

O’Neil’s Markets, Inc., d/b/a Food For Less and United Food and Commercial Workers, Meatcutters Local 88. Case 14–CA–23246

August 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On a charge filed by the Union on September 20, 1994, the General Counsel of the National Labor Relations Board by the Regional Director for Region 14 issued a complaint and notice of hearing dated October 21, 1994. The complaint alleges that the Respondent violated Section 8(a)(1) by ordering the Union to cease engaging in handbilling protected by the Act on the sidewalk and parking lot in front of its grocery store, and by having the local police remove the Union’s handbillers from the sidewalk and parking lot in front of this facility.

On December 8, 1994, the General Counsel, the Respondent, and the Union filed with the Board a stipulation of facts. The parties agreed that the charge, complaint, answer and the stipulation of facts constitute the entire record in this case. The parties further stipulated that they waived a hearing and the making of findings of fact and conclusions of law, and the issuance of a decision by an administrative law judge.

On January 24, 1995, the Board issued an order approving the stipulation of facts and transferring the proceeding to the Board. The General Counsel, the Union, and the Respondent subsequently filed briefs.

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

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Missouri corporation engaged in the retail sale of groceries and related products at its place of business located at 8985 Jennings Station Road, Jennings, Missouri, in the Saint Louis metropolitan area. During the 12-month period ending September 30, 1994, the Respondent derived gross revenues in excess of \$500,000, and it purchased and received goods valued in excess of \$50,000 directly from points outside the State of Missouri. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

We further find that the Union, United Food and Commercial Workers, Meatcutters Local 88, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Respondent’s Food For Less grocery store involved in this case is located in a shopping center known as the River Roads Mall, at New Halls Ferry Road and Jennings Station Road in Jennings, Missouri. The building in which the store is situated is at the east end of the mall; it is accessible to customers only from a parking lot in front of the store, i.e., to the south, from an adjacent parking lot to the east of the store, and from a sidewalk which runs immediately in front of the store and to the southwest. The sidewalk in front of the store is about 9 to 12 feet wide. Customers enter and exit the store through four doors located in the center of the front of the building.

Between the sidewalk and the parking lot in front of the store is a driveway used by cars and pedestrians traveling to and from the stores in the mall, including Food For Less. The first 2 feet of the driveway immediately adjacent to the sidewalk in front of the store is designated as a no-parking area. Both the driveway and the no-parking area are part of the parking lot. New Halls Ferry Road is about 250 feet to the east of the store. A public sidewalk runs parallel to the road, at the perimeter of the mall property.

Sam Wolff & Co. owns the building in which the Respondent’s store is located, and also the parking lots to the south and east of the store.¹ A lease covering the Respondent’s store premises was executed on July 23, 1984, between Sam Wolff & Co. and a predecessor of the Respondent. The predecessor’s leasehold interest was assigned to the Respondent on September 30, 1991. The lease was in effect at all relevant times in this case. It provides in significant part, on page 1:

Lessee shall have in common with Lessor and Lessor’s other Lessees in this Shopping Center, a mutual non-exclusive easement of ingress, egress, and parking for its customers, employees and invitees over and upon the rights of way and parking areas as shown on plot plan.

and at page 5, under the title ‘‘Parking’’ and the sub-heading ‘‘Public Area Maintenance’’:

No. 4-C: The common areas shall be subject to the exclusive control and management of Lessor, and Lessor shall have the right to establish, modify, change and enforce uniform and non-discriminatory rules and regulations with respect to the common areas, and Lessee agrees to abide by and conform with such rules and regulations. No. 4-D: In addition to the rents hereinabove provided for, Lessee agrees, during the terms hereof, to pay to

¹ Another company owns and operates other buildings and parking lots in the River Roads Mall.

Lessor an accommodation charge of \$.25 *per sq.* ft. per year which shall be Lessee's share of Lessor's gross cost and expense of operating and maintaining of the public area. . . . [T]here may be included in such gross cost and expense, the cost of public liability and property damage insurance, operation, repairs, management, security, maintenance, cleaning, lighting and other utilities, line painting, and snow removal.

