security reports from security guards Daniel (GCX 10), Szulanczyk (GCX 5), and Torres (GCX 4, 7, and 8) are in evidence. The reports are consistent with the stipulations and other evidence. Expanding on the stipulations, Business Agent James Herd testified that Daniel said there could be no handbilling inside the mall or on mall property, and that included the parking lot and [private] sidewalks (1:73, 125). At the close of his security report, security guard Daniel denies that he said anything to Herd on August 31. Herd testified persuasively, and I credit his version. Herd's testimony goes beyond the complaint allegation of the "interior mall entrance" to Dillard's. As JMB did not object

to this expansion, I find that the expansion of the complaint allegation was tried by implied consent.

Herd testified, without contradiction, that he simply gave handbills to shoppers who would take them, spoke nothing more than a "Good Morning" type greeting, never blocked traffic, and never asked anyone not to work (1:62-67). Crediting Herd, I find that his handbilling on August 31 was peaceful. Security guard Daniel's report puts the time of Herd's handbilling as "around noon." (GCX 10).

Turning now to the Daniel/Tohara allegation, I note that the parties' stipulation names two other security guards rather than Daniel. Thus:

Respondent, acting through Israel Torres and A. J. Szulanczyk, on or about August 31, 1990, informed Union Agent John Tohara that he could not distribute the leaflets attached as Exhibit A at the interior mall entrance to the Dillard's retail store.

At the close of the hearing, the General Counsel did not move to conform the pleadings to the proof. Nevertheless, in view of the stipulation, I find that the General Counsel, by implied consent, amended complaint paragraph 12 to substitute the names of Torres and Szulanczyk for that of Daniel.

When Business Agent Herd, at the Union's Local 551 hall, asked for a volunteer to handbill at Dillard's, union member John Tohara answered the call (1:157, 163-165). Herd told him where to handbill, just to pass out handbills, and to be polite (1:165-166). Tohara handbilled alone (1:157). The reports of security guards Szulanczyk (GCX 5) and Torres (GCX 4) put the time of Tohara's handbilling as around 6 p.m. Tohara credibly testified that he was never rude while handbilling and never got in a customer's way (1:158-159). I find that Tohara handbilled peacefully and in a nondisruptive manner on August 31.

3. November 10, 1990

a. *Pleadings*

About November 10, 1990, complaint paragraph 13 alleges, JMB, acting through security guard D. J. Daniel, "informed Union Agents James Herd and John Tohara that they could not maintain the handbilling" at the interior mall entrance to Dillard's "and could handbill only on the street by the exterior mall parking entrances."

On the same date, paragraph 14 alleges, JMB, acting through Operations Supervisor Tommy E. Wetuski, "threatened to have Union Agents James Herd and John Tohara arrested for criminal trespass if they did not cease the handbilling activities." The complaint further alleges that JMB violated Section 8(a)(1) of the Act by the conduct of Daniel and Wetuski. JMB denies the allegations.

b. *Facts*

As with the brief handbilling on August 31, most of the critical facts are undisputed and covered to a large extent by the stipulations. Again, the two factual disputes are whether security guard Daniel told Herd that any handbilling would have to take place off the property and at the street entrances, and whether the Union's handbilling inside the mall was peaceful and nondisruptive. For the reasons I give

below, I find that Daniel said there could be no handbilling even on the parking lot, and I also find that the handbilling was peaceful and nondisruptive.

The stipulations respecting this event read as follows (GCX 3 at 3-4):

Respondent, acting through D. J. Daniel, on November 10, 1990, informed Union Agent James Herd that he could not distribute the leaflets attached as Exhibit A at the interior mall entrance to the Dillard's retail store.

Respondent, acting through Officer Dan Daniel, on November 10, 1990, informed Union Agent James Herd that he could distribute the leaflets attached as Exhibit A at the exterior entrances to the mall parking area.

Respondent, acting through Tommy Wetuski, on or about November 10, 1990, threatened to have Union Agents James Herd and John Tohara arrested for criminal trespass if they did not cease distributing the leaflets attached as Exhibit A at the interior mall entrance to the Dillard's retail store.

Respondent, acting through Tommy Wetuski, on November 10, 1990, informed Union Agent James Herd that he could not handbill in the interior of the mall, but that he could handbill at the exterior entrances.

