

Farm Fresh, Inc. t/a Nicks¹ and United Food and Commercial Workers International Union Local 400, AFL-CIO

Farm Fresh, Inc. and United Food and Commercial Workers International Union, Local 400, AFL-CIO

Farm Fresh, Inc. t/a Food Carnival and United Food and Commercial Workers International Union, Local 400, AFL-CIO. Cases 5-CA-21155, 5-CA-21369, 5-CA-21532, 5-CA-21586, 5-CA-21311, 5-CA-21366, 5-CA-21408, 5-CA-21410, 5-CA-21412, 5-CA-21461, 5-CA-21462, 5-CA-21463, 5-CA-21511, and 5-CA-21368

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

This case² presents multiple issues, among which are whether the Respondent established a sufficient property interest to exclude nonemployee organizers from certain portions of the sidewalks in front of its grocery stores and whether it unlawfully ejected nonemployee organizers from the snackbar of one of its grocery stores.

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,³ and conclusions,⁴

¹ The caption herein includes Cases 5-CA-21461, 5-CA-21463, and 5-CA-21511 which the judge inadvertently omitted.

² On January 19, 1993, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs, and the Charging Party filed an answering brief to the Respondent's exceptions.

³ The Respondent and the Charging Party have 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 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Although the Respondent excepted to the judge's finding that it violated Sec. 8(a)(1) by removing a union sticker from the office door of employee Michele Shaffer, we note that the Respondent failed to provide specific supporting argument in its brief.

On March 21, 1994, the Charging Party filed a Motion To Withdraw Exceptions with respect to the judge's dismissal of the 8(a)(1) and (3) allegations involving Shaffer. We grant the motion and note that it is not opposed by Shaffer, the General Counsel, or the Respondent.

Member Brame would not find an 8(a)(1) violation in Assistant Manager Robert Grigsby's statement to employee Robert Puchalski that, "being from New York," Puchalski was "probably a plant for the Union." Grigsby laughed after making the comment, and no further conversation ensued. As the D.C. Circuit recently counseled, albeit under different factual circumstances, "[i]n evaluating an employer's conduct under Sec. 8(a)(1), the Board must consider 'whether the conduct in question had a reasonable tendency in the totality of the circumstances to intimidate.'" [Citation omitted.] In this case, the circumstances raise such a weak inference of intimidation that it is an intolerable stretch to say that substantial evidence supports it." *McClatchy Newspaper, Inc. v. NLRB*, 157 LRRM 2023, 2032 (1997).

and to adopt the recommended Order as modified and set forth in full below.⁵

In section 1 below, Chairman Gould and Members Brame and Hurtgen join in dismissing the complaint allegation that the Respondent unlawfully ejected nonemployee union organizers from its grocery store snackbar. Chairman Gould sets forth his view on this issue in a concurring opinion and Members Fox and Liebman join in a dissenting opinion on this issue. In section 2, all Board Members join in finding that the Respondent possessed a sufficient property interest in sidewalks outside some, but not all of its stores and that the Respondent violated Section 8(a)(1) only at the stores where it removed nonemployee organizers from the sidewalks in which it retained an insufficient property interest. Chairman Gould and Member Hurtgen set forth their views on this issue in a separate concurrence.

1. The judge dismissed the allegation that the Respondent violated Section 8(a)(1) by ordering two nonemployee union organizers to leave the snackbar of its Princess Anne Road store. The General Counsel and the Charging Party except to the dismissal of this allegation. We agree with the judge's conclusion, but for reasons different than those on which he relied.

On May 1, 1990,⁶ union organizers James Green and Dudley Saunders, who were not employees of the Respondent, came to the Princess Anne Road grocery store to solicit union support among the Respondent's employees. In handing out authorization cards and other literature, they stood on the store's sidewalk approximately 30 feet from the entrance of the store. Soon thereafter, Store Manager Nat Harlow appeared and instructed Green and Saunders to move back 50 feet from the entrance. This instruction was in accordance with a promulgated company policy in place at all of its stores that forbade all solicitation within 50 feet of store en-

⁴ The Charging Party excepts to the judge's statement that under *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), an employer can meet its burden of establishing a property interest entitling it to exclude individuals from property by showing, inter alia, that "an owner had by express delegation authorized the employer to stand in its shoes as against trespassers." We find it unnecessary to pass on this "delegation" theory because the judge did not rely on this theory in making any of his findings and because, as the Charging Party correctly notes, there is no evidence that the Respondent ever acted under any delegated authority when it excluded the organizers from the 50-foot portion of store sidewalks.

In its exceptions, the Charging Party interprets the judge's statement that the organizational activity engaged in by the union agents on the sidewalk of the Princess Anne Road store was "not protected by the Act" as meaning that protected activity loses its protected status "just because it occurs on employer property." We find nothing objectionable in the judge's statement, which conveys only that in the circumstances of this case where reasonable alternative means of communications with the employees exist, "Sec. 7's guarantees do not authorize trespasses by nonemployee organizers." *Lechmere*, 502 U.S. at 537.

⁵ We have included a new Order and notice conforming to the violations found.

⁶ All dates are in 1990.

trances.⁷ After Green refused to move, Harlow summoned the police who, after arriving and consulting with the parties, informed Green and Saunders that if they did not move as Harlow had requested, Harlow was privileged to obtain trespass warrants for their arrest from the magistrate's office. When the two organizers saw Harlow leave to obtain the warrants, they departed the premises. On the next day, trespass warrants were issued, ordering Green and Saunders to appear in criminal court on July 5.

On May 3, the Respondent sent the Union the following letter:

Regarding the recent activities of organizers for UFCW Local 400 at stores owned and operated by Farm Fresh Inc., please be advised of the following Farm Fresh, Inc., policies:

1. All outside solicitors must remain no closer than 50 feet from public entrances to the stores;
2. No Farm Fresh, Inc. employee may be solicited during his working time, that is when he is expected to be actually performing his duties for Farm Fresh;
3. The snackbar or cafeteria facilities may be used only in ways consistent with their use by members of the public generally.

It will be appreciated if you will advise your organizers and other agents of the foregoing policies and request their compliance.

Two agents of Local 400, Dudley A. Saunders and James N. Green have been advised of these policies orally by management of the Farm Fresh store located at 3809 Princess Anne Road in Virginia Beach but have chosen to defy them. As a result, warrants accusing them of trespassing have been issued by a magistrate for the City of Virginia Beach. It is requested that you advise these men that if they again appear on the property of the store on Princess Anne Road they will be considered trespassers and will be treated as such.

On May 14 Green and Saunders returned to the store to eat lunch in the snackbar. Harlow approached and told them that in light of the pending warrants issued on May 2, he did not want them anywhere in the store until the matter was resolved. He added that if they again "came into that store he would issue a trespass war-

rant."⁸ Green and Saunders finished their meal, left the store, and did not return to the inside of the store again.

In addressing the 8(a)(1) allegation based on this incident, the judge first noted that in *Lechmere*, which issued after the hearing in this case, the Supreme Court reversed the Board's balancing test in *Jean Country*⁹ and held that except in rare cases of employee isolation or disparate treatment of organizational activity, an employer may lawfully prohibit nonemployee union representatives from trespassing on its property to engage in organizational activity. In light of the holding in *Lechmere*, the judge found questionable the continued viability of the Board's decision in *Montgomery Ward & Co.*,¹⁰ which upheld the right of nonemployee organizers to solicit in an employer's public food service establishment located on its premises, so long as the organizers conducted themselves in a manner consistent with the facility's intended use and were not disruptive. The judge stated that since the Court in *Lechmere* found that the employer therein did not violate the Act by excluding nonemployee organizers from its parking lot *outside* its store, "it would seem illogical" to conclude that the Respondent herein violated the Act by excluding nonemployee organizers from the snackbar *inside* its store. Citing an unpublished Order by the Board in November 1992 remanding to the judge for reconsideration two previous decisions involving 8(a)(1) violations committed by the Respondent for ejecting union organizers from its store snackbars,¹¹ the judge stated further that it was evident that "a majority of the Board no longer clings to [the] view" set forth in *Montgomery Ward*.¹² Accordingly, the judge dismissed the allegation that the Respondent violated Section 8(a)(1) by ejecting Green and Saunders from the snackbar of its Princess Anne Road store.

As an initial matter, we address our dissenting colleagues' argument that the validity of *Montgomery Ward* is not before us. *Montgomery Ward* dealt with whether an employer can lawfully prohibit nonemployee union agents from soliciting in an employer's cafeteria or snackbar. That issue is implicated in this case for the following reasons.

The May 3 letter to the Union clearly outlines *company policy* regarding solicitation and asks that the Union advise "your organizers and other agents of the foregoing policies and request their compliance." In addition, the letter states that Saunders and Green have been notified of the policies, that trespass warrants have been issued,

⁷ At stores such as the one at Princess Anne Road where the judge found that the Respondent held an exclusory property interest in the leased premises, the no-solicitation rule was found to be valid. At stores where the judge found that the Respondent held no exclusory property interest, maintenance of the rule was found to violate Sec. 8(a)(1). We agree with the judge that the Respondent's lease at the Princess Anne Road store granted it an exclusory property interest in the store building and adjacent sidewalks and that the no-solicitation rule was, therefore, validly maintained and applied at this store.

⁸ Harlow also told Saunders that a second trespass warrant had been issued against him based on a visit that he made to the store on May 7.

⁹ 291 NLRB 11 (1988).

¹⁰ 288 NLRB 126 (1988).

¹¹ See 301 NLRB 907 (1991), and 305 NLRB 887 (1991).

¹² The Board subsequently vacated its remand Order following agreements reached between the Respondent and the Charging Party settling all issues raised by the two decisions noted in fn. 11.

and that they would be treated as trespassers if they set foot on store property in the future.

The letter sets forth a rule banning solicitation within 50 feet of the public entrance to Farm Fresh stores by “[A]ll outside solicitors.” (Emphasis added.) The letter subsequently states that, “The snackbar or cafeteria facilities may be used only in ways consistent with their use by members of the public generally.” This, of course, does not modify the “50 foot rule,” which bans *all* outside solicitation, i.e., all solicitation by nonemployees. The rule does not permit snackbar solicitation, but merely allows this use of public facilities consistent with that rule. Whether the Respondent may have observed a more lenient policy with respect to union solicitation before May 3, the Company’s rules were made plain on that date and applied to Saunders and Green on May 14.¹³

When Saunders and Green appeared in the snackbar, the Respondent had reason to believe that they were there to solicit because: (1) the two union representatives had solicited on company property on May 1 contrary to the “50 foot rule,” desisting only when they saw the manager leave to swear out trespass warrants, and (2) the union campaign was continuing. Although Store Manager Harlow invoked the trespass warrant in ejecting Saunders and Green on May 14, the warrant was itself based on the two men’s flouting of the no-solicitation rule on May 1, and it effectuated the May 3 statement of the Respondent’s policies.

Accordingly, the Respondent’s no-solicitation rule and its application to proselytizing by nonemployee union agents squarely raises the *Montgomery Ward* issue.

We agree with the judge that the holding in *Montgomery Ward*, which otherwise would have rendered unlawful the Respondent’s denial of access to the snackbar by Green and Saunders, has effectively been overruled by *Lechmere* and it is expressly overruled. In reaching this conclusion, the Sixth Circuit in *Oakwood Hospital*¹⁴ reasoned, as did the judge in this case, that “[i]f the owner of an outdoor parking lot can bar nonemployee union organizers [as in *Lechmere*], it follows *a fortiori* that the owner of an indoor cafeteria can do so.”¹⁵

¹³ Member Hurtgen notes that the 50-foot rule is to be read in tandem with the rule concerning the snackbar. In essence, solicitation is barred inside the snackbar, unless it is performed in a way that is consistent with the conduct of the general public users of the snackbar. Thus, if the Respondent knowingly permits the general public to solicit in the snackbar, the Respondent would also permit comparable union solicitation in the snackbar. It is only in this sense that the Respondent’s policy can be viewed as permissive. Consistent with this, the Respondent may have previously permitted solicitation in the snackbar (by union agents and others). However, as of May 3, it made it clear that there would be no solicitation in the snackbar by union agents. And, there is no showing that it contemporaneously permitted comparable solicitation by the general public.

¹⁴ *Oakwood Hospital v. NLRB*, 983 F.2d 698 (1993).

¹⁵ *Id.* at 703. In that case, the court sustained a no-solicitation rule and its application to a union representative who solicited employees in

Indeed, in *Oakwood Hospital*, *supra* at 703, the Sixth Circuit concluded that its own opinion in *Montgomery Ward & Co. v. NLRB*, 728 F.2d 389 (1984), upholding union solicitation activity in a public snackbar, did not outlast *Lechmere*. That opinion, in turn, had relied heavily upon the Seventh Circuit’s decision in *Montgomery Ward & Co. v. NLRB*, 692 F.2d 1115 (1982), cert. denied 461 U.S. 914 (1983), reaching the same result on similar facts. The Seventh Circuit’s decision, of course, is the principal judicial authority adduced by our dissenting colleagues. While that court has not had the opportunity to revisit the issue following *Lechmere*, we doubt whether it would now reach the same result.¹⁶

Moreover, the *Oakwood Hospital* court, *supra* at 702, observed that two other courts of appeal, *even before* the Supreme Court issued *Lechmere*, had reached the same conclusion regarding the application of no-solicitation rules to union organizers in cafeteria settings.

Thus, in *Baptist Medical System v. NLRB*, 876 F.2d 661 (1989), the Eighth Circuit, drawing upon foundational principles expressed in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and reaffirmed in *Lechmere*, concluded that a hospital had the right to exclude union representatives from an eating area open to employees, patients, and the general public (“*Babcock* teaches that an employer does not have an affirmative duty to allow the use of its facilities by nonemployees for organizational purposes We do not believe that this principle simply becomes inapplicable because the nonemployees attempt to use an area that the employer has designated for public use,” *id.* at 664). Similarly, the Fourth Circuit found a hospital’s no-solicitation rule valid and its application to union organizers in its cafeteria nondiscriminatory. *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932 (1990). Even though employee family members had been allowed to patronize the cafeteria (formally reserved for employees, patients, patients’ visitors, and medical staff), the court pointed out the “difference between admitting employee relatives for meals and permitting outside entities to seek money or memberships” (of which the court found no evidence). *Id.* at 937. The court followed the Eighth Circuit’s analysis of *Babcock & Wilcox* in evaluating the facts before it.

a cafeteria that was in practice open, though officially closed, to visitors. In so ruling, the court, at 701, stated, “A right to communicate with the employer’s work force does not necessarily imply the existence of a right to trespass on the employer’s property,” and that “[t]he Supreme Court has drawn a very clear line beyond which the organizational rights of the union may not take precedence over the property rights of the employer.”

¹⁶ Member Brame notes that, in *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995), the court found nondiscriminatory an employer’s refusal to permit notices of union meetings to be posted on its bulletin board, although the company allowed employer “swap and shop” notices.

In light of the foregoing, we conclude that the same rules in *Lechmere* governing access rights of nonemployee organizers to an employer's parking lot are equally applicable to nonemployee organizers who, as here, seek access to an employer's in-store public restaurant to solicit off-duty employees. As the Supreme Court stated in *Lechmere* (502 U.S. at 547), those rules preclude access unless (1) the union can show that employees are beyond the reach of reasonable efforts by the union to communicate its message to employees (the "inaccessibility" exception); or (2) the employer's access rules discriminate against the union by allowing other organizations to solicit (the "discrimination" exception).

Applying these rules here, there has been no showing that the employees at the Princess Anne store were beyond the reach of the Union's organizational message. In fact, both before and after the organizers' ejection from the snackbar, the Union was free to and did solicit employees in the store's parking lot beyond the no-solicitation rule's 50-foot boundaries. The Supreme Court described the narrowness of this exception in *Lechmere*, supra at 539:

It does not apply wherever nontresspassory access to employees may be cumbersome or less-than-ideally effective, but only where "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them" [quoting *Babcock*, emphasis added in *Lechmere*]. Classic examples include logging camps . . . mining camps . . . and mountain resort hotels . . . [citations omitted].

Here, as in *Lechmere*, supra at 540, "[b]ecause the employees do not reside on [the employer's] property, they are presumptively not 'beyond the reach' . . . of the union's message." (Citation omitted).¹⁷

Thus, this is not the "rare" inaccessibility situation referred to in *Lechmere* (112 S.Ct. at 848), that warrants the organizers' admittance to the snackbar.

Neither is this a case in which the Respondent's access policy discriminates against the Union. The 50-foot "no-solicitation" rule applies on its face to "all outside solicitors" and there is no evidence that the Respondent has allowed individuals or organizations other than the Union to solicit in the snackbar. We recognize, of course, that the Respondent denied the organizers entry to the snackbar while permitting access to the general public—the same conduct underlying the Board's finding of unlawful discrimination in *Montgomery Ward*. However, a finding of unlawful discrimination or disparate

¹⁷ Accord: *Food & Commercial Workers Local 880 v. NLRB*, 74 F.3d 292, 295 (D.C. Cir. 1996), cert. denied 117 S.Ct. 52 (1996); *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 683 (6th Cir. 1994); *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 997 (9th Cir. 1992); *Oakwood Hospital v. NLRB*, supra, 983 F.2d at 702; see also: *Metropolitan District Council of Philadelphia & Vicinity v. NLRB*, 68 F.3d 71, 73–74 (3d Cir. 1995).

enforcement of a no-access rule requires a showing of treating similar conduct differently, and we find that under *Lechmere* there is a difference between permitting access to the general public for meals and permitting outside entities access to seek money or memberships.¹⁸

Thus, in analyzing whether a union has been discriminatorily denied access to an employer's public eating facility, we shall find a violation only if the General Counsel shows that the employer has refused nonemployee union organizers admittance while at the same time allowing other groups or organizations to engage in comparable conduct.¹⁹ In our view, this result is dictated by the analysis employed by the Supreme Court in *Lechmere*.²⁰ Applying that standard here, we find no violation because, as noted above, the General Counsel presented no credible evidence showing that the Respondent has allowed individuals, groups, or organizations to solicit or engage in promotional activity in its snackbar regarding matters other than union membership.²¹

Contrary to the suggestion of our colleagues, we do not believe that the Respondent must monitor every table conversation to make sure that solicitations do not occur. Thus, if the employer has reasonable cause to believe that union agents are soliciting at a table (e.g., they are talking to employees and displaying cards), the employer may invoke an otherwise valid rule against solicitation. And, if the employer has reasonable cause to believe that

¹⁸ In *Montgomery Ward* the Board sought to base its violation upon a finding of discrimination. However, the finding had no evidentiary foundation. Although there was evidence that the employer forbade union solicitation at a table, there was no evidence that the employer knowingly permitted comparable solicitation at other tables. Thus, *Montgomery Ward* cannot be justified on a "discrimination" theory.