With the apparent exception of snow removal, Sam Wolff & Co. has not billed the Respondent, and the Respondent has not paid Sam Wolff & Co., for the public area maintenance referred to in section 4-D above. In addition, Sam Wolff & Co. maintains its own liability and property insurance covering the Respondent's store and the parking lots. The Respondent also maintains liability insurance in its own name covering the store and the parking lots.

The Respondent performs, not pursuant to its lease agreement, the regular maintenance and repair of the parking lots and sidewalk. This includes sweeping and trash removal; retrieval of shopping carts; patrol by the Respondent's security guard; and instances of asphalt patchwork repair, restriping and repainting of parking areas, and repair of parking lot lights.

At all relevant times, the Respondent has had in effect a no-solicitation/no-distribution policy regarding both employees and nonemployees. The Respondent also has maintained a "No Soliciting or Trespassing" sign near the front doors of the store; however, this sign was not posted on September 20, 1994, the date of the Union's handbilling in this case.² It is apparent that on various occasions both before and after September 20 the Respondent has requested nonemployee individuals and organizations, representing a variety of interests, to stop soliciting—or has denied requests to permit such soliciting—in front of or in the immediate vicinity of the store.

On September 20, from about 10 or 10:30 a.m. until about 11:15 a.m., two members of the Union peacefully distributed handbills to customers while standing both on the edge of the sidewalk and in the no-parking area in front of the store. Neither handbiller was employed by the Respondent, and the Respondent's store employees were not represented by any labor organization. The handbill stated:

FOR INFORMATION ONLY
PLEASE DO NOT BUY MERCHANDISE
FOOD FOR LESS
WHICH IS PAYING THEIR EMPLOYEES
WAGES
AND BENEFITS WHICH ARE LESS THAN
THE
STANDARDS ESTABLISHED BY
UNITED FOOD & COMMERCIAL WORKERS
IN THE AREA, AND THEREBY
UNDERMINING
THOSE STANDARDS.
UNITED FOOD AND COMMERCIAL
WORKERS,
MEAT CUTTERS LOCAL 88
(AFL-CIO)
REQUEST THAT CUSTOMERS
DO NOT PURCHASE ANY MERCHANDISE
FOOD FOR LESS
LOCAL 88 HAS NO DISPUTE WITH ANY
OTHER EMPLOYER
THIS IS AN INFORMATIONAL PICKET
ONLY

The Respondent advised the handbillers to leave the area and to go to, *inter alia*, the public sidewalk next to New Halls Ferry Road. After further discussion with the handbillers, the Respondent called the local police. When the police arrived, the Respondent told them that no one was allowed to handbill on the sidewalk and parking lot. At the Respondent's request, the police told the handbillers that they could not distribute handbills in front of the store and that they had to move to the public sidewalk at New Halls Ferry Road. At that point the union representatives ceased handbilling. After September 20, the Union maintained pickets on an intermittent basis at the public sidewalk parallel to New Halls Ferry Road.

Sam Wolff & Co., the owner of the private property involved here, did not seek the removal of the Union's handbillers on September 20, and the Union did not have the company's permission to handbill on its property. The Respondent acted solely on its own behalf on September 20 when it removed the handbillers from the property.

B. *Issue*

The issue is whether the Respondent violated Section 8(a)(1) by ordering the Union's handbillers to leave the property in front of its store and by causing the police to remove the handbillers from that property.

²All dates hereafter are in 1994.