Respondent, acting through Officer David Hyde, on November 10, 1990, informed Union Agent James Herd that he could distribute the leaflets attached as Exhibit A at the exterior entrances, but could not handbill at the interior mall entrance to the Dillard's retail store.

Expanding on the stipulations, several witnesses testified about the November 10 event. Principal witnesses are James R. Herd Sr., the Union's business agent and organizer; Tommy E. Wetuski, JMB's operations supervisor; and Pasadena Police Officer David L. Hyde. Cynthia Elaine Garza described her operation of the video camera, Benito Garza described the peacefulness of the handbilling, and John Tohara briefly described his own conduct. Tohara I have identified. Benito Garza is an International representative for the United Brotherhood of Carpenters (1:149), and Cynthia Elaine Garza is his wife (1:42-43, 150). Thus, all six witnesses in the case testified to some extent about this event.

Except when I name a specific witness, a composite of the testimony and other evidence establishes that the November 10 event occurred as follows. Around 10:45 the morning of November 10, Herd, the Garzas, and Tohara arrived at TSM. Herd and Tohara took positions to handbill, Cynthia Garza took her position to videotape the activity, and Benito Garza assumed a position to observe. I have reviewed the videotape. As shown by the internal clock or timer on the videotape, Cynthia Garza started the videotape at 10:50 a.m.

As described earlier, several feet in front of Dillard's interior mall entrance sits a concrete planter box. A trash can is at each end. Dillard's 20-foot entrance is formed by two large brick support columns. A large brown cornice (prominent in the principal photograph of the entrance, RX 1) displays Dillard's name in large letters over the entrance. Herd took his position several feet in front of the right (as one faces the entrance from out in the mall) brick column, and Tohara took a similar position in front of the left column.

Both men were standing in TSM's main aisle and not on property leased to Dillard's.

Because of the planter and other structures in the center of the aisle, shoppers walked on the sides of the aisle, passing Herd (the man in burgundy shorts) or Tohara. As the shoppers passed, Herd or Tohara, depending on the side a shopper was on, would extend one of the three handbills (described earlier). If the shopper reached for and grasped the handbill, the union agent released it. If not, the union agent offered it to the next shopper.

Security guard D. J. Daniel, observing the union agents enter TCM and head for Dillard's, alerted management who called the Pasadena police. By the video clock, security guard Daniel approached Herd about 10:55 a.m. Herd testified that Daniel told him he could not handbill on TSM property, and would have to do so at the street (1:133). Daniel's statement is recorded on the video film. The video clock puts the time at 10:57 a.m. (GCXs 14, 12 at 2). Actually, the audio is poor because of noise in the mall and the distance of the subjects from the camera. Daniel's answer that Herd could handbill at the street entrance is barely audible. On the transcript, which Herd prepared, a second answer by Daniel is rendered (GCX 12 at 2):

I'm saying you can't do it on the mall property, this mall, sidewalk, and parking lot.

The audio is too poor for me to understand most of the words of that response by Daniel, although the context, with Herd's asking Daniel to confirm that he must go to the street entrance, suggest that the transcript version is substantially correct. Herd spoke louder than did Daniel.

Shortly after 11:40 a.m., after Operations Supervisor Wetuski and Pasadena Police Officer Hyde had arrived, events came to a conclusion. Officer Hyde told Herd that Wetuski said that TSM management did not want the union agents handbilling inside the mall. Hyde said Herd and the others could handbill at the outside entrances to Dillard's, but that if Herd and the others did not leave the inside he would arrest them for criminal trespass. Hyde's testimony is consistent with the incident report (GCX 11) which he filed with the Pasadena Police Department (1:24, 38-39). To Herd's question, Wetuski confirmed that Herd and the others could handbill at the exterior doors to Dillard's on the mall sidewalk. Herd said he would comply with the police order, and that ended the event.

Wetuski testified that when he arrived on the scene there were 4 or 5 police officers present, perhaps 30 to 40 shoppers entering and leaving the stores, including Dillard's, at that end of the mall (2:229, 251-253). The videofilm shows all the area around Herd. On a few occasions the operator showed the other side. The film shows only occasional shoppers walking by, and nothing like 30 to 40 shoppers in the area at one time. Moreover, security guard Daniel's security report (GCX 6) for the November 10 event makes no mention of any large group of persons (other than uniformed officers), and says nothing about any disruption caused by the handbilling. The videofilm usually focuses on the handbilling by James Herd. It shows no congregating by shoppers accepting or declining a handbill, no obstructing shoppers, and no evidence of littering.

