

**Pay Less Drug Stores Northwest, Inc. and United Food and Commercial Workers Union, Local 1439, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC**

**Richard A. Vandervert and Harlan Douglass d/b/a Douglass-Vandervert Developers d/b/a Wandermere Mall and United Food and Commercial Workers Union, Local 1439, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC.** Cases 19-CA-20690 and 19-CA-20824

September 30, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On June 26, 1991, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondents filed exceptions and a supporting brief and the General Counsel filed a brief in support of the judge's decision and a brief in answer to the Respondents' exceptions. On December 17, 1991, the Board remanded the proceeding for further findings.<sup>1</sup> On February 11, 1992, the judge issued the attached supplemental decision. Thereafter, on February 24, 1992, the Respondents filed a motion to dismiss the complaint, and on March 9, 1992, the General Counsel filed a motion for permission to withdraw the complaint, both citing the decision of the Supreme Court in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841, 139 LRRM 2225 (Jan. 27, 1992). On May 13, 1992, the Board issued an order<sup>2</sup> denying both motions and invited the parties to file briefs concerning the impact of *Lechmere* on this case. Thereafter, the General Counsel, the Charging Party, and the Respondents filed supplemental briefs.<sup>3</sup> The Respondents also filed exceptions to the judge's supplemental decision. On July 28, 1992, the Respondents filed a motion to strike portions of the briefs of the General Counsel and the Charging Party; and the General Counsel and the Charging Party filed briefs in response to that motion.

The Board has considered the decisions and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions to the extent consistent with the following analysis, and to adopt the recommended Order.

<sup>1</sup> Not included in bound volumes.

<sup>2</sup> Not included in bound volumes.

<sup>3</sup> In addition, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the National Retail Federation, and the Council on Labor Law Equality filed briefs as amici curiae.

Respondent Wandermere<sup>4</sup> owns a strip shopping mall with a large parking area and several freestanding "outpad" buildings occupied by various merchants. Respondent Pay Less leases one of the stores in the mall. This case arose as a result of the Respondents having ejected union pickets from the sidewalk in front of the Pay Less store. The pickets were publicizing Pay Less' nonunion status and requesting members of the public not to patronize Pay Less. We affirm the judge's finding that by removing the pickets to the deceleration lane of the highway at the perimeter of their property, the Respondents violated Section 8(a)(1) of the Act. We do so, however, only for the following reasons.

The General Counsel and the Charging Party contend, inter alia, that the Respondents discriminatorily denied access to the union pickets. As a preliminary matter, we address the Respondents' contention that the General Counsel and the Charging Party have waived any argument regarding disparate treatment by not raising it in exceptions to the judge's initial decision. We reject the Respondents' contention, for the following reasons.

In his initial decision the judge found, by application of the accommodation analysis established by the Board in *Jean Country*, 291 NLRB 11 (1988), that the Respondents violated the Act. Accordingly, the judge found it unnecessary to consider the issue of the Respondents' alleged discriminatory denial of access to the Union, as the General Counsel had urged the judge to do at the hearing and in her brief to the judge.<sup>5</sup> Now, in their supplemental briefs in response to the Board's Order Denying Motions, the Charging Party and the General Counsel reassert that the Respondents violated Section 8(a)(1) by discriminatorily denying union pickets access while permitting access by other organizations.<sup>6</sup>

The Respondents move to strike portions of the General Counsel's and the Charging Party's supplemental briefs relating to their argument that the Respondents had discriminatorily denied access to the union pickets. In their motion to strike, the Respondents rely on Section 102.46(b)(2) of the Board's Rules

<sup>4</sup> For the sake of brevity, we refer to Respondents Richard A. Vandervert and Harlan Douglass, d/b/a Douglass-Vandervert Developers, d/b/a Wandermere Mall, collectively as Wandermere.

<sup>5</sup> JD 20, fn. 8.

<sup>6</sup> *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Accordingly, both the General Counsel and the Charging Party also contend that *Lechmere* does not require dismissing the complaint. In addition, the Charging Party avers that *Lechmere* does not govern because this case, unlike *Lechmere*, involves nontrespassory informational picketing by nonemployees and because the Union's picketing is explicitly authorized by the publicity proviso to Sec. 8(b)(7)(C) of the Act. Because we find a violation based on disparate treatment, we do not address these additional issues raised by the Charging Party.

and Regulations<sup>7</sup> and contend that the General Counsel and the Charging Party have waived their right to rely on the disparate treatment theory by failing to except to the judge's decision not to engage in a disparate treatment analysis.

The General Counsel and the Charging Party contend, in response to the motion to strike, that the discriminatory denial of access theory has been fully litigated and remains viable. In addition, the Charging Party contends that the judge's decision to resolve this case by applying one legal theory rather than another equally applicable theory does not constitute a "ruling, finding, conclusion, or recommendation" within the meaning of Section 102.46(b)(2).

The Respondents correctly observe in their motion to dismiss that neither the General Counsel nor the Charging Party, who prevailed under the then-determinative *Jean Country* accommodation analysis, filed exceptions to the judge's failure to engage in a disparate treatment analysis.

The Respondents, however, excepted to certain elements of the judge's initial determination that the Respondents' conduct violated the Act. Further, in their brief in support of those exceptions, the Respondents stated that Respondent Wandermere "uniformly enforced" its no-solicitation policy. We also note that the disparate treatment theory was presented, and evidence on it was adduced during the hearing; that the General Counsel argued the theory in his brief in support of the judge's initial decision, and in his answering brief to the Respondents' exceptions; and that the General Counsel and the Charging Party vigorously continued to argue the theory in their supplemental briefs, and in their responses to the Respondents' motion to strike.

In circumstances substantially similar to those present here, the Board has not required that exceptions be filed on the issue of disparate treatment in order to preserve that issue for its consideration when an administrative law judge has relied on another applicable theory and has not passed on the disparate treatment issue. *Food Lion*, 304 NLRB 602 fn. 2 (1991). We find here that the issue of disparate treatment remains viable and has been fully litigated.

