

**Payless Drug Stores Northwest, Inc. and United Food and Commercial Workers International Union, Local 1442, AFL-CIO.** Case 31-CA-18795

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY, OVIATT, AND RAUDABAUGH

On May 20, 1992, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs.

The National Labor Relations 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 only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) by excluding nonemployee pickets and handbillers because at that time its lease conferred on the Respondent no more than a nonexclusive right to use the area from which the union representatives had been barred. For the reasons discussed, we affirm that finding of a violation. The judge also found, however, that under an amended lease granting the Respondent an exclusive right to the sidewalk's use, the Respondent possessed a sufficient property right in the sidewalk area in front of its store to exclude the Union's pickets and handbillers from that area. He concluded that the exclusion did not violate Section 8(a)(1). This dismissal presents the issue we recently resolved in *Bristol Farms*, 311 NLRB 437 (1993). Here, as in *Bristol Farms*, we disagree with the judge's finding that the Respondent had a sufficient property right to exclude these individuals after the lease was amended. Accordingly, we reverse his dismissal of that complaint allegation.

The Respondent's drugstore is one of two anchor stores in Manhattan Marketplace, a strip shopping center in Manhattan Beach, California. The other anchor is Bristol Farms. The drugstore is leased from Mission-CCH1, a California limited partnership which owns the shopping center. A large parking lot separates the store from the street.

The Respondent and Mission-CCH1 entered into a lease agreement (the original lease) on December 8, 1989. Under the original lease, the leased premises consisted of the exterior of the drugstore, including the covered areas of sidewalk in front of the drugstore and the facility's "garden area," as well as

[t]he non-exclusive use of those portions of the Shopping Center, together with the improvements thereon, designated as the Common Facilities [as described in an addendum to the lease] . . . in ac-

cordance with the provisions of paragraph 7 hereof.

Paragraph 7 of the original lease provides in part:

7(b) Landlord agrees that Tenant, its customers, employees and invitees, and the customers, employees and invitees of any subtenant, concessionaire or licensee of Tenant, shall have throughout the term of this Lease and any extension thereof, in common with Landlord and other tenants and occupants of space situated within the Shopping Center and their customers, employees and invitees (except truck loading and unloading areas, which are for the exclusive use of the particular tenant for which they are provided), the non-exclusive use of the Common Facilities, without being required to pay any charge or fee whatsoever for such use, except as provided in this Lease.

. . . .  
7(e)(4) Even though the sidewalk in front of Tenant's store building is part of the common area it is agreed that Tenant has the right to use said area for the sale of merchandise provided, however, that Tenant's sale of merchandise from the sidewalk area in front of Tenant's store building will not unreasonably interfere with pedestrian or vehicular traffic in the Shopping Center. Tenant shall, at its sole cost and expense maintain the sidewalk area in a neat and clean condition and repair any damage to the sidewalk area caused by any periodic or seasonal sales, and Tenant's obligation shall not be considered Common Facilities expense.

. . . .  
7(i) Landlord may establish reasonable rules and regulations applied on a non-discriminatory basis for the proper and efficient operation and maintenance of the Common Facilities, subject to Tenant's prior written approval.

From about April 4 or 5 to April 12, 1991, union agents who were not employees of the Respondent picketed and handbilled under the outside roofed area in front of the door to the drugstore. The pickets wore sandwich boards bearing the message:

PLEASE! DO NOT SHOP AT THIS NON-UNION PAY-  
LESS DRUG STORE. THE EMPLOYEES AT THIS  
STORE ARE NOT COVERED BY A COLLECTIVE BAR-  
GAINING AGREEMENT

The handbills also requested customers not to shop at Payless Drugs and referred them to a list of "Union Drug Stores" in the area.

On April 12, 1992, the Respondent notified local police, who removed the handbillers under threat of arrest from the entire sidewalk area in front of the store.

The handbillers returned to the scene on April 17, 18, and 19. On April 19, the Respondent requested the Manhattan Beach city attorney to remove the handbillers. According to the Respondent, the city attorney did not believe that, under the original lease, that action was justified, and therefore declined to exclude the pickets.

