

Drexel Company, a Division of Plywood Minnesota, Inc. and Milwaukee & Southeast Wisconsin Carpenters District Council. Case 30-CA-10550

March 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND COHEN

The issue presented here is whether the Respondent violated Section 8(a)(1) of the Act by prohibiting non-employees from communicating the Union's area standards protest by distributing handbills to customers at the private property entrance to the Respondent's store.¹ Applying the analysis of nonemployee access issues set forth in *Jean Country*, 291 NLRB 11 (1988), the judge found that the Respondent acted unlawfully. While the case was before the Board on the Respondent's exceptions, the Supreme Court issued its decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), holding that the Board's balancing test in *Jean Country*, as applied to nonemployee union organizers, was inconsistent with controlling Court precedent.²

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order. For the reasons fully set forth in *Leslie Homes, Inc.*, 316 NLRB 123 (1995), we hold that *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), as reaffirmed in *Lechmere*, applies to nonemployee area standards activities. Under those cases, a union organizer cannot ordinarily gain access to an employer's property for the purpose of organizing the employer's employees. The organizer can gain access only in the exceptional circumstance where the employees are reasonably accessible only through trespassory means. Applying that approach to the instant case, the General Counsel has failed to prove that the targets of the Union's handbilling, the Respondent's customers, were reasonably accessible only through trespassory means. Accordingly, the Union was not entitled to access. We

¹ On March 29, 1990, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in opposition to the exceptions.

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

² On February 14, 1992, the Board advised the parties that it would accept supplemental briefs discussing the impact of *Lechmere* on this case. On February 28, the General Counsel filed a motion to remand the case to the Regional Director for dismissal of the complaint. On April 28, the Board denied the General Counsel's motion. Thereafter, the General Counsel, the Respondent, and the Charging Party filed supplemental briefs. In addition, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the National Retail Federation each filed a brief as amicus curiae.

need not, and do not, reach the issue of whether access would be required if the customer targets of the handbilling were reasonably accessible only through trespassory means.

The Respondent, Drexel Company, sells carpeting and other floor coverings to the public at three stores in the metropolitan area of Milwaukee, Wisconsin. These floor products are generally advertised and sold with installation included. The Respondent subcontracts all of its installation work. Unique Carpet Installation, Inc. (Unique) performs a substantial portion of the subcontracted work. Unique's only office is in its owner's home. Unique's employee-installers report to the Respondent's stores each morning to receive their assignments and materials.

The Union lost an election held among a unit of Unique's installers in September 1988. On about December 10, 1988, the Union began a handbilling campaign at the Respondent's three stores, including the store located on Blue Mound Road in the town of Brookfield. The handbills advised the public that the Respondent used a nonunion carpet installer that paid substandard wages. The handbill also urged a consumer boycott of the Respondent's stores.³ After consultations with the Union and Milwaukee city officials, the Respondent permitted handbilling at the entrance of two stores. Its refusal to grant similar access to the Blue Mound Road store has given rise to this case.

The store in dispute is a freestanding structure separated from Blue Mound Road by a parking lot and a driveway which transects a 6- to 7-foot deep, open drainage ditch. The Respondent owns the building, the parking lot, and the driveway up to a northern property line which borders the roadside edge of the drainage ditch. The distance from the parking lot through the driveway to the property line is approximately 16-18 feet. The driveway is 42-feet wide, sufficient for two lanes of traffic. A lamp post stands at each corner of the driveway entrance into the parking lot.

Blue Mound Road is a heavily traveled four-lane divided highway with a speed limit of 45 mph. Only vehicles traveling east on Blue Mound Road can turn (right/south) into the Respondent's driveway. There is no stop sign, traffic signal, or turn lane at the driveway entrance, but there is a paved shoulder lane alongside the thoroughfare. After the handbilling began, the Respondent generally maintained a line of concrete bumpers separating its parking lot from the lot of an adjacent retail facility. The Respondent's driveway was therefore the only point of direct vehicular access to its store. Between 25 and 30 potential customers a day enter the Respondent's facility during the week; closer to 100 potential customers enter on weekend days. In

³ A representative handbill is appended to the judge's decision.

addition, approximately 50–60 employees go daily to the store.

