

Dillard's, Inc. and Carpenters District Council of Houston and Vicinity, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 16-CA-14705-2

January 10, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On July 31, 1991, Administrative Law Judge Burton Litvack issued the attached decision. The General Counsel and the Respondent filed exceptions and a supporting brief and the Respondent filed an answering 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 conclusions and to adopt the recommended Order.

ORDER

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

Olivia Garcia Boulton, Esq., for the General Counsel.
Fraser A. McAlpine, Esq. (Andrews & Kurth), of Houston, Texas, appearing on behalf of the Respondent.
Victor J. Bieganowski, Esq. (Bieganowski & Allen), of Houston, Texas, appearing on behalf of the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Based on the filing of the unfair labor practice charge in the above-captioned matter by Carpenters District Council of Houston, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Charging Party), on August 20, 1990,¹ the Regional Director of Region 16 of the National Labor Relations Board (the Board), on October 3, 1990, issued a complaint, alleging that Dillard's, Inc. (the Respondent) engaged in unfair labor practices violative of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent timely filed an answer, essentially denying the commission of the alleged unfair labor practices. The trial on the merits of the allegations of the complaint, before me was held on December 18, 1990 in Houston, Texas. At the trial, all parties were afforded the opportunity to examine and to cross-examine all witnesses, to offer into the record any relevant evidence, to argue their legal positions orally, and to file posthearing briefs. The latter documents were filed by counsel for the General Counsel and by counsel for Respondent and have been carefully considered.

¹Unless otherwise stated, all events herein occurred during 1990.

Accordingly, based on the entire record, including the posthearing briefs and my observation of the testimonial demeanor of each of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that, at all times material, it maintained its principal office in Little Rock, Arkansas, and operated retail stores in several states of the United States, including Texas, with one such retail store located at the Westwood Mall in Houston, Texas. Respondent further admits that, during the 12-month period immediately preceding the issuance of the instant complaint, a representative period of time, in the normal course and conduct of its aforementioned business operations, it purchased goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Texas, with goods and materials shipped directly to its Westwood Mall facility in Houston, Texas, and that, during this same representative period, derived gross revenues, from the operation of its retail stores, in excess of \$500,000.

II. LABOR ORGANIZATION

The record establishes that the Charging Party exists for the purpose of dealing with employers concerning labor disputes, that it negotiates collective-bargaining agreements with employers on behalf of their employees, and that it represents employees in the filing of contractual grievances against their employers.

III. THE ISSUE

The complaint alleges that Respondent engaged in conduct violative of Section 8(a)(1) of the Act by prohibiting representatives of the Charging Party from engaging in conduct privileged by Section 7 of the Act (handbilling) at the first-level entryway to its retail store at the Westwood Mall in Houston, Texas, by instructing representatives of the Charging Party that they could only engage in handbilling at the street entrances to the Westwood Mall, by threatening to arrest representatives of the Charging Party unless they ceased their handbilling at the first-level entryway to the retail store at the Westwood Mall, and by causing the arrest of a representative of the Charging Party for having engaged in the above-described conduct, which allegedly constituted a criminal trespass. Respondent denied the commission of the alleged unfair labor practices, arguing that the degree of impairment to the Section 7 right of access to its private property at the Westwood Mall, if such should be denied, is less substantial than the degree of impairment to its property right if access is granted.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent operates a chain of retail department stores in several southern States, including Texas, with eight stores located in the vicinity of Houston, Texas. The retail store involved in the instant proceeding is at the Westwood Mall, which is located at the intersection of the Southwest Freeway and Bissonnet in Houston. The Westwood Mall, which is a typical urban shopping mall, is a two-level, indoor complex

surrounded on all sides by parking lots. The mall is anchored by Respondent's department store at one end and by a Sears retail store at the other and has specialty shops, a movie theater, and restaurants located between the two major retail stores. There are, of course, several outside entrances into the mall and into the various retail establishments. With regard to the Dillard's department store, there are three outside entrances, with one located on each of the three outside sides of the store, and two inside entrances, one on each level of the mall. The entrance at which the incident involved here occurred is the inside entrance on the lower level of the mall.

The record establishes that the lower mall entrance to Respondent's store is enclosed by a marble facade, attached to which is a Dillard's sign which overhangs the entryway and faces out into the mall. Two marble columns, each 32 inches wide, effectively divide the entryway into thirds. A guide rail, 11 inches behind the pillars and along which the sliding glass door, used to close the store from the mall's common area at night, is positioned, runs the entire length of the entrance and forms a demarcation line for the interior of the store. The entrance is slightly less than 48 feet in length and, measured from the guide rail to the outside edge of the Dillard's sign, is between 5 and 6 feet in width. Immediately behind the guide rail, inside the store, are alternating 12-inch-square black and white tiles, which run the entire length of the entryway. Beyond this single row of tiles is the interior floor of the store, which appears to be a beige or brown tile. The floor beneath the facade and sign is a gray-green tile and is identical to the tile in the mall's common area. Finally, inside the store, located just in excess of 4 feet from the guide rail, are display counters for merchandise.

James Mount, the store manager at Respondent's Westwood Mall facility, testified that "anything behind the marble facade," including the marble facade itself and the gray-green tile beneath it, is owned by Respondent and that Respondent is responsible for maintaining the entrance area and performing any repair work there. However, Mount added, at night when the sliding glass door is in place, mall personnel clean the entrance area while performing such work in the common areas of the mall. Finally, with regard to security, Respondent is responsible for providing said services on its property, including the entrance area, and the mall provides security services for the common areas. The Westwood Mall security director, David Schultz, testified that, after hours, in the event of a minor discipline problem on Respondent's property, mall security would handle it; however, if of a more serious nature, "we would call the police."