When he approached Herd, Wetuski testified, Wetuski identified himself and gave Herd one of his business cards.

(The time shown on the videofilm is 11:41 a.m.) When Wetuski began to explain JMB's policy on handbilling, Herd asked if he would step closer to the planter box (where Cynthia Garza was situated with the video camera) so their conversation could be videotaped. "Sure," Wetuski said. They did so and Wetuski explained the policy, as I have described (2:219, 223, 228, 240-242).

Wetuski testified that when they moved over to the planter, there were no shoppers in that immediate area (2:242-243). Later, apparently, shoppers asked him what was going on, why were all the *police officers* present (2:228-229). Herd confirms that when JMB representatives or police officers sought to engage him in conversation he did ask them to move with him toward the video camera. His purpose in this was to promote better sound and visual quality on the videotape (2:264). My review of the videofilm discloses that this occurred only at 11:42 a.m. (by the video clock) moments after Wetuski arrived. At 11:43 a.m. Police Officer Hyde, who had been in conversation off to the left side, stepped over to Herd and delivered his police ultimatum—leave the mall or be arrested. Herd said he would comply and the event ended.

That takes us to the videotape. The government's primary purpose in offering the videotape (GCX 14), with or without the disputed transcript of portions of the audio, the General Counsel asserts, is to show the peaceful nature of the handbilling. JMB also favors receipt of the videotape, but objects to the transcript as incomplete and inaccurate (1:110-113). Eventually I received in evidence both the videotape and the partial transcript (2:270-271). There is no dispute the transcript is incomplete. The poor audio renders a complete transcript impossible. As to the material events, there is no evidence of any errors of substance. Even so, because of the poor audio quality of the video film, I cite the transcript only in limited instances and then only as corroborative of Herd's testimony. As noted earlier, I have reviewed the videotape. Observing that the handbilling shown on the videotape is peaceful, and crediting the General Counsel's witnesses in that respect,⁴ I find that the Union's handbilling on November 10, 1990, was peaceful and nonobstructive.

Any disruption in the normal Saturday scene in the area in front of the interior mall entrance to Dillard's at TSM was caused, I find, by the congregation of about five uniformed officers. As Wetuski testified, shoppers asked why all the *police officers* were present (2:228-229). Note that the shoppers did not ask about the handbilling. Moreover, the police were there because JMB, not the Union, had called them. Most of the uniformed officers actually were JMB's security guards. An off-duty Pasadena Police officer was there as a security guard for Dillard's. Hyde was the only on-duty Pasadena Police officer at the scene.

On Saturday, November 17, Business Agent Herd handbilled on the sidewalk at Dillard's west entrance for about an hour to around noon. During that time only 10 to 15 persons, including children, entered Dillard's west door. Herd selected the west entrance because it (of the outside doors, presumably) afforded the best chance for shopper traffic. This is so because most of the parking is nearby as is one of the triangle entrances to the mall. Union member

⁴This includes Police Officer Hyde who testified that he observed no violent or disruptive conduct (1:23).

Thomas Bannon assisted with the handbilling at the west entrance. Herd concedes that JMB did not interfere with the Union's handbilling on the sidewalk at Dillard's west entrance. However, Herd testified, it is not practical for the Union to cover all the outside entrances to TSM because the Union does not have the members available to do so. At that time the Union was handbilling seven other stores elsewhere. (1:76-79, 122-124, 126, 128).

On November 17 the Garzas also were present, with Benito Garza as an observer and Cynthia Garza present to operate the video camera (1:123-124, 128-129). Garza testified that his mission was as an observer only (1:155-156). Of the 1200 members in the Union's Local 550, Herd testified, about 850 work while the others are retired. (1:142). Herd testified that he has used union members for handbilling (1:149). We know that from Tohara and from Herd's brief identification of Bannon. As described earlier, we know from Tohara that the Union asks for volunteers to handbill without pay.

At the hearing, Herd testified that the purpose for the handbilling was to inform the general public that Dillard's was using contractors from out of town who do not pay into health and welfare. "It was to give them the information and let them decide whether they wanted to shop there or not." (1:68, 118.) "We asked them [the public via the handbills] not to patronize Dillard's." (1:68-69.) Asked what the Union wanted Dillard's to do, Herd testified: "Use our local people, get some local contractors" from Houston or Texas, even if they are nonunion contractors, "and help our economy." (1:118.)