In addition, we note that Section 102.46(b)(2) of the Board's Rules provides that the failure of a party to urge an exception to a judge's *ruling* shall constitute a waiver of the right to object to that ruling. The instant case involves a judge's decision which ruled in favor of the General Counsel's primary contention and found it *unnecessary to rule* on the General Counsel's alternative contention. In these circumstances, the General Counsel's failure to except to the judge's *nonruling* does not fall within the ambit of Section

142.46(b)(2) and is thus not a waiver of the General Counsel's alternative position.

Accordingly, we deny the Respondents' motion to strike portions of the General Counsel's and the Charging Party's supplemental briefs.

Turning to the merits, we note the following evidence bearing on the allegation that the Respondents discriminatorily denied access to the union pickets. Mall Owner Wandermere's lease with Pay Less grants to Pay Less the use of the sidewalk area in front of its store for the sale of merchandise without waiving any of Wandermere's responsibilities as landlord. Paragraph 7(b) of the lease, "Use," provides that the public has the right to use the common areas, including the sidewalk in front of the Pay Less store, and promises that Wandermere will hold Pay Less harmless for any liability arising out of the use of the common areas. The judge found, and there were no exceptions,<sup>8</sup> that the lease gave Pay Less a nonexclusive right to the use of the sidewalk in front of its store.

Wandermere's leases prohibit tenants, but not the general public, from soliciting or handbilling. At the time of the alleged unfair labor practices, Wandermere had not posted no-solicitation signs. Pay Less has an unwritten no-solicitation/no-distribution policy that it communicates orally to store managers. Notwithstanding this policy, however, Pay Less permitted a bloodmobile to park in front of its store for part of one day to encourage members of the public to donate blood.<sup>9</sup>

<sup>8</sup> The Respondents have excepted to aspects of the judge's decision concerning the scope of Pay Less' discretion under the lease to "use the sidewalk in any way and at any time it wished to." The Respondents do not otherwise take issue with the judge's recitation and interpretation of the applicable lease provisions.

<sup>9</sup> In their motion to strike, the Respondents contend that Pay Less' one-time allowance of the bloodmobile in front of its store did not "jeopardize[]" its unwritten no-solicitation/no-distribution rule and was insufficient under *Sentry Markets*, 296 NLRB 40 (1989), *enfd.* 914 F.2d 113 (7th Cir. 1990), to "diminish the strength of the property right asserted." Contrary to the Respondents, we do not find *Sentry Markets* controlling. That case was not decided under a disparate treatment theory which we apply here. Rather, it was decided under the rejected *Jean Country* accommodation standard. The Board found that limited access granted for nontenant use of property (the Salvation Army there) did not significantly affect the strength of the employer's property right. Further, if the Respondents' argument is that the single authorized appearance of the bloodmobile is insufficient to hold Pay Less liable under a disparate treatment analysis, we reject this contention as well. We recognize that "an employer does not violate Sec. 8(a)(1) by permitting a small number of isolated 'beneficent acts' as narrow exceptions to a no-solicitation rule." *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982). However, in the instant case, Pay Less and Wandermere acted in concert in ejecting the Union from the front of the Pay Less store (JD at fn. 4). Accordingly, it is appropriate to consider the past conduct of both Respondents. As noted *infra*, Wandermere has repeatedly permitted the public to use the mall for activity unrelated to the business of the mall. Based on that past conduct, and on Pay Less' past conduct, we find that Respondents have frequently allowed the public to use the property for nonmall business. Accordingly, we find

*Continued*

<sup>7</sup> This section states in pertinent part that: "Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived."

Wandermere's onsite property manager and agent, Lyle Crecelius, testified in a sometimes contradictory manner at the hearing concerning grants of access for outside groups to enter Wandermere's property. He testified generally that Wandermere has not authorized any solicitations on its property. According to Crecelius, Wandermere once removed an unauthorized Sprint telephone sales table from the mall. Crecelius also admitted, however, that while Wandermere had also once required one tenant, Albertsons, to remove a group of Girl Scout cookie sellers from in front of Albertsons, Wandermere had granted permission to the store manager to allow cookie sales inside Albertsons. Crecelius also testified from personal knowledge to public uses of Wandermere's property by outside groups,<sup>10</sup> including a bike ride sponsored by a school or athletic group, a carwash/fundraiser, and meetings and a competition by a classic car club. Notwithstanding the no-solicitation-by-tenants provision in Wandermere's lease, Crecelius also testified that one tenant conducted an annual "coats for kids" drive and at least some tenants posted advertisements for civic events in store windows and at checkout areas. Despite his knowledge of all these events there is no evidence Crecelius tried to stop them, or even cautioned those involved not to repeat them.

We find, based on a preponderance of the evidence, that Wandermere routinely allowed other organizations to use the mall for activity unrelated to the business of the mall and its tenant stores while, at the same time, it required the union pickets to leave Wandermere's property. For the reasons discussed in *Davis Supermarkets*, 306 NLRB 426 (1992), and *Great Scot*, 308 NLRB 598 (1992), we conclude that the Respondents have discriminatorily denied the Union access to mall property in violation of Section 8(a)(1) of the Act. See also *NLRB v. Babcock & Wilcox*, supra.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge.

that Respondents acted discriminatorily when they jointly ejected the Union from the property.

<sup>10</sup>It is unclear whether and from whom permission was sought by these groups.

*Patti L. Hunter, Esq.*, for the General Counsel.  
*Robert R. Tiernan, Esq.*, of Lake Oswego, Oregon, for Respondent Pay Less.  
*Jack B. Albanese, Esq.*, of Atlanta, Georgia, for Respondents.