¹⁹ Because, as noted previously and again below, the General Counsel failed to present evidence in this case of similar solicitation or distribution activity by any other individual, group, or organization, Members Hurtgen and Brame find it unnecessary to judge the breadth of the discrimination exception (first recognized in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797 (1945); *Be-Lo Stores v. NLRB*, 126 F.3d 268, 284 (4th Cir. 1997) ("We . . . doubt that an employer's approval of limited charitable or civic distribution while excluding union distribution constitutes discrimination."); cf. *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995) (employer's refusal to permit notices of union meetings to be posted on company bulletin board not discriminatory, although employer permitted "swap and shop" notices).

²⁰ In *Oakwood Hospital v. NLRB*, supra, 983 F.2d at 702, the court observed:

Neither is this a case in which the proponents of the cease and desist order have sustained their burden of showing that the employer's anti-solicitation rule discriminates against union solicitation. (*Lechmere* reaffirms that it is not the employer that has the burden of proof on this issue. [502 U.S. at 525]. On its face, *Oakwood Hospital's* anti-solicitation rule applies to all nonemployees—and there has been no showing here that nonemployees other than union organizers are permitted to solicit in the cafeteria.

²¹ The manager of one of the Respondent's stores testified (Tr. 1880) that the only exception to the no-solicitation rule that was applied in front of his store "was for the Salvation Army in Christmas of 1989." However, the judge stated (Tr. 1881) that he was "going to find that there is no evidence . . . of discriminatory application against the union," and neither counsel for the General Counsel nor counsel for the Charging Party objected to such a proposed finding.

other persons are engaging in comparable solicitation, the employer may apply such a rule to that activity. In order to establish a violation, the General Counsel would have to show that the employer forbade the union agent's conduct and permitted the other person's comparable conduct.

In sum, absent evidence that the Respondent enforced its no-solicitation rule in disparate fashion, or that the employees were physically inaccessible from union efforts to communicate with them, we conclude, under the authority of *Lechmere*, that the Respondent did not act unlawfully in ejecting Green and Saunders from its Princess Anne store snackbar.²²

2. The Respondent excepts to the judge's failure to find that it possessed a sufficient property interest under Virginia Code Section 18.2-119 to exclude the organizers from seven of its stores where access violations were found.²³ Specifically, relying on the language of the statute which permits a "custodian or other person lawfully in charge" of identifiable property to bring a trespass action, the Respondent contends that as the party responsible for maintaining and exercising control over the store sidewalks, it came within the statute's definition. Claiming a property interest in the sidewalks based on the right to maintain a trespass action under the state statute, the Respondent argues that it did not violate the Act by ejecting the organizers from the sidewalks.

In rejecting this argument, the judge stated that he was not persuaded that the responsibility to maintain the sidewalks established authority under the statute for the Respondent to bring a trespass action. He further concluded that, in any event, "the [f]ederal labor policy addressed in *Lechmere* . . . does not turn upon analysis of a myriad of state laws." We disagree with the judge on both points.

In *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), the Board reaffirmed that "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." To determine the property interest, the Board explained in *Indio Gro-*

²² In Member Brame's view, any issue of whether a violation can be made out where an employer ejects union agents from its property solely on the basis of their status has been settled. The Supreme Court declared in *Lechmere*, supra at 532, that, "By its plain terms . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers." (Emphasis in original); accord: *Food & Commercial Workers Local 880 v. NLRB*, supra; *Metropolitan District Council of Philadelphia & Vicinity v. NLRB*, supra, 68 F.3d at 73; *Sparks Nugget, Inc. v. NLRB*, supra, 968 F.2d at 997.

Since this issue is not raised in this case, Member Hurtgen does not pass on it.

²³ Shore Drive, Victory Boulevard, Mercury Boulevard, Colonial Avenue, West Norfolk Road, Independence Boulevard, and Merrimack Trail.

cery that "we look to the law that created and defined the Respondent's property interest, which is state, rather than Federal, law." *Id.* Doing so, the Board found that, under the law of the State where the respondent's store was located, the respondent did not have a right to exclude union agents from the walkway in front of its store and from its parking lot. Accordingly, the Board found that the respondent violated Section 8(a)(1) by threatening to have the union agents arrested if they did not cease engaging in Section 7 activities on the walkway and parking lot.

We now apply these precepts to the instant case. Virginia Code Section 18.2-119 provides in relevant part as follows:

If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof . . . he shall be guilty of a Class 1 misdemeanor.

The Supreme Court of Appeals of Virginia construed this provision in *Hall v. Commonwealth*, 188 Va. 72, 49 S.E.2d 369 (Va. 1948). The court characterized the language of the statute as "clear and unambiguous." The court stated that the statute "may be invoked only when a person has unlawfully entered or has remained upon the premises after he has been forbidden so to do by one lawfully in charge or in possession." The court held that the purpose of the statute "is to protect the rights of the owners or those in lawful control of private property."

In sum, under Virginia law, it is clear that the right to invoke the trespass statute is not restricted to the owner or lessee of the property; rather, it extends broadly to a "custodian" or "person lawfully in charge" of the property. In light of the expansive language of the statute and its underlying purpose of protecting private property rights, we find that at four of the stores (Shore Drive, Victory Boulevard, Colonial Avenue, and Merrimack Trail) the Respondent possessed the requisite property interest to maintain a trespass action. Thus, as set forth in the margin below, the leases at these locations imposed sufficient responsibility on the Respondent for maintaining the store sidewalks that it can fairly be said that the Respondent was a "custodian or other person lawfully in charge" of the sidewalks within the meaning of the Virginia statute.²⁴ Accordingly, we find that the

²⁴ Thus, the Shore Drive store lease states in par. 5 that the Respondent "will . . . , at its own expense, maintain those items listed in paragraph 4." Par. 4 includes the store sidewalk.

At Victory Boulevard, par. 16 of the store lease imposes on the Respondent the duty of "keep[ing] the demised premises and the sidewalk adjacent thereto clean and free from obstruction, rubbish, dirt, snow and ice."

Respondent did not violate Section 8(a)(1) by removing the union agents from the sidewalks at those four stores or by threatening union agents with arrest because they engaged in organizational activity on the sidewalks in front of three of those stores (Victory Blvd., Merrimack Trail, and Colonial Ave.).²⁵

As to the other three stores, however, we find that the Respondent has not established the requisite property interest under Virginia law to exclude the organizers. Thus, at Mercury Boulevard, the lessor, not the Respondent, retains custodial authority over all sidewalk common areas. At Independence Boulevard, the Respondent sought to exclude the organizer from areas beyond which it had even an arguable property interest, i.e., “the premises” which, as the judge found, was “broad enough to include areas which transcended its property interests, either real or leasehold, or as beneficiary of a qualified or exclusive easement.” And at the West Norfolk Road store, the lease contains no language setting forth who has custodial responsibility over the store sidewalks. Further, the leases at these stores contain no clauses which suggest that the Respondent is “in charge of” the sidewalks within the meaning of the Virginia statute. Accordingly, we affirm the judge’s Section 8(a)(1) findings at these locations.²⁶

The Colonial Avenue lease requires the Respondent at par. 14 to “keep the entryways and sidewalks adjacent to [the demised] premises clean and free from obstruction, rubbish, dirt, snow and ice.” Two other provisions of the lease require the Respondent to “police the area outside of its building to protect against prohibited activities . . . [and] to carry public liability insurance on the . . . sidewalks.”

The Merrimack Trail store lease in sec. 3.5 charges the Respondent with “keep[ing] the premises under its control, including the sidewalks . . . , clean and free from rubbish and dirt at all times.”

²⁵ In light of our findings in this regard, we do not adopt the judge’s finding that the Respondent’s maintenance of a state court criminal trespass action regarding events at its Victory Blvd. store lacked a reasonable foundation in law under the test set forth in *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983).

²⁶ Member Hurtgen agrees with the foregoing result but does not endorse fully the underlying analysis. He would require that an employer need only meet an initial burden of going forward as to the property right issue, i.e., to show prima facie that it possessed the property right to exclude individuals from the property in dispute. If that burden is met, Member Hurtgen would then shift the burden to the General Counsel to show that the requisite property right does not exist. However, Member Hurtgen does not rely on *Indio Grocery* for this analysis.

Applying this burden allocation here, Member Hurtgen finds that the Respondent met its burden with respect to the stores at Shore Drive, Victory Blvd., Colonial Ave., and Merrimack Trail; the General Counsel failed to rebut the Respondent’s showing; and that the Respondent, therefore, did not violate Sec. 8(a)(1) by removing the organizers from the sidewalks at these locations or by threatening them with arrest for remaining on the sidewalks of three of the stores (Victory Blvd., Merrimack Trail, and Colonial Ave.).

As to the other three stores, however, (Mercury Blvd., Independence Blvd., and Norfolk Road), Member Hurtgen finds that the Respondent did not meet its burden and, accordingly, the removal of the organizers was unlawful.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set forth in full below, and orders that the Respondent, Farm Fresh, Inc.; Farm Fresh, Inc. t/a Nicks’, and Farm Fresh Inc. t/a Food Carnival, Norfolk, Virginia Beach, Hampton, Portsmouth, and Williamsburg, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Accusing an employee of being a “union plant.”

(b) Coercively interrogating an employee concerning his union support.

(c) Removing a prounion sticker from an employee’s office door under disparate conditions.

(d) Promulgating and threatening to enforce by arrest or otherwise any ban upon organizational activity by nonemployees in areas that it does not own or possess a sufficient property interest to exclude.

(e) Interfering with peaceful organizational activity waged by nonemployees within 50 feet of the entrances to its leased property on West Norfolk Road (Portsmouth), Independence Boulevard (Virginia Beach), and Mercury Boulevard (Hampton).

(f) Calling police to enforce removal of nonemployees engaged in organizational activity in public areas in which the it held an insufficient property interest at its stores on Mercury Boulevard (Hampton), West Norfolk Road (Portsmouth), and Independence Boulevard (Virginia Beach).

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

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

(a) Within 14 days after service by the Region, post at its facilities at Chimney Hill Center (Virginia Beach), General Booth Boulevard (Virginia Beach), Shore Drive (Virginia Beach), West Norfolk Road (Portsmouth), Independence Boulevard (Virginia Beach), and Mercury Boulevard (Hampton), copies of the attached notice marked “Appendix.”²⁷ Copies of the notice, on forms provided by the Regional Director for Region 5, 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

²⁷ 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.”

material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 3, 1990.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN GOULD, concurring.

I join Members Hurtgen and Brame with respect to the issue presented in section 1 of the majority decision and conclude, in light of the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), that the complaint must be dismissed to the extent that it alleges that the Respondent violated Section 8(a)(1) by ejecting two union organizers from the snackbar of its Princess Ann Road store. I write separately, however, to state my individual view in reaching this conclusion.¹

In my concurring opinion in *Leslie Homes, Inc.*, 316 NLRB 123, 131 (1995), I noted the importance of the place of work as a basis for employee communication in connection with hearing the pros and cons of representation in the collective-bargaining process and the advantages of self-organization from others. This was the point emphasized by Justice White when he dissented in *Lechmere*. As the Supreme Court has said: "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees."² And this view constitutes the rationale for the conclusion reached by the Supreme Court in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) itself.

¹ With respect to sec. 2 of the decision which discusses the property rights issue, I agree with the result reached by the majority but I do not endorse fully the underlying analysis regarding an employer's burden of proof in establishing its property interest. I would require that under *Indio Grocery Outlet*, 323 NLRB 1138 (1997), an employer need only meet an initial burden of going forward as to the property right, i.e., to show prima facie that it possessed the property right to exclude individuals from the property in dispute. If that burden is met, I would then shift the burden to the General Counsel to show that the requisite property right does not exist.

Applying this burden allocation here, I find that the Respondent met its burden with respect to the stores at Shore Drive, Victory Blvd. Colonial Ave., and Merrimack Trail; the General Counsel failed to rebut the Respondent's showing; and that the Respondent, therefore, did not violate Sec. 8(a)(1) by removing the organizers from the sidewalks at these locations or by threatening them with arrest for remaining on the sidewalks of three of the stores (Victory Blvd., Merrimack Trail, and Colonial Ave.).

As to the other three stores, however, (Mercury Blvd., Independence Blvd. and Norfolk Road), I find that the Respondent did not meet its burden and, accordingly, the removal of the organizers was unlawful.

² *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974).

As I said in *Leslie Homes*, supra, my view is that the Court's decision in *Lechmere* is bad law and contrary to basic policies of the National Labor Relations Act which support not only the collective-bargaining process itself but also the ability of employees to learn the strengths and weaknesses of union representation, and an ability to learn from unions as well as employers. See *Quamco, Inc.*, 325 NLRB 222, 225-227 (1997) (W. Gould, concurring and dissenting in part); *Mod Interiors, Inc.*, 324 NLRB 164 (1997); *Fountainview Care Center*, 323 NLRB 990, 990-991 (1997) (W. Gould, concurring); *American Biomed Ambulette, Inc.*, 325 NLRB 911 (1998) (W. Gould, concurring); *Thiele Industries*, 325 NLRB 1122, 1123 (1998) (W. Gould, concurring); *Bear Truss, Inc.*, 325 NLRB 1162, 1163 (1998) (W. Gould, concurring); *Technology Service Solutions*, 324 NLRB 298, 302-303 (1997) (W. Gould, concurring); *Nabors Alaska Drilling, Inc.*, 325 NLRB 574, 574-577 (1998) (W. Gould, dissenting); Gould, *The Question of Union Activity on Company Property*, 18 Vand. L. Rev. 73 (1964); and Gould, *Union Organizational Rights and the Concept of "Quasi Public" Property*, 49 Minn. L. Rev. 506 (1965).

But *Lechmere* resolves this issue definitively just as it did in the case of *Leslie Homes*, supra and *Loehmann's Plaza*, 316 NLRB 109 (1995). In this case, of course, just as was true of the relevance of *Lechmere* to union efforts to reach customers and the public, *Lechmere* itself did not reverse *Montgomery Ward*. But the tenor of the Court's opinion and its logic reverse that holding. Thus, I agree with the administrative law judge here that it is illogical to conclude that *Lechmere* precludes nonemployee union solicitation in the parking lot outside the store and then to protect the very same solicitation inside the establishment.³

The dissent, although agreeing that the Respondent lawfully ejected the organizers from its snackbar at the Princess Anne Road store, contend that in reaching this conclusion we have unnecessarily "reach[ed] out" to overrule *Montgomery Ward* in light of the fact that the Respondent's policy during the 1990 organizational campaign was to allow the Union, consistent with *Montgomery Ward*, to solicit in its snackbars. In their view, it was the outstanding trespass warrants alone which justified the organizers' ouster from the snackbar, rather than the Respondent's no-solicitation rule which they assert applied only to the outside premises of the stores. I find this contention entirely unpersuasive.

³ In deciding to overrule the Board's decision in *Montgomery Ward*, I do not address any cases decided before *Lechmere* and I do not rely on the discussion of the court decisions in *Baptist Medical System* and *Southern Maryland Hospital Center* because of their irrelevance to the issue at hand. Indeed, my view of the relevant law prior to *Lechmere* is set forth in W. Gould, "Union Organizational Rights and the Concept of 'Quasi-Public' Property," 49 Minn. L. Rev. 505 (1965).

Whatever the scope of the Respondent's no-solicitation rule prior to the organizers' ejection from the snackbar, the rule was clearly being applied to *them* on the day they were ordered to leave. To say that it was the trespass warrant alone on which the store manager relied in removing the organizers ignores the basis on which the warrants were issued. They were issued because the organizers violated the no-solicitation rule 2 weeks earlier at this particular store. In response, the Respondent determined to extend the no-solicitation rule to such activity, including in the snackbar, and the trespass warrants were simply the vehicle utilized to ensure that result. And most important, it is obvious that the Respondent excluded the organizers from the snackbar because it assumed that the organizers would engage in another round of solicitation there. The Court's holding in *Lechmere* obliterates the foundation upon which *Montgomery Ward* rests—the idea that nonemployee union organizer access was rooted in public access to private property absent discrimination between groups or individuals seeking to solicit others.

In any event, I do not understand how the dissent can claim that *Montgomery Ward* remains good law after *Lechmere* while simultaneously concluding that the trespass warrants granted the Respondent the right to avoid the holding in that case. As noted, the conduct which resulted in the warrants' issuance was for soliciting outside the store, not for doing so inside the store where the dissenters contend *Montgomery Ward* should continue to apply. Thus, if as the dissent claims *Montgomery Ward* survives *Lechmere*, there would have been no lawful basis under our Act for the Respondent to remove the organizers from the snackbar. Since I conclude, however, that *Lechmere* has effectively overruled *Montgomery Ward*, I find that the Respondent acted lawfully in removing the organizers from the snackbar.