C. Procedural Rulings

1. *Jencks* issue

a. *Facts*

As earlier indicated, Police Officer Hyde is among those who appear on the videofilm (GCX 14) which Cynthia Garza recorded on Saturday, November 10, 1990. At the completion of the General Counsel's direct examination of officer Hyde, JMB, citing 29 CFR § 102.118, asked for production of any prehearing statements by Hyde within the possession of the General Counsel. When the Government asserted it had none, JMB argued that the videotape came within the regulation's definition of a recorded oral statement. The General Counsel argued that the film did not meet the definition. Agreeing with the Government, I denied JMB's motion to produce and its subsequent motion to strike the testimony of Police Officer Hyde (1:25-37).

b. *Discussion*

The Board's *Jencks* regulation, 29 CFR § 102.118(b)(1), requires production of any "statement," as later defined, after a witness called by the General Counsel or a charging party has testified in circumstances described by the regulation. For background, see *Jencks v. U.S.*, 353 U.S. 657 (1957); 18 U.S.C. § 3500; *Ra-Rich Mfg. Corp.*, 121 NLRB 700 (1958). A "statement" is defined at 29 CFR § 102.118(d) to mean a signed, adopted, or approved written statement or:

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of such oral statement.

It seems clear that "statement" means an account or description of an event, such account or description being made to "an agent." Here we do not have an account or description of an earlier event, but a moving picture of the event itself. The moving picture film is evidence, not an account of that evidence. Accordingly, I affirm my ruling, and I find that the videotape was not producible under the *Jencks* regulation, 29 CFR § 102.118(b), (d). As evidence, the videotape may have been subject to production under a subpoena duces tecum, but apparently no such subpoena was served on the Union for this purpose.

The situation would be different had someone at the scene, moments after the event ended, interviewed Police Officer Hyde and, on videotape, asked him what had happened minutes earlier in his conversation with Business Agent Herd and Operations Supervisor Wetuske. At that point any answer from Hyde, by rendering an account of the earlier event, would be a producible "statement."

Had Officer Hyde viewed the videofilm and orally told an investigating Board agent, or counsel for the General Counsel, that the sights and words in his conversation on the videotape were true and correct, one would think that such oral adoption of an electronic picture story would suffice to render the videotape producible even though the regulation refers to adoption of a written statement. However, that possibility does not arise here because the General Counsel represents (1:27) that Hyde never reviewed the videotape.

2. JMB's rejected Exhibit 16

After the parties had rested and closed their evidence, JMB sought to introduce its Exhibit 16, an exhibit consisting of certain property and store diagrams apparently received in evidence in the trial of Case 10-CA-21677. The Board's decision in that case is reported as *Red Food Stores*, 296 NLRB 450 (1989). JMB asserts that the facts of that case are very close to our facts and that the diagrams would be helpful here. The General Counsel objected on the basis of tardiness, limited if any relevance, and prejudice without all the other evidence from that case to explain the documents and to put them in context.

For the reasons expressed by the General Counsel, I sustained the Government's objection. Stating that I would not stand on any technicality respecting the stage of our case if all that was involved was simply introducing an exhibit already litigated, and observing that JMB's motion would require us to reopen the record to, in effect, litigate a second case, one already litigated, I denied JMB's motion to reopen the record to introduce its Exhibit 16, saying that I would be guided by the Board's decision. I granted JMB's motion to place RX 16 in the rejected exhibits file. (2:272-279). By motion dated May 31, 1991, JMB seeks to substitute certified copies of the diagrams for RX 16. Granting that unopposed motion, I have placed JMB's motion and attachments in the folder for Respondent's rejected exhibits.

D. Analysis and Conclusions

1. Legal principles

Decisions in shopping mall access cases such as this one are governed by the Board's analysis in *Jean Country*, 291 NLRB 11 (1988). In modifying its analytical approach in these cases, the Board in *Jean Country* reviewed the applicable decisions of the United States Supreme Court, particularly *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1965), and *Hudgens v. NLRB*, 424 U.S. 507 (1956).