#### DECISION

##### STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Spokane, Washington, on Janu-

ary 9, 1991,<sup>1</sup> pursuant to a second amended consolidated complaint<sup>2</sup> issued by the Regional Director for the National Labor Relations Board for Region 19 on June 27, and which is based on charges filed by United Food and Commercial Workers Union, Local 1439, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC (the Union) on January 5, 1990 (19-CA-20690), and on April 2, 1990 (19-CA-20824). The complaint alleges that Pay Less Drug Stores Northwest, Inc. and Richard A. Vandervert and Harlan Douglass d/b/a Douglass-Vandervert Developers d/b/a Wandermere Mall (Respondents) have engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act).

#### Issues

Whether Respondents violated the Act by denying union pickets access to the sidewalk in front of the Pay Less retail store and by threatening the union pickets with arrest if they did not discontinue picketing in that area.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondents.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

#### FINDINGS OF FACT

##### I. RESPONDENTS' BUSINESS

Respondent Pay Less admits that it is a Maryland corporation which operates an office and several retail stores in Spokane, Washington. It further admits that during the past year, in the course and conduct of its business that its gross sales of goods and services exceeded \$500,000 and that annually it purchases goods and materials valued in excess of \$50,000 directly from sources outside the State of Washington. Accordingly, Respondent Pay Less admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent Wandermere admits that at all times material it has been jointly owned by Richard A. Vandervert and Harlan Douglass, as copartners doing business as Douglass-Vandervert Developers and under the name of Wandermere Mall. In its answer, Respondent Wandermere denied, but at hearing admitted (Tr. 11-12) that at all times material it has engaged in the business of developing and leasing commercial real estate, including Wandermere Mall. It also admitted that during the past 12 months, a representative period, in the course and conduct of its business operations, it sold and shipped goods or provided services to customers who were themselves engaged in interstate commerce by other than indirect means of a total value in excess of \$50,000. Accordingly, Respondent Wandermere admits, and I find, that it is

<sup>1</sup> All dates refer to 1989 unless otherwise indicated.

<sup>2</sup> Union allegations in Cases 19-CA-20881 and 19-CA-20689 against a different shopping center were resolved prior to hearing. (G.C. Exhs. 2 and 3.)

an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

Both Respondents admitted at hearing (Tr. 11–12), and I find, that United Food and Commercial Workers Union, Local 1439, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *The Facts*

#### 1. General background

Originally Osco Drug and the Union had a collective-bargaining relationship encompassing the employees at the several Osco retail stores in the Spokane area. Sometime prior to February 1988, Respondent Pay Less purchased the Osco stores in the Spokane area. Respondent Pay Less, as successor to Osco, and the Union subsequently bargained to impasse in February 1988, when employees voted to strike. The strike did not resolve the labor dispute and in July 1988, a decertification election was held, in which a majority of voters voted to decertify the Union. On August 1, 1988, the Board issued a Certification of Results of Election reflecting the majority's choice. (G.C. Exh. 8.)

Once the election results were official, the Union instructed its pickets to change picket signs from “On Strike, UFCW, L. 1439” to “Pay Less Non-Union, Please Do Not Patronize, UFCW, L. 1439.”

Currently, the Union has approximately 2500 members in the Spokane area. Respondent Pay Less maintains approximately five stores in the same area. Nationwide, Respondent Pay Less has about 300 stores.

#### 2. Wandermere Mall

One of the newer Pay Less stores in the Spokane area is located in the Wandermere Mall (the mall). This so-called strip mall—meaning that all lessees are in a straightline or strip, with no enclosed mall area—is located at Highway 395 and Hastings Road, about three quarters of a mile outside the Spokane city limits and about 11–12 miles north of downtown Spokane.

Open in 1986, the mall contains approximately 98,000 square feet and is composed of two major or anchor tenants, Albertson's Food Store, whose employees are represented by the Union, and Pay Less. There are about five smaller tenants in the mall, a hair salon, dry cleaner, yogurt store, video rental, and mailbox rental. There are other nearby businesses within the shopping center area, but not attached to the mall. Described by one witness as “outpod” tenants, these businesses are a pizza restaurant, a bank, and a gas station, which is directly on the corner of Highway 395 and Hastings Road. Directly to the front of the strip business is a 15-acre parking lot area, divided up into approximately 500 spaces for parking. No public transportation brings customers to the mall. All patrons must arrive by car or on foot.

A diagram illustrating the general area as described above and a color overhead photograph of the same area were admitted into evidence at hearing. As they are helpful to understand the issues in this case, I reproduced them in this decision. (See Appendices 1A and 1B.)

As indicated in the diagram and photograph, there are a number of entrances to and exits from the mall. During the hearing, those off of Hastings Road were marked D-1 through D-4 on General Counsel's Exhibit 4. Those off of Highway 395 were marked D-5 and D-6 and they have acceleration lanes for traffic leaving the mall and deceleration lanes for traffic entering the mall. These lanes are illustrated in a photo received into evidence.

The mall perimeter along Hastings Road has a sidewalk which ends at Highway 395:

Between D-5 and D-6 is a large slightly graded grassy area, separating Highway 395 from the parking lot. At D-5, there is a sign with “Wandermere Mall” on it, as well as

“Pay Less” and “Albertson's.” Although Highway 395 is not lit, D-5 and D-6 are illuminated by large light poles and

the parking lot itself is illuminated by regularly spaced light poles visible in General Counsel's Exhibit 4 above.

Directly in front of each mall tenant runs a continuous sidewalk, which varies in width from 8 to 10 feet wide to 4 feet wide for the sidewalk in front of Pay Less. In general, each tenant is responsible for maintaining the sidewalk and other area in front of its business, but the mall maintains a maintenance crew for general mall cleanup and parking lot maintenance.

The tenants belong to an informal merchants association which consider such questions as advertising and special promotional events.