I am also unsympathetic to the dissent's view that because it is unrealistic to assume that a restaurant owner would monitor its customers' conversations, it is essentially impossible to ever establish discriminatory application of a no-solicitation policy. This perceived problem is simply a burden of proof issue and the problem is unlikely to arise in any or the overwhelming number of cases arising out of solicitation disputes. As it relates to the instant case, there is no showing that an outside non-union group engaged in snackbar solicitation of which the Respondent was aware yet was allowed to remain on the premises. There was no monitoring in this case and it is unlikely that there will be monitoring in any or many cases. Monitoring was unnecessary here because, based on the organizers' soliciting on May 1, the Respondent knew that the purpose of their return to the snackbar on May 14 was to engage in the same activity.⁴

⁴ Although not raised as an issue in this case, I am of the view that a violation of Sec. 8(a)(1) would have been established if the Respondent

Accordingly, I am required to join and concur in the majority opinion. My own view remains that *Lechmere* was erroneously decided because “the balance ought to be weighted on the side of the freedom of association rights protected by the statute itself and not private property, because of the statute's explicit protection of the former and not the latter.”⁵ But, as I have said in *Leslie Homes and Loehmann's Plaza* and elsewhere⁶ “[i]f there is to be a different result, it must come from the President and the Congress and not the Board.”

MEMBERS FOX and LIEBMAN, concurring and dissenting.

We agree with our colleagues, although for reasons different from theirs, that the Respondent did not violate Section 8(a)(1) when it prohibited union organizers Saunders and Green from coming onto the property of its Princess Anne Road store. We do not agree that the Board's decision in *Montgomery Ward & Co.*, 288 NLRB 126 (1988), has any bearing on the resolution of this issue, or that it is necessary that we decide in this case what effect the Supreme Court's decision in *Lechmere v. NLRB*, 502 U.S. 527 (1992), has on the continuing validity of the *Montgomery Ward* line of cases. Because, however, our colleagues have decided to reach out to overrule *Montgomery Ward*, purportedly under the authority of *Lechmere*, we are compelled to state our dissent from that aspect of their decision.

The facts are as follows: In 1990, the Union was conducting an organizing campaign among the Respondent's employees at a number of grocery stores operated by the Respondent in the Tidewater, Virginia area. On May 1, union organizers Green and Saunders handed out authorization cards and other union literature at the Respondent's Princess Anne Road store, approximately 30 feet from the entrance of the store. Store Manager Harlow instructed them to move back 50 feet from the entrance in accordance with company policy. After they refused to move, Harlow summoned the police, who in-

had ejected Green and Saunders from the snackbar based solely on their status as union organizers. That Green and Saunders were not employees of the Respondent is irrelevant to finding such a violation. Thus, I disagree with Member Brame that this question has been settled to the contrary by *Lechmere's* declaration that the Act “confers rights only on employees, not on unions or their nonemployee organizers.” This statement is inconsistent with the Court's holding that Sec. 7 rights are implicated vis-a-vis nonemployee organizers in the two instances noted above, i.e., when employees are inaccessible or when an employer's access rules are discriminatory.

⁵ Gould, *Agenda for Reform: The Future of Employment Relationships and the Law* (1993 MIT Press), p. 157. Moreover, “despite the need for promoting communication to workers on choices relating to union representation, the fact is that the contest will be unequal. Even where unions have access to company property for putting forth their view, the employer, by virtue of the control over the employment relationship and the potential for confusing its ideas about union representation with its orders about job assignments, will have a distinct advantage.” *Id.* at 158.

⁶ *Monson Trucking, Inc.*, 324 NLRB 933, 938–940 (1997) (W. Gould, concurring); *Longshoremen ILA (Coastal Stevedoring Co.)*, 323 NLRB 1029, 1031–1036 (1997) (W. Gould, dissenting).

formed Green and Saunders that if they did not move as requested, Harlow was privileged to obtain trespass warrants for their arrest. When the two organizers saw Harlow leave to obtain the warrants, they left.

On May 2, trespass warrants were issued ordering Green and Saunders to appear in criminal court on July 5.¹

The following day, May 3, the Respondent's counsel wrote a letter to Thomas McNutt, president of the Union, stating as follows:²

Regarding the recent activities of organizers for UFCW Local 400 at stores owned and operated by Farm Fresh Inc., please be advised of the following Farm Fresh, Inc., policies:

1. All outside solicitors must remain no closer than 50 feet from public entrances to the stores;
2. No Farm Fresh, Inc. employee may be solicited during his working time, that is when he is expected to be actually performing his duties for Farm Fresh;
3. The snackbar or cafeteria facilities may be used only in ways consistent with their use by members of the public generally.

It will be appreciated if you will advise your organizers and other agents of the foregoing policies and request their compliance.

Two agents of Local 400, Dudley A. Saunders and James N. Green have been advised of these policies orally by management of the Farm Fresh store located at 3809 Princess Anne Road in Virginia Beach but have chosen to defy them. As a result, warrants accusing them of trespassing have been issued by a magistrate for the City of Virginia Beach. It is requested that you advise these men that if they again appear on the property of the store on Princess Anne Road they will be considered trespassers and will be treated as such.

Your cooperation will be appreciated.

Thereafter, on May 14, Green and Saunders went to the snackbar in the Princess Anne Road store to eat lunch. While they were eating, Harlow approached them, making an issue of their reappearance despite the fact that the May 2 summons was pending in court. Harlow warned that until that matter was resolved, he would swear out a trespass warrant each time they came into the store. Green and Saunders finished their meal and exited the store. There is no evidence that Green and Saunders engaged in organizational or other union activity in the snackbar on May 14, or indeed that they did anything other than sit at a table and eat their lunch.

¹ Saunders and Green were subsequently convicted of criminal trespass in connection with the May 1 incident.

² G.C. Exh. 9.

We agree with our colleagues that the lawfulness of the Respondent's actions with respect to Green and Saunders must be determined in accordance with the principle that absent a showing that the union has no other reasonable means of communicating its organizational message to employees, an employer generally has the right to bar nonemployee union organizers from his property, provided that the employer's access rules do not discriminate against union solicitation. *Lechmere*, supra at 534, citing *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956). From that point, however, our views of this case diverge.

Our colleagues start with the premise that the Respondent ejected Saunders and Green pursuant to a neutral rule prohibiting solicitation in its snackbar, and that the issue to be decided is therefore whether the Respondent could lawfully maintain and enforce such a rule. In order to resolve this question, they then reach out to overrule the well-established line of cases holding that union solicitation in restaurants cannot be prohibited when, as in this case, the conduct of the nonemployee organizer is consistent with the conduct of other patrons of the restaurant.³

As the above recitation of the record facts makes clear, however, the Respondent had no blanket rule prohibiting solicitation in its snackbar. Moreover, the Respondent has never claimed that it had such a rule. The record reflects, and Respondent has specifically acknowledged, that "Farm Fresh *permitted* Union organizers to engage in lawful solicitation in the snackbars which Farm Fresh operated in many of the stores in question."⁴ As set forth in its May 3 letter to the Union, the Respondent's policy with respect to snackbars in its stores simply required—

³ *Montgomery Ward & Co.*, 288 NLRB 126 (1988), citing *Dunes Hotel & Country Club*, 284 NLRB 871 (1987); *Harold's Club*, 267 NLRB 1167 (1983), enf. 758 F.2d 1320 (9th Cir. 1985); *Ameron Automotive*, 265 NLRB 511 (1982); *Montgomery Ward & Co.*, 263 NLRB 233 (1982), enf. as modified 728 F.2d 389 (6th Cir. 1984); *Montgomery Ward & Co.*, 256 NLRB 800 (1981), enf. 692 F.2d 1115 (7th Cir. 1982), cert. denied 461 U.S. 914; *Marshall Field & Co.*, 98 NLRB 88 (1952), enf. as modified 200 F.2d 375 (7th Cir. 1952). See also *Montgomery Ward & Co.*, 162 NLRB 369 (1966).

⁴ Respondent's Brief in Support of Cross Exceptions, p. 7. (emphasis added). Our colleagues, like the judge, err in stating that there is "no evidence" that the Respondent allowed solicitation in its snackbars. There is undisputed testimony in the record that supports the Respondent's statement in its brief that it permitted union organizers to engage in nondisruptive solicitation in its snackbars. (See Tr. pp. 584, 913-915, 1201-1203, 1217-1218, 1895-1896.) Indeed, organizers Green and Saunders themselves testified that, prior to the May 1 trespass incident, they had frequently visited the snackbar at the Princess Anne Road store and had spoken to employees about supporting the Union, without any interference from the Respondent (Tr. pp. 584, 1201-1203, 1217-1218). Our colleagues also misconstrue the purpose and effect of the "50 foot rule." The record reflects that the Respondent regarded the rule as another exception to its general no-solicitation policy pursuant to which Salvation Army volunteers and others, including union organizers, were permitted to solicit outside the Respondent's stores as long as they remained at least 50 feet from store entrances. Respondent's Brief in Support of Cross-Exceptions, p. 7; Tr. 1879 (R. Exh. 118).

consistent with the line of cases that our colleagues would overrule—that the snackbars be used “only in ways consistent with their use by members of the public generally.” Thus, our colleagues have created a defense for the Respondent which the Respondent itself did not raise and which is inconsistent with the record facts.⁵

What the record does show is that, as an exception to its general policy permitting nondisruptive solicitation in its snackbars, and in response to the May 1 trespass issue, the Respondent issued a specific directive prohibiting the two *particular* union organizers, Saunders and Green, from coming anywhere on the property of the Princess Anne Road store, for any purpose. When Harlow ejected Saunders and Green from the snackbar on May 14, it was this directive he invoked, not any purported general rule prohibiting solicitation in the snackbar, and it is the lawfulness of this directive that is therefore really at issue.

Under these circumstances, there is no need to decide the purely hypothetical question of whether the Respondent lawfully could have maintained a rule prohibiting all solicitation in its snackbar. The real question for decision is indeed precisely the converse: whether, in view of the fact that the Respondent generally *allowed* nondisruptive solicitation in its snackbar, it could nevertheless lawfully eject Saunders and Green from the premises. The resolution of that issue turns, under the *Lechmere* standard, on whether the employer’s treatment of Saunders and Green impermissibly discriminated against union solicitation in violation of Section 8(a)(1).⁶ It does

⁵ In attempting to read the May 3 letter as announcing a new company policy prohibiting all solicitation in its restaurants, our colleagues assert that the 50-foot rule was intended to prohibit solicitation in any form in the Respondent’s restaurants, and that the separate rule requiring that the restaurants be used only in ways “consistent with their use by members of the public generally”—although phrased in terms that track the language used by the Board in the *Montgomery Ward* line of cases—has some other purpose unrelated to the regulation of solicitation. Our colleagues do not explain why the Respondent’s attorneys would have written the Union a letter announcing a policy that, if read the way our colleagues say it was intended to be read, was patently unlawful under the then well-established *Montgomery Ward* line of cases, particularly since those attorneys were at the time also representing the Respondent in separate unfair labor practice proceedings involving the same union in which the Respondent was claiming that its policies regarding solicitation in its snackbars comported with *Montgomery Ward*. See *Farm Fresh, Inc.*, 301 NLRB 907, 935 (1991) (respondent contends that it did not violate settlement agreement in which it agreed to allow nonemployee representatives of the union reasonable access to store snackbars for the purpose of lawfully soliciting off-duty employees); and *Farm Fresh, Inc.*, 305 NLRB 887, 890 (1991). Nor do our colleagues explain why, if their reading of the May 3 letter is correct, Respondent is asserting in its brief in this case that its policy was to permit union organizers to engage in lawful solicitation in its snackbars. See fn. 4, *supra*.

⁶ No party is contending that access to the snackbar by Saunders and Green was necessary because employees at the Princess Anne Road store were otherwise beyond the reach of reasonable efforts by the Union to communicate its message. Thus, we agree with our colleagues that the “inaccessibility” exception to the general rule that

not, however, require that we apply or reconsider the *Montgomery Ward* line of cases.

Applying the *Lechmere* standard to the facts of this case, as properly understood, we find that although the ejection of Green and Saunders from the Princess Anne Road store was an exception to Respondent’s general policy permitting nondisruptive solicitation in its snackbar, it was not an exception which discriminated against union solicitation, since it had neither the intent nor the effect of denying access to its property to the union’s organizers generally.

As we have noted, it is undisputed that the Respondent did in fact allow union organizers to engage in nondisruptive solicitation in its snackbars. Although the Respondent stated in its May 3 letter to the Union that it would not permit Saunders and Green on the property of the Princess Anne Road Store for any purpose, the letter makes clear that this prohibition was applicable to Saunders and Green only, and was based on the May 1 incident, for which the two organizers were subsequently found guilty of trespass. As the trial judge found, the Respondent’s banning of Saunders and Green was “an exception to the Respondent’s general ‘hands off’ approach to nondisruptive organizational conduct on the part of union representatives inside the stores.” We note finally that there is no evidence to suggest that had the Respondent’s managers had a similar confrontation with persons soliciting for another organization outside one of its stores, the Respondent would not have banned them from its property as well. Taken together, these facts persuade us that in banning Saunders and Green from the Princess Anne Road store, the Respondent was not discriminating against union solicitation. Accordingly, we agree with the majority, although for different reasons, that the Respondent’s actions did not violate Section 8(a)(1).

As we have shown, the facts are not as the majority presents them, and *Montgomery Ward* is inapplicable to the actual issue presented. Nevertheless, our colleagues not only reach out to overrule that line of cases, but do so under the guise that these precedents have already been “effectively overruled” by the Supreme Court’s decision in *Lechmere*. This is perhaps the most disturbing aspect of their decision.

The rule that union organizers cannot be barred from engaging in solicitation in restaurants if they are conducting themselves in a manner consistent with that of other restaurant patrons is specifically predicated on the Supreme Court’s admonition in *Babcock & Wilcox* that an employer’s access rules may not discriminate against union solicitation. *Montgomery Ward & Co.*, *supra*, 288 NLRB at 127. As the Board has repeatedly recognized, *Lechmere* did not disturb the prohibition against dis-

employers may bar nonemployee organizers from their property is not applicable here.

crimination in *Babcock*. See, e.g., *Schear's Food Center*, 318 NLRB 261 (1995); *Great Scot, Inc.*, 309 NLRB 548 fn. 2 (1992), enf. denied on other grounds 39 F.3d 678 (6th Cir. 1994). Thus, there is no basis for our colleagues' claim that after *Lechmere*, that rule is no longer valid.

As the Seventh Circuit has explained, if an employer maintains a no-solicitation rule so broad that it prohibits essentially private conversations between off-duty employees and union organizers in a restaurant that is open to the public, "[i]t is difficult, if not impossible, to envisage how [such a rule] could be applied to such a situation in a non-discriminatory manner." *Montgomery Ward & Co. v. NLRB*, 692 F.2d 1115, 1122 (7th Cir. 1982). Under such a rule, if neutrally applied, a salesman pitching a product to a potential client, a business owner soliciting another to join the local Chamber of Commerce, a school board candidate asking a constituent to support her campaign, a college fundraiser urging an alumnus to make a contribution, a soccer league organizer asking a parent to sign up his child for the league, and a religious activist trying to get a neighbor to join her church all would be in violation of the rule and thus would be subject to ejection from the restaurant. Yet it is virtually impossible to believe that a restaurant proprietor would want to prohibit private conversations such as these from taking place or would eject from the restaurant customers overheard engaging in such conversations, particularly since such a policy, if actually publicized and enforced, would surely drive away rather than attract potential business. As the Seventh Circuit noted: "[M]ost customers would obviously find it offensive for [the restaurant proprietor] to monitor their conversation to guard against solicitation in a wide variety of circumstances not involving labor organizations. Yet such monitoring appears to be the only way [it] could effectively and nondiscriminatorily enforce the rule."

In other words, it is an employer's "inability to detect discreet solicitation" between willing participants sitting together at a table ordering and eating a meal which makes it impossible for an employer to enforce a rule against nondisruptive solicitation in a public restaurant in a nondiscriminatory manner. *Supra*, 692 F.2d at 1128 (emphasis in original). And it is for that reason that under the longstanding rule reaffirmed by the Board in the 1988 *Montgomery Ward* case, the Board and the courts have traditionally held that union organizers cannot be prohibited from soliciting off-duty employees in restaurants open to the public as long as they conduct themselves in a manner consistent with that of other patrons of the restaurant. 288 NLRB at 126.

The majority cites the decision of the Sixth Circuit Court of Appeals in *Oakwood Hospital v. NLRB*, 983 F.2d 698, 703 (1993) for the proposition that "[i]f the owner of an outdoor parking lot can bar nonemployee union organizers [as in *Lechmere*], it follows *a fortiori*

that the owner of an indoor cafeteria can do so." This argument, however, overlooks the point that under *Montgomery Ward*, the owner of a public restaurant *can* lawfully bar union organizers from soliciting in the restaurant, if the solicitation is conducted in a manner that is inconsistent with the use of the restaurant by other customers. Since the seminal case of *Marshall Field & Co.*, 98 NLRB 88, 94 (1952), modified on other grounds and enf'd, 200 F.2d 375 (7th Cir. 1952), the Board has made clear that "restrictions . . . designed to insure that solicitation is carried on in public restaurants only as an incident to normal use of such facilities" are lawful. In accordance with that principle, the Board has held that employers may prohibit solicitation that involves circulating from table to table,⁷ flagging down persons passing by,⁸ attempting to distribute literature,⁹ attempting to solicit employees who work in the restaurant while they are on duty,¹⁰ or in any other way creating a disturbance.¹¹ It is only when an employer attempts to apply an otherwise lawful no-solicitation rule to reach solicitation which involves conduct indistinguishable from that of other restaurant customers that *Montgomery Ward's* discrimination concerns come into play.