C. Contentions of the Parties

The General Counsel contends that the accommodation doctrine of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), concerning the exercise of Section 7 rights on private property, is not applicable in this case because the Respondent's limited property interest in the parking lot in front of its store did not provide it with the authority to expel trespassers. More specifically, the General Counsel argues that under the terms of its lease and Missouri case law, and even accounting for its maintenance and repair and insurance coverage concerning the parking lot, the Respondent's interest in this area was at best a nonexclusive easement in common with the owner and other tenants of the mall. According to the General Counsel, this property interest was not sufficient to permit expulsion of the Union's handbillers under any circumstances on September 20, and thus the Respondent's conduct violated Section 8(a)(1). Alternatively, the General Counsel contends that, if the Respondent did possess a valid right to exclude trespassers from the parking lot, it still violated the Act pursuant to a *Babcock/Lechmere* analysis, because the Union did not have reasonable alternatives to handbilling in the parking lot. The Union's argument, similar to the General Counsel's primary position, is that under the lease and Missouri case law, the Respondent did not have a property interest in the parking lot adequate to authorize the ejection of the handbillers.

The Respondent contends that the General Counsel and the Union have not met the "heavy burden" of proving that the Union's handbilling activity was protected by the Act because they did not show that the Respondent's wages and benefits in fact were below the area standards, citing *NLRB v. Great Scot, Inc.*, 39 F.3d 678 (6th Cir. 1994). The Respondent further argues that pursuant to its lease and state law, it had a sufficient property interest in the parking lot to expel the handbillers, and that its control is further established by its insurance coverage and its maintenance and repair regarding the parking lot. The Respondent contends that, in view of its property right, the *Babcock/Lechmere* doctrine and court cases interpreting it establish that the Union had no statutory right to access to the parking lot and the area in front of the store to distribute its handbills. Accordingly, in the Respondent's view, its conduct on September 20 was justified and did not violate the Act.

D. Discussion

1. The area standards handbilling

A union's peaceful area standards activity is protected by Section 7 of the Act. See, e.g., *Sears, Roebuck & Co. v. San Diego County District Council Car-*

penters, 436 U.S. 180, 206 fn. 42 (1978); *Leslie Homes, Inc.*, 316 NLRB 123, 125 (1995). In cases such as the instant one, where the issue is whether asserted area standards activity is statutorily protected, the Board normally does not look beyond the communication the union is conveying to consumers. Thus, if the message on the union's handbill or picket sign indicates that an employer is undermining the collectively bargained wage and benefit standards in the area, and if the union's conduct in conveying this message is peaceful and consistent with the nature of the message, i.e., if the union's activity is ostensibly in support of area wage and benefit standards, we will consider, prima facie, the union's activity protected by Section 7. At that point, it is the respondent employer's burden to establish, if it can, that the union's activity is not what it appears to be and that it is outside the sphere of Section 7 protection. See, e.g., *Great Scot, Inc.*, 309 NLRB 548, 553 (1992), enf. denied 39 F.3d 678 (6th Cir. 1994).

Cases in which ostensible area standards activity is alleged to violate Section 8(b) of the Act present a distinctly different analytical context. Thus, for example, where the General Counsel has established a prima facie case that a respondent union's picketing is in violation of one of the subsections of Section 8(b)(7), the burden shifts to the respondent union to prove that its picketing, assertedly in support of area standards, was based on a bona fide investigation and evaluation of comparative labor costs. In this way, the respondent seeks to avoid an inference that the true objective of its picketing was an organizational or recognition one proscribed by the Act. See, e.g., *Teamsters Local 88 (West Coast Cycle)*, 208 NLRB 679, 680 fn. 10 (1974); *Teamsters Local 296 (Alpha Beta Acme)*, 205 NLRB 462, 471, 473-474 (1973); see also *NLRB v. Operating Engineers Local 571*, 624 F.2d 846, 849 (8th Cir. 1980). This analytical approach is not particularly apposite or useful in the instant case, where no violation of the Act has been alleged against the Union, and the relevant question, as we indicated above, is whether the Union's activity merits the affirmative protection of Section 7.³

Accordingly, we respectfully disagree with the Sixth Circuit's view in *NLRB v. Great Scot, Inc.*, supra, and we reject the Respondent's contention that the General Counsel and the Union did not prove that the Union's activity in this case was protected by Section 7. The