The handbillers at the Blue Mound Road store initially stood on the Respondent's private property alongside the driveway at its intersection with the parking lot. The Respondent, with the assistance of local police, ousted the handbillers from the storefront location. On two occasions, Brookfield Chief of Police Harlan Ross told the handbillers that they would be arrested if they did not move from the storefront to the parking lot entrance. The handbillers complied and returned to the parking lot entrance. According to Dennis Penkalski, the Union's business representative, approximately 75 percent of those handbilled at the storefront accepted the handbills, while 25 percent of those handbilled at the driveway entrance accepted them.

For 13 months after being denied access to the Blue Mound Road store entrance, the handbillers distributed handbills from positions on the Respondent's property at, or a few feet north of, the lampposts at the driveway's intersection with the parking lot. Unless giving handbills to drivers, the handbillers stood on the shoulder area between the driveway and the drainage ditch. There is no evidence that any official of the Respondent or the police told the handbillers to stand at those exact locations. Chief Ross testified that he offered to "let them exceed on to the Drexel property by 20 more feet, which seemed to relieve, or you know, sort of take a little bit more of that pressure off of having an accident." Union Agent Penkalski testified that Chief Ross told the handbillers to stand "approximately" where the driveway meets the parking lot. The handbillers did not regularly move any farther into the lot, but Penkalski told them that, if an inbound car stopped beyond the lampposts, they would be allowed to proceed into the parking lot to deliver the handbill.

On 4 occasions during the 13 months of handbilling at the driveway entrance, handbillers had to jump out of the way to avoid being hit by cars. Backups of incoming traffic were rare, due in part to the handbillers' practice of waving vehicles through to avoid such situations. The judge personally viewed the driveway and concluded that it would be safer to handbill at the storefront than at the driveway handbilling site, specifically because a driver stopping a car at that site would fear being hit by a following car. Chief Ross likewise testified that it would be safer to handbill at the storefront. He also testified that it would be relatively safer to handbill 20 feet farther into the parking lot than the site at which the Union's agents were then handbilling.⁴

After reviewing the evidence, the judge observed that it was "obvious that the better place to handbill" was at the storefront entrance rather than at the parking

lot entrance. Applying the balancing test of *Jean Country*, he further found that the Respondent's property right was "weak" and the Union's area standards right under Section 7 was "significant." Finally, he found that there were no reasonable alternative means for the Union to communicate its message.

In *Lechmere*, the Supreme Court held that *Jean Country* impermissibly recast as a "multi-factor balancing test" the general rule of *Babcock & Wilcox* permitting an employer to prohibit nonemployee distribution of union organizational literature on its property. 502 U.S. at 538. *Babcock's* holding, as reaffirmed in *Lechmere*, is that Section 7 does not protect nonemployee union organizers *except* in the rare case where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." Id. Thus, "it is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights." Id. (Emphasis in original.)

The General Counsel, the Respondent, and amicus National Retail Federation contend that the Court's interpretation of *Babcock* in *Lechmere* applies to the nonemployees in this case who were seeking access to the Respondent's private property storefront to engage in area standards handbilling. The General Counsel argues, however, that the Respondent's denial of access to that location was unlawful even under the *Babcock/Lechmere* analysis because no reasonably effective alternatives existed for the Union to communicate its message to the public. The Respondent and the National Retail Federation contend that the General Counsel has failed to prove a lack of reasonable alternative means. The Union and amicus AFL-CIO argue that the *Babcock/Lechmere* analysis involved organizational activity and should not apply to protected area standards activity. They contend that more liberal access principles should govern where, as here, a union is acting on behalf of employees whom it already represents. Further, they argue, even if the *Babcock/Lechmere* analysis does apply, the Respondent violated the Act because the Union had no reasonable alternatives to communicating with the Respondent's customers at the Blue Mound Road storefront entrance.

In *Leslie*, supra, the Board considered the impact of *Lechmere* on nonemployee area standards activity. After reviewing *Lechmere* and related Court precedent,⁵ the Board concluded that the Court intended the *Babcock* accommodation analysis to apply in nonorganizational settings. Accordingly, the general rule is that an employer may prohibit nonemployees

⁴The judge did not refer to this uncontroverted testimony in his decision.