During the spring and summer of 1990, Respondent was engaged in a complete interior renovation of its Westwood Mall store and two others in the Houston municipal area. The general contractor for these remodeling projects was GC Plus which, in turn, hired a subcontractor, Oklahoma Installation,² to perform the work of installing the "furniture fixtures," including the display cases. In or about August 1990, the Charging Party was in the midst of an organizing campaign amongst the carpenter employees of Oklahoma Instal-

² Apparently, Oklahoma Installation is an out-of-state contractor, based in Oklahoma. Likewise, GC Plus is an Arkansas contractor.

lation in the Houston area³ and became aware that the employees were then working in three of Respondent's retail stores in the city, including the one at the Westwood Mall. Thereafter, business agent, James Herd, and other representatives of the Charging Party held meetings, in the parking lot next to the Dillard's store's loading dock⁴ at the Westwood Mall, with the Oklahoma Installation employees and discussed representational matters. Also, besides its organizing campaign, without limiting such to the three Dillard's stores at which employees of Oklahoma Installation were working, officials of the Charging Party decided to commence a handbilling campaign against Respondent at all of its Houston area department stores. The purpose of said activity, according to James Herd, would be "to induce the general public not to shop at Dillard's because of the way that they done their construction."⁵

Having decided that the first of Respondent's stores to be handbilled would be the Westwood Mall facility, on August 17, Herd, Benny Garza, an International representative for the Charging Party, and Garza's wife arrived at the mall at approximately 2:45 in the afternoon. Herd's intent was to have two of the Oklahoma Installation carpenter employees, J. B. Baxter and Craig Hurley, who were working at the store that day, help with the handbilling; however, upon entering the Dillard's store and speaking to them, he learned that they would not end their work shift until 3:30 p.m. Thereupon, Herd and the Garzas waited in a mall restaurant until the two Oklahoma Installation employees finished working and met the two men in a parking lot adjacent to Respondent's store. After demonstrating how they should perform their handbilling task, Herd stationed the two workers at one of the outside entrances to the Dillard's store and gave each some handbills.⁶ Then, Herd and the Garzas entered the lower level of the mall through a center entrance and walked to an El Chico's restaurant, which is located to the side of the entrance to the Dillard's store on the lower

³ The record establishes that the Charging Party is engaged in an on-going labor dispute with Oklahoma Installation in several southern States, including Tennessee and Louisiana.

⁴ James Mount testified that Respondent owns this particular parking lot at the Westwood Mall.

⁵ Elaborating, Herd explained that the Charging Party discovered that Oklahoma Installation normally acts as the fixture installation subcontractor on Respondent's remodeling projects, and "it became evident to us that Dillard's was primarily in the business of using non-union people." Therefore, the handbilling was designed "to put a little extra pressure on Dillard's to start using some fair contractors."

⁶ The handbilling, addressed to the public, stated that "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." The handbill concludes with the appeal, "DO NOT PATRONIZE DILLARD'S."

There is no dispute that the handbill addresses the failure of Oklahoma Installation's terms and conditions of employment to meet area standards. In this regard, during cross-examination, Herd conceded that the Charging Party's only dispute was with Oklahoma Installation and that the Charging Party had no labor dispute with Respondent and was not attempting to organize its employees. There is no contention by the Charging Party that Respondent's employees were being paid substandard wages or any evidence that the Charging Party was, at all, interested in the wages or benefits received by Respondent's employees.

level. In front of the restaurant, Herd and Benny Garza set up a videotape camera in order that Garza could record Herd's handbilling activities for instructional purposes, and Herd "positioned [himself] . . . six feet or so in front of the sign in the middle of the major opening" into the store. Estimating his starting time at 3:45 p.m., Herd handbilled for no more than 8 minutes when David Schultz, the Westwood Mall security director, approached him from inside the mall. According to Herd, "he asked what I had." Herd introduced himself, showed Schultz a handbill, and said he was engaged in an organizing campaign with Oklahoma Installation and "we had a right to be there." Herd testified that Schultz asked if he had received the mall manager's permission to engage in handbilling, and Herd said he was not aware that such was required. To this, the security guard replied that "They do not allow any handbilling inside of the mall." Then, for the next several minutes the two men discussed handbilling that Herd had done elsewhere. Eventually, Schultz said he would "grant" that Herd had a "right" to handbill "but not here." Herd asked where, and the security guard "directed" Herd to the area beneath the Dillard's entrance facade, saying "this out here belongs to the mall and that in there belongs to Dillard's and you're going to have to be underneath that sign." Schultz then walked away in the direction of the mall.⁷

Adhering to the security director's instructions, Herd continued to handbill for several more minutes beneath the Dillard's facade. At one point, he was approached by another Westwood Mall security official, who grabbed the handbills from Herd and, as the latter grabbed them back, said Herd "couldn't do that in there, I had to go outside." Herd explained about his conversation with Schultz, and the guard "backed off," speaking into a radio. Herd resumed handbilling inside the Dillard's entryway beneath the store sign, and, after a few minutes, Schultz returned, accompanied by a woman he identified as Michelle Frazier, the mall's marketing director. According to Herd, Schultz said that they had been "mistaken" and "I had to be either outside or inside the store. . . . But I was not going to be allowed to handbill . . . inside the mall." Herd added that, when Schultz said "inside the store," he "pointed" to the area behind the black and white tiles behind the guide rail. Finally, referring to the two Oklahoma Installation employees who had been handbilling at an outside entrance to the Dillard's

⁷David Schultz' account of this initial conversation with Herd is essentially corroborative of the latter. According to the mall security director, he explained to Herd the mall's policy prohibiting the distribution of handbills inside the "common area" of the mall and told him to "get out." At this point, Herd began moving toward the Dillard's entrance area, stopping every few feet, and asking if he was "fine." Schultz said, no, until Herd "got into the Dillard's area" and, then, said, yes.