³ As we interpret *Lechmere, Inc. v. NLRB*, the "heavy burden" of a union in a trespassory access case refers to the requisite demonstration of the unavailability of alternative means of communication, at the risk of forfeiture of the normally protected status of its activity in the face of a predominant property right. See *Leslie Homes*, supra at 126, 127. The "heavy burden" concept does not refer to an enhanced obligation—distinct from the alternative means inquiry—to prove that facially legitimate Sec. 7 activity, such as that in support of area standards, is in fact protected.

handbills the Union distributed on September 20 bore a clear area standards message, and nothing in the Union's conduct of the handbilling suggested anything other than peaceful area standards activity. The Respondent submitted no evidence raising the possibility that the ostensible area standards activity might be unprotected, for example, a showing that its wage and benefit policies actually were not substandard and that the Union was or should have been aware of this. Further, there is no claim or evidence that the Union had any immediate objective to organize or represent Food For Less employees which could have underlaid the area standards handbilling. Therefore, we find that the Union's handbilling activity was protected by Section 7.

2. The Respondent's property interest

In cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representatives, an interest which *entitled* it to exclude individuals from the property. See, e.g., *Bristol Farms*, 311 NLRB 437, 438 (1993); *Johnson & Hardin Co.*, 305 NLRB 690 (1991), *enfd.* in relevant part 49 F.3d 237 (6th Cir. 1995). In the absence of such a showing there is in fact no conflict between competing rights requiring an analysis and an accommodation under *Lechmere*, *supra*. See *Bristol Farms* at 438. In determining whether an adequate property interest has been shown, it is appropriate to look not only to relevant documentary and other evidence on record but to the relevant state law. *Bristol* at 438-439; *Johnson & Hardin* at 690, 695.

The lease between the Respondent and Sam Wolff & Co. explicitly grants to the Respondent "a mutual non-exclusive easement," held "in common with Lessor and Lessor's other Lessees." The uses of the Respondent's nonexclusive easement are specified: "ingress, egress, and parking for [the Respondent's] customers, employees and invitees over and upon the rights of way and parking areas." It is indisputable that the "rights of way and parking areas" include the parking lot in front of the Respondent's store, and the driveway and no-parking area immediately in front of the store, since they are part of the parking lot. The lease also explicitly states that the "common areas shall be subject to the exclusive control and management of Lessor." The context of this passage in the lease, and especially within a section entitled "PARKING," indicates with sufficient clarity that the "common areas" under the Lessor's, and not the Lessee's, exclusive control include the parking lot in front of the store. Thus, on the face of the lease, the Respondent's

property interest in the parking lot constitutes, at best,⁴ a nonexclusive easement for specified business purposes, with control and management of the parking lot retained in Lessor Sam Wolff & Co.

Current Missouri case law defines an "easement" as a nonpossessory interest; it is an interest in the land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists The easement owner who finds it necessary to resort to the courts for protection of his easement is debarred from actions traditionally established for the protection of a possession, such as trespass, writ of entry and ejectment, because the easement owner does not have the prerequisite possession.

Gilbert v. K.T.I., Inc., 765 S.W.2d 289, 293 (Mo.App. 1988) (citations omitted); see also *Nieberg Real Estate v. Taylor-Morley-Simon*, 867 S.W.2d 618, 627 (Mo.App. E.D. 1993). *Gilbert* also states that legal recourse for one whose easement is interfered with or obstructed is to be found in the law of nuisance. 765 S.W.2d at 294.

The Respondent cites *Winslow v. Sauerwein*, 285 S.W.2d 21 (Mo.App. 1955), for the proposition that Missouri precedent permits the trespass of private property to be enjoined by the holder of an easement in the property.⁵ In *Winslow*, it is apparent that the court in fact enjoined the trespass of a private street by building-construction trucks based on the plaintiff's easement interest in the street. The plaintiff held this interest in common with others who, like himself, were owners of property abutting the street. In view of the more current Missouri precedent above, which precludes a trespass action by an easement holder because of lack of possession, it may well be that the *Winslow* case, as precedent, is limited to its particular facts. In any event, even viewing *Winslow* more broadly, it is readily apparent that it is distinguishable from the instant case, in light of the Respondent's far more circumscribed easement interest, the far less intrusive "trespass" by the handbillers, and the failure of the Respondent to satisfy *Winslow*'s standard for issuance of an injunction: a showing of irreparable injury, permanent and continuous interference, or the inadequacy of a damages remedy. *Id.* at 25.