In fall 1990 "No Solicitation" signs were posted by order of the mall management. This occurred after the picketing at issue in this case and after various other groups desired to handbill for various reasons on mall property and after one or more individuals attempted to panhandle mall patrons.<sup>3</sup>

### 3. Pay Less store

Respondent Pay Less maintains a store with approximately 23,700 square feet of space, most of which is used for retail sales. Items sold include household goods, hardware, garden tools and plants, pharmaceuticals, and related items. Open on June 20, the Pay Less store leases its space from Respondent Wandermere under terms and conditions contained in a standard Pay Less lease used by all or most of its stores, which are located in strip shopping malls. In particular, the standard Pay Less lease used in this case contains a provision under paragraph 7, *Common Facilities*:

(e) *Maintenance and Operation*

(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 without waiving any of Landlord's responsibilities hereunder. (G.C. Exh. 6, p. 6.)

This lease provision is different from the standard lease used by Respondent Wandermere for all other tenants which limits and restricts the tenant's use of the sidewalk in front of the tenant's store unless Respondent Wandermere expressly consents to a given use. Respondent Wandermere agreed to use the Pay Less lease as part of the bargain for Respondent Pay Less becoming one of the two anchor stores in the mall.

To facilitate the use of the sidewalk area in front of its store, Respondent Pay Less maintains a broad overhand area or canopy over the entire sidewalk. This provides shelter from the elements both for the public and Pay Less merchandise on display. In the overhang is a sprinkler system in case of fire and a series of lights. In addition, Respondent Pay Less maintains jacks for one or more cash registers and intrastore telephones. Respondent Pay Less' insurance policies specifically provide for coverage of sidewalk areas in front of its strip stores where members of the public might "slip and fall" or otherwise have a cause of action against Pay Less.

To a certain extent, the pattern and content of outdoor displays are controlled by Pay Less officials at headquarters.

<sup>3</sup>In the mall's standard lease which was not used with Pay Less as explained below, tenants are prohibited from soliciting or handbilling the public. No restrictions in the lease prohibit the public from similar activities.

Store managers are entrusted with some discretion to allow for local variances due to climate and tastes. However, all Pay Less stores, except for about six in indoor malls, utilize the sidewalks in front of their stores as selling areas every day of the year. According to Respondents' witness, Robert Tiernan, Pay Less' general counsel, Pay Less arranges its sidewalk selling areas to appeal to impulse buyers and in fact, the sidewalk area is one of the stores' most profitable areas. Indirectly, the sidewalk displays also serve to entice customers into the stores where additional purchases may be made.

Several witnesses at hearing described exactly what Respondent Pay Less sells in front of its stores, including the mall store. In summary, the displays are rotated by season of the year—for example, snow shovels in winter, lawn mowers, and garden products in summer, and by holiday—for example, candy for Halloween and Christmas trees and decorations for the Christmas season. In addition, on a quarterly basis, Pay Less announces and heavily promotes store sales with much of its on-sale merchandise displayed on the sidewalk area. Just as the store itself maintains aisles for people to move through, so is a portion of the sidewalk left clear for persons, customers, and noncustomers alike, to pass through.

To illustrate its use of the outdoor area, Respondent Pay Less offered several photographs, some of the mall store and, some of other stores. Some of the photographs were taken recently and some were from company files. I will reproduce a representative sample of the Pay Less mall store sidewalk selling area.

A summer view showing a plant nursery area with a 4-foot wall used to display pottery and plants, with merchandise out to the fire lane curb:

A sidewalk sale with balloons and banners used to attract customers' attention and showing spring-summer merchandise such as lawn chairs, briquets and bicycles:

A winter display showing Christmas trees, and on the pallet, boxes of tree decorations containing light bulbs and ornaments:

A handrail used for customer assistance, and the base which is used for display purposes:

A nonholiday winter display showing dog kennels, butane tanks, and shopping carts:

Exh. 14b

Exh. 14d

Respondent Pay Less has an unwritten no solicitation/no distribution policy. According to Tiernan, this policy is communicated to store managers at manager meetings. It is, Tiernan testified, as widely known as having to open the store on time. On at least one occasion, Respondent Pay Less permitted a bloodmobile to park in the parking lot in front of its mall store and encourage members of the public to donate blood.

#### 4. Union picketing

As noted above, after the Union was decertified as Pay Less bargaining representative, it began a campaign to convince the public to boycott Pay Less stores in the Spokane area. Led by Daniel Olstad, a witness for the General Counsel, two periods of picketing the mall Pay Less store occurred. An employee of the Union since June 1988, Olstad never worked for Pay Less; the other pickets were also neither current nor former Pay Less employees. Moreover, the Union never represented the employees at the mall Pay Less store which opened after the decertification. In addition, the Union never attempted to organize employees of the mall Pay Less store. During both periods of picketing, the Union's sole objective was to inform the public of Pay Less' non-union status and to urge the public to shop elsewhere because of the store's nonunion status.

During both periods of picketing, there were no violent activities, no interference with persons entering or leaving the store, including persons making deliveries, and no verbal or physical altercations. In sum, the picket was entirely peaceful.

Exh. 14c

##### a. *First picket*

On June 18, the Wandermere Pay Less store opened for business and a group of about four or five pickets led by Olstad picketed the store from 9 a.m. when the store opened to 9 p.m. when the store closed. During approximately 5

weeks that this activity continued, the locus of the picket changed. At first the pickets were on the sidewalk in front of the store and to the side of the handrails. Either the store manager or a mall representative called the local sheriff who arrived soon after. According to Olstad, a deputy sheriff told him that the pickets could not picket in front of Pay Less and had to move to the Highway 395 deceleration lane, pictured on General Counsel's Exhibit 4 as the area between D-5 and D-6. Initially, the pickets also picketed on the sidewalk along Hastings Road between D-2 and D-3. However, the sidewalk picketing ended within a day or two after the pickets allegedly entered into an agreement with the manager of the Albertson's Food Store at the mall. The Union represented the Albertson's employees and in order to avoid any impression that the labor dispute involved Albertson's, the store manager agreed to allow union pickets to use store bathrooms if they agreed not to picket on Hastings Road. Both parties agreed and the Union thereafter confined their picketing to the Highway 395 area.