The Court's decision in *Lechmere* is not inconsistent with that principle. The Court in that case upheld the right of a storeowner to exclude from the store parking lot union organizers who were attempting to place handbills on the windshields of cars parked in the lot—conduct that was not consistent with normal use of the parking lot and that any observer could see constituted solicitation. To the extent that the employer's no-solicitation rule prohibited such conduct, it was a rule that was capable of being enforced in a neutral, nondiscriminatory manner.

It does not, however, follow that the employer in *Lechmere* could lawfully have extended its no-solicitation rule to reach conduct indistinguishable from that of other customers and employees who used the parking lot—for example, to prohibit a union organizer from sitting and talking with an employee in the employee's parked car during her break. Since any customers talking to each other in a car in the parking lot might conceivably be engaged in solicitation of one form or another, in order for such a rule to be nondiscriminatorily enforced, the employer would have to somehow monitor private conversations in cars and eject any customer who might happen to solicit a client, or a contribution, or

⁷ *Montgomery Ward & Co.*, *supra*, 256 NLRB at 801; *Montgomery Ward & Co.*, *supra*, 263 NLRB at 233; *Marshall Field & Co.*, *supra*, 98 NLRB at 94.

⁸ *Farm Fresh, Inc.*, 301 NLRB 907, 929 (1991).

⁹ *Montgomery Ward & Co.*, *supra*, 256 NLRB at 801.

¹⁰ *Montgomery Ward & Co.*, *supra*, 256 NLRB at 801; *Oertle Management Co.*, 182 NLRB 722 (1970).

¹¹ *Farm Fresh Inc.*, 305 NLRB 887, 888 (1991) (no violation where employer reasonably believed that organizer whom it ejected from the snackbar had just engaged in unprotected "blitz").

membership in an organization in the course of such a conversation—clearly an impossibility.

Thus, for the same reason that the owner of a public restaurant cannot, under *Montgomery Ward*, prohibit a union organizer from quietly meeting with an off-duty employee in the restaurant, any rule prohibiting any contact between union organizers and off-duty employees from taking place in a public parking lot would in our view be unlawful notwithstanding *Lechmere*.

In sum, we consider the rationale for the *Montgomery Ward* line of cases to be as valid today as it has ever been, and because it is grounded in the *Babcock & Wilcox* rule that an employer may not discriminate in its access rules against union solicitation, it is not undermined by any statement or holding of the Court in *Lechmere*. We therefore dissent from the majority's finding that this line of cases has been effectively overruled by *Lechmere*.¹²

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.

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.

WE WILL NOT accuse any of our employees of being a "union plant."

WE WILL NOT coercively interrogate any employee concerning union activity.

WE WILL NOT discriminatorily remove pronoun material from an employee's office door.

WE WILL NOT promulgate or threaten to enforce, by arrest or otherwise, any ban upon organizational activity by nonemployees in areas that we do not own or where we do not possess a sufficient property interest to exclude.

WE WILL NOT interfere with peaceful organizational activity waged by nonemployees in areas that we do not

¹² We also dissent from the majority's adoption of the judge's finding that the Respondent did not unlawfully threaten employees with store closure and other reprisals in a mandatory antiunion meeting held at the Victory Boulevard store on May 25. In our view, the Respondent's statements were not supported by objective facts and therefore constituted unlawful threats, not permissible predictions. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

own or where we do not possess a sufficient property interest to exclude.

WE WILL NOT threaten union representatives with arrest because they were engaged in organizational activity in areas that we do not own or possess a sufficient property interest to exclude.

WE WILL NOT call police to enforce removal of nonemployees engaged in organizational activity in areas that we do not own or possess a sufficient property interest to exclude.

WE WILL NOT in any like or related manner interfere with, coerce, or restrain employees in the exercise of the rights set forth at the top of this notice.

FARM FRESH, INC.; FARM FRESH, INC. T/A NICKS'; FARM FRESH, INC. T/A FOOD CARNIVAL

Angela S. Anderson, Esq., for the General Counsel.
A. W. VanderMeer Jr. and Sharon S. Goodwyn, Esqs. (*Hunton & Williams*), of Norfolk, Virginia; and *Thomas J. Flaherty and Michael P. Oates, Esqs.*, of Richmond, Virginia, for the Respondent.
Carey Butsavage and George Wiszynski, Esqs. (*Butsavage & Associates*), of Washington, D.C.; and *Jeffrey D. Lewis, Esq.*, of Landover, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This consolidated proceeding was tried in Portsmouth and Norfolk, Virginia, on various dates between November 14 and December 18, 1991, upon an initial unfair labor practice charge filed on May 3, 1990, and a consolidation order dated April 2, 1991. The seven consolidated complaints allege that the Respondent (Farm Fresh, Inc. t/a Nick's)¹ independently violated Section 8(a)(1) of the Act through a variety of measures tending to coerce employees in their efforts to form a union. The complaints further alleged that the Respondent violated Section 8(a)(1) of the Act when nonemployee union organizers were denied access to areas within 50 feet of store entrances, and by enforcing the denials through threats of arrest, and/or by requesting and causing local law enforcement authorities to issue arrest warrants. Finally, it is alleged that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Glenn Campbell and by issuing a reprimand to Michele Shaffer for reasons proscribed by the Act. In its filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel, the Charging Party, and the Respondent.

On the entire record,² including my opportunity directly to observe the witnesses and their demeanor, and after considering the posthearing briefs, I make the following

¹ Name appears as corrected at the hearing.

² Inadvertent errors in the official transcript of proceeding are corrected at App. "A" attached to this decision. [Omitted from publication.]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Virginia corporation, is engaged in the operation of a retail grocery chain from various locations within the Commonwealth of Virginia. In the course of that operation, the Respondent during the 12 months prior to issuance of the complaints, received gross revenues exceeding \$500,000, while purchasing and receiving at the facilities, goods and materials valued in excess of \$5000 directly from points outside the Commonwealth of Virginia. The complaint alleges, and I find based on the admitted facts, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the United Food and Commercial Workers International Union, Local 400, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

This case pertains to a number of grocery stores operated by Farm Fresh, Inc., in the Tidewater area of Virginia.³ There is no history of collective bargaining for any of its 5000 employees in that area. In 1987, these employees were the object of an unsuccessful organization campaign waged by the Union. In April 1990, the Union renewed its interest, embarking on a massive drive to organize the Respondent's stores, as well as several other chain operations in the area. As part of that effort, nonemployee organizers distributed literature and authorization cards at nine of the Respondent's Tidewater locations. Consistent with this effort, the organizers sought access to employees both inside and outside the stores. The Respondent intervened inside a store just once,⁴ but outside it maintained and enforced a policy that precluded solicitation within 50 feet of entrances. At the nine locations involved here, organizers were informed of the policy and urged to comply, but when they declined, they often were threatened with arrest, urged to move by police at the Respondent's behest, and, occasionally, arrested.

The proponents of the complaints contend that the 50-foot policy was unlawfully promulgated and enforced in areas over which the Respondent had no property interest either through lease or ownership, and, hence violated Section 8(a)(1). Beyond that, the seven separate complaints, set forth 35 distinct 8(a)(1) allegations, variously founded on the Respondent's interrogation, threats, or otherwise unlawful coercion of employees in the exercise of organizational rights. Finally, the proponents of the complaint allege that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging one employee and reprimanding another, assertedly in reprisal for union activity.

³ The stores in this case were operated by the Respondent, variously under the names "Farm Fresh," "Nick's," and "Food Carnival." Identification of the individual stores is of minor relevance to the issues in controversy, and, for purposes of this decision, as a convenience, all locations, for the most part, are referred to simply as Farm Fresh stores.

⁴ In an earlier decision, the Board held that the Respondent violated Sec. 8(a)(1), when nonemployee organizers were excluded from snack-bars. *Farm Fresh*, 305 NLRB 887 (1992). As shall be seen, that ruling, since the close of the instant hearing, is in the process of reconsideration.

B. Interference, Restraint, and Coercion

1. The access issues

a. The Respondent's burden of proof

Over the years, the Board and courts have struggled in an attempt to draw a fair accommodation between the right of employees under Section 7 to decide whether or not they wish to form a labor organization, and the assertion of property interests under conditions which directly or indirectly, intentionally or unintentionally, deny them information relevant to that choice. In the instant case, as shall be seen, the Respondent at each and every location involved in this proceeding did exclude professional organizers from areas within 50 feet of store entrances. As framed in this case, the legitimacy of the conduct turns essentially on a narrow issue; namely, whether the Employer's action was founded on a legally cognizable property interest, and, as such, sufficient to overcome any intrusion on Section 7 activity.

It is recognized as a matter of settled policy that Section 7 rights of employees are vindicated through the informational activity of nonemployee organizers. "The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." Thus, pursuant to settled authority, the rights conferred by Section 7 would be infringed were employers free to isolate employees from outside "communication of information." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

At the same time, as shall be seen, this statutory right is not absolute. Thus, while acknowledging protective guarantees in this area, the Supreme Court has sought to accommodate the tension that exists between employee rights and those of the employer where "nonemployees . . . sought to trespass on the employer's property." *Eastex, Inc. v. NLRB*, 437 U.S. 558, 571 (1978). It was reasoned that the legitimacy of an employer's intrusion to protect its property requires an accommodation that "must be obtained with as little destruction to one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 112. See also *Hudgens v. NLRB*, 424 U.S. 507, 521-522 (1976). In the final analysis the Court, in *Babcock & Wilcox Co.*, supra, upheld the legitimacy of an employer's right to prevent nonemployees from trespassing on its property unless the union were able to demonstrate the unavailability of alternative channels of communication which would enable it to reach the employees. See also *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978); *Central Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972). Absent such a showing, nonemployees must draw the line where an employer's property interests begin.

However, beginning in 1986, first through *Fairmont Hotel*, 282 NLRB 139 (1986), as revised in *Jean Country*, 291 NLRB 11 (1988), the Board adopted a formulation which blurred the presumptive vitality of private property rights as a means of insulating employees from nonemployee organizers. As stated by the Board:

[I]n all access cases, our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. [291 NLRB at 14.]

Under this approach, even if employees might be contacted by other means, the employer's property interest would not necessarily legitimize an interference with union representatives engaged in organizational activity on its premises.

After close of the instant hearing, the Supreme Court issued its decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The Court reviewed a Board finding in that case that the employer violated Section 8(a)(1) under its *Jean Country* formulation. In *Lechmere*, union organizers were precluded from distributing organizational literature on a parking lot *jointly owned* by Lechmere, the targeted employer, and the developer of the shopping center. The lot was a public area, available freely to patrons and employees of all stores in the strip mall. The Board acknowledged that the "property right is relatively substantial," but also noted that the Section 7 right, being organizational, "is relatively strong." Faced with this conflict, the Board went on to state that there was "no reasonable alternative means available for the Union to communicate its message . . .," and found the violation on reasoning:

Here, the Union targeted the parking lot used by the affected employees at their worksite as the locale for invoking the organizational rights of those employees. As the Union's attempts to distribute handbills to the employees neither impeded traffic flow nor interfered with the normal use of the parking lot, the Respondent's business was not disrupted or its customers inconvenienced to any significant degree by the handbilling. Accordingly, we find that consideration of the factors of the situs of the Union's conduct and the manner of that conduct does not diminish the strength of the core Section 7 right asserted. Under the circumstances, we find that the section 7 right is certainly worthy of protection against substantial impairment. [295 NLRB at 93.]

The Supreme Court reversed, categorically holding that:

§ 7 simply 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." [502 U.S. at 537.]

The Court also rejected the Board's finding that the union had no "alternative means of communication." In doing so, that exception was limited to extreme cases of employee isolation, namely:

Classic examples include logging camps . . . mining camps . . .; and mountain resort hotels. [Citations omitted.] *Babcock's* exception was crafted precisely to protect the § 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society. The union's burden of establishing such isolation is, as we have explained, "a heavy one." [502 U.S. at 540.]

Accordingly, it would appear that the Section 7 right, albeit of the highest quality, must yield to the employer's property interest, unless the need to trespass is excusable under this most onerous exception. See *NLRB v. Babcock & Wilcox Co.*, *supra*.

On behalf of the complaints in this case, it is not argued that, in the *Lechmere* sense, the union failed to enjoy alternative means of communication. Nor is it claimed that the nonemployee organizers were removed from areas adjacent to the stores in consequence of any disparate application of the re-

spondent's 50-foot policy. (502 U.S. at 530 fn. 1.) Instead, the General Counsel and the Charging Party contend that *Babcock & Wilcox* and its progeny, including *Lechmere*, come into play only where the employer has proven that it holds an enforceable property right which, itself, is sufficient "to make the non-employee's presence on the property a trespass." Taking this one step further, it is contended that the violations are substantiated by the Respondent's failure to prove that it had a property interest in the area within 50 feet of the entrances at any of the nine stores involved in this proceeding.

The Respondent would side step this issue, suggesting that employers enjoy an absolute right to intervene and preclude outsiders from engaging in organizational activity *in the vicinity* of their business operations. The Respondent, therefore, would disagree with any assumption that *Lechmere* imposes a requirement that the employer, who urges that the organizers were legitimately excluded, first establish its property interest. In this respect, the Respondent's posthearing brief makes the point as follows:

Contrary to pre-*Lechmere* Board decisions, the Supreme Court did not require the employer to establish the sufficiency of its property interest. Rather, the Court expressly stated that the nature of the employer's property rights would not become an issue until the Union showed that the employees were inaccessible. 520 U.S. at 537. Despite the clear language of the Court's opinion, the Union and the General Counsel will attempt to distinguish *Lechmere* on the grounds that the employer in that case had a greater interest in the subject property than Farm Fresh holds in the instant case. Specifically, the Union and the General Counsel are likely to rely on pre-*Lechmere* Board decisions which require an employer to make a threshold showing of a protectable property interest before challenging a nonemployee organizer's asserted right of access to the employer's premises.

The Respondent's position in this regard is erroneous. The issue was not addressed in *Lechmere* because the employer's ownership interest in the parking lot was an established fact and not in controversy. Furthermore, there is not the slightest intimation that the Court intended to broaden the scope of employer rights beyond that envisioned by *Babcock & Wilcox*. Instead, *Lechmere* merely rearticulates the Court's formula for resolving tension between the Section 7 right which seeks to assure that employees are informed as to their organizational rights, on the one hand, and an employer's right to prevent incursions on its property, on the other. Where the employer has failed to demonstrate a property right sufficient to create a trespass, there is no harm to any employer interest, and simply put, there is no "conflict between Section 7 rights and property rights." In such a case, the Section 7 right is unimpeached, and nothing in *Babcock & Wilcox* allows its diminution.⁵

This is a generic facet of the law. Thus, nothing in *Lechmere*, *supra*, detracts from the Board's decision in *Barkus Bakery*, 282 NLRB 351 (1986), *enfd. mem. sub nom. NLRB v. Caress Bake*

⁵ The Respondent's position entails an illogical reversal of burdens. Under this view, the "property right," so central to the Court's reasoning, loses all material bearing upon the outcome. It is a line of reasoning that allocates proof responsibility in a fashion which would have the analysis start at the point at which it, in fact, ends. For, once a union's claim of inaccessibility is substantiated, the inquiry is closed, and no matter how sacrosanct the employer's property right, access may not be withheld lawfully.

Shop, 833 F.2d 306 (3d Cir. 1987). In *Barkus*, the Board held that an employer could not lawfully exclude nonemployee organizers from property owned by others. That case was decided without mention of the formula expressed in either *Fairmount Hotel*, supra, which had issued a month earlier, or *Jean Country*, supra, which remained under consideration. In *Gainsville Mfg. Co.*, 271 NLRB 1186, 1188 (1984), the Supreme Court's decision in *Babcock & Wilcox*, supra, was distinguished on the ground that the union organizers had not intruded upon any property rights held by the employer. See also *Giant Food Stores*, 295 NLRB 332 fn. 8 (1989); *Furr's Cafeterias*, 292 NLRB 749 (1989); and *Polly Drummond Thriftway*, 292 NLRB 331, 333 (1989), affd. mem. 882 F.2d 512 (3d Cir. 1989). The result in each of these cases is in consonance with *Johnson & Hardin Co.*, 305 NLRB 690 (1991), wherein the Board stated that:

The balancing test set forth in *Jean Country* . . . is applicable, however, only in cases where property rights and Section 7 rights conflict. When an employer does not possess a property interest entitling it to exclude individuals from the property even if their presence were not protected by Section 7, the employer's exclusion of such individuals from such property does not implicate *Jean Country's* balancing test. Absent such a property interest, the exclusion of the individuals presents no conflict between the asserted Section 7 right and the employer's property right. Thus, to invoke *Jean Country* [sic] balancing test, the employer must meet the threshold burden of showing that it possesses such a property interest.

Contrary to the Respondent, the holding in *Johnson & Hardin* does not collide with the Supreme Court's decision in *Lechmere*. The latter, like *Jean Country*, was addressed solely to cases involving a conflict between property rights and Section 7 rights, and it is in that light that its teaching must be interpreted and applied. See *Lechmere, Inc.*, 308 NLRB 1074 (1992).