In light of the above, we conclude that the Respondent has not satisfied the burden of proving that on September 20 it had a property interest in the parking lot in front of its store which entitled it to expel the

⁴We need not pass on the General Counsel's theory that the Respondent's interest may amount to no more than a license.

⁵The Respondent also cites *Kansas City Power & Light Co. v. Riss*, 319 S.W.2d 262, 265 (Mo.App. 1958), to the extent it refers to *Winslow* with approval, although it is not otherwise on point.

Union’s handbillers.⁶ Thus, the Respondent has shown that at best it had a nonexclusive easement interest for limited business purposes, and it has not established that this interest carried the legal authority to exclude.⁷ Nor has the Respondent shown that under state law its liability insurance coverage and its repair and maintenance of the parking lot transformed the easement interest set forth in the lease into a more substantial property right providing the legitimate power to expel. See *Johnson & Hardin*, supra, 305 NLRB at 695.

3. Conclusion

Because the Respondent has not proven the sufficiency of its property interest, it is unnecessary for us to consider any of the parties’ contentions dependent on a *Lechmere* conflict between competing statutory and property rights. On this record the Respondent has not provided any acceptable justification for its interference with the Union’s protected distribution of area standards handbills on September 20, and accordingly, its conduct violated Section 8(a)(1). See, e.g., *Bristol Farms; Johnson & Hardin*, supra.

CONCLUSION OF LAW

By ordering representatives of United Food and Commercial Workers, Meatcutters Local 88, who were engaged in peaceful handbilling protected by the Act, to leave the property in front of its store in the River Roads Mall, Jennings, Missouri, and by causing the police to remove the handbillers from that property, the Respondent has violated Section 8(a)(1) of the Act.

THE REMEDY

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

ORDER

The National Labor Relations Board orders that the Respondent, O’Neil’s Markets, Inc., d/b/a Food For Less, Jennings, Missouri, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from

⁶We note that the union representatives were standing partially on the sidewalk in front of the Respondent’s store when they distributed their handbills. It is unclear on this record who, under the lease, controls this sidewalk. However, even assuming the Respondent properly controlled the sidewalk, it caused the union representatives to be ejected not only from the sidewalk but from the parking lot and the entire mall property as well—clearly beyond any authority pursuant to a property interest held by the Respondent.

⁷We observe in passing that the Respondent did not demonstrate that the peaceful handbilling by the two individuals in this case constituted a nuisance, i.e., an interference with, or an obstruction of, the business uses—ingress, egress, and parking—protected by the Respondent’s easement.

(a) Ordering representatives of United Food and Commercial Workers, Meatcutters Local 88 who are engaged in peaceful handbilling protected by the Act to leave the property in front of its store in the River Roads Mall, Jennings, Missouri, and causing the police to remove such handbillers from that property, as long as such handbilling is conducted by a reasonable number of persons and does not unduly interfere with the normal use of facilities or operation of businesses not associated with the Respondent’s store.

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

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

(a) Post at its store at the River Roads Mall copies of the attached notice marked “Appendix.”⁸ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁸If 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.”

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 order representatives of United Food and Commercial Workers, Meatcutters Local 88 who are engaged in peaceful handbilling protected by the Act to leave the property in front of our store in the River Roads Mall, Jennings, Missouri, and WE WILL NOT cause the police to remove such handbillers from that property, as long as such handbilling is conducted by a reasonable number of persons and does not unduly interfere with the normal use of facilities or operation of businesses not associated with our store.

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

O'NEIL'S MARKETS, INC., D/B/A FOOD
FOR LESS