On April 19, 1992, the Respondent and Mission-CCH1 amended the lease to modify original lease paragraph 7(e)(4) to read in part as follows:

It is agreed that Tenant has the exclusive right to use that area in front of Tenant's store up to the edge of the curb for the sale of merchandise from the sidewalk area in front of Tenant's building provided, however, that Tenant's sale of merchandise from the sidewalk area will not unreasonably interfere with vehicular traffic in the Shopping Center.

After the lease amendment, the union agents were again excluded from the sidewalk.<sup>1</sup>

At the hearing, which was held before the Supreme Court decided *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), the General Counsel took the position that the union representatives were entitled to picket and handbill outside the drugstore because the Union's Section 7 right outweighed the Respondent's property right under the "balancing of interests" analysis set forth in *Jean Country*, 291 NLRB 11 (1988). After the Court in *Lechmere* rejected the "balancing of interests" analysis, the General Counsel, on brief, abandoned this theory and limited his position to an attack on the Respondent's asserted property right.<sup>2</sup>

The judge found that the original lease granted the Respondent only a nonexclusive right to use the entrance in front of its store and that Mission-CCH1 retained the right to control the property. The judge therefore rejected the Respondent's property-rights defense to the alleged 8(a)(1) interference with the picketing and handbilling that occurred before the lease was amended. The judge found, however, that the property interest conveyed under the amended lease was significantly greater than under the original lease and that under the amendment the Respondent's exclusion of the union representatives was justified. In making these findings, the judge summarily rejected the General Counsel's contention, restated in his excep-

tions, that the free speech and petition provisions of the California State constitution dictated a contrary result. We disagree and find merit in the General Counsel's exceptions.

In *Bristol Farms*, supra, the Board considered the property interest of the other anchor store in Mission-CCH1's shopping center under a lease essentially identical to the Respondent's amended lease. The Board looked to the law of the State of California to establish the extent of the respondent's property rights and, thus, whether the respondent had the requisite property interest to support a property-rights defense. The Board noted that the California Supreme Court had held that a shopping center's property right was limited by the free speech and petition provisions of the California constitution.<sup>3</sup> In affirming the state court's decision, the United States Supreme Court in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), upheld California's right to restrict the property rights of shopping centers. Thereafter, a California appellate court extended *Pruneyard* to permit the distribution of union handbills at a shopping center.<sup>4</sup>

Here, as in *Bristol Farms*, we find that under California law the Respondent had no right to exclude the union agents from the entrance to its drugstore under either the original lease or the amended lease.<sup>5</sup> Accordingly, as the Respondent has no property interest defense to the allegations of interference with the union representatives' activities, which are protected by Section 7 of the Act, and as the Respondent raises no other defense to these allegations,<sup>6</sup> we find that the Respondent's exclusion of the union agents on both April 12 and 19, 1992, violated Section 8(a)(1) of the Act.<sup>7</sup>

<sup>3</sup>*Robins v. Pruneyard Shopping Center*, 153 Cal.Rptr. 854, 592 P.2d 341 (Cal. 1979), affd. 447 U.S. 74 (1980). The court found that the shopping center could, however, adopt reasonable time, place, and manner rules concerning the exercise of free speech at the shopping center.

<sup>4</sup>*Northern California Newspaper Organizing Committee v. Solano Associates*, 239 Cal.Rptr. 227 (Cal.App. 1 Dist. 1987).

<sup>5</sup>See *Bristol Farms*, supra.

<sup>6</sup>There is no evidence that the Respondent has adopted any rules regulating time, place, or manner of picketing or handbilling on the sidewalk in front of the drugstore that it could have invoked if it had a sufficient property interest to justify such regulation. Indeed, there is no evidence that the union representatives' conduct was anything but peaceful.

<sup>7</sup>Member Oviatt agrees with the judge that, with respect to the April 12 incident, the Respondent did not possess a sufficient property interest under the original lease to justify the exclusion of the union representatives. Member Oviatt concludes, therefore, that the Respondent violated Sec. 8(a)(1) when it ordered them removed. As to the April 19 incident, Member Oviatt notes that he expressed strong reservations as to the result in *Bristol Farms*, supra at fn. 12, in circumstances similar to those in this case. He is nonetheless constrained, as in *Bristol Farms*, to find that under California law the Respondent cannot justify excluding the Union, and that the Respondent violated Sec. 8(a)(1) in that incident as well.