According to the General Counsel's witness, Tiernan, he was present at the mall for the Pay Less store grand opening. When the deputy sheriffs arrived, Tiernan spoke to Olstad and said the pickets had to move to the outer edge of the parking lot on the grassy area. Later that same day, Tiernan testified he spoke to Olstad again to say it was okay for pickets to keep their cars in the parking lot.

At first Olstad denied talking to Tiernan on that first day, or that Tiernan said pickets could picket on the grassy area, or that pickets could park their cars in the parking lot. (Tr. 176.) Then Olstad was called back as the General Counsel's rebuttal witness to reiterate that no such conversation occurred, because if it had, pickets would have gone to the grassy area. (Tr. 235.) However, on cross-examination of Olstad's rebuttal testimony, Olstad admitted having a 1989 Ford Escort just as Tiernan had described in his testimony. Then Olstad testified:

I spoke to him (Tiernan) . . . at the beginning in front of the store, okay? In front of the Pay Less Drug Store. When the police arrived, I remember now that . . . he was there, and I don't know what he said to me, but he did not say anything to me about being able to picket on the grass. I do remember that. What else he said . . . I don't now. (Tr. 241-242.)

I credit Tiernan on this point, finding him to be a more credible witness than Olstad.

Another union employee named Sue Bennett also testified for the General Counsel. In July, she was employed as a general organizer and union representative when she received a telephone call in her office at union headquarters. The caller identified himself as Richard Vandervert, who did not testify in this case. He complained that pickets were leaving coffee cups and other debris on the grassy area. In addition, he threatened to have pickets' cars towed away. Bennett assured him that she would arrange for trash collectors for the pickets' debris. She did so and no further complaints were made and no cars were ever towed.

The distance from the Pay Less store to the grassy area was approximately 200 yards, at least by one estimate at hearing. The size of the picket signs were about 3 feet long by 2 feet wide.

#### b. *Second picket*

On or about December 18, union pickets again appeared at the mall Pay Less store to picket on the front sidewalk. This time, as before, Olstad and three others were present pursuant to the orders of Union President Sean Harrigan. The pickets carried signs with the inscription recited above. The earlier scenario basically repeated itself. Sheriff's deputies were called,<sup>4</sup> and, on arrival, directed the pickets to leave the front of the store under threat of arrest. The pickets moved to the same location as before, because, according to Olstad, that is where the deputies in the summer told them they had to picket.

Due to less favorable weather conditions and earlier darkness, the pickets ended their picketing for the day shortly after 4 p.m. Olstad testified that traffic and weather conditions made picketing in the deceleration lane extremely hazardous. On December 23, the Union halted the picketing.

Before engaging in the December picketing of the mall Pay Less store, Bennett testified that the Union attempted to publicize its dispute with Pay Less by distributing about 3000 yard signs to homeowners and business owners in sympathy with the Union's position. This strategy was ultimately abandoned in July, after a number of signs were stolen from the yards where they had been posted.

It is the second picketing which is directly in issue in this case.

#### B. *Analysis and Conclusions*

I begin with some basic principles of Board law taken from the recent decision of *Lechmere, Inc.*, 295 NLRB 92 (1989), affd. 914 F.2d 313 (1st Cir. 1990):

In *Jean Country*, the Board reevaluated the analytical approach for resolving conflicts between Section 7 and private property rights set forth in *Fairmont Hotel*, 282 NLRB 139 (1986), and clarified that the availability of reasonable alternative means is a factor that must be considered in every access case in which a legitimate property interest and a Section 7 right must be accommodated.<sup>4</sup> The Board further held (291 NLRB at 14):

Accordingly, in all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process. In the final analysis however, there is no simple formula that will immediately determine the result in every case.

The Board in *Jean Country* found that the following factors may be relevant to assessing the weight of a property right: the use to which the property is put; the restrictions, if any, that are imposed on public access to the property; and the property's relative size and openness. The factors that may be relevant to the consideration of a Section 7 right include: the nature of the

<sup>4</sup>Representatives of both Respondents called the Sheriff's office (Tr. 66-67), and when deputies arrived, their actions were ratified by Respondent's agents on the scene. (Tr. 230-231.)

right; the identity of the employer to which the right is directly related (e.g., the employer with whom a union has a primary dispute); the relationship of the employer or other target to the property to which access is sought; the identity of the audience to which the communications concerning the Section 7 right are directed; and the manner in which the activity related to that right is carried out. Finally, factors that may be relevant to the assessment of alternative means include: the desirability of avoiding the enmeshment of neutrals in labor disputes; the safety of attempting communications at alternative public sites; the burden and expense of nontrespassory communication alternatives; and the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message.

<sup>4</sup>In reaching this conclusion the Board emphasized that, under the Supreme Court's decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Board is "'charged with seeking to avoid the destruction' of [Sec. 7 and property] rights, if at all possible, and with permitting infringements on one right only to the extent necessary to maintain the other." *Jean Country*, supra at 12-13.

Other principles from *Jean Country* are also helpful in resolving the instant case. For example, at 291 NLRB at 13, the Board instructs that "there is a 'spectrum' of Section 7 rights and private property rights and . . . the place of a particular right in that spectrum might affect the outcome of a [given] case." The Board explained further, that "in cases when a property owner has especially compelling reasons for barring access and when the Section 7 right is less central than, for example, the right of employees to organize . . . we may more readily find that means of communication other than those entailing entry onto the property in question constitutes a reasonable alternative." *Id.* at 13. Conversely if a particular property right is diluted as "when property is open to the general public" and some "more private character has [not] been maintained," it becomes more likely that other alternatives will be found unsatisfactory and a denial of access found unlawful. *Id.* at 14.