⁵*Hudgens v. NLRB*, 424 U.S. 507, 522 (1976); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 (1978).

from gaining access to its private property to engage in area standards activities. No balancing of employee and employer rights is appropriate unless the union can first demonstrate that it lacks reasonable access to the employer's customers outside the employer's property.⁶

We turn then to the question of whether the General Counsel has proven that the Union had no reasonable alternative means of communicating with Drexel consumers.⁷ In *Lechmere*, the Court stated that the *Babcock* exception requiring access to private property by nonemployee organizers applied only in rare situations where a union confronts "unique obstacles" to nontrespassory communications, as when the location of a plant and the living quarters of employees "isolated [them] from the ordinary flow of information that characterizes our society." 502 U.S. at 539–541. The Court emphasized that the union's burden of proving the exception is a heavy one, which cannot be satisfied "by mere conjecture or the expression of doubts concerning the effectiveness of non-trespassory means of communication." *Id.* at 540.

In assessing the availability of reasonable alternative means in this case, the judge focused only on the alternatives of mass media advertising and of handbilling at the driveway location actually used by the Union. He found the former to be prohibitively expensive and the latter to be both unsafe and ineffective. We need not pass on these findings. We find that the General Counsel has failed to prove that the Union was unable to communicate with the Respondent's customers by handbilling at locations on the Respondent's property where the Union was permitted to handbill.

At no time did the Respondent attempt to exclude handbilling entirely from its private property. Not only did it permit storefront handbilling at its other two stores, but also for 7–10 days before the attempt to handbill at the Blue Mound Road storefront, and for 13 months after this attempt, the Respondent permitted handbilling in the area of its private driveway entrance into its private parking lot. Furthermore, neither the

Respondent nor the police officials who acted at its request instructed the handbillers to stand on the driveway shoulder north of the lampposts and adjacent to the drainage ditch. Most significantly, Chief Ross encouraged the handbillers to move as much as 20 feet farther into the parking lot than the site at which they were then handbilling. The Respondent had cooperated with police officials in permitting handbilling at the entrances of its other two stores, and it did not disagree with Chief Ross as to the location of handbilling at the Blue Mound Road store.⁸ Notwithstanding this, the handbillers chose not to move to this available alternative location.⁹

There is no proof that handbilling from positions 20 feet farther into the parking lot would be unsafe. Police Chief Ross specifically testified that handbilling there would be "relatively safe." Any dangers at the actual handbilling site posed by rapidly turning cars and by handbillers' proximity to the open drainage ditch would not exist at the alternative site. Furthermore, evidence concerning the light daily volume of traffic into the parking lot and the rarity of backups due to handbilling at the Union's chosen site warrants the inference that there would be no significant traffic hazard posed by handbilling at the alternative site. Entering vehicles would have additional time to decelerate, and traffic in either direction would have more room to make any necessary maneuvers around handbillers and cars stopped to receive handbills.

With respect to the effectiveness of the Union's message, handbillers at the Respondent's exclusive parking lot entrance faced no significantly greater problem of customer identification than they would have encountered at the storefront. While some of the Respondent's potential customers might have parked in the adjacent store's lot and walked across the concrete bumper dividing it from the Respondent's lot, the General Counsel did not introduce any evidence showing that this actually happened to any significant degree. Consequently, the overwhelming majority of the Respondent's potential customers would pass by handbillers at the parking lot entrance.

⁶We therefore do not rely on the judge's assessment of the relative weight of the employee and employer rights in this case.

⁷As in *Leslie*, we assume, without deciding, that the *Lechmere* analysis affords the possibility of an exception permitting access to private property for area standards activity if a union can prove that an employer's customers are not reasonably accessible by nontrespassory methods. Compare *Sears*, *supra* at 206 ("Even on the assumption that picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation, it would be unprotected in most instances."); but cf. *John Ascuaga's Nugget v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992) (inaccessibility exception to the rule that an employer need not accommodate nonemployee organizers does not apply to attempts to communicate with the general public).

For a complete discussion of Member Cohen's position on the application of *Lechmere* to area standards activity, see *Leslie Homes*, *supra* at fn. 18.