<sup>1</sup>As noted by the judge, the General Counsel does not contend that, in securing this amendment to the lease, the Respondent was prompted by antiunion considerations.

<sup>2</sup>In *Lechmere*, the Court's grant of certiorari did not extend to the Board's holding, affirmed by the court of appeals, *Lechmere, Inc. v. NLRB*, 914 F.2d 313, 325 (1st Cir. 1990), that the employer had violated Sec. 8(a)(1) of the Act by attempting to expel organizers from public property adjoining the privately owned shopping center on which the employer's store was situated. The Board thereafter affirmed that holding on remand, 308 NLRB 1074 (1992).

## CONCLUSION OF LAW

By prohibiting representatives of United Food and Commercial Workers International Union, Local 1442, AFL-CIO from engaging in peaceful picketing and handbilling protected by the Act on the sidewalk in front of the Respondent's store in the Manhattan Marketplace shopping center, Manhattan Beach, California, and, through local authorities, threatening those representatives with arrest if they did not cease engaging in this activity, the Respondent has violated Section 8(a)(1) of the Act.

## THE REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act, we shall order it to cease and desist and to take certain affirmative action that will effectuate the policies of the Act.

## ORDER

The National Labor Relations Board orders that the Respondent, Payless Drug Stores Northwest, Inc., Manhattan Beach, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting representatives of United Food and Commercial Workers International Union, Local 1442, AFL-CIO from engaging in peaceful picketing and handbilling protected by the Act on the sidewalk in front of the Respondent's store in Manhattan Marketplace shopping center, Manhattan Beach, California, and, through local authorities, threatening those representatives with arrest if they do not cease engaging in that activity, as long as that activity is conducted by a reasonable number of persons and does not unduly interfere with the normal use of facilities or operation of businesses not associated with the Respondent's store.

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

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

(a) Post at its store at the Manhattan Marketplace shopping center copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps

<sup>8</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

## APPENDIX

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

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

WE WILL NOT prohibit representatives of United Food and Commercial Workers International Union, Local 1442, AFL-CIO from engaging in peaceful picketing and handbilling protected by the Act on the sidewalk in front of our store in the Manhattan Marketplace shopping center, Manhattan Beach, California, and, through local authorities, threaten the representatives with arrest if they do not cease engaging in that activity, as long as that activity is conducted by a reasonable number of persons and does not unduly interfere with the normal use of facilities or operation of businesses not associated with our store.

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

PAYLESS DRUG STORES NORTHWEST,  
INC.

*Ann Reid Cronin, Esq.*, for the General Counsel.

*Bob Tiernan, Esq. (Tiernan & Orheim)*, of Lake Oswego, Oregon, for the Respondent.

*David Adelstein, Esq. (Schwartz, Steinsapir, Dorhmann & Sommers)*, of Los Angeles, California, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on November 6 and 7, 1991, in Los Angeles, California, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 31 of the National Labor Relations Board (Board) on June 6, 1991, based on a charge filed on April 24, 1991, and docketed as Case 31-CA-18795 by the United Food and Commercial Workers International Union, Local 1442, AFL-CIO (the Charging Party or the Union) against Payless Drug Stores Northwest, Inc. (Respondent). Posthearing briefs were due on January 29, 1992.

The complaint alleges that Respondent's agents excluded union agents from the sidewalk at the entrances to Respond-

ent's Manhattan Beach store in violation of Section 8(a)(1) of the National Labor Relations Act (Act). Respondent denies that its conduct violated the Act.

#### FINDINGS OF FACT

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record here, including helpful briefs from the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following<sup>1</sup>

#### I. JURISDICTION

At all times material, Respondent has been a Maryland corporation with an office and place of business in Manhattan Beach, California, where it has been engaged in the retail drugstore business. Respondent as part of its business operations annually enjoys revenues in excess of \$500,000 and annually purchases and receives goods or services from outside the State of California of a value in excess of \$50,000. Respondent is therefore an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. LABOR ORGANIZATION

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

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Background

Respondent operates a chain of drugstores including a new facility (the Drugstore) in the newly constructed Manhattan Marketplace shopping center (the Shopping Center) on Rosecrans Avenue in Manhattan Beach, California. At all relevant times the Drugstore's employees have not been represented by a labor organization.