With regard to the mall's solicitation policy, Schultz' testimony was not entirely clear. Initially stating that, as of August 17, the Westwood Mall's policy was to prohibit handbilling and any form of solicitation, Schultz then stated that an exception existed for "anything related to a marketing function," such as the Boy Scouts. During cross-examination, he mentioned functions put on by a jazzercise group, the Lion's Club, and a church group. Finally, after stating that the Boy Scouts merely put on a soap box derby demonstration, Schultz averred that the Girl Scouts are permitted to sell cookies inside the mall.

store,⁸ Schultz said "we was going to have to get out at the street entrance to the mall." Contradicting Herd, Schultz testified that, when he returned with Frazier to where Herd was handbilling, the latter was not standing where he had been when Schultz left but, rather, was inside the mall's common area, directly in front of the Dillard's sign. While not denying what Herd attributed to him, Schultz further testified that he told Herd to move back onto Dillard's property and that he was "prohibited" from handbilling in the common area.⁹

There is no dispute that, while Herd handbilled in the common area of the mall and inside the Dillard's entryway and while he spoke to the mall security guards, he was being observed by Respondent's store manager Mount and by the Dillard's store's security guard, Clinton Falls, who is a full-time Houston policy officer and, while off-duty, is employed by Respondent in the above capacity.¹⁰ Falls stated that, during the afternoon of August 17, he was notified by the store telephone operator that he was to meet Mount at the lower level mall entrance to the store and that "there was a man handing flyers out in the mall." Thereupon, he met Mount at the above location, and they stood in the area of the display cases and watched Herd handbilling for about 5 or 10 minutes "just a little bit outside of Dillard's property." After a while, according to Falls, he observed Mall Security Director Schultz approach Herd; watched, as Schultz and Herd spoke and possibly moved inside the store entrance area and, therefore onto Respondent's property; and listened to Schultz telling Herd that he could not be out in the mall area. Assertedly without being instructed to do so and believing that Schultz was having a problem and aware of Respondent's policy prohibiting any solicitations on its property by employees or anyone else, Falls walked over to where Herd and Schultz were speaking and intervened in the conversation. While Falls specifically denied having been instructed

⁸By this point, the two Oklahoma Installation employees, Baxter and Hurley, had ceased handbilling outside and come inside and were observing and listening to the conversations between Herd and Schultz. As to why they had stopped handbilling, Baxter said "we wasn't getting any traffic outside" and "it was real hot and we were getting thirsty and wanted something to drink."

⁹As stated above Oklahoma Installation employees, Baxter and Hurley, witnessed what occurred. According to the former, he observed a mall security officer approach Herd and tell him that he could not handbill inside the mall but could do so "in the store," beneath the canopy. Hurley corroborated this, adding that Herd replied that he did not know what property belonged to the mall and what was owned by Dillard's. The security guard pointed to the area between the columns, beneath the marble facade, and Herd handbilled in that area. A short while later, according to Hurley, the mall security man returned.

¹⁰Falls himself described his work responsibility for Respondent as mainly acting as a "deterrent for shoplifters." While working for Respondent, Falls is paid by the latter but continues to wear his Houston Police Department uniform, including his gun and holster but not his radio; must, according to policy regulations for off-duty work, adhere to all Federal, state, and local laws; and must be available to respond to any police situations. Finally, Falls testified that he is "authorized" by Respondent to arrest law violators and to threaten arrest in accord with district attorney authorization. In the latter regard, Fall explained that normal procedure is to seek authorization from the office of the Houston district attorney prior to arresting anyone.

by Mount to intervene,¹¹ the latter contradicted Falls, testifying that he (Mount) spoke to Falls as they observed Herd handbilling out in the mall's common area, telling the police officer "He can't be inside our store passing out leaflets."¹²

As he testified, Clinton Falls intervened in the second conversation between James Herd and David Schultz. According to Herd, Falls approached and interjected that "Schultz is right, there is no soliciting in the mall." Then, after asking Falls to identify himself, Herd again protested that he had a legal right to handbill where he stood; however, Falls disagreed, saying there was a no-soliciting rule and "nobody was allowed to solicit." Herd responded that a labor organization was entitled to do certain things, but the Houston police officer again disagreed. According to Herd, he thereupon suggested to Falls that he telephone the district attorney's office and ascertain exactly what rights Herd possessed regarding handbilling. Westwood Mall Security Director Schultz recalled that Clinton Falls came out from the store while he (Schultz) was in the midst of his conversation with Herd and, after Schultz told Herd he could not handbill in the mall's common area, Falls said he was also "prohibited" from being on Dillard's property. Then, after some further discussion, without Herd suggesting such, Falls volunteered to seek the advice of the district attorney. Falls testified that, while approaching the two men, he overheard them disagreeing, with Schultz instructing Herd to move outside of the mall and the latter saying he possessed a right to be inside the mall. At this point, Falls interjected, saying that Herd could handbill "outside of the . . . Dillard's doors, or anywhere outside." Schultz added that Herd could not be in the common area and pointed to the guide rail as to where he could stand, but Falls disagreed, saying Herd "couldn't be inside the store." At this point, according to the police officer, he said to Herd "There's no common ground here that you can stand, it's either mall or Dillard's," and announced that he would telephone the district attorney's office before taking any action.¹³

¹¹ Falls did concede that "I knew that they didn't want [Herd] in the store. They have a policy against handbilling inside the store."

