

**Schear's Food Center and United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC.**

**Forest Park, Inc., Lodar, Inc., Thomas J. Desantis, William H. Heller, Berrimore Company, and Hank Schneider, Partners, d/b/a Forest Park Partners, Limited and United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC.** Cases 9-CA-31626 and 9-CA-32030

August 9, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On December 8, 1994, Administrative Law Judge William N. Cates issued the attached decision. The Respondents filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,<sup>1</sup> findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order.

ORDER

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

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (fiMDBUfi\*ERR17\*fiMDNMfi1950) (fiMDBUfi\*ERR17\*fiMDNMfi1950) 3d Cir. 1951) (fiMDBUfi\*ERR17\*fiMDNMfi1950) F.2d 362 (fiMDBUfi\*ERR17\*fiMDNMfi1950) 3d Cir. 1951) (fiMDBUfi\*ERR17\*fiMDNMfi1950) find no basis for reversing the findings.

<sup>2</sup>We agree with the judge that the Respondents violated Sec. 8 (fiMDBUfi\*ERR17\*fiMDNMfi1950) (fiMDBUfi\*ERR17\*fiMDNMfi1950) from engaging in protected handbilling and picketing on private property. See, e.g., *Riesbeck Food Markets*, 315 NLRB 940 (fiMDBUfi\*ERR17\*fiMDNMfi1950) (fiMDBUfi\*ERR17\*fiMDNMfi1950) *Richards United Super*, 308 NLRB 201 (fiMDBUfi\*ERR17\*fiMDNMfi1950) (fiMDBUfi\*ERR17\*fiMDNMfi1950) finds the circumstances in this case distinguishable from those in *Riesbeck*, supra, in which he dissented from the Board's finding of a violation. Thus, here there is no evidence that either Respondent maintained a nondiscriminatory policy or rule barring consumer boycott activity from its property.

<sup>3</sup>In the fourth paragraph of part III.B of his decision, the judge opined that, under *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (fiMDBUfi\*ERR17\*fiMDNMfi1992) (fiMDBUfi\*ERR17\*fiMDNMfi1992), the "inaccessibility exception" permitting access to private property is available only when nonemployee union representatives are attempting to communicate with employees, not with customers. We find it unnecessary to affirm the judge's view, because it represents dicta not affecting the resolution of this disparate-treatment case, and because it addresses a question which the Board has specifically left open. See *Leslie Homes*, 316 NLRB 123, 129 (fiMDBUfi\*ERR17\*fiMDNMfi1950) (fiMDBUfi\*ERR17\*fiMDNMfi1950) *Plaza*, 316 NLRB 109, 112 fn. 9 (fiMDBUfi\*ERR17\*fiMDNMfi1950) (fiMDBUfi\*ERR17\*fiMDNMfi1950) agrees with the judge's view, because he considers that the "inaccessibility exception" applies regardless of whether the audience is employees or customers. See *Members Browning and Truesdale's* joint dissent in *Loehmann's Plaza*, supra at 114, 120 fn. 24.

orders that the Respondents, Schear's Food Center and Forest Park Partners, Limited, Dayton, Ohio, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

*James E. Horner, Esq.*, for the General Counsel.

*Robert M. Lamb, Esq.*, of Cincinnati, Ohio, for the Respondents.

*Peter Fox, Esq.*, of Cincinnati, Ohio, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This consolidated proceeding was litigated before me at Dayton, Ohio, on September 28, 1994,<sup>1</sup> pursuant to charges and amended charges filed by the United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC (fiMDBUfi\*ERR17\*fiMDNMfi1950) July 25, August 3, and August 29, in Case 9-CA-32030 and on February 24 and March 24, in Case 9-CA-31626, and complaints having issued in Case 9-CA-32030 on September 8 and in Case 9-CA-31626 on April 8,<sup>2</sup> alleging Schear's Food Center (fiMDBUfi\*ERR17\*fiMDNMfi1950) (Company) (fiMDBUfi\*ERR17\*fiMDNMfi1950) Thomas J. Desantis, William H. Heller, Berrimore Company, and Hank Schneider, Partners d/b/a Forest Park Partners, Limited (fiMDBUfi\*ERR17\*fiMDNMfi1950) (Forest Park Partners) (fiMDBUfi\*ERR17\*fiMDNMfi1950) National Labor Relations Act by: (fiMDBUfi\*ERR17\*fiMDNMfi1950) (fiMDBUfi\*ERR17\*fiMDNMfi1950) 14, prohibiting representatives of the Union from engaging in peaceful picketing and handbilling at the Company's Breitenstrater store in Dayton, Ohio; (fiMDBUfi\*ERR17\*fiMDNMfi1950) (fiMDBUfi\*ERR17\*fiMDNMfi1950) February 24 and July 20, prohibiting representatives of the Union from engaging in peaceful picketing and handbilling at the Company's Forest Park store in Montgomery County, Ohio; and (fiMDBUfi\*ERR17\*fiMDNMfi1950) (fiMDBUfi\*ERR17\*fiMDNMfi1950) on or