The Union represents employees in the retail trade in the geographical area in which the Drugstore is located. Among those represented employees are employees of employers who are competitors of the Drugstore.

##### B. The Drugstore

###### 1. The physical layout

The Drugstore is one of two anchor tenants in the Manhattan Marketplace, a new strip mall shopping center which was not as yet fully occupied at the time of the events at issue here. The shopping center is located on Rosecrans Avenue in Manhattan Beach, California, and is accessible from a main shopping center entrance and a second entrance to the west. The Drugstore and a grocery store, the two main or anchor stores in the shopping center, as well as a few smaller stores, are in a row parallel to but well set back from Rosecrans and separated from it by a substantial parking lot. These stores all face toward Rosecrans and are fronted by a

sidewalk or promenade. A separate, smaller strip of stores abuts Rosecrans and proceeds directly away from the street toward the setback store strip at right angles to it.

The Drugstore building is essentially square with an enclosed area of about two-thirds of an acre. The roof of the structure overhangs the front sidewalk area providing a covered area Respondent utilizes for the display and sale of merchandise. The front of the building has two main doors which are located on the front wall of the structure, but are well under the portico.

###### 2. The lease

The shopping center has at all times material been owned and operated by Mission-CCH1, a California state limited partnership (the landlord). Respondent and the landlord entered into a lease agreement on December 8, 1989. The agreement (the original lease), which refers to Respondent as Tenant, sets forth the premises covered at section 2:

##### 2. LEASED PREMISES

Landlord hereby leases unto Tenant, and Tenant hereby rents from Landlord, for the consideration and upon the terms and conditions herein set forth, the following premises:

(a) That certain Premises shown in cross-hatching on Exhibit A, located on the Shopping Center described in Exhibit B containing approximately 27,462 square feet, together with the store and improvements to be constructed thereon pursuant to paragraph 8 hereof (Leased Premises); and

(b) The non-exclusive use of those portions of the Shopping Center, together with the improvements thereon, designated as the Common Facilities on Exhibit A, in accordance with the provisions of paragraph 7 hereof.

The diagonal "hatch marks" on Exhibit A of the Lease include the exterior of the Drugstore including the covered areas of the sidewalk and the facility's "garden center."

Paragraph 7(b) of the original lease entitled "Common Facilities" provides in part:

(b) Landlord agrees that Tenant, its customers, employees and invitees, and the customers, employees and invitees of any subtenant, concessionaire or licensee of Tenant, shall have throughout the term of this Lease and any extension thereof, in common with Landlord and other tenants and occupants of space situated within the Shopping Center and their customers, employees and invitees (except truck loading and unloading areas, which are for the exclusive use of the particular tenant for which they are provided), the non-exclusive use of the Common Facilities, without being required to pay any charge or fee whatsoever for such use, except as provided in this Lease.

Paragraph 7(e)(4) of the original lease provides in part:

(4) Even though the sidewalk in front of Tenant's store building is part of the common area it is agreed that Tenant has the right to use said area for the sale of merchandise provided, however, that Tenant's sale of merchandise from the sidewalk area in front of Ten-

<sup>1</sup> As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings here are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

ant's store building will not unreasonably interfere with pedestrian or vehicular traffic in the Shopping Center. Tenant shall, at its sole cost and expense maintain the sidewalk area in a neat and clean condition and repair any damage to the sidewalk area caused by any periodic or seasonal sales, and Tenant's obligation shall not be considered a Common Facilities expense.

Original lease paragraph 7(i) provides in part:

Landlord may establish reasonable rules and regulations applied on a non-discriminatory basis for the proper and efficient operation and maintenance of the Common Facilities, subject to Tenant's prior written approval.

On April 19, 1991, the parties entered into a first amendment to lease agreement which deleted original lease paragraph 7(e)(4), quoted in full supra, and replaced it with the following:

It is agreed that Tenant has the exclusive right to use that area in front of Tenant's store up to the edge of the curb for the sale of merchandise from the sidewalk area in front of Tenant's building provided, however, that Tenant's sale of merchandise from the sidewalk area will not unreasonably interfere with vehicular traffic in the Shopping Center. Tenant shall, at its sole cost and expense maintain the area in a neat and clear condition and repair any damage to the sidewalk area caused by any periodic or seasonal sales and Tenant's obligations shall not be considered a Common Facilities expense.