¹² Mount testified that "I didn't feel that we had any reason to take any action, as long as [Herd] was out in the mall. . . . Only when he got on our property . . . did I have a problem with that." When he observed Herd move into the entryway, he made certain his security guard Falls was aware that Herd could not distribute his leaflets on Respondent's property.

It is not in dispute that Respondent did nothing to interfere with the handbilling by the Oklahoma Installation employees at one of the store's outside entrances that afternoon. Mount stated that he did nothing simply because the handbilling was outside the doors of the store and added that Respondent has never attempted to stop handbilling on mall property as "we don't have any reason to say something to anyone that's outside in the mall or outside our store."

Handbillers Baxter and Hurley corroborated Mount that no one attempted to interfere with their distribution of the Charging Party's leaflets while they stood at an outside entrance to the Dillard's that afternoon.

¹³ Oklahoma Installation employees, Baxter and Hurley, each overheard this conversation. According to the former, the Houston police officer stood on the store's black and white tiles and said to Herd, who was standing under the facade, that "he couldn't handbill here in the store . . ." but he "didn't care" about handbilling in the mall. The mall security guard said that Herd could not handbill in the mall but could do so on store property, and Herd said to both that he had a legal right to handbill and said the officers should

Again, there is no dispute that, at this point in the incident, Falls and Schultz walked into the Dillard's store, and Falls placed a telephone call to the Houston district attorney's office. According to Herd, he was left alone, standing in Respondent's store entrance, and began handbilling customers as they entered the store. A few minutes later, Schultz walked out from inside the store, approached Herd, and said "that it was definite. . . . I could not stand underneath this sign area, that I would have to get inside of the store." Herd protested that he knew he could not handbill inside the store, and Schultz said he could not stay where he was and, if he did not move, "there's going to be trouble." According to Herd, he responded that he would stand on the black and white tiles and, when Schultz walked back into the store, did so.¹⁴ Herd testified further that he observed Falls conclude his telephone conversation and that Schultz, the store manager Mount, and Falls then walked back to where Herd was standing. Falls said that he had just concluded speaking to the district attorney's office and was told that Herd would have to leave "or face charges, be arrested." The police officer continued, saying "that I needed to be outside of the mall, I need to be off of the mall property, I need to be out on the street at the entrances to the mall property, that's where I could handbill." As Falls spoke, Herd activated a small tape recorder in order to record what the police officer said and pushed it toward the latter. Falls pushed it aside; Herd protested; Falls said, "That's it"; and, with the assistance of Schultz, proceeded to handcuff and arrest Herd.

While Schultz recalled little of what was said subsequent to Falls telephoning the district attorney's office other than that Falls told Herd he was being arrested for criminal trespass, Clinton Falls recalled the incident in detail. According to the Houston police officer, the assistant district attorney, to whom he spoke, told him that he could require Herd to handbill on city property at the entrances to the mall and advised him that, if he asked and Herd refused to leave the area, he (Falls) "had the right to arrest [Herd] for criminal trespassing" on both the mall's and Dillard's property.¹⁵ Following this telephone conversation, Falls confronted Herd, who, according to Falls, was standing "probably three to four feet, if not five feet, inside the store on the black and white tile," and told the business agent that he could arrest him (Herd) for criminal trespass if he did not leave, explain-

"make up [their] minds" about where he could do so and suggested that the police officer telephone his superiors to get instructions. The latter agreed. Hurley's version of what was said after Falls intervened in the conversation between Herd and Schultz differs from that of Baxter. According to Hurley, both Falls and Schultz insisted that the place Herd should be handbilling is "the outside entrance, street entrance," but Herd replied that he had a right to be where he stood. To this, the Dillard's guard warned that, if Herd did not leave, he would be arrested. To this, Herd said that the police officer should telephone his superiors "to find out what's going on." The officer agreed to do so.

¹⁴ Herd admitted that he distributed some handbills from this location as "a couple of two or three people came by."

¹⁵ While on the telephone, according to Falls, he observed Herd distributing his flyers between the entrance columns and, on one occasion when an individual attempted to avoid him, managing to hand a handbill to that person inside the gate rail "on the marble area," inside the black and white tiles. Such was specifically denied by Herd.

Falls further testified that the property about which he asked the assistant district attorney was the Dillard's property.

ing “that from the DA’s information . . . we could push you all the way to the sidewalk at the city property.” Falls further testified that, as he spoke, Herd “brought” a tape recorder within inches of his face and asked if Falls was prepared to arrest him. Falls said he was, and Herd kept saying “by whose authority” and making it obvious “he wasn’t going to leave.” Therefore, according to Falls, “I went to handcuff him.” The police officer denied speaking to store manager Mount or receiving any instructions from his superior; however, he admitted that it was Respondent who wanted Herd arrested as the latter was on store property at the time of the arrest.¹⁶ During cross-examination, Falls changed his testimony as to where he told Herd the latter would be able to engage in his handbilling at the Westwood Mall, stating he “told Herd that I could possibly make him go all the way out to the city . . . but we would be happy if he just went outside the Dillard’s entrance . . . on the sidewalk.” This assertion was contradicted by the transcription of Herd’s tape recording of the incident, General Counsel’s Exhibit 5, according to which Falls told Herd, “You are going to have to get off the property, outside distributing your flyers. You will have to get on city property, which is out by the street by the entrance.” In any event, there is no dispute that Herd was placed under arrest and charged with criminal trespassing for what occurred on August 17.¹⁷