#### 1. The nature of Respondent's property interest

In the section entitled "Facts" above, I have recited paragraph 7(e)(4) of the lease (G.C. Exh. 6) setting forth Respondent's right to use the sidewalks in front of its store for the sale of merchandise. To put this subsection in proper context, I note other provisions of paragraph 7. For example, paragraph 7, *Common Facilities*, b. "Use," indicates that the public shall have a right to use the common facilities, including sidewalks in front of the mall Pay Less store and that Respondent Wandermere agrees to hold harmless Respondent for any liability arising out of the use of the common areas at the mall. As to paragraph 7(e) "Maintenance," and "Operation," Respondent Wandermere agrees to maintain sidewalks in good order and repair, and in a safe, sound and clean condition. To accomplish this, Respondent Wandermere will pay for liability insurance on the common area,<sup>5</sup> employ a maintenance person on an "as needed"

<sup>5</sup>It is not clear if both Respondents pay for separate liability insurance covering accidents occurring on the sidewalk in front of the Pay Less store.

basis and perform other duties and accept other responsibilities not directly relevant to this case. None of Respondent Wandermere's responsibilities are waived by Section 7(e)(4) of the lease quoted in the "Facts."

In light of the above, I find in agreement with the General Counsel (Br. 31), that Respondent Pay Less has a nonexclusive right to the use of the sidewalk in front of its store. Pay Less' argument (Br. 8-9), that the sidewalk in front of its store is the functional equivalent of the selling areas of its store must be rejected. Unlike the public actually entering the Pay Less store who are at least prospective or potential customers, the public passing the store on the sidewalk has no such presumptive character. They could be prospective customers of other stores or even person walking by solely for exercise.

I find that the property right present here of Respondent Pay Less is relatively modest. See *L & L Shop Rite*, 285 NLRB 1036 (1987). In *Polly Drummond Thriftway*, 292 NLRB 331 (1989), a lease was in issue similar to the lease in the instant case. The Board stated (*id.* at 332):

We agree with the judge that this lease did not convey to A&P the sidewalk in front of the leased store building. Rather, it granted to A&P only the right to use the sidewalk in common with the other occupants of the shopping center. Further, under the lease, "all duties, responsibilities, and liabilities in regard to . . . control of . . . sidewalks" were assumed by the shopping center owner. Under its sublease with the Respondent, A&P conveyed to the Respondent no greater interest than that which A&P itself possessed. Accordingly, we find it clear that the lease and sublease did not grant the Respondent a property interest giving it authority to exclude anyone from the sidewalk in front of its supermarket. The Respondent merely had a nonexclusive right to use the sidewalk, while control of the sidewalk remained with the shopping center owner. Thus, while the sidewalk in front of the Respondent's rented supermarket building was private property, it was not the Respondent's property, and the Respondent lacked the right to exclude anyone from it.

See also *Furr's Cafeteria*, 292 NLRB 749 (1989); and *Giant Food Stores*, 295 NLRB 330 (1989). Compare *Sentry Markets*, 296 NLRB 40, 41 (1989).

Thus, I conclude that the substantial use on a year-round basis made by Respondent Pay Less of its front sidewalk is unavailing. Notwithstanding this use and the profits which may be derived from the sidewalk selling area, the Pay Less property interest, derived from the lease, remains modest at best.

Respondent Wandermere's property interest, while perhaps greater than Respondent Pay Less, is nevertheless insubstantial. It does not employ security guards or any other method to regulate public access to the mall. Thus so far as the mall is concerned, the public has virtually an unfettered right to come on the mall property for any nondisruptive purpose. To be sure, signs prohibit parking for "unauthorized vehicles," and Mall Manager Lyle Crecelius testified that cars have been towed away if they obstructed driveways, were abandoned, or were positioned in the parking lot for sale. (Tr. 43.) Since Crecelius does not maintain an office at the mall

and there is no evidence that mall maintenance employees act as agents of the mall to enforce restrictions on parking, I find that public parking on mall property is as unregulated as public access in general.

## 2. The nature of the Union's Section 7 rights

In analyzing the Union's Section 7 rights, I note that union access for organizing purposes, a core Section 7 right, is considered the most important union interest to be protected. *Chugach Alaska Fisheries*, 295 NLRB 44 (1989). Area standards picketing which seeks to protest an employer's failure to pay prevailing area wages and benefits and to persuade the employer to change its policies is also protected by Section 7 of the Act, albeit to a lesser extent than activity that furthers a "core" purpose of the Act. *Giant Food Stores*, supra at 39, 41. Finally, the Union's request of the public to shop elsewhere, because an employer is nonunion, is also protected conduct under Section 7, but is less important conduct, than organizing or area standards picketing described above. *Wegman's Food Markets*, 300 NLRB 868, 872 (1990); *D'Allessandro's, Inc.*, 292 NLRB 81, 82 (1988).

## 3. Reasonable alternative means of communicating with targeted audience

I will assume without finding that the property interests of at least Respondent Wandermere and of the Union are roughly equivalent. Accordingly, I will consider this final factor to arrive at a proper decision. Once again, I look to *Jean Country*, supra at 13, for a partial list of factors that may be relevant to an alternative means determination. These factors include:

[T]he desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and most significantly, the extent to which use of the nontrespassory alternatives would dilute the effectiveness of the message.

In reviewing the evidence on this issue, I note the credited testimony of Tiernan that he told Olstad during the first picket that pickets could picket at the perimeter of the parking lot. Why Olstad elected to picket on the highway I do not know. Clearly the Board has held that picketing on public highways constitute a danger and does not constitute a reasonable alternative means of communication. See *Lechmere, Inc.*, supra at 93. Notwithstanding the available but unused parking lot perimeter, I conclude that the General Counsel has met her burden of showing that no reasonable means exist of communicating with potential customers of Respondent Pay Less.