pass complaint to issue against the Union's director of organizing William N. Dudley (fiMDBUfi\*ERR17\*fiMDNMfi1950) (Union Director of Organizing) (fiMDBUfi\*ERR17\*fiMDNMfi1950) in retaliation for engaging in peaceful picketing and handbilling. The Company and Forest Park Partners deny the charges and the amended charges. I will, as hereinafter more fully explained, conclude the Company and Forest Park Partners violated the Act substantially as alleged in the complaints.

FINDINGS OF FACT

I. JURISDICTION

At times material the Company has been a corporation engaged in the retail sale of groceries and food products at its stores in Dayton, Ohio, and vicinity, including its Forest Park Shopping Center and Breitenstrater Shopping Center stores. During the 12 months preceding issuance of the complaints the Company in conducting its operations derived gross revenues in excess of \$500,000 and purchased and received at its Dayton, Ohio, and vicinity facilities goods valued in excess

<sup>1</sup> All dates are in 1994 unless otherwise indicated.

<sup>2</sup> An order consolidating the cases issued on September 8.

of \$50,000 directly from points outside the State of Ohio. The complaint alleges, the parties admit, the evidence establishes and I find the Company is an employer engaged in commerce within the meaning of Section 2 of the Act.

At times material Forest Park Partners has been a limited partnership engaged in the management and rental of a shopping center in Dayton, Ohio, known as Forest Park Shopping Center. During the 12 months preceding issuance of the complaint, Forest Park Partners derived gross revenues in excess of 1 million dollars, of which in excess of \$25,000 was derived from its tenant, the Company herein. The complaint alleges, the parties admit, the evidence establishes and I find that Forest Park Partners is an employer engaged in commerce within the meaning of Section 2 of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the parties admit, the evidence establishes and I find that the Union is a labor organization within the meaning of Section 2 of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Company operates a number of supermarkets/food stores in the greater Dayton, Ohio area. Only two stores are involved in the instant case. The Company leases the two food stores in question from the property owners and the Company is allowed "some control" over the areas outside the two stores including the sidewalks and parking lots.<sup>3</sup>

One of the two stores in question is located in the Forest Park Shopping Center (for Plaza) at the corner of Nottingham Road and North Main Street (Route 48) in Montgomery County, Ohio, outside the city limits of Dayton, Ohio. I shall refer to this store location as the Forest Park Store. The other store is located in the Breitenstrater Shopping Center,<sup>4</sup> a strip mall, located at the corner of Willington Pike and Patterson Road, within the city limits of Dayton, Ohio. I shall hereinafter refer to this store as the Breitenstrater store.

The Company has a "solicitation policy"<sup>5</sup> outlined in its employee handbook, however, the handbook is distributed only to employees of the Company. Forest Park Store Manager George James testified there are signs on the doors to the Forest Park store that read "no solicitation."

<sup>3</sup>Breitenstrater Store Manager Herbert Oney testified the owners at that property allow the Company "some control" over the sidewalk and parking lot while Forest Park Partners Facility Manager Gary Alexander testified the owners of that property allow the Company "pretty much" up to its tenants.

<sup>4</sup>The parties stipulated that the Breitenstrater Shopping Center is owned by Trust for the Breitenstrater Family. Documents introduced by the Company reflect Louise Kennett as Trustee of the Breitenstrater Trust. I shall refer to the property owners as the Breitenstrater Trust.

<sup>5</sup>The policy stipulated that the Breitenstrater Shopping Center is owned by Trust for the Breitenstrater Family. Documents introduced by the Company reflect Louise Kennett as Trustee of the Breitenstrater Trust. I shall refer to the property owners as the Breitenstrater Trust.

It is undisputed that none of the handbillers or picketers were employees of the Company or Forest Park Partners. It is likewise undisputed that the Union not only handbilled at the store but also conducted voter registration drives, mailed mailings to the public as well as radio and billboard advertisements and held press conferences or provided press releases to the public. I have focused on the handbillings as a resolution on that activity fully addresses the allegations of the complaints. It is also undisputed that no representatives of the Union sought permission to picket or handbill at the Company's two locations involved herein.

Union Organizer Jeffery Crider testified he went to the Forest Park Store in June 1993, and observed a table set up just inside the store where a representative of the Union handed out literature and requesting donations.<sup>6</sup> Forest Park Store Manager James testified no solicitations were authorized by the Company at his store during the previous year, but acknowledged that over the past 2 years, Girl Scouts sold cookies inside the store, the Jaycees conducted voter registration drives outside the store, and a coalition of churches, including the Seventh-Day Adventist, conducted campaigns against drugs inside the store "usually monthly or every 2 months . . . on Friday, Saturday, and Sunday normally."