Thus, consistent with the position of the General Counsel and the Charging Party, the onus is upon the Respondent to prove that it held a property interest at each of the nine locations involved in this proceeding broad enough to include all areas where its 50-foot policy was enforced against nonemployee organizers.⁶ As an overview, this burden obviously would be met on evidence that the employer held fee simple ownership in the area occupied by the organizers, or that it possessed the area exclusively pursuant to express conveyance in a lease. It also would appear to suffice if the owner had by express delegation authorized the employer to stand in its shoes as against trespassers.⁷ As shall be seen, the nine stores under

⁶ There is no merit to the Respondent's position that, even if that burden is not satisfied, it should be privileged to exclude the organizers because "unfettered use of the property at issue is universally necessary to the successful operation of the stores." While the premise is debatable, absent a cognizable property interest, the Respondent's use of public sidewalks is an opportunistic venture no more vital to its objectives than access would be to union goals.

⁷ The Respondent contends that the burden, so cast, is more stringent than imposed by the Supreme Court in *Lechmere*, supra. This argument is founded upon the fact that *Lechmere*, a co-owner of the parking lot, had yielded usage to all stores in the shopping center. It does not follow, however, that *Lechmere* in granting access to others compromised its ownership interests. By taking this step neither *Lechmere* nor its partner in ownership yielded any possessory interest, or vestiges thereof, including the right to enforce against trespassers. The Respondent's interest, unless created in the fashion described in the above text,

consideration here, without exception, were operated under leases, whose terms differed from location to location. The nature of the Respondent's interest under the leases, along with other factual legal issues bearing upon the access allegations are discussed below on a location-by-location basis.

b. Concluding findings at individual stores

(1) High Street (Portsmouth)

The complaint in Case 5-CA-21532 alleges that the Respondent violated Section 8(a)(1) of the Act on October 10, 1990, when Bill DeVinney, the store manager, denied union representatives access to the sidewalk and parking lot adjacent to and within 50 feet of the entrance to Respondent's leased property, while threatening their arrest if they did not vacate.

The supervisory and agency status of DeVinney are admitted. There is no question that, on October 10, DeVinney, on several occasions, tried to remove the organizers from the sidewalk in front of the store. He did so by direct request, then, on direction from superiors, by calling the police.⁸ The police, and, apparently at the request of the home office, the landlord, appeared at the scene to confront McGhee, but neither took a stand to secure his ouster. The next day, DeVinney attempted to swear out a warrant which was never served.

The proponents of the complaint contend that DeVinney's efforts were unlawful because the Respondent merely holds a nonexclusive easement to the sidewalks. Thus, the lease at this location "demises and leases unto [Farm Fresh]," the following:

(a) *Property Building:*

A certain building containing 15,800 square feet, of floor space, fronting feet along the strip of stores comprising the "Rodman Shopping Center," and the parking area for that shopping center.

(b) *Property Parking:*

A nonexclusive easement for automobile parking and maneuvering and general pedestrian and vehicular ingress and egress over and upon property described as follows: The area bounded on the South by High Street, on the West by Vermont Avenue, on the North

would not be coextensive with that held by *Lechmere*, but instead would be equatable to the various store owners in the shopping center. Nothing in the Supreme Court's decision suggests that the latter could legitimately exclude nonemployee organizers from the parking area, either severally or in conjunction with their nonpossessory neighbors.

⁸ DeVinney claims that he observed, for about 20 minutes, as an organizer remained facing the store, with his leg across the shopping cart corral, blocking the separation between two cart guards, which are formed by heavy tubular cast iron guards or railings and separated by about 2-1/2 feet. The corral is designed to prevent carts from going over the curb and into the parking lot. I would reject any notion that the organizer's position blocked access, as one seeking egress would simply go to the next passage a few feet away. There is no indication by DeVinney that either organizer was rude to anyone, and he testified that he had received no complaints. Had there been inconvenience, either actual or threatened, to any customer, employee, or deliveryman, it is presumable that DeVinney, armed with the 50 feet rule, would have intervened with rapacity. Indeed, he showed no hesitation and quickly intervened when, at some point during the day, he observed an organizer talking to a "bagger" who was on the clock. Moreover, when DeVinney did go outside, he attempted to impose a ban more comprehensive than that which was reasonably necessary to relieve any blockage.

by the strip of stores comprising the “Rodman Shopping Center,” and on the East by London Boulevard.

These separate conveyances are clarified by *paragraph 5*, which states:

[t]he word “building,” as used throughout this lease, shall mean the store building, sidewalks, and driveways. [R. Exh. 122(a).]

On this basis, the Respondent contends that it holds an exclusive leasehold interest in the High Street store “building,” which, in accord with “paragraph 5,” includes the sidewalk and driveway. I agree. There is no merit in the Charging Party’s editorialized construction of the lease which is at odds with its terms. The intent is plain. Two conveyances are contemplated: (i) a leasehold interest in certain defined areas, and (ii) a non-exclusive easement to other specified areas. As to (i) the leasehold is defined as the “building,” which by definition includes the sidewalks and driveway but does not mention parking areas. The nonexclusive easement is limited to “parking areas,” which omits reference to sidewalks and driveway.⁹ The scheme and intention of the parties is both coherent and clear.¹⁰ Accordingly, on authority of *Lechmere*, supra, I find that the Respondent’s enforceable leasehold interest on the sidewalks was no different than its interest inside the store, and, hence, that it did not violate Section 8(a)(1) by enforcement of its 50 feet policy at this location.

(2) Shore Drive (Virginia Beach)

The complaint in Case 5-CA-21311 alleges that the Respondent violated Section 8(a)(1) of the Act on August 1, 1990, when Sherry Carroll, its store manager, denied union representatives access to areas within 50 feet of the entrance to Respondent’s leased property, and threatened arrest if they did not vacate.

On August 3, the store was to be the site of mandatory employee meeting at which Mike Julian, the Respondent’s chief executive officer, was scheduled to address employees concerning the Union. Union Representatives Paul Evans, Lynn Curry, and Melanie Dupree arrived in advance of that meeting to distribute literature and to pursue other organizational activity.

Store Manager Carroll’s account substantiates the above allegations. She testified that as employees were reporting to attend the meeting, the union representatives were “right outside the door,” with one passing out literature and the second playing a “boom box.”¹¹ After reporting to superiors, she was

⁹ Contrary to the Charging Party, the lease does not confer an easement across property in which the Respondent already holds a leasehold interest. That document grants no easement with respect to the areas encompassed by its definition of the “building.”

¹⁰ I find incomprehensible the General Counsel’s position that at this and other stores, the Respondent’s duly authenticated leases should be discounted because the attachments are not the originals.

¹¹ Evans admitted that he had a tape of Jesse Jackson’s remarks at the Union’s rally, and that it was played on request of a bakery employee on a portable cassette player. The tape was played once on the sidewalk in front of the store, without objection from any of the Respondent’s representatives. This would not furnish no defense to invocation of the 50 feet policy in this instance. Moreover, uncontradicted evidence establishes that management did not complain about the tape, and that Carroll continued to invoke the 50-foot policy after the tape had been played. It is obvious from the total circumstances that Carroll

instructed to invoke the 50 feet rule. She did, and when the organizers declined to adhere, also in accord with orders from above, she called the police. A total of five police cruisers appeared at the scene. There were no arrests, but the police officers did obtain information as to the identity of the organizers, data that would be required to support a warrant. The organizers were warned by the officers that the Respondent would swear out a warrant if they did not move 50 feet from the entrances or go into the parking lot. The organizers complied, but the police cars positioned themselves at the perimeter of the parking lot facing them, where they apparently remained for the balance of the incident.

The conveyance at this location:

lease[s] and . . . does grant, demise, and lease unto [Farm Fresh] a store building 137’ x 160’, and other improvements to be constructed thereon, together with all appurtenances and right-of-ways [sic] incident thereto.

The lease adds that:

[a]ll portions of the shopping center land . . . not covered by buildings, shall be common area equally available and shared in common by all tenants of the shopping center, their employees, agents, customers and invitees¹².

Paragraph 4 thereof charges the landlord with the duty, during the first year of the lease (1974), “to keep and maintain at its sole expense, in good order and repair, replacing where necessary . . . canopies, sidewalks, exterior doors, plate glass.” That paragraph further declares that, “[d]uring the lifetime of this lease, Landlord will keep and maintain at its sole expense, in good order and repair, paved areas (including restriping of parking spaces and snow removal) and rights-of-way adjoining leased premises.”

Paragraph 5 of the lease provides that “[Farm Fresh] will, after the first year of this lease, at its own expense, maintain those items listed in paragraph 4 above as the Landlord’s maintenance responsibility during the first year.”

Paragraph 24 of the lease requires the landlord to “keep all parking areas and other common areas on the shopping center property orderly, clean, reasonably free of snow, adequately striped, and in good state of repair, and will provide adequate lighting and drainage of same.”(R. Exh. 122(b).)

Thus, Farm Fresh assumed maintenance responsibility for the storefront sidewalks, even though these common areas would remain open for use by other tenants, their employees, and invitees. The parking areas, pursuant to paragraphs 4 and 24, would remain under the primary control of the landlord.

The Respondent does not specify any possessory interest of an exclusive nature beyond the interior of this store. However, at this and other locations (Victory Boulevard, Colonial Avenue, and Merrimack Trail) it argues that as the custodian charged with responsibility for sidewalk maintenance it had authority to maintain a trespass action under Virginia law. Consistent therewith it cites the Virginia Code Section 18.2-119, which in relevant part provides:

was interested in restricting organization within 50 feet of the store, and not simply to put an end to the tape incident.

¹² Beverly Gerehart, the Respondent’s real estate manager, testified that she would construe the sidewalk in front of this store as within the “common area” referred to in this lease.

If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, *custodian* or *other person lawfully in charge thereof*. . . , he shall be guilty of a Class I misdemeanor.

I am not persuaded that the responsibility to clean and maintain, without specific delegation of authority to exclude, would establish standing to invoke the Virginia trespass statute, against others engaged in peaceful use of public areas.¹³ The Federal labor policy addressed in *Lechmere*, *supra*, does not turn upon analysis of a myriad of state laws. To do so, would require the Board to give full faith and credit to the laws of one State, and hence find lawful the very conduct which in another would be deemed an unfair labor practice. Frequently, local ordinances depart from the common law by broadening the class having standing to maintain a trespass action—not to preserve classical property interests—but, in light of the broadened incidence of absentee ownership, to hedge against squatter’s rights and adverse possession, and other sociological phenomena that might be regarded as undesirable. These considerations are not necessarily compatible with legal understanding of what constitutes a property interest for purposes of administering Section 7 of the National Labor Relations Act.¹⁴

As repeatedly recognized by the Supreme Court, the Board and the courts are charged with responsibility to develop a uniform national labor policy. To do so, preempts—the patchwork of geographically diverse rules which may please certain authorities,” but which, at the same time, would foster, rather than diffuse—diversities and conflicts likely to result from a variety of local . . . attitudes toward labor controversies” *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 242-243 (1959). I find that the Virginia statute did not privilege the Respondent, at this or any other location, to interfere with organizational activity waged in public areas, as to which it held no clear property interest.¹⁵

In sum, the Respondent’s interest in the critical 50-foot area at this location was limited to a nonexclusive easement. No one beneficiary of this open-ended demise might maintain a trespass action against the other absent an interference with usage. The Respondent was no different from numerous others within that category and merely enjoyed nonpossessory access which would not include authority to restrict a nonintrusive use by others. The Board, with court approval, has so held. See *Johnson & Hardin*, *supra*; *Barkus Bakery*, *supra*; *Polly Drummond Thriftway*, *supra*.

¹³ Cf. *Reed v. Commonwealth*, 366 S.E.2d 274 (Va. App. 1988).

¹⁴ *Woll v. U.S.*, 570 A.2d 819 (D.C. App. 1990), would appear to involve property rights cognizable under Federal labor policy to the extent that it recognizes the holder of a nonexclusive easement’s right to enforce a trespass statute against those that obstruct such usage. Here, as well, there is no question that the Respondent could invoke trespass laws against those that blocked access to its entrances.

¹⁵ This analysis does not collide with the teachings of *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983); *Sears, Roebuck & Co. v. San Diego County District of Carpenter*, 436 U.S. 180 (1978), that employers have the right, where there is no other available forum, to invoke jurisdiction of local courts for initial determinations of tortious conduct. However, this does not mean that the Board is bound by local applications of substantive law or that it must develop a quilted policy based upon the rules of different jurisdictions.

For all of the above reasons, it is concluded that the Respondent violated Section 8(a)(1) of the Act when Sherry Carroll directed nonemployee, union representatives to leave areas in which the Respondent held no possessory interest, and by enforcing that directive by calling the police.

(3) Victory Boulevard

The complaint in Case 5–CA–21366 alleges that the Respondent violated Section 8(a)(1) of the Act on May 15, 1990, when Vernon Riser, its store manager, enforced the 50 feet policy by informing union representatives that he would call the police and by actually calling the police, and, on May 18, 1990, by his causing arrest warrants to be served on Union Representatives James Hepner and Juanita Fridley, an allegation that invokes the Supreme Court’s decision in *Bill Johnson’s Restaurants v. NLRB*, *supra*, and its progeny.

Fridley and Hepner were present at this store on May 15 in an effort to secure signatures to authorization cards. They entered the store, walked through, and then went to the snackbar. They then left to continue their organizational activity on adjacent sidewalks.

Although the testimony is in conflict, the elements of the prima facie violation are substantiated by Riser’s own account. He claims that he approached the organizers after receiving a report that they were standing in the entranceway. On exiting, he found Hepner and Fridley standing on the 8- to 10-foot threshold mat that activates the door. He advised that they “were not authorized to solicit and that they would have to move down from the entrance to the store 50 feet.” The organizers refused. He repeated his direction twice more, and then returned to the store.¹⁶

Riser went on to testify that, on instructions from superiors, he again left the store, whereupon, he advised Hepner and Fridley that he would call the police and have them arrested for trespassing if they did not move. The organizers declined. He then called the police, urging on their arrival, that the organizers be arrested.¹⁷ Ultimately, the policeman informed Riser that warrants would be necessary if he desired further action against the organizers. Hepner and Fridley then left the store. With the identification obtained by the officer, Riser then sought to obtain a warrant for their arrest. Initially, however, his request was denied by the magistrate pending authorization from his superiors.

Fridley and Hepner reappeared on May 16 and 17 apparently without incident. However, they returned on May 18, first going into the snackbar where they talked with some employees. Fridley avers that she needed to purchase eye drops so they went into the selling area, but that being unaware of “Visine’s” location, they requested and obtained assistance of an employee. Mike Keltner, the assistant store manager, approached

¹⁶ In an apparent attempt to establish that the entrances were blocked, the Respondent’s attorney elicited testimony that as the four or, perhaps, five of them talked, customers were having difficulty accessing the store. If this were the case, Riser did not testify that he even mentioned or made any attempt to deal with the problem. Riser admitted, however, that the disruption was caused by his presence, and not alone by the location of the union representatives. In fact, as I understand his testimony on cross examination by counsel for the Charging Party, access to the store was unimpeded.

¹⁷ According to the organizers, they were told by the police officer that Riser had complained about their solicitation in violation of the company’s policy, stating that they could not solicit within 50 feet of the entrances.

stating that he would “appreciate” their not talking to employees while they were on the clock.¹⁸ The nature of the conversation was explained to him, and Keltner then took them to the product. She made the purchase. They then returned to the snackbar. While there, two policemen walked up and informed Fridley and Hepner that they were under arrest. (G.C. Exhs. 108(h), (j).) Both were escorted by the officers out of the store, and taken to the police station.¹⁹ After processing, in which Fridley and Hepner claimed to have been subjected to several indignities, they were taken before a magistrate who instructed that they not return to that store until the case were resolved by a judge. Both were released on \$500 cash bond. On June 25, the case was tried and dismissed.

Also on May 18, Al Wanzelak, the Respondent’s vice president for human resources, by mail, informed Hepner, as follows:

It has been brought to my attention that you have repeatedly violated Farm Fresh, Inc. policies regarding solicitation at the . . . Victory Boulevard store . . . and have refused store management’s requests that you comply. Under these circumstances we must insist that you stay off . . . [the Respondent’s] property at that location. If you come on the property, you will be considered a trespasser, and appropriate legal action will be taken. [G.C. Exh. 108(l).]

Here again, the Respondent contends, that it enjoys a possessory leasehold interest in the sidewalks adjoining its store. (R. Exh. 122(c).) This store is part of a strip mall. The Respondent claims a property right to enforce its 50-foot rule by virtue of the lease in evidence as Respondent’s Exhibit 122(c). Paragraph 1 thereof:

leases and demises unto Tenant. . . . certain premises . . . as shown and outlined in RED on . . . Exhibit “A” (the site plan) which is attached hereto.

The demised premises are located on a . . . tract of land owned by the landlord . . . on which Landlord has developed a shopping center . . . , and include the building . . . and canopy, if any (the Building), existing thereon and the sidewalk (which

¹⁸ Like other organizers, Fridley and Hepner customarily would “walk through” the store to introduce themselves to employees, inviting them outside to talk when they had a chance. Fridley and Hepner were unconcerned as to whether employees in the store were on the clock during those exchanges. Fridley initially testified that she would talk to employees if in selling areas whether on or off the clock. Later, however, she testified that in this store she would ask the employees if they were on the clock because she would not break Riser’s rule about interfering with their work. Then, she appeared to return to the original format when in response to counsel for the Charging Party she summarized her standard approach as follows:

Hello, my name’s Juanita Fridley. I’m with Local 400, and when you have a break or lunch I’ll be around if you’d like to talk to me.

Hepner’s affidavit attests to the fact that at least on May 14, he followed basically the same routine, implying that such conversations were waged without concern for whether the employees addressed were on the clock.