The decisions make clear that the Union here had no constitutional right to enter the Pasadena Town Square Mall and distribute handbills at the interior mall entrance to the Dillard's department store there. The rights and obligations of the parties here are dependent exclusively on the National Labor Relations Act. When Section 7 rights conflict with private rights, the Board's task, as the Supreme Court declares, is to accommodate the two "with as little destruction of one as is consistent with the maintenance of the other." *Hudgens*, 424 U.S. at 522, quoting from *Babcock*, 351 U.S. at 112.

Quoting *Hudgens*, the Board in *Jean Country* observed that there is a "spectrum" of Section 7 rights and property rights, and that the place of a particular right in that spectrum might affect the outcome of a case. Listing potential factors to be assessed when balancing the three interdependent categories of property rights, Section 7 rights, and alternative means, the Board views the latter as "especially significant in this balancing process." *Jean Country* at 14. However, "denial of access will more likely be found unlawful when property is open to the general public than when a private character has been maintained." *Jean Country* at 14.

Respecting burdens, the initial burden is on the party claiming a property right to show that it has a property interest. The General Counsel bears the initial burden to show that without access to the property the one seeking to exercise the Section 7 right (here the Union) has no reasonable means of communicating with the audience that exercise of that right entails. That is, based on objective considerations, the General Counsel must show that reasonable effective alternative means were unavailable in the circumstances. "We note however that, generally, it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact." *Jean Country* at 13.

2. Discussion

As the open-air-mall operator in *Jean Country*, JMB here had a genuine interest in the TSM property. JMB is the agent of the unidentified owner of TSM. That threshold interest established, I turn now to examine the relative strengths of the competing rights.

Consisting of over 90 retail stores, TSM is open daily to the public. The commercial nature and purpose of the mall property are clear. Public access is provided from two major city streets into a large parking lot for motor vehicles. Although the record gives no estimate of the average number of daily or weekly shoppers, clearly the number is substantial. A covered mall such as TSM is attractive to customers because it provides shoppers protection from the elements while they shop in air-conditioned comfort up and down the stores abutting the large central aisle. It is readily apparent that TSM has, and is intended to have, certain quasi-public

characteristics. These characteristics enhance the mall's commercial nature and purpose.

At the same time, however, the quasi-public traits tend to lessen the private nature of the property, for it is apparent that the public is extended a broad invitation to come on the property, and not necessarily with the specific purpose of purchasing a particular product or service. *Jean Country* at 16. Unlike *Jean Country*, however, here JMB has posted the TSM property with notices to the public restricting access. Also unlike *Jean Country*, JMB, making no exceptions to its restriction policy, has never allowed fairs for arts and crafts or solicitations by charities, or children selling candy. Users of TSM's community room are restricted to that room for their meetings and activities.

The Union's two handbillers were a reasonable number, they did not interfere with the shoppers nor cause littering, and their handbilling was peaceful and nondisruptive. The Union's handbilling message generally was area standards, although in part the handbilling reflected an additional purpose, that purpose being to organize the employees of OKI, a contractor doing remodeling work for Dillard's. However, OKI was not doing any work at the TSM Dillard's. Indeed, there is no evidence that OKI was scheduled to do any work at Dillard's TSM store. (The Dodge Report information was received for the limited purpose of showing the basis for the Union's course of action, not for the truth of the data. No contention was made that the report was being offered generally, as a hearsay exception under FRE 803(17).)

OKI was working at three other Houston-area stores of Dillard's. Thus, shoppers at Dillard's TSM store would not see any remodeling work being done by OKI's employees. The handbills themselves make no reference to TSM, and instead specifically name three other shopping malls in Houston, with the closest of those malls being at least 15 miles away. The only connection with TSM, so far as shoppers could learn from reading the handbills, is that Dillard's is the same name at all of the shopping malls, and that Dillard's has hired OKI at three malls over 15 miles away in Houston. In short, the Dillard's retail store at Pasadena TSM is a secondary employer to the Union's labor dispute with OKI, and the situs of the labor dispute is at least 15 miles from TSM. As the Board declared in *Jean Country*, 291 NLRB at 12, access to sites with only a remote connection to the labor dispute is not automatic. *Hardee's Food Systems*, 294 NLRB 642 (1989), *enfd.* 904 F.2d 715 (D.C. Cir. 1990).