Union Organizer Crider testified he, Scott Adkins, and Katrina Dreisback handbilled collected signatures regarding the North American Free Trade Agreement (NAFTA) at the store for 2 to 3 hours without any objection from store management.<sup>7</sup>

Forest Park Store Manager James testified he did not give permission for, nor was he aware of anyone handbilling regarding NAFTA at his store in 1993.

Union Organizer Douglas Burgstaller testified he first visited the Breitenstrater store in February 1993. Union Organizer Burgstaller testified he and Union Director of Organizing William Dudley photographed two individuals, Baumann and Jennifer Vaughn—handing out voter registration forms in front of and to the side of the entrance to the store.<sup>8</sup> Baumann testified she and her friend Vaughn went to the Breitenstrater store with Ohio voter registration forms on February 7, and proceeded to the service desk to seek permission to distribute the forms. Baumann stated no one was at the service desk, but the cashier at the first register told them permission was not given. Baumann testified they first set up outside the entrance to the store, but the weather was cold and one of the store baggers invited them inside. Baumann

By the Commission obtained by Crider was received in evidence. The literature reflects the group was Family Health Education Society of Montgomery County, Ohio, an "outreach" of the Seventh-Day Adventist Church of Ohio, Pennsylvania, Virginia, and West Virginia. The literature warns of the dangers of drug addiction.

<sup>7</sup>The petition reads in part: "We the undersigned call on President Clinton and Congress to dump the North American Free Trade Agreement as negotiated by George Bush. Its wholly unacceptable and unfair to workers in the United States." The petition contains what is purported to be the signatures and addresses of those signing the petition.

<sup>8</sup>Dudley corroborates Burgstaller's testimony. A photograph of Baumann and Vaughn at the store was received in evidence.

said they setup at the inside front of the store "on one side . . . so we weren't blocking anyone." Baumann stated that Breitenstrater Store Manager Oney twice passed where they were and even spoke to them.<sup>9</sup> According to Baumann no one objected to their being there.

Breitenstrater Store Manager Oney could not recall anyone handing out voter registration forms at his store and he did not recognize Baumann in the courtroom. Breitenstrater Store Manager Oney testified corporate headquarters had approved certain groups to solicit at the Breitenstrater store; namely, Girl Scout cookie sales (fiMDBUfi\*ERR17\*fiMDNMfi probably sure checks for senior citizens (fiMDBUfi\*ERR17\*fiMDNMfi probably Oney said schools and churches had been denied an opportunity to sell candy or conduct bake sales at his store.

Union Director of Organizing Dudley testified he visited the Forest Park store on February 7, where he observed and photographed two individuals "passing out voter registration forms at the door of the store." Dudley identified the two individuals as Jeff Crider and Scott Adkins.<sup>10</sup> Dudley testified Union Organizer Crider told him the store manager gave them permission to handbill.

Union Director of Organizing Dudley testified that he along with Union Organizer Burgstaller's brother Phil, Bonnie France (fiMDBUfi\*ERR17\*fiMDNMfi a store clerk at an area Kroger store, whose employees are represented by the Union) fiMDBUfi\*ERR17\*fiMDNMfi and Dreisback (fiMDBUfi\*ERR17\*fiMDNMfi an employee of Michner's store, whose employees are represented by the Union) fiMDBUfi\*ERR17\*fiMDNMfi visited the Forest Park store at around 10 a.m., February 14, where they handbilled and picketed at the entrance to the store. The yellow colored handbills they distributed reads as follows:

PLEASE DON'T SHOP  
AT NON-UNION  
SCHEAR'S FOOD  
CENTER  
  
The members of UFCW  
Local 1099 ask for your  
support in our  
struggle to maintain good union jobs  
in our community.  
  
PLEASE  
SHOP AT  
UNION STORES

On the reverse side of the flyers are cost comparisons of 25 items between the Company's Forest Park store and Kroger's Needmore Road, Dayton, Ohio store.

Director of Organizing Dudley testified that around 11 a.m., a Montgomery County Deputy Sheriff's representative came to the Forest Park store and he asked her if there was a problem and she said there might be. According to Dudley, the deputy sheriff spoke with someone inside the store and when she came out he gave her one of his business cards and told her if she needed him to call him. Dudley testified he left for a while, but returned to the Forest Park store that afternoon (fiMDBUfi\*ERR17\*fiMDNMfi February 14) fiMDBUfi\*ERR17\*fiMDNMfi

<sup>9</sup> Baumann had not previously met Oney but said she observed his name and title on a tag he was wearing.