Respondent’s store manager, James Mount, while denying that he authorized the stoppage of handbilling activities on the property of the Westwood Mall, admitted that he was within 5 feet of police officer Falls at the time of the confrontation with and arrest of James Herd, and there is no record evidence that Mount disavowed anything done or said by Falls. While stating that he had no objection to anyone handbilling inside the common area of the mall or outside the store doors, Mount was adamant that Respondent could not tolerate such conduct inside the store entrance on the first level of the mall as “I think it interferes with a customer shopping in the store.” Elaborating, Mount explained, “our showcases . . . are . . . four or five feet from the edge of those columns. A person . . . could be standing outside [of] . . . the track . . . and literally reach in and touch . . . people that are shopping or bending over inside our cases. . . . I think it’s difficult for our people to stand behind the showcase there and to try and explain to a customer the features and benefits of this merchandise and . . . a person standing four feet away passing out a leaflet [about] . . . why people shouldn’t trade with Dillard’s.”¹⁸ Apparently in agreement with Mount, James Herd conceded that he “definitely” would have preferred not to have handbilled under the facade within the entryway as “the closer you get to the door, then the more chance there is that you’re going to be in somebody’s way. If you’re five, or eight, or ten foot away from

that door, then they’ve got plenty of room to go around you if they want to. And that’s what we try to do.”

Finally, with regard to the August 17 incident, as to what alternative means existed by which the Charging Party could have communicated with its intended audience, the customers of Dillard’s at the Westwood Mall, the record establishes that James Herd would have preferred not to have engaged in handbilling within the inside mall entrances to Respondent’s store and that there were other locations for said conduct. In this regard, Oklahoma Installation employees handbilled, for a short time, by one of the outside entrances to the Dillard’s store, without any interference from Respondent, but such may have been of dubious value as, one of the handbillers testified, there was little traffic and, according to Herd, “we found that the outside entrances was nearly a ghost town, that 80 to 90 percent of the people were coming through the mall.” The location, where Herd would have preferred to conduct his handbilling, was inside the common area of the mall, at least, 10 feet from the lower level store entrance; however, the Westwood Mall security officers prohibited him from doing so. Another potential handbilling location, the outside doors leading into the mall’s interior common area, does not appear to have been considered by the Charging Party. Finally, upon Herd’s arrest by Houston police officer Falls, the Charging Party was prohibited from conducting any more handbilling either within the inside common area of the mall,¹⁹ by the outside doors of the Dillard’s store, or at any other location on the property of Westwood Mall. As the record establishes, the closest point to the Dillard’s store the Charging Party would have been permitted to handbill was at the street entrances to the Westwood Mall—on property owned by the city of Houston. There was no record evidence as to the effectiveness of handbilling at said location on August 17.

While, I believe, of no relevance to the legality of the foregoing events, the record establishes that, pursuant to a conversation between the Charging Party’s attorney and an attorney for the Westwood Mall, the Charging Party was permitted to, and did, engage in handbilling against Respondent in the common area of the Westwood Mall and by the outside doors of the Dillard’s store on, at least, two occasions subsequent to August 17 and that Respondent did not interfere with said conduct. The record also establishes that Oklahoma Installation employees were working at the store on the first occasion and, on the second, according to business agent Herd, Oklahoma Installation was “putting the finishing touches on.” Moreover, subsequent to the instant events, the Charging Party broadened its area standards and consumer boycott campaign by handbilling at “all” of Respondent’s stores in the Houston vicinity, including those at which Oklahoma Installation employees were not working.

B. Analysis

The complaint alleges that, by threatening the arrest of James Herd, causing his arrest, and informing him that he could only engage in handbilling at the street entrances to the Westwood Mall on August 17, Respondent, acting through

¹⁶ There is no dispute that Respondent and Store Manager Mount are named as the complaining parties on the arrest report, which Falls drafted regarding this incident.

¹⁷ Oklahoma Installation employee J. B. Baxter testified that he heard and observed the final confrontation between Herd and Falls and that, with regard to the location of the renewed handbilling, the latter told Herd “he’d have to either get out in the mall or go outside.”

¹⁸ Notwithstanding his fears of the effects of handbilling within the inside entrance to Respondent’s store, Mount conceded that Herd’s handbilling on August 17 had no effect on customers.

¹⁹ Of course, even before police officer Falls spoke to an assistant district attorney and received authority to evict Herd from the mall, the Westwood Mall security officers stated that Herd would not be permitted to handbill in the common area of the mall.

its agent, Houston police officer, Clinton Falls, engaged in conduct violative of Section 8(a)(1) of the Act. Central to the resolution of these issues is a question which vexed the Board and the courts for many years—the accommodation of the exercise of Section 7 rights with the right of property owners to protect their property from intrusions by outsiders who have not been invited onto such property. All parties agree that this question, the legality of Respondent's aforementioned conduct, and the underlying rationale are governed by the Board's decision in *Jean Country*, 291 NLRB 11 (1988), wherein the Board stated, "in all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process." *Id.* at 14.