Save for the quoted change, the first amended lease ratified and reaffirmed the original lease.

### 3. Events

On or about April 4 or 5 through April 12, 1991, agents of the Union located themselves at the outside of the Drugstore's two doors but under the structure's outside roofed area. This placed them well within the area used by Respondent to display merchandise offered for sale. They wore sandwich boards bearing the message:

PLEASE!  
DO NOT SHOP  
AT THIS  
NON-UNION  
Payless Drugs  
STORE.  
THE EMPLOYEES AT THIS  
STORE ARE NOT COVERED  
BY A COLLECTIVE  
BARGAINING AGREEMENT

The union agents also passed out handbills asking customers not to shop at the store and directing customers to other "Union Drug Stores" listed by name and address in the area.

On April 12, 1991, Respondent contacted local police and had the handbillers removed under threat of arrest.<sup>2</sup> Handbillers returned to the sidewalk area in front of the Drugstore on April 17, 18, and 19, 1991.<sup>3</sup> Respondent attempted to induce the Manhattan Beach city attorney to again remove the handbillers. The city attorney, however, as Respondent notes on brief at 7, "did not believe the language [of the Drugstore's original lease] was strong enough to exclude the pickets." Respondent then amended the original lease on April 19, 1991, as noted supra, and the pickets were again excluded that same day.

### 4. Analysis and conclusions

The Board has repeatedly addressed the situation where property holders act to exclude employees and or union agents from that property. The Board's cases have identified the property interests and the rights under the Act in conflict and determined in given situations whether or not the former rights allowed exclusion of the latter from the property.

The instant case at trial seemed to again present the balancing process putting the property interests of Respondent and the rights of the Union into the scales. This seemingly conventional litigation was overtaken by events and the evolving law discussed infra. The change in the law and its implications for the instant case are discussed initially below. Thereafter the remaining case of the General Counsel is addressed.

#### a. *The Supreme Court's January 27, 1992 decision in Lechmere Inc. v. NLRB*

This case was tried with the Board's lead case of *Jean Country*, 291 NLRB 11 (1988) (*Jean Country*), in the minds of all parties. The record closed on November 7, 1991, and posthearing briefs were ultimately due on January 29, 1992. On January 27, 1992, the Supreme Court issued its decision in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), rejecting substantial portions of the Board's *Jean Country* analysis.

In an admirable display of rapid reanalysis, counsel for the General Counsel in a brief mailed the day following the Court's decision, January 28, 1992, acknowledged the Supreme Court's decision in *Lechmere* and abandoned her earlier argued *Jean Country* "balancing of interests" theory of a violation. Accordingly, I shall not address that argument nor Respondent's counterarguments respecting the balancing of property rights and Section 7 rights under the Board's decision in *Jean Country*. I regard that earlier-expressed theory of a violation as withdrawn.

#### b. *The General Counsel's attack on Respondent's property rights here*

The General Counsel did not abandon and on brief vigorously pressed her argument that Respondent here simply has insufficient property rights to the property at issue to exclude union handbillers irrespective of the nature and extent of

<sup>2</sup>The area utilized for the display and sale of merchandise from which the handbillers were excluded included the entire sidewalk area in front of the store.

<sup>3</sup>Richard Wallace, the Drugstore manager, credibly testified to noting the handbilling on these dates in his monthly planning calendar. I credit this testimony over the testimony of others to the contrary.

their rights under the Act. This argument remains in issue and is discussed below.

### 1. The legal argument

The General Counsel argues that the instant case is controlled by the Board's recent decision in *Johnson & Hardin Co.*, 305 NLRB 690 (1991). In that case the Board found that an employer had improperly excluded union handbillers from the driveway leading to its plant. The Board found the driveway was on land owned by the State of Ohio and that Respondent

did not possess an interest in this property sufficient to exclude from it trespassers, such as the organizers here, who were not interfering with the Respondent's right to use the driveway for ingress and egress. [305 NLRB 690, supra.]