<sup>10</sup> According to Dudley, Adkins is the son of one of their business representatives who works for a company whose employees are represented by the Union herein.

est Park Store Manager James. James came to the outside entrance where the pickets were and told Dudley he wanted them to leave the premises. Dudley told James the Company had allowed other solicitation such as the Girl Scouts and he "felt we had a legal right to be there." James again told Dudley he wanted them to leave. Dudley gave his business card to James and told him the pickets would conduct themselves in a professional manner, they would not block entrances, but they were going to continue their handbilling activities.

Director of Organizing Dudley and other pickets returned to the Forest Park Store the next day, February 15, and were approached by Facility Manager Alexander. According to Dudley, Alexander said he was the owner of the property and wanted the pickets to leave. Dudley told Alexander he thought they had a right to be there and would not leave. The Union continued picketing 5 to 6 days per week, until February 24.

Union Organizer Burgstaller testified that on February 24, Director of Organizing Dudley was confronted at the Forest Park store by Montgomery County Sheriff's Department Major Casey and at least two other representatives of the Sheriff's Department. Dudley testified, "Major Casey informed us that if we didn't leave the property, we would be arrested for criminal trespassing." Dudley told Casey he thought they had a right to be there, but they didn't want to be arrested so they left the property.

Director of Organizing Dudley testified he, along with Union Organizer Crider, Kroger Meat Cutter employee Hernandez and Kroger Clerk employee and union executive board member Jones handbilled again at the Forest Park store on July 20. On this occasion Dudley said they handbilled with leaflets that asked consumers not to shop at the Company but added the leaflets did not contain price comparisons between the Company and Krogers. After they started handbilling, Major Casey and Sergeant Skidmore of the Montgomery County Sheriff's Department arrived at the store. Major Casey informed Dudley he was on his way inside to see who had called the Sheriff's Department. According to Dudley, Dale Bull was inside the store at the time.<sup>11</sup> A few minutes later Major Casey came outside and asked Dudley for his driver's license. Within a few minutes a uniformed officer from the Sheriff's Department arrived at and entered the store. Shortly thereafter Major Casey, Sergeant Skidmore, Forest Park Partners Representative Bull and the uniformed Sheriff's Department representative approached the pickets at the store entrance. According to Dudley, Bull said, "We want you to leave the property now. Go where you belong." Dudley told the group he thought they had a right to be there and asked Bull who he was doing this for, the property owners or the Company. Bull declined to answer and again asked if Dudley and the pickets were going to leave. Dudley said he was not. Bull then signed papers for the law enforcement personnel. The authorities asked Dudley to step over by a police cruiser where Dudley was charged with criminal trespassing.<sup>12</sup>

On this occasion he spoke with Forest Park Store Manager James testified he asked the pickets on February 14, to leave the premises, but said they

<sup>11</sup> Dudley said Bull worked for the property owners.

<sup>12</sup> The summons reflects the complained-of action is a fourth-degree misdemeanor.

refused to do so. James said he telephoned the Sheriff's Department and Forest Park Partners Facility Manager Alexander. James said Alexander established a "picketing island" using shopping carts and tape "just behind the for hand-capped parking stalls" which is the parking area closest to the store entrance. James said the pickets refused to move to the "picketing island." James testified the Sheriff's Department initially told him they could not do anything. James said the picketing continued for 5 to 6 days per week thereafter. Facility Manager Alexander testified that on February 24, the Montgomery County Sheriff's Department, at his request, ordered the pickets to leave from in front of the Forest Park store and told them if they refused they would be arrested.<sup>13</sup> The pickets left.

Facility Manager Alexander testified he learned union pickets had returned to the entrance at the Forest Park store on July 20, when Forest Park Partners Representative Bull telephoned him.<sup>14</sup> In their conversation Bull told Alexander, Forest Park Store Manager James wanted the pickets removed. Accordingly Bull executed the necessary papers and Union Director of Organizing Dudley was issued a criminal trespass summons.