First, the distance (of about 200 yards) between the perimeter of the parking lot and the Pay Less store is too great for the Union's message to be read and understood.<sup>6</sup> See *Sentry Markets*, supra at 40, 41. Next, it is impossible to identify the customers of Respondent Pay Less from all cars

<sup>6</sup>In *Jean Country*, supra at 26, the distance between the store in question and the nearest public property where the Union could picket was one-quarter mile. Here, the distance is closer to one-eighth of a mile, still a considerable distance to read a picket sign.

which may enter the mall from Highway 395. Further, the additional problems during the winter with early darkness, the lack of adequate lighting to read picket signs and the possibility of snow and sleet all create hazards both for the pickets and for the driving public at large. See *Wegman's Food Market*, supra at 873, and cases therein cited. *Lechmere, Inc.*, supra at 93. Compare the *Red Food Stores*, 296 NLRB 450 (1989).

Finally, I find that picketing on the sidewalk along Hastings Road does not present a reasonable alternative, because of the possibility of enmeshing Albertson's in the labor dispute with Pay Less. Because the Union represents Albertson's employees and because persons entering the mall by car may not perceive from picket signs that the labor dispute involves Pay Less, the possibility of confusion is real, as feared by the Albertson's manager.

For the reasons recited below, I find Respondents have violated Section 8(a)(1) of the Act, by requiring union pickets under threat of arrest to move from the Pay Less sidewalk to the perimeter of the parking lot.<sup>7</sup> *Mountain Country Food Store*, 292 NLRB 967 (1989), enf. denied by unpublished order (9th Cir. 4/23/91, 90-1385).<sup>8</sup>

## CONCLUSIONS OF LAW

1. Jurisdiction is properly asserted in this proceeding.

2. The Union, United Food and Commercial Workers Union, Local 1439, United Food and Commercial Workers International Union, AFL-CIO, CLC, is a statutory labor organization.

3. By prohibiting representatives of United Food and Commercial Workers Union, Local 1439, United Food and Commercial Workers International Union, AFL-CIO, CLC from picketing on the sidewalk in front of Respondent Pay Less' store in Wandermere Mall in order to advise the public that Respondent Pay Less' store is nonunion and to request the public to shop at unionized stores, and by calling the local sheriff to enforce the ban, Respondents have violated Section 8(a)(1) of the Act.

4. The unfair labor practices found above have affected and do affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

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

<sup>7</sup>I have found above that at all times material to this case, union pickets were entirely peaceful. In addition, at no time were pickets told that they had to move because they were interfering with access of patrons to the store, or to the outside selling areas. No evidence was presented to prove interference and the Board could not find on this record that ingress or egress of patrons was impeded. Accordingly, the case of *Tecumseh Foodland*, 294 NLRB 486 (1989), does not apply to the instant case.

<sup>8</sup>In this case, it is unnecessary to apply a "disparate treatment" analysis which focuses on Respondent's allegedly discriminatory conduct.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

#### ORDER

The Respondents, Pay Less Drug Stores Northwest, Inc. and Richard A. Vandervert and Harlan Douglass d/b/a Douglass-Vandervert Developers d/b/a Wandermere Mall, Spokane, Washington, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting representatives of United Food and Commercial Workers Union, Local 1439, United Food and Commercial Workers International Union, AFL-CIO, CLC from picketing in front of Pay Less Drug Stores in Wandermere Mall, Spokane, Washington, in order to inform the public that Pay Less is nonunion and to request the public to shop at unionized stores.

(b) Calling local sheriff's deputies or other law enforcement officers to enforce the unlawful ban against picketing on the sidewalk in front of the Pay Less Drug Store in Wandermere Mall.

(c) 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) Respondent Pay Less should post at its retail store at the Wandermere Mall near Spokane, Washington, copies of the attached notice marked "Appendix."<sup>10</sup> Respondent Wandermere should post at its office copies of the attached notice marked "Appendix." Copies of the notice, on forms

<sup>9</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>10</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."

provided by the Regional Director for Region 19, after being signed by the Respondents' authorized representatives, shall be posted by Respondents immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have 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 Union, Local 1439, United Food and Commercial Workers International Union, AFL-CIO, CLC from picketing on the sidewalk in front of Pay Less Drug Store in Wandermere Mall near Spokane, Washington, in order to inform the public that Pay Less is nonunion and to request the public to shop at unionized stores.

WE WILL NOT call the local sheriff deputies or other law enforcement officers to enforce the unlawful ban against picketing on the sidewalk in front of the Pay Less 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.

PAY LESS DRUG STORES NORTHWEST, INC.  
RICHARD A. VANDERVERT AND HARLAN  
DOUGLASS D/B/A DOUGLASS-VANDERVERT  
DEVELOPERS D/B/A VANDERMERE MALL

APPENDIX 1a

appendix 1b

## SUPPLEMENTAL DECISION

## STATEMENT OF THE CASE

On June 26, 1991, I issued a decision finding that Respondents Pay Less Drug Stores Northwest, Inc. and Richard A. Vandervert and Harlan Douglass d/b/a Douglass-Vandervert Developers d/b/a Wandermere Mall, inter alia, violated Section 8(a) (1) of the National Labor Relations Act (Act), by requiring union pickets under threat of arrest to move from the sidewalk in front of Respondent Pay Less retail store to the perimeter of the parking lot.

On December 17, 1991, the Board issued an unpublished Order Remanding Proceeding to administrative law judge.

## I. DIRECTION AND ACTION ON REMAND

A. *The Board's Direction on Remand*

MICHAEL D. STEVENSON, Administrative Law Judge. In its Order remanding, the Board stated, "certain testimony must be considered further by the judge and any resulting issues of credibility resolved." More specifically, the Board directed that I consider further the testimony of the General Counsel witness Olstad, union representative (inadvertently named Olsen in the remand order), Mall Manager Crecelius, and Respondent witness Andrews, Respondent Pay Less store manager. All of this testimony relates to what deputy sheriffs told union pickets in December 1989 after Respondents' representatives called the sheriff's office for assistance. The resulting supplemental credibility findings will assist the Board in reviewing my original finding that no reasonable alternative means of communicating with the targeted audience existed at the time and place in question.