⁸*Cf. Little & Co.*, 296 NLRB 691, 693 (1989) (union had no reason to believe other locations in the respondent's facility were available alternatives for picketing in light of respondent's objection to picketers' presence on private property generally); *W. S. Butterfield Theatres*, 292 NLRB 30, 33 fn. 9 (1988) (union had no reason to believe respondent would have permitted handbilling in theater's parking lot in view of fact that it wanted pickets to move to the public street).

⁹The fact that the Respondent permitted limited access to its private property for the Union's area standards handbilling does not prove waiver by condonation of its right under the general rule of *Babcock* to prohibit handbilling at other locations on the property. See *Midway Ford Truck Center*, 272 NLRB 760, 762 (1984) (condonation of ambulatory picketing on the fringe of the employer's property did not extend to permitting posting of stationary pickets in the same area).

The record also shows that customers in cars were capable of receiving handbills offered to them by handbillers at the driveway entrance, where at least 25 percent of them did accept the proffered handbills. It is reasonable to infer that there would be a higher handbill acceptance rate at an alternative handbilling site 20 feet farther into the Respondent's parking lot, where neither the handbillers nor drivers would have any safety concerns about stopping cars. Union Agent Penkalski testified that approximately 75 percent of potential customers accepted handbills at the storefront. An extreme disparity in handbill acceptance rates at different locations may be relevant to a consideration, in conjunction with other facts, of whether a union has any reasonable opportunity to communicate at the locus of lower handbill acceptance.¹⁰ Even the 25-percent acceptance rate at the driveway entrance, however, standing alone or in comparison with the higher acceptance at the storefront, does not, in itself, prove that customers in vehicles were "inaccessible" in the sense contemplated by *Babcock* and *Lechmere*. In each of those cases, the organizing union was only able to secure the names and addresses of, and send mailings to, approximately 20 percent of the employer's employees.

Finally, we note that the continuous handbilling at the driveway location for over 13 months suggests the Union itself did not regard handbilling there as ineffective. It was merely less effective than at the storefront; or, as stated by the judge, the storefront was "the better place" to handbill. Concededly, the Union's pressure against the Respondent and Unique would be stronger if it handbilled in front of the entrance to the Respondent's store. The Court warned in *Lechmere*, however, that the narrow exception to *Babcock's* rule does not apply merely because nontrespasory access to employees may be "cumbersome or less than ideally effective." 502 U.S. at 540.

Based on the foregoing analysis, we find that the General Counsel has failed to meet the heavy burden of proving unique obstacles to the Union's attempts to communicate its area standards message to the Respondent's customers. Accordingly, we conclude that the Respondent did not violate Section 8(a)(1) of the Act by denying the Union access to handbill at the entrance to its Blue Mound Road store. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

¹⁰ "Access to employees, not success in winning them over, is the critical issue—although success, or lack thereof, may be relevant in determining whether reasonable access exists." *Lechmere*, 502 U.S. at 540–541.

CHAIRMAN GOULD, concurring.

I join in the dismissal of the complaint in this case. See my additional comments set forth in my concurring opinion in *Leslie Homes*, 316 NLRB 123 (1995).

John A. Corrigan and *Benjamin Mandelman, Esqs.*, for the General Counsel.

William A. Denny and *Daniel J. Miske, Esqs.*, of Elm Grove, Wisconsin, for the Respondent.

John J. Brennan, Esq., of Milwaukee, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On July 18, 1989, Milwaukee & Southeast Wisconsin Carpenters District Council (the Union) filed a charge against Drexel Company, a Division of Plywood Minnesota, Inc. (Respondent).

Thereafter, on August 31, 1989, the National Labor Relations Board, by the Regional Director for Region 30, issued a complaint which alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it caused union handbillers under threat of arrest to cease handbilling at Respondent's store entrance.

Respondent filed an answer in which it denied that it violated the Act.

A hearing was held before me in Milwaukee, Wisconsin, on January 19, 1990.

Based upon the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent and my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with stores at several locations within the State of Wisconsin, including the facility involved herein at 19355 Blue Mound Road in Brookfield (Waukesha County), Wisconsin, has been engaging in the sale of floor and wall coverings, and other products.