The Union recalled Dudley as a rebuttal witness and he testified that after the incident at the Forest Park store on February 24, he observed Girl Scouts selling cookies (fIMDBUfl\*ERR17\*fIMDNMfl) inside the Forest Park store during their activities.<sup>15</sup>

Union Organizer Crider testified he, two union members, and a union member's wife handbilled at the entrance to the Breitenstrater store starting at 10 a.m. on February 14.<sup>16</sup> Crider said that after being there a short while an employee told them the store manager wanted to speak with whomever was in charge of the handbilling. Crider said he told the employee that if the manager wanted to speak with them he knew where they were. Shortly thereafter a City of Dayton, Ohio police officer arrived at the store. Thereafter a second police officer (fIMDBUfl\*ERR17\*fIMDNMfl) Sergeant Tenor) arrived at the store and spoke with Store Manager Oney. According to Crider, Sergeant Tenor then came outside and told those handbilling it was his job to ask them to leave. Crider told Tenor they were not going to leave. Sergeant Tenor told them store personnel were trying to make contact with the property owners and added "If she comes out here and tells you to leave, you will have to leave or you will be arrested." According to Crider, around 4 p.m., Breitenstrater Manager Oney and Breitenstrater Trustee Louise Kennett gave him a letter. The letter reads as follows:

February 14, 1994

TO: UFCW, Local 1099 and Pickets:

<sup>13</sup> Facility Manager Alexander testified the Forest Park Partners do not allow solicitation on mall property except for hire such as a carnival paying a fee to operate in the parking lot. Alexander said he even had an individual with a "Work for Food" sign removed from the premises.

<sup>14</sup> According to Alexander, Bull was fully authorized by the Forest Park Partners to sign a complaint against trespassers.

<sup>15</sup> Dudley's photographs were received in evidence.

<sup>16</sup> The handbills in question were similar to those distributed at the Forest Park store which are described elsewhere in this decision. Crider stated they did not seek permission from the Company to engage in the handbilling.

Schear's Metro Market and the property owners are asking you to move to a designated picketing island located in the parking lot.

We would appreciate your compliance and cooperations.

SINCERELY,  
/S/ GENE A. BLAIR  
GENE A. BLAIR  
GENERAL MANAGER—293-6491  
/S/ LOUISE E. KENNETT  
CO TRUSTEE & OWNER OF  
BREITENSTRATER SHOP CENTER

Crider testified he read the letter and Trustee Kennett asked him to go to the roped off area to handbill.<sup>17</sup> Crider declined to do so. Breitenstrater Store Manager Oney and Trustee Kennett went back inside the store, but shortly thereafter came outside again with Dayton City Police Sergeant Tenor. Crider testified Breitenstrater Trustee Kennett ordered him and the handbillers off the property. Crider stated that based on what Sergeant Tenor had earlier told them (fIMDBUfl\*ERR17\*fIMDNMfl) property owner ordered them off and they did not leave they would be arrested) (fIMDBUfl\*ERR17\*fIMDNMfl) they moved to the public sidewalk joining the Breitenstrater property. Crider said they have picketed almost every day on the public sidewalks at the store of the Breitenstrater property since February 14.

Union Organizer Burgstaller testified he and Director of Organizing Dudley went to the Breitenstrater store on February 27 where they observed Girl Scouts inside the store selling cookies. Burgstaller stated he and Dudley purchased some Girl Scout cookies and photographed the activities. Burgstaller testified there was a poster advertising the event which read: "Everyone's Favorite! Girl Scout Cookies."

Breitenstrater Store Manager Oney said he first learned on February 14, about pickets at his store when a Dayton, Ohio city policeman (fIMDBUfl\*ERR17\*fIMDNMfl) whom he had not called to the store. Oney stated the policeman arrived and went inside the store. Oney stated the policeman asked him if there was a problem. He said he told the policeman not at that time. Oney asked the policeman what he needed to do and the policeman told him he needed a written statement from the landlord or the Company authorizing the removal of the pickets if that was what he wanted. Oney directed an associate to ask Union Organizer Crider to come into the store. Oney stated that after Crider refused he "went out and asked [Crider] would he please go away from my entrance" and added, "I told him I would make a designated area for him, and I was in the process of doing so." Oney testified about the picketing island he established, "We took four grocery carts and turned them upside down and took yellow caution tape and round around it." According to Oney, Crider and the others would not move to the designated picketing island. Breitenstrater Store Manager Oney testified he then contacted Breitenstrater Trustee Kennett and she came to the property and gave Crider a letter asking him to move to the area designated for picketing. When Crider refused Kennett asked what she should do and Oney told her it was her call. The police asked Kennett what she wanted and she told the police she wanted the pickets "off the property totally."

<sup>17</sup> Crider described the roped off area as being in the parking lot with grocery carts turned upside down with yellow "Do Not Enter" caution tape strung through the carts outlining the area.

As alluded to elsewhere, Breitenstrater Store Manager Oney testified the Company has a policy on solicitation but authorized some soliciting. Oney testified that for examples the Breitenstrater store allowed a blood pressure check for senior citizens in either February or March, "shortly after" the Girl Scouts conducted a cookie sale at the store. Oney denied seeing or knowing of any voter registration forms being distributed at the Breitenstrater store.

#### B. Analysis and Conclusions

A brief sketch of the parties positions is helpful at this point.