Balancing the category of property rights and statutory rights, it appears that the property right here ordinarily would be relatively weak because of the quasi-public nature of the shopping mall. However, as the property always has been posted for use restricted mainly to shoppers (with only a limited and restricted exception for use of a meeting space), expressly prohibiting handbilling, and as JMB has never allowed the interior aisles to TSM to be used for arts and crafts, charities, or other nonshoppers, I find that the property interest is relatively strong. By contrast, the Section 7 right exercised here—area standards handbilling—is relatively weak because it does not further a "core" purpose of the Act. *Red Food Stores*, 296 NLRB 450 (1989). The Union's right is further weakened here because OKI was not working at the Pasadena TSM Dillard's, nor even scheduled to work there so far as the evidence shows. Thus, the situs of the

Union's primary dispute was located at least 15 miles away in Houston, as in *Hardee's Food Systems*, supra.

Turning now to the third category, that of alternative means, I note that eventually on November 10 the Union was advised that it would be permitted to handbill on TSM's sidewalks at Dillard's exterior doors. As if testing JMB on this, the Union did just that, without interference from JMB, a week later on November 17. Although that conceding by JMB appears substantial, in practice it is of limited value to the Union in comparison with the ability to handbill at the interior mall entrance.

First, only two handbillers need be present to handbill Dillard's if they can be stationed at Dillard's interior mall entrance. This is so because, except for an undetermined percentage of shoppers who enter Dillard's exterior doors, shop at Dillard's, and leave through an exterior door, at least a substantial number of Dillard's shoppers enter the interior mall entrance or walk from Dillard's into the central aisle of TSM by passing through that interior entrance.

But if the Union is required to remain out of the inside mall and handbill at exterior doors only, the Union would have to find enough volunteers to handbill at Dillard's three outside entrances. Added to those three volunteers (six if the Union wanted to station the same number at the exterior entrances as at the interior entrance, as it did on November 17) would be the volunteers necessary to staff the four triangle doors plus the three exterior doors of Foley's plus the exterior door to Palais Royal.

Once the Union begins handbilling at the independent (triangle) doors, the danger arises of enmeshing the customers of neutrals to the labor dispute. This is particularly true respecting any handbilling at the exterior doors of Foley's and Palais Royal. The evidence does not clearly establish that JMB would relax its restriction so as to permit the Union access to the sidewalks in order to handbill against Dillard's at the exterior doors of Foley's. Nevertheless, the Union would need to handbill at Foley's because the record shows that some shoppers enter Foley's, shop there and walk through the mall to Dillard's where they also shop. The Union simply does not have the volunteers available to handbill all the exterior entrances of TSM.

As for notices in the media, the record does not show whether the Union considered such or what that expense would be. The Houston area population is large. While it may be assumed that most of TSM's shoppers come from the Pasadena area (the southeast side of Houston), that popu-

lation is still substantial. As shown by the 1991 Randy McNally Road Atlas (pp. 1, 126), the December 31, 1986 estimated population of Pasadena alone is over 115,000. Television at Houston is available. As the Board did in *Jean Country* at 18 fn. 18, I conclude that delivery of the Union's message by mass media would be heavily expensive and therefore not a reasonable alternative. Nevertheless, as the Board notes, the test is one for "reasonable means of communication, not the most effective means." *Hardee's*, supra.

Balancing the conflicting rights here, I shall dismiss the complaint. JMB's property interest is relatively strong, while the Union's Section 7 right is relatively weak. Because the Union could handbill at the sidewalk entrances to most, perhaps all, the Pasadena TSM, I conclude that the Union had a reasonable means to engage in its protected activity. Thus, impairment of the Section 7 right is less substantial than would occur to JMB's property interest if the Union were granted access to the interior mall entrance to Dillard's. Accordingly, I find that JMB did not violate Section 8(a)(1) of the Act by prohibiting the Union from handbilling inside TSM, by threatening to have the Pasadena police arrest the Union's representatives in order to enforce this exclusion, and by causing the Pasadena police to come and warn Union Representative Herd that he would be arrested for criminal trespass unless the Union switched its handbilling to the sidewalk entrances outside the building.

CONCLUSION OF LAW

By prohibiting the Union from peaceful handbilling protected by the Act at the interior mall entrance to the Dillard's retail store in Pasadena Town Square Mall, Pasadena, Texas, and by threatening union representatives with police arrest for engaging in such handbilling, Respondent JMB Properties Company has not violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The complaint is dismissed.

⁵If 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.