Respondent operates its Blue Mound Road Store from a building and surrounding parking area which it owns.

Respondent admits, and I find, that it is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is now and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Issue Presented

The only issue is whether Respondent violated Section 8(a)(1) of the Act when it caused union handbillers, who were engaged in "area standards" handbilling, under threat of arrest by the police to cease handbilling at Respondent's store entrance. The dispute between the Union and Respond-

ent is over area standards and the object of the handbilling is to protect area standards. In short, this is an access case and the answer requires a balancing between the Section 7 rights of employees and the property rights of Respondent. The leading case in this area is the Board's decision in *Jean Country*, 291 NLRB 11 (1988). I decide this issue against Respondent. Therefore, I will recommend the posting of a notice, a cease and desist order, and recommend that Respondent be ordered to permit union handbillers to handbill at the entrance to Respondent's store on Blue Mound Road. Needless to say such handbilling should be done in a manner which does not impede customers and employees of Respondent or its subcontractors from entering or leaving the store.

B. *Factual Background and Discussion*

The parties stipulated the following:

1. Respondent subcontracts the installation of carpeting and floor covering to various installers, including Unique Carpet Installation, Inc. (hereinafter Unique). Respondent has no contract or written agreement with Unique for the performance of such service, other than a listing of current prices charged by Unique for services it offers to Respondent. Respondent performs no carpet or floor covering installation work. Respondent subcontracts such work at the will and discretion of both Drexel and the installers.
2. Respondent actively advertises its products, including carpeting for sale to the general public in the Milwaukee metropolitan area. With regard to carpeting, Respondent advertises that the price "(i) includes installation and lifetime padding." In said advertising, no mention is made regarding who will or does perform the installation work.
3. Some price tags used and displayed by Respondent for carpeting state that the price includes "padding and professional installation." No mention is made regarding who will or does perform the installation. Drexel also sells carpeting without including padding or installation. The price tags for such carpeting do not include the above-mentioned notation.
4. A petition for representation (NLRB Form 502) was filed with Region 30 of the National Labor Relations Board on July 29, 1988, by the Milwaukee and Southeast Wisconsin Carpenters District Council seeking to represent certain employees of Unique Carpets, Inc. (later amended to Unique Carpet Installations, Inc.) A Stipulated Election Agreement (NLRB Form 652) was executed by the parties and approved by the Regional Director on August 19, 1988. On September 9, 1988, an election was held in a unit consisting of:

All full-time and regular part-time carpet installers, semi-skilled installers and helpers employed by the Employer; but excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

Four of the ballots were challenged. A Hearing on Challenged Ballots was held on November 4, 1988. The National Labor Relations Board, by order dated

May 5, 1989, ordered that two of the four challenges be overruled and that those two ballots be counted. On May 17, 1989, said ballots were counted and a revised Tally of Ballots (NLRB Form 4168) issued which showed the results of the election as seven votes for the petitioner and eight votes against. On May 23, 1989, the results of the election were certified by the Acting Regional Director (NLRB Form 4280).

5. On or about December 10, 1988 the Milwaukee and Southeast Wisconsin Carpenters District Council started a handbilling campaign at the Respondent's facility on Bluemound Road, in Waukesha County (Town of Brookfield). A representative copy of the handbills used is attached as Exhibit A.
6. After approximately 7-10 days of handbilling activity in the vicinity of the entrance to Respondent's parking lot, the handbillers shifted their handbilling activity to the Respondent's privately owned store entrance which is connected to Respondent's privately owned parking lot. Upon the insistence of Respondent, and with the assistance of the police, the handbillers again took station in the vicinity of the entrance to Respondent's parking lot.
7. Until August 1989, the handbillers generally stood on the East side of the parking lot entrance.
8. On or about August 15, 1989, the handbillers, without request from Respondent, generally moved their activities to the West side of the parking lot entrance.
9. Respondent has no documents concerning any customer complaints or comments regarding the handbilling at the entrance to its store or at the entrance to its parking lot at Respondent's facility on Bluemound Road, Waukesha County (Town of Brookfield).

The handbill itself is attached as Appendix A to my decision. The "nonunion carpet installer" referred to in the handbill is, of course, Unique.