The Government and Union contend that while an employer may limit nonemployee union organizers from picketing or distributing union literature on private property it may not treat activities by union personnel in a disparate manner; that is, if an employer permits picketing or distribution of literature by other nonunion charitable and/or commercial activities it may not selectively preclude pickets from distributing literature on behalf of a union—which is what they contend happened herein.

The Company and Forest Park Partners contend the activities of the Union at the two stores was nothing more than an aggressive campaign by the Union to destroy its business and divert its customers to its competitors. The Company and Forest Park Partners note the Union does not represent any of their employees and was not attempting to organize their employees nor was it attempting to be recognized as their employees bargaining representative. The Company contends the Union's campaign was solely directed at consumers to injure its business. The Company and Forest Park Partners further contend that as part of its campaign the Union's organizers trespassed on the private property of the Company's landlords and that such activity is not protected by the Act. The Company and Forest Park Partners assert they did not unlawfully discriminate when they defended their property (fiMDBUfi\*ERR17\*fiMDNMfi) against criminal trespass. The Company and Forest Park Partners further contend that to allow the Union access to its private property to injure the Company's business would be a taking of property in violation of the 5th Amendment to the Constitution.

Section 7 of the Act guarantees "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" and makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Section 8(fiMDBUfi\*ERR17\*fiMDNMfi)fiMDBUfi\*ERR17\*fiMDNMfi. The Supreme Court, 502 U.S. 527 (fiMDBUfi\*ERR17\*fiMDNMfi1992)fiMDBUfi\*ERR17\*fiMDNMfi, held that as a rule an employer cannot be compelled to allow distribution of union literature by non-employee organizers on its property. The Court, however, went on to note that like many rules there are exceptions. The Court excepted the situation where, for example, the location of a plant and the living quarters of the employees placed the employees beyond the reach of reasonable union efforts to communicate with them. In such circumstances the employer's property rights may be required to yield to the extent needed to permit communication of information on the right to organize. The Court admonished that even in such circumstances accommodation between employees' Section 7

rights and employer's property rights must be attained with as little destruction of the one as is consistent with the maintenance of the other. This inaccessibility exception only applies when the employee pickets or handbillers are trying to reach employees not customers. It is clear that the above described Lechmere exception does not apply in the instant case inasmuch as the nonemployee pickets and handbillers were trying to reach customers not employees.

The Court in *Lechmere*, quoting from *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (fiMDBUfi\*ERR17\*fiMDNMfi1978)fiMDBUfi\*ERR17\*fiMDNMfi, that situation in which "the employer's access rules discriminate against union solicitation." See *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (fiMDBUfi\*ERR17\*fiMDNMfi1956)fiMDBUfi\*ERR17\*fiMDNMfi, 306 NLRB 426 (fiMDBUfi\*ERR17\*fiMDNMfi1992)fiMDBUfi\*ERR17\*fiMDNMfi, NLRB 201 (fiMDBUfi\*ERR17\*fiMDNMfi1992)fiMDBUfi\*ERR17\*fiMDNMfi; It is on this exception that the Government's case herein will rise or fall.

Turning to the Breitenstrater store first, Union Organizer Burgstaller and Director of Organizing Dudley visited that store on February 7, where they observed two individuals—Tammy Baumann and Jennifer Vaughn—distributing voter registrar forms. Baumann credibly testified they distributed the forms in front of and inside the store. Baumann said she even spoke twice to Breitenstrater Store Manager Oney.<sup>18</sup> Breitenstrater Store Manager Oney acknowledged that Company Headquarters authorized certain solicitation activities at the Breitenstrater Store. Oney acknowledged Girl Scouts were allowed to conduct cookie sales inside the store, probably in February, and the Company allowed blood pressure checks to be conducted inside the store for senior citizens in February or March.<sup>19</sup> Union Organizer Burgstaller and Union Director of Organizing Dudley even photographed Girl Scouts selling cookies inside the Breitenstrater store on February 27.

When on February 14, Breitenstrater Store Manager Oney and Breitenstrater Trustee Kennett ordered Union Organizer Crider, the other pickets to stop peacefully picketing-handbilling and leave the property or be arrested, while permitting others before and after this incident to solicit, the Company violated the Act as alleged in the complaint and I so find.

The evidence establishes that the Seventh-Day Adventist Church distributed literature and solicited donations for a community crusade against drugs inside the Forest Park store in June 1993. Forest Park Store Manager James, although disputing any activity in 1994, acknowledged that the Seventh-Day Adventist Church conducted antidrug crusades inside the Forest Park store in 1993, "usually monthly or every 2 months . . . on Friday, Saturday, and Sunday normally." James also acknowledged that during that same time Girl Scouts sold cookies inside the store, and the Jaycees conducted voter registration drives outside the store. I credit Union Organizer Crider's testimony that he, Scott Adkins,

<sup>18</sup>I credit Burgstaller, Dudley, and Baumann's testimony as outlined above even though Breitenstrater store manager Oney could not recall anyone handing out voter registrations forms at his store, nor did he recognize Baumann in the courtroom. I note Burgstaller and Dudley photographed Baumann's and Vaughn's activities on the day in question.