At the outset, there can be no question that Houston police officer, Clinton Falls, acted herein as Respondent's agent and that the latter is liable for any allegedly unlawful acts in which Falls engaged. Thus, at the time of the August 17 incident, Falls was working part time for Respondent as its security guard in the Westwood Mall facility and concededly was "authorized" by the latter to arrest law violators. Further, Store Manager Mount admitted that, at the time he and Falls observed James Herd handbilling in the common area of the mall, he instructed the police officer that Herd should not "be inside our store passing out leaflets." Moreover, Mount admitted standing within 5 feet of Falls as the latter told Herd that he would only be allowed to handbill on city property at the street entrances to the mall, threatened to arrest Herd if he did not leave Respondent's and the mall's respective property, and arrested Herd, and the record establishes that Mount did nothing to contravene Falls' statements or conduct. In these circumstances, I find that, at all times on August 17, police officer Falls acted as Respondent's agent so as to bind the latter for the consequences of his conduct. *Hudson Oxygen Sales Co.*, 264 NLRB 61, 71 (1982); *Westward Ho Hotel*, 251 NLRB 1199 (1980); *National Paper Co.*, 102 NLRB 1569 (1953), *enf. denied* 216 F.2d 859, 868 (5th Cir. 1954).

With regard to what occurred during the afternoon of August 17 when the Charging Party attempted to handbill at the outside doors of Respondent's store at the Westwood Mall, in the interior common area of the mall just outside the lower level entrance to the store, and, later, inside the lower level entryway of the store, I find that, except for minor details, there is not much dispute as to what occurred. Also, other than Clinton Falls, who was contradicted by other witnesses as to some aspects and was internally contradictory as to another and who, I believe, dissembled in order to protect Respondent's interests herein and, therefore, shall not be credited except for any admissions, I found the witnesses herein to be basically forthright and honest and generally consistent as to what occurred. Accordingly, I find that, after placing the two Oklahoma Installation employees at an outside entrance to the Dillard's store, James Herd entered the interior of the mall in order to handbill; that he stationed himself in the mall's common area a few feet outside the lower level entrance to the Dillard's store; that, after a few minutes, mall security director Schultz approached, advised Herd that, rather than on property owned by Westwood Mall,

he (Herd) would have to confine his handbilling to property owned by Dillard's, and directed Herd to the area beneath the marble canopy of the store's entryway; that Herd commenced handbilling from this area; that, a few minutes later, Schultz returned and stated that Herd would be required to handbill inside the store or by a street entrance to the mall and could not do so inside the mall; that police officer Falls joined them and told Herd he would not be permitted to handbill on Respondent's property; that Herd protested he had a legal right to engage in handbilling and suggested that Falls telephone the Houston district attorney's office in order to resolve the dispute as to where he could handbill; that Falls did so and was informed by an assistant district attorney that Herd could be arrested for a criminal trespass if he did not leave Respondent's property and could be forced to confine the Charging Party's handbilling to city property at the street entrances to the mall; that Falls returned to where Herd was standing and, with Store Manager Mount standing close by, threatened to arrest Herd for a criminal trespass if he did not leave Respondent's property and told Herd he could not handbill on the property of the mall and would have to do so on city property near the street entrances to the mall; and that, after Herd again protested that he had a legal right to handbill, Falls arrested Herd for engaging in a criminal trespass on Respondent's property.²⁰

In *Jean Country*, *supra*, the Board identified numerous illustrative factors that may be relevant to assessing the relative weight of the competing rights asserted as well as the availability of alternative means. With regard to the asserted private property right,²¹ relevant considerations include the use to which the property is put, restrictions, if any, upon the right to public access, and the property's relative size and openness. Factors bearing upon the relative strength of the asserted Section 7 right may include the nature of the right, the identity of the employer to which the right is directly related, the relationship of the targeted employer to the property to which access is sought, the identity of the audience to which the communications concerning the Section 7 right are directed, and the manner in which the activity related to that right is carried out. Finally, factors possibly relevant to the assessment of alternative means of communication include the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sights, the burden and expense of non-trespassory communication alternatives, and, "most significantly," the extent to which exclusive use of the non-trespassory alternatives would dilute the effectiveness of the message.²² *Id.* at 13. Finally, with regard to the balancing of the competing asserted rights and the various factors to be considered, the Board recognized that there may exist "a

²⁰ While I am cognizant of the testimony of Oklahoma Installation employee Baxter that Falls told Herd he would be able to handbill either in the common area of the mall or outside, I do not rely upon the witness's recollection on that point. In this regard, I note that the tape recording of the arrest incident quotes Falls as instructing Herd to handbill at the street entrance to the mall.

²¹ In *Jean Country*, the Board pointed out that "there is an initial burden of the party claiming the property right to show, through testimonial or documentary evidence, that it has an interest in the property and what its interest in the property is." *Id.* at 13 fn. 7.

²² The General Counsel bears the initial burden on the alternative means factor. *Id.* at 13.

certain interdependence” to the factors with some being relevant to more than one inquiry. *Ibid.*

Herein, I initially turn to whether Respondent has a genuine interest in the property at issue—the lower level interior entrance area to its store at the Westwood Mall. In this regard, there is no dispute and Store Manager Mount testified that Respondent’s property includes all the area beneath the marble facade from the guide rail to the Dillard’s sign. Accordingly, I find that Respondent’s conduct was based upon a legitimate interest in the property in dispute. Next, with regard to the relative strength of Respondent’s right to maintain the privacy of said property, I note, at the outset, that the disputed 48-foot-long and 6-foot-wide area is, of course, the point of entry for customers to enter the store from the interior of the lower level of the mall, that the Board has traditionally held that “the degree that an owner opens up property to the general public reasonably has a bearing on the strength of the property right asserted,” (40–41 *Realty Associates*, 288 NLRB 200, 203 (1988)), and that the Board will “more likely” find denials of access unlawful in such circumstances (*Jean Country*, supra at 14). In urging that the fact that the disputed property is open to the public during the store’s business hours²³ must not be considered in a vacuum, counsel for Respondent points to the close proximity of display cases to the lower level entrance and argues that, with shopping occurring within 5 feet of potential handbilling, “a person handbilling inside the entrance would for all effective purposes be in the midst of the shoppers and sales personnel.” While an analysis of the entire record herein, including the testimony, pictures, and videotapes, has convinced me that Respondent may have overstated the degree to which one individual handbilling in an area 48-feet wide may interfere with shopping activities inside the store,²⁴ there is, I believe, some merit to Respondent’s contention. Thus, the undeniable fact is that display cases and sales areas are no more than 4 feet from the entrance, and a distinct possibility exists that a person, handbilling while standing in the entrance area, may inadvertently step back onto the black and white tiles behind the guide rail in order to distribute his flyers, thereby not only disturbing customers at the display counters but also making it difficult for incoming customers to view the merchandise inside the display cases. That such interference with sales and customer use of the store is, indeed, a potential result of handbilling inside the store’s entrance was recognized by James Herd himself when he conceded his distaste for conducting handbilling inside a store’s entrance inasmuch as “the closer you get to the door, then the more chance there is that you’re going to be in somebody’s way.” In these circumstances, notwithstanding the fact that the entrance is obviously open to the public, given