At the hearing certain additional facts were disclosed. Respondent, which has three stores in the Milwaukee area pays between \$150,000 to \$175,000 per year to advertise on television. It pays \$19,000 for a large billboard which it moves periodically around the Milwaukee area. It pays \$6500 every other month to advertise on radio. A full page ad in the Milwaukee Journal cost \$10,000. The Union handbilled at all three stores in the Milwaukee area but there is a dispute only about the handbilling at the Blue Mound Road store.

Between 25 and 30 potential customers a day enter Respondent's Blue Mound Road store during the week and on the weekends closer to 100 potential customers a day will enter the store.

Unique does about \$500,000 worth of business a year for Respondent. It is far and away Respondent's biggest single subcontractor. All of Respondent's carpet installers are non-union. Unique's employees report to Respondent's store on Blue Mound Road in the morning and receive their assignments and the carpet they are to install. Unique's only other office is in the private home of its owner.

During the union organizing campaign among Unique's employees, which is referred to above, Gerry Boschwitz, the president and CEO of Respondent, not only addressed a

meeting of Unique's employees and urged them to vote against the Union but also distributed, just 1 week before the election, to each Unique employee a letter urging the employees to vote against the Union.

Beginning in December 1988 the Union handbilled at the Blue Mound Road store. It was still handbilling as of the time of the hearing in mid-January 1990.

The handbillers have been refused permission under threat of arrest to handbill at the front entrance to Respondent's building, which has one customer entrance. Local Chief of Police Harlan Ross had been asked by Respondent on two occasions to keep handbillers away from the front entrance and down at the parking lot entrance.

The handbillers have been required to handbill at the entrance to the parking lot which is right off Blue Mound Road. The handbilling takes place approximately 100 feet from the front entrance of the store. Blue Mound Road is a divided four-lane road going east and west. There is also a shoulder lane in each direction, the posted speed limit is 45 miles per hour. It is heavily traveled in one direction during rush hour in the morning and heavily traveled in the other direction during evening rush hour.

Vehicles on Blue Mound Road traveling in an easterly direction only can enter the parking lot. Vehicles traveling west have to go beyond the store and circle back in order to enter Respondent's parking lot.

There is no traffic light at the entrance to Respondent's parking lot. Therefore, vehicles are moving at a fast clip as they begin to turn into the parking lot. As soon as you turn into the parking lot there are ditches (6 or 7 feet deep) on each side of the 16-foot driveway into the lot. Because of the presence of concrete bumper stops placed in Respondent's parking lot by Respondent those persons driving into Respondent's parking lot are able to park only in Respondent's parking lot unless they drive over the concrete bumper stops. Once in the parking lot the people in the vehicle are able to walk to other nearby stores to include a Best Buy, right next door to Respondent's facility. Needless to say people parked in Best Buy's parking lot are able to walk to Respondent's store without going anywhere near the entrance to Respondent's parking lot.

It is obvious that the better place to handbill is at the front entrance to Respondent's place of business rather than at the entrance to the parking lot for the following reasons:

1. When handbillers handbill at the parking lot entrance they are standing by open ditches which are 6 or 7 feet deep.

2. On two occasions Union Representative Dennis Penkalski has seen handbillers have to jump out of the way to avoid being hit by cars turning into the parking lot off Blue Mound Road, one of whom was a retiree who had to jump into the ditch behind him and these two incidents are in addition to those recounted in reasons 5 and 6 below.

3. While 75 percent of the customers offered handbills at the front entrance to the store accepted the handbill only 25 percent accepted the handbill at the parking lot entrance.

4. Chief of Police Harlan Ross who threatened handbillers at the front entrance with arrest for either disorderly conduct or trespassing admits that the chances of an accident are greater with handbillers present at the parking lot entrance

than if there were no handbillers and that handbilling at the front door would be safer.¹

5. Handbiller Michael Pesch testified that one time in order to avoid being hit by a car he had to jump into the ditch behind him.

6. Handbiller Anthony Bouchlas had to jump out of the way also to avoid being struck by a car while handbilling at the parking lot entrance.