<sup>19</sup>Oney did state the Company had refused to allow schools and churches to sell candy or conduct bake sales at the Breitenstrater store.

and Katrina Dreisback collected signatures on a petition regarding NAFTA at the Forest Park store in July 1993.<sup>20</sup> Notwithstanding Forest Park Manager James testimony that no soliciting activities took place at his store in 1994, I credit Union Director of Organizing Dudley's testimony that he visited the Forest Park store on February 7 and observed, as well as photographed, two individuals "passing out voter registration forms at the door of the store." I also credit Dudley's testimony that he observed and photograph Girl Scouts selling cookies inside the Forest Park store, perhaps in March, and definitely after February 24.

It is clear the Company allowed others to solicit at its Forest Park store before and after February 24, when at Facility Manager Alexander's request, Montgomery County Sheriff's Department personnel ordered Union Director of Organizing Dudley and the other pickets off the Forest Park property or be subject to arrest for criminal trespassing. Such action by the Company and Forest Park Partners violated Section 8(f)(1) of the Act.

Likewise when on July 20, Forest Park Store Manager James notified Forest Park Partners that the Union pickets had returned to his store and Forest Park Partners Representative Bull signed the necessary papers bringing about the arrest of Union Director of Organizing Dudley for criminal trespass and causing the other union pickets to leave their peaceful handbilling activities or be arrested the Company and Forest Park Partners violated Section 8(f)(1) of the Act and I so find.

I reject the Company's contention the price comparisons handbills were an effort by the Union to destroy the Company such that the activity lost its protection under the Act. I find in agreement with the Union the inclusion of the price comparisons did not change the nature of the Union's message—which was a request not to patronize the Company for the reasons reflected on the handbills and picket signs. Thus, the activity did not lose its protection under the Act. The price comparisons were nothing more than attempts by the Union to persuade the target of its activity—customers—that exercising the choice not to patronize the Company would not cost the customers money. I also reject the Company's constitutional (Fifth Amendment) argument.

CONCLUSIONS OF LAW

1. Shear's Food Center is an employer engaged in commerce within the meaning of Section 2 of the Act.

2. Forest Park, Inc., Lodar, Inc., Thomas J. Desantis, William H. Heller, Berrimore Company, and Hank Schneider, Partners d/b/a Forest Park Partners, Limited is an employer engaged in commerce within the meaning of Section 2 of the Act.

3. United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC is a labor organization within the meaning of Section 2 of the Act.

4. In Case 9-CA-31626 Schear's Food Center violated Section 8(f)(1) of the Act.

discriminatorily prohibited representatives of United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC from peacefully picketing and distributing handbills in front of its Breitenstrater store.

5. In Case 9-CA-32030, Schear's Food Center violated Section 8(f)(1) of the Act discriminatorily prohibited representatives of United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC from peacefully picketing and distributing handbills in front of its Forest Park store.

6. In Case 9-CA-32030 Schear's Food Center and Forest Park, Inc., Lodar, Inc., Thomas J. Desantis, William H. Heller, Berrimore Company, and Hank Schneider, Partners d/b/a Forest Park Partners, Limited jointly violated Section 8(f)(1) of the Act on July 20, 1994, when it discriminatorily prohibited representatives of United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC from peacefully picketing and distributing handbills in front of the Forest Park Store and causing the other union pickets to issue against Union Director of Organizing William Dudley in retaliation for engaging in peaceful picketing and handbilling.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2 of the Act.

REMEDY

Having found the Company and Forest Park Partners have committed violations of Section 8(f)(1) of the Act, I recommend they be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The affirmative action that I shall recommend will include that Schear's Food Center and Forest Park, Inc., Lodar, Inc., Thomas J. Desantis, William H. Heller, Berrimore Company, and Hank Schneider, Partners d/b/a Forest Park Partners, Limited jointly notify the Montgomery County, Ohio Sheriff's Department and appropriate court authorities in writing with a copy to Union Director of Organizing William Dudley that the National Labor Relations Board has determined that Dudley's arrest on July 20, 1994, violated the National Labor Relations Act, that it request in writing, with a copy to Dudley, that the department and the court expunge any and all records of that unlawful arrest and that it make Dudley, the United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC, whole with interest for all reasonable legal fees and expenses incurred as a result of the arrest. Interest shall be figured in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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

ORDER

The Respondent, Schear's Food Center, Dayton, Ohio, its officers, agents, successors, and assigns, shall

cease and desist from

<sup>20</sup>In crediting Crider I am not unmindful that Forest Park Store Manager James testified he did not give permission for nor was he personally aware of any activities by anyone regarding NAFTA at the Forest Park store in 1993. The activities related to NAFTA were photographed by the Union.