²³ I agree with counsel for Respondent’s point that the relevant focus herein should be when shoppers are present in the store and in the mall and not the hours during which no business is conducted. Accordingly, the fact that the mall’s maintenance crew may clean the entrance area at night does not detract from the relative strength of Respondent’s property interest herein.

²⁴ With the two marble columns, the store entrance is essentially divided into three equal parts. Accordingly, notwithstanding Store Manager Mount’s reluctance to concede such, based upon the photographic and videotape evidence, it appears that entering customers would have room to maneuver around an individual who is stationed in the middle of the entrance and handbilling.

the close proximity of display cases and selling areas to it and the potential interference with business activities, I believe Respondent’s property interest would suffer some degree of impairment by permitting access to the Charging Party for the purpose of handbilling and that, therefore, Respondent’s property right is not insubstantial.

With respect to the Charging Party’s activities, there is no dispute that the message conveyed to the Dillard’s customers by the Charging Party’s handbills on August 17 concerned the asserted failure of Oklahoma Installation to provide its employees with benefits (health insurance) commensurate with area standards in the Houston vicinity. The Board has long held that area standards activity is clearly a protected exercise of a Section 7 right. *Giant Food Markets*, 241 NLRB 727, 728 (1979), enf. denied on other grounds 633 F.2d 18 (6th Cir. 1980). This is so as labor organizations have a legitimate interest in protecting the wage and benefits standards of its members who are employed by competitors of the targeted employer. “Area standards [handbilling] is, however, protected to a lesser extent than activity that furthers a ‘core’ purpose of the Act” and constitutes a “relatively weak” Section 7 right. *Red Food Stores*, 296 NLRB 450 (1989); *Hardee’s Food Systems*, 294 NLRB 642 (1989). The weight assigned to such activity is diminished further when, as herein, the Charging Party’s conduct is of a tertiary nature,²⁵ the name of the contracting or secondary employer, GC Plus, is not mentioned on the handbill (leaving the erroneous inference to be drawn that Respondent had contracted directly with Oklahoma Installation), the handbills failed to mention that the Charging Party was engaged in an organizing campaign of the Oklahoma Installation employees, and “the maintenance of construction industry employees’ area standards has no apparent immediate potential to benefit even indirectly the retail store employees of the Respondent.” *Federated Department Stores*, 294 NLRB 650 (1989).

Strengthening the Charging Party’s Section 7 interest is the relationship between the primary employer to the property to which access is sought herein. Thus, although Respondent may be a tertiary party to the labor dispute between the Charging Party and Oklahoma Installation and the handbilling did not concern Respondent’s employees, such did occur on a day during which Oklahoma Installation’s employees were working at Respondent’s Westwood Mall store. Accordingly, there exists some connection between Respondent and the handbilling. Moreover, there is no evidence but that the handbilling was conducted in a peaceful manner and, notwithstanding my findings above, there is no record evidence that Herd’s limited handbilling in the entrance to the Dillard’s store on August 17 “unduly” interfered with Respondent’s business operations. *Best Co.*, 293 NLRB 845 (1989). In the foregoing circumstances, while clearly on the weak end of the spectrum of Section 7 rights, I believe the Charging Party’s area standards handbilling on August 17 was entitled to protection from impairment.

Given the relatively equal private property interest of Respondent and the Section 7 interest of the Charging Party, the existence, or lack thereof, of reasonable, alternative

²⁵ The primary employer was, of course, Oklahoma Installation, against whom the Charging Party was conducting an on-going organizing campaign. Rather than Respondent, the entity which had contracted with Oklahoma Installation was the general contractor for Respondent, GC Plus.