The Board specifically held that its *Jean Country* balancing test does not come into play in such a situation simply because there is an insufficient property interest on the part of the employer to exclude individuals from the property even if their presence is not protected by Section 7 of the Act. *Ibid.*

In *Giant Food Stores*, 295 NLRB 330 (1989), a case relied on by the General Counsel, the Board found the employer leasing land in a shopping center did not have "any exclusory property interest in the sidewalk in front of the [employer's] store or in the shopping center parking areas" because the lease gave the employer "merely the 'non-exclusive' right to 'use' such common areas" and the landlord was obligated to maintain common areas and keep them free of obstructions (295 NLRB supra at 332). See also *Polly Drummond Thriftway*, 292 NLRB 331 (1989).

The General Counsel further argues that the State of California recognizes a free speech right of access to common areas of shopping centers citing *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 910; 153 Cal.Repr. 854, 869, 592 P.2d 341 (1979), *affd.* 447 U.S. 74 (1980). Counsel for the General Counsel notes that in *In re Lane*, 71 Cal.2d 872, 79 Cal. Repr. 729, 733, 457 P.2d 561 (1969), the California Supreme Court upheld the right of a labor union to handbill on a privately owned sidewalk in front of a grocery store. From these cases the Government argues on brief at 9:

While employers in other jurisdictions may be able to claim a strong property interest in these areas, Respondent cannot do so, inasmuch as, under the law of this State, it has no property interest or right to [] exclude free speech and petitioning activities in front of its Manhattan Marketplace store.

Respondent emphasizes the fact that it uses the covered sidewalk area involved here as an extension of its sales area. Respondent cites a panoply of cases for the proposition that otherwise protected activity may be banned from sales areas by employers. Thus, argues Respondent, it was entitled to exclude the handbilling union agents just as if they had been handbilling in the sales area within the building. The General Counsel responds to this argument on brief at 10:

Respondent's decision to display merchandise on the sidewalk in front of its store should have little effect on

the free-speech guarantee recognized by California courts. California courts have repeatedly recognized the right to handbill in the common area of shopping centers. These shopping centers frequently have a mixed use: they provide walkways for customers between stores and on occasion they are used to display merchandise. In these circumstances, Respondent cannot immunize itself from handbilling and public criticism by displaying merchandise on the sidewalk.

### 2. Respondent's rights under the original and amended lease

The applicable lease provisions have been quoted supra. It is appropriate to consider initially the terms of the original lease and thereafter the terms of the amended lease. The original lease clearly designates the areas at issue here as "Common Facilities" for the nonexclusive use of all shopping center tenants, their employees, customers, invitees, etc. At original lease paragraph 7(e) the landlord commits itself to insure, repair, replace, and maintain common facilities at its sole expense. Original lease paragraph 7(e)(4), quoted in full supra, specifically addresses the area from which the handbillers were excluded. The area is specifically noted as part of the "common area." Respondent is given the right to use the area for sales so long as the activity "will not unreasonably interfere with pedestrian or vehicular traffic in the Shopping Center." Further Respondent is obligated at its own expense to keep the area clean, properly maintained, and in good repair.

The April 19, 1991 amendment to the lease changes only the first sentence of paragraph 7(e)(4) as quoted in full, supra. Perusal of the two versions reveals two changes of significance. First, the amended lease provides for Respondent's "exclusive" use of the area in front of its store for the sale of merchandise whereas the earlier original language simply provided a nonexclusive use of the area for Respondent's sale of merchandise. Second the amended lease requires that Respondent's sales activity not unreasonably interfere with vehicular traffic whereas the original language required Respondent's sales activities not to interfere with either vehicular or pedestrian traffic in the shopping center.

### 3. Analysis and conclusion

The parties were aware of and briefed the proposition asserted in *Jean Country*, 291 NLRB 11 at 13 fn. 7 (1988):

Of course, there is an initial burden on 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. A party has no right to object on the basis of other persons' property interests, and an employer's mere objections to having union pickets outside its establishment does not in itself rise to the level of a property interest. See *Barcus Bakery*, 282 NLRB 351 (1986), *enfd.* mem. sub nom. *NLRB v. Caress Bake Shop*, 833 F.2d 306 (3rd Cir. 1987). There the Board found it unlawful for the respondent employer to eject union organizers from privately owned property which abutted the employer's plant but which was under the control of another estab-

ishment that was not shown to object to the organizers' presence. 282 NLRB 351, at fn. 2.