<sup>21</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.

(fMDBUfl\*ERR17\*fMDNMfla)fMDBUfl\*ERR17\*fMDNMfl United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC from peacefully picketing and/or distributing handbills in front of its Forest Park and Breitenstrater stores by demanding that they leave, by calling the police or sheriff's department personnel to remove them, by having them placed under arrest or in any other way interfering with them.

(fMDBUfl\*ERR17\*fMDNMflb)fMDBUfl\*ERR17\*fMDNMfl ing, 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.

(fMDBUfl\*ERR17\*fMDNMfla)fMDBUfl\*ERR17\*fMDNMfl ment and appropriate court authorities in writing with a copy to Union Director of Organizing William Dudley that the National Labor Relations Board has determined that Dudley's arrest on July 20, 1994, violated the National Labor Relations Act; in writing, with a copy to Dudley, request that the department and the court remove any and all records of that unlawful arrest and make Dudley, the United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC whole with interest for all reasonable legal fees and expenses incurred as a result of the arrest.

(fMDBUfl\*ERR17\*fMDNMflb)fMDBUfl\*ERR17\*fMDNMfl and Breitenstrater store copies of the attached notice marked "Appendix."<sup>22</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Schear's Food Center's authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Schear's Food Center to ensure that the notices are not altered, defaced, or covered by any other material.

(fMDBUfl\*ERR17\*fMDNMflc)fMDBUfl\*ERR17\*fMDNMfl from the date of this Order what steps Schear's Food Center has taken to comply.

B. The Respondent, Forest Park Inc., Lodar Inc., Thomas J. Desantis, William H. Heller, Berrimore Company, and Hank Schneider, Partners d/b/a Forest Park Partners, Limited, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(fMDBUfl\*ERR17\*fMDNMfla)fMDBUfl\*ERR17\*fMDNMfl Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC from peacefully picketing and/or distributing handbills in front of Schear's Food Center at the Forest Park Shopping Center by demanding they leave and/or by placing them under arrest for criminal trespassing.

(fMDBUfl\*ERR17\*fMDNMflb)fMDBUfl\*ERR17\*fMDNMfl ing, 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.

(fMDBUfl\*ERR17\*fMDNMfla)fMDBUfl\*ERR17\*fMDNMfl and appropriate court authority, in writing, with a copy to Union Director of Organizing William Dudley that the Na-

tional Labor Relations Board has determined that Dudley's arrest on July 20, 1994, violated the National Labor Relations Act; in writing, with a copy to Dudley, request that the department and the court remove any and all records of that unlawful arrest and make Dudley, United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC whole with interest for all reasonable legal fees and expenses incurred as a result of the arrest.

(fMDBUfl\*ERR17\*fMDNMflb)fMDBUfl\*ERR17\*fMDNMfl In any like or related matter interfering with, restrain- Notify the Re from the date of this Order what steps Forest Park, Inc., Lodar, Inc., Thomas J. Desantis, William H. Heller, Berrimore Company, and Hank Schneider, Partners d/b/a Forest Park Partners, Limited, has taken to comply. Notify the Montgomery County, Ohio Sheriff's Depart-

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 at its Corporate Headquarters, Forest Park store, and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

Notify the Regional Director in writing within 20 days WE WILL NOT discriminatorily prohibit representatives of United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC from peacefully picketing and/or from distributing handbills in front of our Forest Park store and our Breitenstrater store by demanding that they leave, by calling the police (fMDBUfl\*ERR17\*fMDNMflor Montgomery County, Ohio Department)fMDBUfl\*ERR17\*fMDNMfl to remove them, by having them arrested, or by any other means, prohibiting other representatives of United

Discriminators, prohibiting other representatives of United 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.

WE WILL notify the Montgomery County, Ohio Sheriff's Department and the appropriate court authorities in writing in any like or related manner interfering with, restrain- that the National Labor Relations Board has determined that Dudley's arrest on July 20, 1994, violated the National Labor Relations Act.

WE WILL notify the Montgomery County, Ohio Sheriff's Department and the appropriate court authorities in writing with a copy to Union Director of Organizing William Dudley that the National Labor Relations Board has determined that Dudley's arrest on July 20, 1994, violated the National Labor Relations Act. WE WILL make Dudley and United Food and Commercial Workers International Union, Local 1099, AFL-CIO-CLC whole, with interest, for all reasonable legal fees and expenses incurred as a result of the arrest.

<sup>22</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."