¹⁹ Riser swore out the warrants that day after being informed by the magistrate that he was willing to act upon Riser’s request of May 15. The magistrate advised that if the organizers came in the store again, Riser could call the police and arrests would follow. Riser claims that he followed this advice when he returned to the store and learned that Fridley and Hepner were in the snackbar. The warrants were based upon the May 15 incident. G.C. Exhs. 108(i), and (k).

shall be maintained at all times by Tenant as a sidewalk accessible to the public) and loading facilities.²⁰

Paragraph 1 adds that Farm Fresh is:

granted (i) the right of nonexclusive use, in common with other tenants of the Shopping Center and their employees, customers, business invitees, contractors and other permitted users, of the automobile parking areas and other Common Areas (as hereinafter defined) within the Shopping Center.

“Common Areas” are defined in paragraph 13 to include:

All portions of the Shopping Center, exclusive of the portions on which buildings are constructed . . . and loading areas which are intended for the exclusive use of the occupant of a portion of the buildings, which are either landscaped or are paved or otherwise improved for purposes of parking, vehicular or pedestrian traffic and passage, or for other use in common by the owners of the Shopping Center, or portions thereof, and their tenants and the employees (subject to certain limitations), licensees, contractors, business invitees and customers of all of the above and for ingress and egress to and from each and every portion of the Shopping Center. . . . [this] includes but is not limited to . . . Parking areas . . . Roadways, driveways . . . Sidewalks and walkways.

In paragraph 13(b), the landlord covenants to maintain the common areas in good condition and repair.

Paragraph 16, however, charges Farm Fresh with the duty of caring for the sidewalks. Specifically, paragraph 16 states:

Tenant covenants and agrees that it will . . . keep the demised premises and the sidewalk adjacent thereto clean and free from obstruction, rubbish, dirt, snow and ice.

Tenant, however, reserves the right to sell seasonal merchandise outside on the sidewalks adjoining the front of the demised premises, as is allowable by law, and agrees not to hinder or interfere with the passage of pedestrian traffic on such sidewalks.

The Respondent contends that the assignment of responsibility and reservation of rights in the storefront sidewalks stated in paragraphs 1 and 16 indicate that the parties intended Farm Fresh to hold an exclusive interest in the those areas and exercise control over them, subject only to the sidewalks remaining open to cotenants, their employees, and invitees for ingress and egress to other parts of the shopping center. The lease is ambiguous. It includes specifically all sidewalks in the definition of common areas as to which the Respondent would merely enjoy a nonexclusive interest. At the same time article 1 could be construed as including the sidewalks as part of the absolute demise. The conflict could only be resolved by the site plan. The Respondent held the burden of establishing its property right, and having failed to produce the “site plan,” the ambiguity on the face of the lease is properly resolved against it. Accordingly, I find that all sidewalks, including those abutting the Respondent’s store are common area, with the Respondent’s rights in that area confined to nonexclusive usage, except where

²⁰ It is not entirely clear that the reference to the sidewalk and canopy means that they are part of the demise or a part of the description of the property held by the landlord of which the demise is merely a part. The issue would be resolved by the site plan which has not been produced in evidence.

actually dedicated by the Respondent as an area for display of merchandise. This construction is in comport with the fact that the lease expressly precludes the Respondent from utilizing areas that “hinder or interfere with the passage of pedestrian traffic on such sidewalks.” Accordingly, the lease conveys no exclusive easement or leasehold interest to the Respondent in any “common area,” including the sidewalks which front the store.

On the foregoing, it is concluded that the Respondent violated Section 8(a)(1) of the Act by directing the union representatives to remove themselves from areas as to which the Respondent held no possessory property interest. For reasons stated below, I also shall find that the Respondent violated Section 8(a)(1) by threatening to call the police to enforce that directive.

The legality of Riser’s actual swearing out of warrants, and thereby causing the arrest and related criminal prosecution of Fridley and Hepner turns upon other considerations. The fact that the Respondent sought protection of local authority in that fashion does not automatically violate Section 8(a)(1) even though taken without support from any cognizable property interest. In order to preserve the constitutionally protected right of access to the courts, the Supreme Court distinguished such measures from other situations in which an employer, on a mistaken assertion of property interests, encroaches upon Section 7 rights. See *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731. On authority of that decision, the Board may not interfere with an employer’s invocation of protection from local authorities unless certain conditions have been met.

First, the defense under *Bill Johnson’s* applies only as to actions in local courts that have not been preempted under *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236. To understand when that occurs, it is necessary to explore the pathology of the Court’s thinking in that case. *Bill Johnson’s Restaurants* emerged from a Board finding that an employer unlawfully initiated and maintained a state court action against employees engaged in picketing and handbilling. Despite the obvious incursion on Section 7 rights, earlier an exception to the preemption doctrine had been carved out in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180. In *Sears*, it was held that a state action to enjoin peaceful picketing was not preempted because the union had filed no unfair labor practice charge and hence there was no assurance that the employer would receive a Board ruling on whether the union’s conduct was protected. Thus, it was necessary to relax the preemption doctrine in order to guarantee the employer a forum for adjudication of its property rights.

Consistent with this reasoning, the Board will find local trespass actions to violate Section 8(a)(1) if the employer is assured that the Board will rule on its position, and hence the exception to the preemption doctrine fails to apply. In *Loehmann’s Plaza*, 305 NLRB 663 (1991), the Board concluded that this occurs once a complaint issues, and it is at this juncture that state action is preempted. Thus, the maintenance of local criminal actions or laws suits filed or maintained thereafter will be deemed preempted and unlawful solely upon a finding that the union’s conduct is protected by the Act. *Oakwood Hospital*, 305 NLRB 680 (1991). In this instance, the matter was dropped before the complaint issued on August 27, and hence the employer’s conduct was not preempted.

Even in such circumstances, however, the General Counsel still has a string in its bow. Thus, where the local action is not

preempted, the Board will intervene upon proof that (1) the lawsuit lacks a reasonable foundation in law, and (2) the lawsuit was filed with a retaliatory motive. *Johnson & Hardin Co.*, 305 NLRB 690.

The General Counsel’s burden has been met as to (1) above. The trespass warrants were unfounded legally since the Respondent merely enjoyed a nonexclusive right of usage in the property, and its objection to the presence of the union representatives was broader than any reasonably founded claim that such usage had been impaired. As for (2), the General Counsel and the Charging Party contend that the criminal charges were leveled with both “retaliatory motive” and “illegal objective.”²¹ Yet, neither has particularized evidence that would support such a finding.²²

My own examination of the record fails to reveal a “retaliatory motive.” Cf. *Johnson & Hardin Co.*, supra. The warrants were not sought until after the organizers were informed of the 50-foot policy, asked to leave, and warned that failure to do so would lead to arrest. When they refused, Riser sought the warrants with immediacy. At trial, on June 25, the case against the organizers was dismissed. That result was accepted by the Respondent at that time. Moreover, Riser testified, without contradiction, that with the exception of an incident on May 25, for about 7 weeks after May 18, teams of organizers regularly, and without disruption, walked through the store, and met with employees in the snackbar. There is no suggestion of an attempt to exclude them from that area or any site 50 feet beyond the store entrances. The circumstances do not bear the earmarks of “harassment,” but merely suggest that the warrants were secured, not out of retaliatory design, but to secure adjudication of whatever right the Respondent had to invoke local trespass laws to enforce the 50-foot policy. *Loehmann’s Plaza*, supra. I find that Riser secured the arrest warrants under conditions that, while not “preempted,” were not in consonance with a desire to retaliate. Although this step was taken against union organizers engaged in organizational activity in public areas in which the Respondent held no property interest, in the circumstances, the Respondent did not violate Section 8(a)(1) in this respect.

Nevertheless, it is concluded that the Respondent violated Section 8(a)(1) of the Act by “threatening” union representatives with arrest if they did not move 50 feet from the entrances. Since the arrest was legitimate under *Bill Johnson’s*

²¹ Consistent with *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832 (1991), “illegal objective” would exist (and possibly preemption would have occurred) had the Board previously ruled on the issue, and the employer’s pursued the legal action in the face of said ruling. I am unaware that the Respondent continued to press the criminal complaint after the Board at any level had ruled on its property interests at this location.

²² The Charging Party goes no further than to point out that the Respondent had engaged in “the numerous unfair labor practices . . . [alleged] in this case and [had pursued] a long history of unlawful anti-Union activity.” To find “retaliatory motive” solely upon this checkered history would subvert the constitutional interests underlying *Bill Johnson’s Restaurants*, supra, and *Sears Roebuck*, supra. These decisions are grounded upon the concept that employer’s are constitutionally guaranteed a forum through which they might seek protection against intrusion upon their asserted rights. To sustain the Charging Party’s position is to assume that the Board may punish a recidivist employer by, in effect, causing a forfeiture of this constitutional right. In keeping with the Supreme Court’s holdings, the constitution draws no distinction between those who, as a collateral matter, have opposed unionization lawfully and those who have done so unlawfully.

Restaurants, supra, one might reason that the threat must carry the same fate as the action itself. However, the exception set forth in that decision, only applies to a sincere effort to petition the courts, but not where that possibility is used solely as the backbone for a threat. Until the employer actually invokes the legal process, one can never be certain that the threat to do so is anything more than a tactical measure designed to restrain a form of activity protected by the Act. Yet, a demand, in that form, might well suffice to thwart the organizing activity.²³ It would be anomalous to legitimize such conduct, where the interference with Section 7 activity is clear, and the precise objective if stated in other terms would clearly constitute an unfair labor practice. Moreover, to find the threat unlawful does not collide with *Bill Johnson's Restaurants*. Such a violation does not require redress in the form of any extraordinary reimbursement remedies and hence would impose no penalty likely to discourage utilization of "the governmental machinery which redresses violations of municipal ordinances." *Johnson & Hardin*, supra. Accordingly, it is concluded that the Respondent violated Section 8(a)(1) of the Act by Riser's threat to have union representatives arrested if they did not suspend organizational activity in a public area in which the Respondent held no property interest.

(4) Princess Anne Road

The allegations affecting this location are unique in that they raise issues not only with respect to the Employer's right to regulate nonemployee organizational activity in public areas outside the building as in *Babcock & Wilcox* and *Lechmere*, supra, but also with respect to exclusion of union representatives from an area of public use inside a store.

Outside. The complaint in Case 5-CA-21366 alleges that the Respondent violated Section 8(a)(1) of the Act when Nat Harlow, the store manager, enforced the 50 foot policy on May 1, 1990, by, in the presence of employees, threatening Union Representatives James Green and Dudley Saunders with arrest, and on May 2, 1990, by causing warrants to be issued against them.

There is no question that Green and Saunders were engaged in organizational activity on May 1 at this store. Harlow testified that earlier that day, he was approached by John Deiter, a bagger, who was in an agitated state, complaining that he was "sick and tired of the harassment." Harlow asserts that because of Dieter's complaint, he went about his duties,²⁴ but watched the organizers. However, when he saw Green offer a card to a clerk who was on duty, he instructed the organizers to move 50 feet from the door. Green adamantly refused to move. Harlow called Vice President Wanzelak. At the latter's suggestion, Harlow repeated his request that the organizers move. Green refused, stating that Harlow had no right to make him move. According to Saunders, Harlow returned to the store, before doing so, informed that they left him no choice and that he

²³ A similar fear led the Supreme Court in *Textile Workers v. Darlington Co.*, 380 U.S. 263 (1965), to assure that, while holding that an employer has a legitimate right to go out of business for antiunion reasons, it was not validating an employer's right to threaten to go out of business for that reason. 380 U.S. at 968 fn. 20

²⁴ Deiter confirmed that, while off the clock, the union representatives asked him to sign a card, and that he complained to Harlow that he had been "harassed." The claim of harassment apparently stemmed solely from the fact that he had been solicited on several prior occasions while on the clock. There is no testimony that Deiter mentioned these earlier incidents to Harlow. Were it necessary to reach the issue, I would find that Deiter's grievance furnished no legal justification for removal of the organizers.

would call the police and have them arrested. Harlow again called Wanzelak and was told to call the police. He did. The police arrived and an officer, after conversing with Harlow, told the union representatives, "Gentlemen, you have to move back 50 feet" Later, the officer backed off, advising that he could merely take their names and addresses at that point, but that if the store manager requested a trespass summons, it would be issued. Harlow then went to the courthouse to swear out trespass warrants. On observing his departure, Green and Saunders left. Harlow testified that he was instructed both by superiors and one of the Respondent's attorneys to file additional charges should Saunders and Green reappeared at the store.

The next day, Saunders and Green discovered that a summons had issued against them in consequence of this incident. Both were scheduled to appear in court on July 5. (G.C. Exhs. 102(c), (f).) At that time, they were convicted of trespassing. The instant complaint issued on August 20. Thereafter, the Respondent did not take steps to terminate the criminal trespass action. However, an appeal was taken and, on October 4, the charges were dismissed after trial de novo before the Circuit Court of Virginia Beach on the basis of the preemption doctrine.²⁵ The organizers were represented by counsel furnished at union expense both at the original trial and the appeal.

The Respondent contends that the governing lease conveys the storefront sidewalks as part of the demised premises in which it holds an exclusive possessory interest. This store is part of a strip mall. The lease that defines the property interest held by the Respondent is in evidence as Respondent's Exhibit 122(d). The leasehold conveyance is generally described at page 2 of the master agreement as follows:

Landlord has agreed to Lease to Tenant under a long-term lease approximately 51,503 square feet (plus additional sidewalk, loading dock and service areas) of the Tract ("the Demised Premises") together with certain nonexclusive easement rights over, across and under the Tract.

....

Tenant has agreed to construct a building ("Tenant's Building") containing 51,503 square feet of floor area together with all loading docks, sidewalks and other improvements.

Pursuant to the lease, the demised premises would include the sidewalks that the Respondent agreed to construct as part of the "tenant's building," as distinguished from the sidewalks to be constructed by the landlord. Thus, article II, section 1(b) charges the landlord with responsibility for:

The construction and/or installation of all improvements in the Common Areas. . . . mean[ing] . . . all of those areas in the Shopping Center other than the areas on which Landlord's Buildings and Tenant's Building are to be constructed.

Nowhere in the lease is a nonexclusive easement conveyed as to the sidewalks appurtenant to the tenant's building. On the other hand, article XV, section 1, page 38, entitled "USE AND OPERATION OF COMMON AREAS," grants the tenant:

(b) a non-exclusive right, privilege and easement to use the entranceways, driveways, roadways, service roads and areas, sidewalks, walkways, and similar facilities which have been or will be erected by Landlord in the *Common Areas* for the

²⁵ The cases were prosecuted by a public official, but on charges pressed by the Respondent, and on evidence adduced from the Respondent's representatives.

purpose of providing pedestrian and vehicular traffic with access, ingress and egress to and from the *Demised Premises*. [Emphasis added.]

The lease in clear and convincing terms contains an outright conveyance, of the sidewalks built by the Respondent as part and parcel of the tenant's building. All subsequent definitions of common areas and easements are consistent with the intention reflected in that specific demise. Thus, the "common areas" do not include the storefront sidewalk constructed by Farm Fresh, and Farm Fresh is given a nonexclusive easement only with respect to the sidewalks, etc., to be constructed by the landlord. In this connection, the Respondent's real estate manager, Gerehart, did testify that she could not locate the plats referred to in the lease, and that reference to that document is required before one could ascertain "outside of the store building" that which is leased and that which is not. Her testimony is not free from ambiguity, for it speaks to far more than the sidewalks. Accordingly, it is not taken as inconsistent with the precise terms of the lease itself. The intention of the parties is so abundantly clear from within the four corners of that document that the language therein would prevail, reducing the plat to a secondary document, possibly of clarifying, but not controlling, utility.²⁶

As the Respondent held an absolute leasehold interest in the sidewalks adjacent to the store premises, *Lechmere* controls and the organizational activity on sidewalks within 50 feet of store entrances was not protected by the Act. Accordingly, the Respondent did not violate Section 8(a)(1) through Harlow's implementation and attempts to enforce that policy, including his causing arrest warrants to be issued against the union representatives.²⁷

Inside. Buried among the seven complaints is a single phrase which raises the issue of whether employers, in light of the supervening decision in *Lechmere* are free to exclude union representatives from selling areas and the snackbar, both of which indisputably reside within the former's property. Thus, the complaint in Case 5-CA-21366 alleges that the Respondent violated Section 8(a)(1) of the Act on May 7, 1990, when Harlow caused a warrant to be issued against Saunders, and on May 14, 1990, when Harlow threatened union representative with additional arrests if they appeared "anywhere on the leased property, including the public, snackbar area."

Although there are differences in the accounts, they are not material. Saunders, despite warrants issued by Harlow on May 2, returned to the store to walk through and purchase a drink in the snackbar on May 7, with Staff Representative Pinto, and on May 13, with Barry Morrisett. He had his drink, smoked a cigarette on each occasion, and then left. They at no time were stationed outside the store within 50 feet of the entrances.

According to Saunders, on May 14, he returned to this store with Green to have dinner in the snackbar. Harlow approached

them, making a point of their reappearance despite the fact that the May 2 summons was pending in court. He warned that, until that matter was resolved, on each occasion that they "came into that store he would issue a trespass warrant." Harlow then addressed Saunders, alerting him to the fact that based on his May 7 visit, Harlow had sworn out an additional trespass warrant. The organizers informed Harlow that they would leave as soon as they finished their dinner.²⁸ Green testified that he did so, and never returned to that store again.²⁹

In fact a trespass summons had been issued on May 8 in this regard.³⁰ In this time frame, a hearing was held on the criminal charges based on both the May 1 and 7 incidents. The charges concerning May 7 were dismissed.