means of communication to the customers of Dillard's at the Westwood Mall on August 17, besides handbilling from within the store's entrance, is crucial to a determination as to the legality of Respondent's conduct. In this regard, four other locations seem to have been available to the Charging Party for disseminating its message to customers—the outside entrances to the Dillard's store, the outside entrances to the mall building, the interior common areas of the mall in front of the open store entrances, and on city property at the street entrances to the mall. Counsel for the General Counsel dismisses any of the alternatives as not being “viable.” As to handbilling by the outside entrances to the store, while James Herd compared them to a ghost town, there is no record evidence that he handbilled from that location on August 17, and his characterization seems to have been based upon the Charging Party's subsequent experience. Further, the two individuals, who did handbill at an outside entrance to the Dillard's store on August 17, Hurley and Baxter, did so for no more than 20 to 40 minutes, discontinued handbilling there not only due to slight customer traffic but also due to the heat and their desires for refreshment, and admitted that Respondent, in no way, interfered with their efforts to handbill. With regard to handbilling within the interior common area of the mall in front of the store entrances, the indisputable fact is that, as Herd was prohibited from handbilling from that location by Mall Security Officer Schultz, whether this area was a viable alternative to being in the store's entrance area is a moot point.²⁶ There is no record evidence with regard to the efficacy of handbilling by the outside entrances to the interior common area of the mall, whether such would have been permitted by mall security, or whether such had even been considered by the Charging Party. Finally, upon the arrest of Herd, the only permissible alternative handbilling location was on the property of the city of Houston at the street entrances to the Westwood Mall. As to this, while the Board has, in several decisions subsequent to *Jean Country*, discussed the myriad safety and communicative problems inherent in handbilling from public property adjacent to the street entrances to shopping malls and the likelihood of enmeshing neutrals in labor disputes not their own, any findings by the Board are based upon developed facts, the General Counsel bears the initial burden of establishing the non-viability of a proposed alternative means of communication (*Target Stores*, 300 NLRB 964 (1990)), there exists no record evidence herein as to the viability of handbilling by the street entrances to the mall, and, accordingly, any finding as to the nonviability of the location would be based on speculation.

In addition to the foregoing, one must bear in mind that, underlying the handbilling against Respondent, was the

²⁶ Respondent's defense to the unfair labor practice allegations herein, in part, is based on the mall's prohibition against Herd handbilling in the common area in front of the store entrance. As counsel states, “had the Mall not required Mr. Herd to move into the store, Dillard's would have remained a passive bystander. The [Charging Party] would have been satisfied because [it] preferred to handbill in the common area of the Mall.” Ultimately, counsel utilizes the foregoing to frame what he perceives as the proper legal issue herein—“whether the Mall's act of forbidding handbilling in its common area gives the [Charging Party] a right to require Dillard's to permit handbilling within close proximity to ongoing retail operations.”

Charging Party's labor dispute with Oklahoma Installation, involving the former's organizing campaign amongst the carpenter employees of Oklahoma Installation. In support of said campaign, prior to August 17, representatives of the Charging Party held meetings with Oklahoma Installation employees, who worked at Respondent's Westwood Mall store, in the parking lot near the loading dock without interference by Respondent. Moreover, in light of the tertiary nature of Respondent to the Charging Party's labor dispute with Oklahoma Installation, it seems to me that it was incumbent on the General Counsel to have demonstrated that the Charging Party could not have effectively communicated elsewhere its protest involving Oklahoma Installation. However, counsel for the General Counsel offered no evidence about the existence of other Oklahoma Installation jobsites in the Houston vicinity or even those of secondary employers, such as GC Plus, which may have contract relationships with Oklahoma Installation. *Federated Department Stores*, supra; *Hardee's Food Systems*, supra; and *Homart Development Co.*, 286 NLRB 714 (1987).

Based on the record as a whole, accommodating the rights in conflict in accord with the Board's analysis in *Jean Country*, in view of the close proximity of display cases to the store entrance at issue, the likelihood that handbillers, who are standing within the entrance area, will inadvertently step back into the 4-foot area separating the display cases from the entrance and interfere with sales activity and customer access to the sales counters, and James Herd's admission as to the possibility of such interference, I find that there would be significant impairment to Respondent's property interest if access is granted for handbilling no matter how unobtrusively such activity may be conducted. In contrast, noting the relatively weak nature of the Section 7 right involved, the fact that Respondent is but a tertiary party to the Charging Party's labor dispute with Oklahoma Installation, and, most significantly, the absence of evidence that the outside entrances to the Dillard's store²⁷ or to the interior mall common area or public property adjacent to the street entrances to the mall²⁸ were not effective, alternate locations for the Charging Party's handbilling or that “no reasonable alternative means existed for the [Charging Party] to engage in area standards protests against the primary [employer]” (*Federated Department Stores*, supra), in the circumstances

²⁷ The fact that, during a 40-minute period, only a few customers entered the store through the outside entrance does not, without more, render this location an unreasonable alternative to the entrance at issue herein. Thus, I do not believe the short time that the two Oklahoma Installation employees stood at the outside entrance was sufficient enough to be representative for that day, and they left said location, partly, for reasons having nothing to do with the effectiveness of the handbilling. Moreover, given the tertiary nature of the labor dispute and that fact that Respondent never interfered with the Charging Party's direct organizational efforts directed at the Oklahoma Installation employees, continued handbilling at the outside doors to the Dillard's store on August 17 would not have been an unreasonable alternative to being inside.

²⁸ The lack of record evidence as to the efficacy of handbilling on public land by the street entrances to the mall or by the outside doors to the mall's common area distinguishes this case from those in which no reasonable alternative means of communication existed. See, for example, *Sentry Markets* 296 NLRB 40 (1989), and *Best Co.*, supra.

of this case,²⁹ I find that the degree of impairment to the Charging Party's Section 7 right is less substantial. Accordingly, I conclude that Respondent did not violate Section 8(a)(1) of the Act by its conduct herein. *Target Stores*, supra.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

²⁹I agree with counsel for the General Counsel that neither Respondent nor the Westwood Mall desired the Charging Party to be handbilling inside the mall on August 17 and that Respondent could have exerted some influence on the mall to permit the handbilling. Such, however, does not excuse the General Counsel from establishing that no reasonable alternative existed—as was its burden of proof.

3. The Charging Party did have a statutory right to handbill on the private property of Respondent in the circumstances of this case.

4. Respondent engaged in no unfair labor practices within the meaning of 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 recommended³⁰

ORDER

The complaint herein is dismissed in its entirety.

³⁰If 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.