7. During the 13 months of handbilling to include some handbilling at the front door not one single customer of Respondent complained about the handbilling.

Respondent's main reason, I suspect, in refusing permission to the Union to handbill at the front entrance to the store is that more customers will take the handbill which states quite clearly that the customer is being asked *not* to patronize the store. I might add at this juncture that at the request of the General Counsel, with no objection from Respondent, I personally viewed the area in question in the company of counsel for both the General Counsel and Respondent. During the viewing I was a passenger in a car that drove into the parking lot from Blue Mound Road and saw the ditches on either side of the 16 foot or so driveway into the parking lot.

It seems clear to me that anyone driving into the parking lot would or should hesitate before stopping and having the passenger window rolled down, if it was not already, to accept a handbill. The reason for this is that the driver would or should be concerned about being hit in the rear by a car following the driver into the parking lot. This is one more reason why it would be safer to have the handbilling done at the front entrance to the store.

I am not unmindful of Respondent's property rights. However, this is not a private home or high security area. It is rather a business that encourages the general public, even though it has and enforces a no-solicitation rule, to visit its showroom and make purchases. In other words, Respondent has not made it its business to keep its property off limits to the general public. As the Board noted in *Thriftway Supermarket*, 294 NLRB 173 (1989), a property interest is weakened by the fact that the public is invited onto the property. Permitting handbilling to occur at the front entrance will not damage any of Respondent's property, e.g., there is no manicured lawn that will be stood on by handbillers as a result of handbilling at the front entrance. The property right advanced by Respondent is weak.

It goes without saying that peaceful area standards handbilling by a union urging a customer boycott of a business which uses nonunion subcontractors is legal provided the contents of the handbill are truthful. *DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988). Area standards handbilling is not as significant a Section 7 right as organizational activity or handbilling to protest an unfair labor practice but it is significant. *Jean Country*, supra.

¹Tr. 103 states:

Q. At the door would be safer?

A. Oh, yes, definitely.

The Union clearly had a basis in fact for all the claims it makes in its handbill. Respondent's carpet installers are all nonunion. The biggest installer by far being Unique which as noted earlier has done approximately \$500,000 a year in business for Respondent. Uncontradicted testimony from Union Business Representative Dennis Penkalski, and former Unique employees Ricky Barnhardt and Michael Pesch establish that Unique pays wages and benefits substantially less than union contractors and that Unique has no formal training program for carpet installers as does the union contractors. The handbill is truthful.

In balancing the Section 7 rights of employees against the property rights of Respondent, it is clear that the property rights of Respondent must yield.

Under the Board's decision in *Jean Country*, supra, I am required to take into account the availability of reasonable alternative means for the Union to get its message across without interfering with Respondent's property rights. I note that in the 13 months of handbilling between December 1988 and the hearing in January 1990 the Union spent approximately \$20,000. It has a budget of \$200,000 to cover this type of activity but out of that \$200,000 it must pay the salaries of its business agents and all other organizing expenses to include legal fees. The cost of radio ads, television ads, billboards, and newspaper ads is prohibitively expensive and, therefore, not a reasonably available alternative. *Lechmere, Inc.*, 295 NLRB 92 (1989). Those costs are set out above. The Union's audience is customers of Respondent. A media

campaign would reach at prohibitive cost an audience far larger than the one the Union has in mind. The audience the Union wants to get its message to is reachable by handbilling at the store and at the store the safe place to do that is not at the entrance to the parking but at the front entrance to the store. The Union does not seek to handbill inside the store. Respondent's property rights inside the store would be greater than employee Section 7 rights. This is not the kind of exceptional case where the Board will put the burden of the cost of a media campaign on a union. *Red Food Stores*, 296 NLRB 450 (1989). As the Board noted in *Jean Country*, supra, it is only the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact.

CONCLUSIONS OF LAW

1. The Respondent, Drexel Company, a Division of Plywood Minnesota, Inc., is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Milwaukee and Southeast Wisconsin Carpenters District Council is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. When it caused union handbillers under threat of arrest to cease handbilling at the front entrance to its store on Blue Mound Road, Respondent violated Section 8(a)(1) of the Act.

[Recommended Order omitted from publication.]

(for handbill picture)

APPENDIX A