The conduct attributed to Harlow was an exception to the Respondent's general "hands off" approach to nondisruptive organizational conduct on the part of union representatives inside the stores. As indicated, it is entirely possible that the Respondent adopted this stance in reaction to the unfair labor practice proceeding dealing with the 1987 campaign, a part of which had been influenced by the Respondent's execution of a settlement agreement. In any event, the Board, relying on *Montgomery Ward & Co.*, 288 NLRB 126 (1988), in a supplemental decision issued on December 19, 1991, following an earlier remand,³¹ held, inter alia, that the Respondent violated Section 8(a)(1) when a union representative, who was conducting himself in orderly fashion, was ejected from a snackbar. 305 NLRB 887. The status, however, of this holding is no longer clear.

Following the Supreme Court's decision in *Lechmere*, supra, the Board, by order dated November 23, 1992, again remanded the above matter to Judge David L. Evans in light of *Lechmere*, supra, and the Fourth Circuit's decision in *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932 (1990), for reconsideration of findings that the Respondent violated Section 8(a)(1) by causing the removal of nonemployee organizers from its "snackbars" and parking lots.

In this light, the question presented, raises serious question as to the continuing viability of *Montgomery Ward & Co.*, 288 NLRB 126 (1988), and its holding that retailers engage in a presumptive violation of Section 8(a)(1) when nonemployee organizers are excluded from in public areas inside their stores. The Board's position was founded on the notion that exclusion of nonemployee union organizers from a snackbar or restaurant was inherently discriminatory. As stated in *Montgomery Ward*, supra at 127:

The Board and the courts have traditionally held that solicitation in restaurants cannot be prohibited when . . . the conduct of the nonemployee organizer is consistent with the conduct of other patrons of the restaurant. [Citations omitted.] To hold otherwise would license a property owner to prohibit a union organizer from utilizing its restaurant solely because the or-

²⁶ I reject the General Counsel's characterization of this lease as inconclusive. The General Counsel does not address the dichotomy set forth on the face of the lease based on sidewalks built by the Respondent, which are unreservedly conveyed, and the nonexclusive easement created as to those built by the landlord.

²⁷ Consistent with the analysis of *Bill Johnson's Restaurants*, supra, had the Respondent failed to establish a leasehold interest in the sidewalks, it would be deemed to have violated Sec. 8(a)(1) both on the basis of the threatened arrest, and under *Loehmann's Plaza*, supra, the failure to terminate the criminal matter following issuance of the instant complaint.

²⁸ Because Harlow admittedly was confused as to the precise sequence of events, the above is based on the credited account of Saunders. Harlow admits that he was told, and acted on counsel's direction to file charges against Saunders should he return to the store, including the snackbar.

²⁹ One might assume that Green meant that he never went inside that store again. Saunders' affidavit states that they returned to the parking lot after May 14.

³⁰ G.C. Exh. 102(g). The summons noted that a hearing was scheduled for July 5.

³¹ See *Farm Fresh*, 301 NLRB 907 (1990).

ganizer was discussing organizational activity with off duty employees [who are there in the capacity of restaurant patrons].

That a majority of the Board no longer clings to this view is evident from the terms of its 1992 remand Order in Case 5–CA–17940, which directs Judge Evans to:

adduce further evidence on the issued raised . . . including . . . whether the Respondent has allowed sales, solicitation or distribution activity unrelated to the operation of its stores in the . . . snackbars.

Thus, it would appear that, henceforth, the presumption would be to the contrary, with the employer privileged to remove the organizers from the snackbars absent evidence that there is no alternative means of communicating with employees, or that other forms of solicitation are condoned in those areas. The remand of Judge Evans findings would be untoward and a wasteful exercise under any other construction. Moreover, in the light of *Lechmere*, it would seem illogical to conclude that an employer's property rights have greater sanctity outside at public entrances than inside within public, nonselling areas. Accordingly, as that decision is viewed as the overriding precedent, and as there is no evidence that the Respondent had permitted its snackbar to be used for purposes unrelated to union organization, Harlow's conduct against Green and Saunders was justified as a legitimate assertion of property rights. The 8(a)(1) allegation in this respect shall be dismissed.

(5) Mercury Boulevard (Hampton)

The complaint in Case 5–CA–21311 alleges that the Respondent violated Section 8(a)(1) of the Act on August 1, 1990, when Dale Heinz, the store manager, denied union representatives access to the sidewalk and parking lot adjacent to and within 50 feet of the entrance to Respondent's leased property, while threatening arrest by calling police.

The answer admits the factual allegations in the complaint. Charles Garbers, a union business agent, and his partner, Murray, had been assigned to this store since April. On August 1, union literature was being distributed to employees as they arrived for a mandatory employee meeting concerning the Union scheduled for 4 p.m. This continued until the store manager excluded him from within 50 feet of the entrances.

Heinz testified that on the day in question, he went out to talk to the organizers after a customer complained that an organizer put a piece of union literature in her basket. He asked one of the organizers if they would move out of the way of incoming traffic, but after conferring, they refused to move.³² He then claims to have requested that they move because of the 50 feet policy. They refused, arguing that that rule was not legally enforceable. Heinz then went into the store, where he was instructed by Wanzelak to call the police if they declined to

³² Although Heinz initially testified that he noticed that the union representatives had positioned themselves in front of the store so that "traffic flow into the store was blocked," requiring those seeking access to the store to maneuver around them, on cross-examination by counsel for the Charging Party, Heinz conceded that he did not personally observe any such blockage, and that those seeking access, to his knowledge, were inconvenienced only after Heinz, himself, engaged the organizers in conversation, and customers had to step around them. He did not testify that he attempted to move their discussion off to the side. From the scenario he depicts, Heinz was as culpable as the others concerning any blockage.

adhere. Heinz again warned the organizers, then called the police when they resisted. Heinz described his conversation with the officer, as follows:

The police . . . asked me what the problem was. And I told him that our company had a fifty foot no solicitation rule on the front doors, that I had asked the gentlemen to move on two occasions.

After further conversation with the police officers, the union representatives left.

This lease states that:

The premises demised herein is the building outlined in red on the Plot and Development Plan of Mercury Plaza hopping Center . . . together with the non-exclusive right, in common with others, to use the parking service area, drives, walks, aisles, mall corridors and entrances shown on said above referred to Plot and Development Plan.

In paragraph 25(b), the landlord agreed that Farm Fresh and its customers shall have unobstructed use of all common areas, and paragraph 25(c) requires the landlord to keep the common areas clean and unobstructed.

Paragraph 4 requires Farm Fresh to pay a monthly fee for parking lot maintenance. (R. Exh. 122 (e).)

Respondent appears to concede that the conveyance in this instance was limited to a nonexclusive easement. In any event, I find this to be the case. Moreover, as previously found, the responsibility imposed on the Respondent by the lease to maintain and control areas which it neither owned, nor lease would not substantiate the type property interest that would permit lawful ejection of nonemployee organizers. Accordingly, it is concluded that the Respondent violated Section 8(a)(1) when Heinz directed the union representatives to vacate areas in which it held no possessory property interest, and called the police to enforce their exclusion.

(6) Colonial Avenue

The complaint in Case 5–CA–21532 alleges that the Respondent violated Section 8(a)(1) of the Act at this store on October 16, 1990, when its manager, Marie Kretzer, denied union representatives access to the sidewalk and parking lot adjacent to and within 50 feet of the entrance to Respondent's leased property, while threatening arrest, and causing police to issue an arrest warrant because the union representatives declined to vacate.

On October 16, Karen Gompers and Scott Chismar, both union representatives, appeared at this store.³³ Gompers brandished a small union sticker on her knee and Chismar wore a union T-shirt. They entered the store, separated, taking different routes through the selling area.³⁴ Gompers and Chismar went

³³ Neither had previously visited this facility. Since April, Cindy Allgood and Vera Harrison had covered this location on a regular basis.

³⁴ According to Gompers, as she stood in the produce area, she was approached by Kretzer who informed her that she would have to leave "because we were union organizers." Kretzer testified that after an employee, Fred Anthony, reported that he had been approached in the store by the organizers, she instructed the latter to leave the store "because they had solicited one of . . . [her] employees while he was on the clock." Anthony acknowledged both the contact described by Kretzer and that he had reported it to her. He also testified that he overheard Kretzer inform the union representatives that "they're not allowed to be inside the store soliciting for the Union." The conflict need not be resolved.

outside where they remained in front of the store for the purpose of communicating with employees.

Kretzer testified that once outside, the organizers stood near the door. She consulted with the Respondent's personnel officials, and then went out, instructing that it was her "understanding" that the Respondent has a policy banning solicitation within 50 feet of the front door.³⁵ Chismar indicated that he would not abide, whereupon Kretzer said if he did not she would have to call a police officer "to come out and talk to him." On direction from the Respondent's personnel office, she called the police.

As Gompers and Chismar resumed their organizational activity, two police cruisers appeared.³⁶ Another cruiser subsequently appeared, so that all told, there were five police officers on the scene. Kretzer was observed leaving the store, gesturing toward them. After this, the organizers moved away from the immediate vicinity of the entrance.

Later, Gompers and Chismar learned that warrants had been sworn out for their arrest. (G.C. Exh. 100(c).) The warrant falsely charged the union representatives with having "picket[ed] the premises of Farm Fresh in such a manner as to obstruct or interfere with the free use of public street, sidewalk or other public ways." (G.C. Exhs. 100(c) and (d).)

An earlier hearing date was continued until December 4 because no one appeared on behalf of the Respondent. On this latter date, the case was "nolle prosequi." The relevant complaint subsequently was issued by the Regional Director on January 1, 1991.

Paragraph 1 of this lease covering this store:³⁷

demises and leases to Tenant . . . a store unit containing 26,381 square feet, herein called the "leased premises."

Paragraph 2 adds that

[t]he use and occupancy by Tenant of the leased premises shall include the use in common with others entitled thereto of the common areas, designated retail parking areas, service roads, loading facilities, and sidewalks.

Paragraph 11 requires the landlord to maintain the parking area.

Paragraph 14 requires Farm Fresh to:

keep the entryways and sidewalks adjacent to [the demised] premises clean and free from obstruction, rubbish, dirt, snow and ice.

Paragraph 15 also charges Farm Fresh with policing the area outside of its building to protect against prohibited activities,

³⁵ Anthony testified that after the organizers went outside, he overheard Kretzer tell them to move 30 to 50 feet away from the door or she would have to call the police. Although he testified that the organizers were making it "harder" for customers to get in "because they were real close to the doors," he does not relate that Kretzer sought merely to move them away from the doors.

³⁶ According to Gompers, Kretzer again appeared, informing the officers that the union representatives were attempting to cause a riot and were violating the 50-foot rule. Chismar did not mention this, but did testify that one of the police officers stated that they had been called because the organizers were inciting a riot. According to Kretzer, when the cruiser arrived with two policemen, Kretzer explained the 50-foot policy to one of the officers, who then went to talk to the organizers. Kretzer denied informing the police that the union representatives were attempting to incite a riot in the store.

³⁷ R. Exh. 122(f).

Paragraph 18 requires Farm Fresh to carry public liability insurance on "the demised premises (including the adjoining sidewalks and driveways)."

Paragraph 22 keeps "all parking areas, driveways, entrances and exits thereto, and other facilities furnished by the Landlord adjacent to the demised premises" within the exclusive control of the landlord.

Paragraph 15 is the sole provision tending to suggest that the Respondent held an assertable property interest. However, the delegation contained therein, does not define what is meant by "prohibited activities" and hence it is too vague and indefinite to be a clear authorization that the Respondent, on behalf of the landlord, could enforce criminal trespass laws against any and all forms of peaceful solicitation. Accordingly, the Respondent violated Section 8(a)(1) of the Act when Kretzer directed the organizers to an area 50-feet distant from the store entrances and when she threatened to call the police because of their refusal to do so.

I shall dismiss the allegation with respect to the issuance of warrants. That step produced a legal proceeding aborted before issuance of the instant complaint, and hence was not preempted under the test espoused in *Loehmann's Plaza*, supra. The criminal proceeding was never viable during periods when preempted by an unfair labor practice complaint. Furthermore, the naked claim by the General Counsel and the Charging Party that the criminal complaint was filed with a "retaliatory motive" is not particularized by reference to specific evidence. For reasons already expressed, the Respondent's history of unfair labor practices is no substitute for proof that property rights were asserted as a pretext, and that in reality, the Employer sought to use local processes as a means of combatting unionization. As was true of Victory Boulevard, the evidence at this location fails to convince that the Respondent acted on grounds other than removal of nonemployee organizers whom it felt, albeit wrongfully, to be intruding on its property interests. In these circumstances, the 8(a)(1) allegation based on Kretzer's securing arrest warrants shall be dismissed.

(7) West Norfolk Road (Portsmouth)

The complaint in Case 5-CA-21461 alleges that the Respondent violated Section 8(a)(1) of the Act at this store on September 12, 1990, when its manager, Renie Kifus, denied union representatives access to the sidewalk and parking lot adjacent to and within 50 feet of the entrance to Respondent's leased property, while causing police to threaten to arrest union representatives if they did not vacate.

Chad Young and Juanita Fridley testified that they visited this store on or about September 12. They did a walk-through, telling the workers that they would be outside in the parking lot, inviting them to stop by during their breaks or lunch. They then went to the bench on the sidewalk fronting the store. According to Fridley, Kifus came out and told them of the 50-foot policy and then returned to the store. Kifus acknowledges that she did so, and that when the organizers declined to adhere, she sought instructions from a superior.³⁸ With that she returned to again attempt to enforce the policy. She then called the police.³⁹

³⁸ Kifus claims to have interceded initially on a complaint by Michelle Riddick, an office clerk, that the union representatives "were giving her a hard time and they were in her face kind of being loud and sarcastic and that she was real uncomfortable." Riddick testified that she was outside on break when the union representatives approached her. She had talked to them before, and stated again that she was not

Eventually the police arrived. They entered the store, then came out and went to the bench where Young and Fridley identified themselves. The officer said, "You're not from around here, are you?" Young indicated that he was not. The policeman then said, "If they don't want you on the property, they can have you arrested and we will take you to jail. . . . So you will leave." When Fridley suggested that they leave and return after Kifus had time to cool off, the officer interjected, "No, you won't, or you will be arrested." Young and Fridley then left.

The Respondent claims an exclusive possessory interest in the areas from which the organizers were excluded. (R. Exh. 122(g).) This lease recites that the lessor:

does grant, demise, and lease unto Tenant a store building. . . and any other improvements now located thereon or to be constructed thereon."

. . . .

All portions of the shopping center land . . . not covered by buildings, shall be common area equally available and shared in common by all tenants of the shopping center, their employees, agents, customers and invitees. [R. Exh. 122(g).]

Absent a more precise definition, the scope of common areas, as stated above, includes all public access areas within the entire shopping center, except the land occupied by the buildings themselves. The Respondent would broaden the building area to include the sidewalk the store by reference to the store's large overhang, which covers that area. (G.C. Exhs. 106(c) and (d).) The overhang, being either an original part of the store building or a later improvement thereto, covers an area measuring roughly 100-foot long and 15-foot wide. (See R. Exh. 121(d).) The Respondent contends that, according to the terms of the lease, this area is excluded from the definition of the common areas, and therefore, must be a part of Farm Fresh's demised premises. In this instance, the lease does not clearly establish that the Respondent had any proprietary interest in the area from which it excluded union representatives. The Respondent's interpretation of the terms "covered by buildings" is self-serving and it is entirely possible that it was not meant to include appurtenances that merely affect sunlight and rainfall. Absent a clearer intent, I am unwilling to infer that the landlord intended to subject unrestricted usage of common areas to a tenant's will to erect overhangs. At a minimum, in this instance, I accept the testimony of Real Estate Manager Gerehart that,

interested in doing so. She claims that the organizers kept talking, prompting her to report the matter to Kifus. She claims that she accompanied Kifus when the latter spoke with the organizers. She testified that the organizers were informed not only of her complaint, but that Kifus also referred to the 50-foot rule. Riddick's complaint did not justify the broader measures taken by Kifus under cloak of property rights.

³⁹ The General Counsel sought fit to adduce testimony concerning the playing of union propaganda on a tape player. The incident took place at Young's automobile on the parking lot, more than 50 feet from the store's entrance. According to the testimony, Kifus tried to stop the playing of the tape even though the employees were on their own time and wished to hear it. This entire incident is denied by Kifus, who relates that she had no discussion with organizers concerning the playing of the Jesse Jackson tape. The entire matter is outside the purview of the complaints and is not relevant to any issue properly before me. The conflict is not resolved.

without the plat, it cannot be determined that the Respondent had any interest outside the buildings.⁴⁰

Accordingly, it is concluded that the Respondent violated Section 8(a)(1) of the Act when Store Manager Kifus requested that the union representatives conduct their organizing activity beyond 50 feet from store entrances, and by then causing the police to threaten arrests if they refused.

(8) Independence Boulevard

The complaint in Case 5-CA-21366 alleges that the Respondent violated Section 8(a)(1) of the Act at this store on April 23, 1990, when its manager, Chuck Britt, denied union representatives access to the sidewalk and parking lot adjacent to and within 50 feet of the entrance to Respondent's leased property, and threatened union representatives with arrest if they did not vacate.

Paul Evans, a union representative, testified that on or about April 28 he made his first visit to this store arriving at between 8:30 and 9 a.m. He did a walk through, then went to the snack-bar, but could not sit down to eat his breakfast because the booths were freshly painted. At a clerk's suggestion, he did so on a bench outside the store. He remained on the bench alone to read his newspaper, when approached by Britt, who asked if he could help Evans with something. Evans said he was just drinking his coffee, eating his pastry, and reading his newspaper. Britt then asked if he was working for the Union. Evans said he was. Britt then said that he would have to leave the premises immediately as he was not permitted "in the store or on the premises." Evans inquired as to what he was doing wrong, but Britt answered with a warning that "either you're going . . . to leave the premises immediately, or I'm going to have to call the police department and have you arrested." Evans reiterated that he was doing nothing wrong, going on to tell Britt that he would just have to call the police.