B. *Directed Credibility Resolutions*

## 1.

I begin with a brief summary of the facts.<sup>1</sup> On June 18, the Pay Less store opened in the Wandermere Mall (the mall) shopping center outside Spokane, Washington. On opening day and in December, the Union assigned a number of persons to picket the store with signs urging Pay Less customers to shop elsewhere. As recited in my original decision, the picket on both occasions began picketing directly in front of the Pay Less store. What happened next is disputed by the parties.

## 2.

Both sides agree that on both occasions when the picketers were present, local sheriff's deputies were called and arrived on the scene within a few minutes. In its remand order, the Board noted that I did not specifically credit Olstad's testimony that a deputy sheriff told him in June that the pickets must move to the deceleration lane of Highway 395 running in front of the mall.

I now credit Olstad's testimony regarding his conversations with the sheriff's deputies. In support of this credibility finding, I note the following. First, Olstad and other pickets did picket in the deceleration lanes and it is most unlikely

that the location would have been chosen voluntarily. They were seen picketing there by the General Counsel's witness, Sue Bennett, a union employee who went to the mall in July after receiving a phone call from Mall Owner Richard Vandervert. (Tr. 105.) Vandervert had called to complain about debris left on the grassy area by pickets. I also note that Respondents did not call as a witness any sheriff's deputy to rebut Olstad's testimony.<sup>2</sup>

As the Board noted in its remand order, I credited Pay Less General Counsel Tiernan over Olstad with respect to what Tiernan told Olstad after the deputies arrived. That is, I believed Tiernan when he testified that he told Olstad, after the deputies arrived, that he had to go to the outer edge of the parking lot out by the road, Tiernan added that the deputy told Olstad exactly the same thing. (Tr. 190.) Since I credited Tiernan in my original decision, I could not account for Olstad's picketing on the highway.

I now conclude that Olstad apparently received different instructions from the sheriff's deputies than he received from Tiernan<sup>3</sup> and Olstad prudently decided to follow the deputies' order. In light of Olstad's testimony, supported by Bennett, I do not credit Tiernan's testimony that he observed the pickets picketing on the grassy area (Tr. 212), or that the deputy told Olstad he could picket at the outer edge of the parking lot.

## 3.

As additional rationale for crediting Olstad above, I look to what happened in December. After the same or a different deputy ordered Olstad to move away from the sidewalk in front of the Pay Less store, Olstad returned to the same area on the highway where he had picketed in June. This time Crecelius corroborated Olstad's testimony: the former testified that when he arrived at the mall the afternoon of December 18, after the deputies had arrived and left, he observed the pickets out on the highway. When Crecelius talked to Andrews about what had happened with the sheriff's deputies, Andrews made a comment to Crecelius that they (deputies) had asked them (pickets) to move out to the street. (Tr. 67.) However, Olstad testified that in December the sheriff's deputies did not tell him to go out to the highway; they said, "you have to stop picketing here. If you don't stop picketing here, you will be arrested." (Tr. 168.) Olstad returned to the highway, because that is where the deputies had told him to go in June.

According to Andrews, when the deputies arrived in December, he instructed them to order the pickets to move "next to the road in the grassy area." (Tr. 230, 231.)

## 4.

The allegation in issue is based on the December picketing; however, as the Board noted in its Remand Order, the June picketing as some bearing on the events that occurred during the December picketing.

<sup>2</sup> It is not clear whether in December, the same or a different sheriff's deputy responded to Respondents' call for assistance at the Pay Less store.

<sup>3</sup> As general counsel for Pay Less, Tiernan had no authority to permit pickets ejected from the sidewalks in front of Pay Less to remain in the parking lot owned and controlled by Respondent mall. (Tr. 223.)

<sup>1</sup> All dates are in 1989 unless otherwise indicated.

I conclude that, under the facts and circumstances of this case on both occasions, sheriff's deputies were acting as agents of Respondents. *Dillard's, Inc.*, 305 NLRB 1102, 1107 (1992). None of these agents were called as witnesses by their principals, the Respondents, who are charged with responsibility for the deputies' actions. Because an unidentified deputy told Olstad in June that he and the other pickets must move to the highway deceleration lane and picket, Respondents are responsible for this order. In December, Olstad reasonably believed that the prior police order was still in effect because no credible evidence was presented to show that Respondents had changed or modified their position .

Finally, even if the grassy area or the parking lot perimeter was made available to the pickets, given the distance from this area to the Pay Less store and for other reasons recited at page 18 of my original decision, would again find that no reasonable means of communicating with the targeted audience existed because even here, the picketing was generally ineffective, possibly dangerous, and enmeshed neutral employees. See *Loehmann's Plaza*, 305 NLRB 663 (1991).

## II. CONCLUSIONS AND RECOMMENDED DISPOSITION OF THIS PROCEEDING

Accordingly, I hereby adopt by reference, without modification, the findings of fact, conclusions of law, remedy, and recommended Order<sup>4</sup> set forth in my decision issued on June 26, 1991, and I recommend that Respondents Pay Less Drug Stores Northwest, Inc. and Richard A. Vandervert and Harlan Douglass d/b/a Douglass-Vandervert Developers d/b/a Wandermere Mall, Spokane, Washington, their officers, agents, successors, and assigns, be ordered by the Board to take the action set forth in that recommended Order.<sup>5</sup>

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<sup>4</sup>On January 27, 1992, the Supreme Court decided the case of *Lechmere, Inc. v. NLRB*, 139 LRRM 2225, a case containing issues similar to those presented here. I have made no attempt to assess the impact, if any, of *Lechmere, Inc.* on the instant case as any such effort would exceed the scope of the Board's remand order.

<sup>5</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.