The General Counsel argues and I agree that this minimum property interest requirement was not diminished by the Supreme Court's *Lechmere* decision. Indeed it seems axiomatic that a property interest must be demonstrated whenever the right to exclude or prohibit activity in particular areas is asserted. Only those who have a sufficient interest in property, an exclusory interest, may properly remove or seek the removal of union handbillers.

The General Counsel correctly notes that, as in *Barcus Bakery*, supra, the fee holder here, the landlord, has not been shown to have "joined Respondent" in excluding the Union's agents from the property at issue. Respondent's conduct must therefore be justified by its own independent property rights. It is therefore appropriate to immediately turn to Respondent's property interests here.

Respondent's interest in the property at issue is based entirely on the original lease to April 19, 1991, and the first amended lease thereafter. Substantial portions of those documents have been quoted above. I find the original lease granted Respondent no more than a nonexclusive right to use the area at issue here in common with other tenants and that the landlord retained substantial rights of control. Such nonexclusive use and limited control of the property did not give Respondent an exclusory right with respect to union handbillers under *Johnson & Hardin Co.*, 305 NLRB 690 (1991); *Giant Food Stores*, 295 NLRB 330 (1989); and *Polly Drummond Thriftway*, 292 NLRB 331 (1989). Accordingly, Respondent's admitted exclusion of the handbillers on April 12, 1991, may not be justified by Respondent's property interest at that time and therefore violated Section 8(a)(1) of the Act. To this extent the General Counsel's complaint is sustained.

The first amended lease signed on April 19, 1991, substantially increased Respondent's property interests in the area at issue here. Thus, the first amended lease paragraph 7(e)(4), quoted in full supra, gave Respondent exclusive rights to the area and, unlike the original lease language, did not limit Respondent's usage to only those activities which did not interfere with pedestrian traffic. The General Counsel argues that the lease amendment did not delete or modify original lease provision 7(b) nor confer on Respondent the exclusive right to control the area. I read the lease amendment as conferring greater rights than the General Counsel concedes. I do not believe the retention of original lease paragraph 7(b) defeats the clear language of new paragraph 7(e)(4) particularly given the use that Respondent was putting to the property at the time—a use which must have been well known to the landlord at the time the amendment was entered into.

I find the rights Respondent held under the first amended lease are significantly greater than those held under the original lease and, further, are greater than those held by the em-

ployers in the General Counsel's cited cases. I find that Respondent's property rights under the first amended lease<sup>4</sup> are sufficient to meet the burden in footnote 7 in *Jean Country* quoted in full supra. In so concluding, I reject the argument of the General Counsel that under the first amended lease the landlord "possessed a property interest in the sidewalk area that was superior to that of Respondent," brief at 10. Rather I find that Respondent had at least an equal right with the landlord under the first amended lease to seek to exclude union handbillers from the areas at issue here.

I have noted supra that the General Counsel on brief abandoned any theory of a violation based on *Jean Country*, 291 NLRB 11 (1988), other than the footnote 7 "threshold issue" discussed here, in the face of the Court's decision in *Lechmere*. Given that position and my finding here that Respondent had substantial property rights under the first amended lease, I find that Respondent did not violate the Act by excluding union handbillers at any time after the first amended lease was entered into on April 19, 1991.<sup>5</sup> To this extent the General Counsel's complaint is without merit and will be dismissed.

#### 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 Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act on April 12, 1991, by improperly excluding and threatening with arrest representatives of United Food and Commercial Workers International Union, Local 1442, AFL-CIO from the sidewalk in front of its Manhattan Marketplace Mall store at a time when it did not have a property interest in the area sufficient to justify such action.

4. Respondent did not violate the Act by excluding representatives of United Food and Commercial Workers International Union, Local 1442, AFL-CIO from the sidewalk in front of its Manhattan Marketplace Mall store after entrance into its first amended lease on April 19, 1991.

#### REMEDY

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

[Recommended Order omitted from publication.]

<sup>4</sup>The General Counsel did not attack the circumstances under which the amended lease was negotiated and signed nor argue that the rights created by the amended lease were somehow lessened thereby.

<sup>5</sup>I do not find that the California property rights cases cited by the General Counsel command a different result.