According to Evans, Britt went in the store, but soon returned with two employees. The latter were instructed by Britt to remove the bench and take it to a backroom inside the store. Each grabbed an end and positioned themselves to lift the bench with Evans still in it. Evans told them to wait, as they had better not throw him off the bench. Britt apparently had second thoughts, because the two employees backed off without actually lifting the bench, while telling Evans that he would call the police. He then, with the two employees, returned to the store.

After about 10 minutes, a police car entered the parking lot. Britt met the car in front of the store, and pointed towards Evans, who had left the bench to cross the parking lot to meet with another union representative, Ann McNutt, who was in a restaurant in the same mall. The latter emerged from the restaurant and they got into Evans' car and left.

Britt testified that sometime in April,⁴¹ consistent with corporate policy, he effectively removed political activists from the front of the store by application of the 50 feet rule. Soon

⁴⁰ It is noteworthy that, under par. 23, the landlord is obligated to keep the "parking areas and other common areas on the shopping center property orderly, clean and in [a] good state of repair." The Respondent's obligation to pay a fee to the landlord to defray the cost of common area maintenance is a collateral obligation, which does not on its face entail transfer of any property interest nor imply any such intent.

⁴¹ Britt was either confused or referring to the earlier campaign when he testified that union representatives had appeared at the store several months earlier.

thereafter he noticed a gentlemen, whom he latter learned was Evans, seated on the bench. Evans was observed stopping a bagger. The bagger came inside and reported that he had been solicited to sign a union card. Britt went to the bench and encountered Evans in conversation, noting that he had solicited an employee who was on the clock, that this was against the rules, and that he should refrain from doing so. According to Britt, Evans became loud, nasty, and abusive, as if he intended to create a scene. Evans, who is considerably larger than Britt, then allegedly threw up his hands, stating, "Don't hit me." Britt, claims to have been about 6 feet away thought this "humorous," and describes Evans as "rambl[ing] . . . about he had every right in the world to be on the bench."⁴² He claims to have informed Evans that they also had a rule "against loitering" and Evans would be permitted to sit on the bench, but only until he finished his drink, and no more than 10 minutes. He avers that Evans again got loud and abusive, whereupon, he told him to leave in a reasonable time. Britt then returned to the store.

Britt went on to testify that the bench was kept inside in the store lobby, but placed outside the night before to enable the floors to be stripped.⁴³ He states that about 8 minutes after his encounter with Evans, a customer, who apparently wanted to sit inside, approached him, inquiring as to where the bench was. Britt claims that he told the customer that he had "forgotten" to bring it back inside. He then went outside, with Robert Tucker, an employee to help carry the bench,⁴⁴ and believing that Evans had enough time to finish his drink, asked him "to please" get off so the bench could be returned inside where it belonged. Evans again allegedly became abusive, acting as though Britt was "a threatening force." He asked once more that Evans "please get up." When he refused, Britt informed Evans that he had been asked to move "nicely" and threatened to call the police if he did not. However, when Britt returned to the store and picked up the phone, he noticed that Evans had left. He therefore did not call the police.

Britt denied that on their initial confrontation, he asked Evans if he worked for the Union. He denied that he demanded that Evans leave the premises. He denied that two employees began to lift the bench with Evans still on it. He denied that Evans was told that he was not allowed on store premises at any time, or that he could not talk to nonworking employees on the property or in the store. He denied that he called the police or that they actually arrived.

The Respondent called Allen Vaughn, a senior clerk at the store, to confirm in part Britt's account. He claims to have overheard Britt tell Evans, "Can you please get up nicely? [W]e need to move the bench." Vaughn testified that Britt asked Evans "nicely," but "sooner or later" the union representative became hostile and got "loud with lip and everything." He claims that Evans used words suggesting that he was going to

"get" Britt or "would see him in court." He claims that Britt informed Evans that:

[T]he bench was temporary outside because we's doing a lot of cleaning in the store that particular day. You, know, basically for customer's use right inside the store, in front.⁴⁵

Vaughn denied that he was asked to move the bench while Evans remained on it. Vaughn, who does not claim to have been present during the earlier confrontations between Britt and Evans, also denied that he heard Britt tell Evans to get off the property.

Contrary to Britt, I believe that Evans was told to remove himself from the premises of the store, and that this was not merely a difference limited to Evans' right to remain on the bench. Thus, according to his own testimony, before noticing Evans, Britt had just excluded political solicitors because they were within 50 feet of the "building." On the heels of that exercise, during a confrontation with Evans he referred Evans to the Respondent's "rule against loitering," a remark which had ramifications geographically broader than any dispute confined to Evans' occupancy of the bench.⁴⁶ Having just received information that an employee had been solicited to sign a union card, with knowledge that this was violative of both the Respondent's working time and the 50 feet policy, considering Evans' aggressive behavior, it is considered entirely unlikely that Britt would have been more tolerant of this union representative than the politicians that he had just excluded from the premises. It is not insignificant that Britt acknowledged that Evans' protestations included an argument by the union representative that he was rightfully present. However, as Evans testified, I find that this right was asserted not just in relation to an unwillingness to vacate the bench, but in rebuffing a declaration that he vacate the premises.⁴⁷

Thus, even assuming that the Respondent had a cognizable property interest in the area immediately in front of the store, Britt's injunction was unlimited, and broad enough to include areas which transcended its property interests, either real or leasehold, or as beneficiary of a qualified or exclusive easement. In sum, the exclusion from "the premises" had a ten-

⁴⁵ Britt did not testify that the store was being cleaned "that particular day," nor did he testify that he offered Evans any justification for moving him or the bench. Moreover, while Vaughn testified that Britt asked him earlier that morning to move the bench back inside later in the day, Britt testified that he remembered that the bench was supposed to be inside well after his first exchange with Evans.

⁴⁶ Britt's initial loss of memory as to the normal location of the bench seemed a bit too pat. If he is to be believed, with one minor exception there never had been a bench in front of the store. Were this the case, it is difficult to imagine that he at any time would have had difficulty recalling that the bench in question was not supposed to be outside. This is especially so, when one considers that this lapse would have continued unabated through the initial heated confrontation with Evans in which the bench was the centerpiece.

⁴⁷ I also had difficulty believing Britt's testimony that his demeanor, in effect remained placid, despite the abusive, abrasive, and profane conduct that he attributes to Evans. Hardly helping the Respondent's cause was the testimony of Allen Vaughn, whose testimony in certain areas, concerning this event of about 18 months' earlier, seemed a bit too precise, yet was not cleansed to the point of avoiding important differences with Britt's account. Vaughn, while having a basic grasp of what he was supposed to relate, seemed to get tripped up by his zeal to corroborate Britt, on the one hand, and his failure to grasp the entirety of what he was supposed to relate, on the other. Vaughn and Britt were not believed.

⁴² This aspect of Britt's account supports Evans, for it is unlikely that Evans would have argued in this vein if he had not been asked to leave the bench.

⁴³ The Respondent offered testimony of Kelly Smith and Allen Vaughn to confirm that the bench was generally kept inside the store. While their testimony is not entirely consistent, for purposes of argument one might assume its accuracy.

⁴⁴ Britt testified that Allen Vaughn, a bagger, was in the parking lot. He claims that Vaughn "noticed" Evans behavior and took a few steps back out of curiosity.

dency to impede Section 7 rights under conditions that it no way furthered the Respondent's legitimate property interests, and therefore violated Section 8(a)(1) of the Act.

In any event, Britt could not lawfully enforce the 50-foot policy against Evans. This lease covering this store does not define the leased premises, but rather refers to it only as being part of a shopping center outlined in exhibit A-1 attached to the lease. (R. Exh. 122(h).) Paragraph 13 states that:

Tenant, its customers, employees and invitees shall have the right to use and enjoy, in common with the Landlord and other tenants and occupants . . . and their customers, employees and invitees, the parking areas, approaches, entrances, exits and roadways . . . (herein collectively called the "Common Areas").

Paragraphs 6 and 13 of the lease require the landlord to maintain these common areas, but paragraph 12 provides that Farm Fresh will bear a prorata share of that maintenance cost. Thus, for reasons heretofore stated, the lease conveys no property interest to the Respondent outside the store proper, and it violated Section 8(a)(1) of the Act both by invocation of the 50-foot policy and using police to enforce it.

(9) Merrimack Trail (Williamsburg)

The complaint in Case 5-CA-21461 alleges that the Respondent violated Section 8(a)(1) of the Act at this store on September 8, 1990, when its assistant manager, Jerry Minkins, and its district manager, William Wieme, denied union representatives access to the sidewalk and parking lot adjacent to, and within 50 feet of the entrance to, its leased property; and when William Wieme threatened union representatives with arrest if they did not vacate areas of the sidewalk.

Glenda Marshall and Jean Anderson were engaged in organizational activity at this store on this date. With one exception, the material aspects of the incident are confirmed by Minkins and Weime. Minkins claims that at the time, he received a call from Weime who was in the parking lot. Using a car phone, Weime reported that a woman was within the 50-foot zone talking to an employee retrieving cards. Minkins was instructed to tell the organizer to move beyond that area, and to report her response back. Minkins made the request as the organizer was standing at the ice machine 20 feet distant from the entrance. She responded that the 50 foot rule was no longer in effect. This was reported to Weime, who directed Minkins to call the police. The police and Weime arrived inside the store at the same time. Weime explained the 50 foot policy and requested that the officer assist him as he requested the union representative to comply. They went out and Weime told the organizers they could not stand within 50 feet of the entrances.⁴⁸ They declined. The officer then stated that the managers had rights too, and ask that they back up as requested. The union representatives again refused, but after taking identification from Weime, Minkins, and the officer, Marshall and Anderson left.

This lease pertaining to this store conveys to Farm Fresh:

a certain air conditioned and heated store building. . . .
TOGETHER with the use in common with other tenants of
Landlord in the Shopping Center of the walkways, parking
lots, driveways, service driveways, sidewalks, and other ser-

⁴⁸ Marshall and Anderson both testified that Weime threatened them with arrest if they failed to comply with the 50-foot rule. I credit them. Weime did not appear as a witness and Minkins did not specifically deny that the former had made such a threat.

vice portions of the Shopping Center which are designated for use of the tenants in the Shopping Center, and tenant's customers, invitees, and employees [Common Areas].

Section 3.5 of the lease charges Farm Fresh with "keep[ing] the premises under its control, including the sidewalks adjacent to the premises and loading area allocated for use of Tenant clean and free from rubbish and dirt at all times." Section 4.1, as amended on January 2, 1983, provides that the landlord shall maintain the parking facilities and common areas "in good and usable condition," and that Farm Fresh shall bear a prorata share of that common area maintenance cost. (R. Exh. 122(i).)

Once again, the lease indicates that the parties intended Farm Fresh to exercise control over, and have responsibility for, the storefront sidewalks, even though the areas were open for use by other tenants, their employees and invitees. As in *Polly Drummond Thriftway*, 292 NLRB 331, 332 (1989), the lease provided the respondent merely "the right to use the sidewalk in common with other occupants of the shopping center." Accordingly, the actions of Minkins and Weime were not founded upon any possessory property right, and the Respondent violated Section 8(a)(1) by their enforcement of the 50-foot policy and by Weime's threat of arrest in the event that the union representatives failed to comply.

c. The published restriction

The complaint in Case 5-CA-21366 alleges that the Respondent violated Section 8(a)(1) of the Act by oral announcement and by letter to the Union, promulgating a restriction that "All outside solicitors must remain no closer than 50 feet from public entrances to the store."

I am unaware of any verbal announcement of such a policy other than those associated with actual enforcement of the policy repeatedly mentioned in the above text. However, the Respondent's attorney, A.W. VanderMeer Jr., by letter dated May 3, informed Thomas McNutt, the president of the Union, as follows:

Regarding the recent activity of organizers for UCFW Local 400 at stores owned and operated by Farm Fresh, Inc., please be advised of the following Farm fresh, Inc. policies:

1. all outside solicitors must remain no closer than 50 feet from public entrances to the stores;

. . . .

It will be appreciated if you will advise your organizers and other agents of the foregoing policies and request their compliance.

Two agents of Local 400, Dudley A. Saunder [sic] and James N. Green have been advised of these policies orally by management of the Farm Fresh store located at 3809 Princess Anne Road in Virginia Beach but have chosen to defy them. As a result, warrants accusing them of trespassing [sic] have been issued by the magistrate of the City of Virginia Beach. It is requested that you advise these men that if they again appear on the property of the store on Princess Anne Road they will be considered trespassers [sic] and will be treated as such. [G.C. Exh. 9.]

The letter includes a republication of the 50 foot rule, together with a threat that warrants might well be sworn on those union solicitors who choose to defy that policy. Moreover, the Union was informed that the ban applied to all stores owned and operated by Farm Fresh, Inc. Since the 50 foot policy could

be applied lawfully only to areas where the Respondent held an enforceable, exclusive property interest, the May 3 letter published a presumptively invalid policy,⁴⁹ which on this record, violated Section 8(a)(1) of the Act.

2. Other independent 8(a)(1) allegations

a. Preliminary statement

The seven distinct complaints impute numerous 8(a)(1) violations to a variety of supervisors.⁵⁰ With the exception of the multistore allegations, the various incidents on which the General Counsel relies in this respect are treated below on a store-by-store basis.

b. The individual stores

(1) High Street (Portsmouth)

The complaint in Case 5–CA–21155 alleges that the Respondent violated Section 8(a)(1) of the Act when Store Manager Bill DeVinney, on April 24, 1990, told an employee to refrain from union activity and threatened unspecified reprisals should he continue to do so.

The foregoing is founded on testimony by Glenn Campbell, the produce manager at this location. Campbell's employment ended on April 28, an event which is the subject of an 8(a)(3) allegation discussed below.⁵¹ He testified that he learned of union activity on April 24, and spoke in favor of it to coworkers.⁵² Later that same day, according to Campbell, he was approached by Store Manager DeVinney, who stated that he was not to discuss the Union in the store, on break, or at lunch, or on the parking lot and that if he did, it would go hard on him.

Counsel for the General Counsel states in her posthearing brief that DeVinney "virtually admitted the allegation." In fact, DeVinney denied making either comment. He admitted, however, that during the week in question, employees Mary Leedingham and Gracie Jenkins expressed concern that Campbell was making favorable comments concerning the Union. In consequence, as Campbell was believed to be a member of management, DeVinney approached Campbell in his work area and inquired as to whether he had been talking to other employees about the Union, adding that, if he was, DeVinney wanted to make sure that, Campbell was not being misunderstood. Campbell replied that he must have been misunderstood because he had no such conversations with employees. DeVin-

⁴⁹ It is noteworthy that Leslie Harlow, the Respondent's store manager at Princess Anne in April, referred to a document dated November 22, 1989, that describes the 50-foot rule as a "corporate policy." He attests to the fact that this policy was promulgated well prior to the instant organizational campaign. (R. Exh. 118.) On its face, that memo purports to having been transmitted to all stores involved in this proceeding.

⁵⁰ Representatives of the General Counsel that might have contributed to the litigation of this case apparently felt that it was not worth the effort to join each of the unfair labor practice allegations in this case into a single document. Early in the hearing, I attempted to simplify the task of referencing and confirmation through personal preparation of a summary of all operative unfair labor practice allegations. See ALJ Exh. 1. In addition, I provided the parties with separate summaries of the access and nonaccess 8(a)(1) allegations.

⁵¹ The Respondent contends that Campbell is a supervisor within the meaning of Sec. 2(11) of the Act. The issue is resolved below in conjunction with issues pertaining to the legitimacy of Campbell's discharge.

⁵² Campbell did not relate that he had direct contact with union organizers on this or any earlier date.

ney asserts that the matter ended there because he believed Campbell's denials. Although DeVinney was not an impeccable witness, Campbell, for reasons to be unveiled below, was viewed as even less reliable. In this instance, DeVinney's testimony, which in essential elements was provided as an adverse witness, before Campbell was called, seemed to be a straightforward, entirely plausible rendition, and it is credited. Accordingly, the 8(a)(1) conduct attributed to DeVinney is unsubstantiated by credible proof and the relevant allegations are dismissed.

(2) Shore Drive (Virginia Beach)

(a) By George Marshall

George Marshall is named in two separate complaints as having engaged in unfair labor practices on three different dates while store manager at this location. These allegations rest essentially on uncorroborated testimony by Michele Shaffer, a receiving clerk at his store. The issues are discussed chronologically.

May 3. The complaint in Case 5–CA–21369 alleges that the Respondent violated Section 8(a)(1) on this date when Marshall told "employees" that if the Union comes in, the stores would be closed; questioned employees about discussions with "the Union;" removed a union sticker from the door of a rear office, while allowing other nonbusiness related material to remain; and threatened unspecified retaliation because the union sticker had been posted.

Until July 1990, George Marshall was the manager at this location. It seems that Shaffer and Marshall over a course of several days had engaged in several conversations involving the Union. They provide the background for the events of May 3, the focus of the above allegations.

Thus, on April 23, according to Shaffer, Marshall requested that she make "No Soliciting" signs for placement in the front of the store. For the rear, he wanted signs stating "employees only" and "no public restroom."⁵³ Marshall allegedly informed her that the signs were needed because union organizers were in the area and had already "hit" certain other stores.

On April 24, Marshall entered Shaffer's office to get a cup of coffee and allowed how he had heard that the union organizers were driving fancy cars with New Jersey plates and probably were all a bunch of "thugs, probably Teamsters."

On April 26, Marshall, after a joking complaint by Shaffer, allegedly informed her that she could raise an issue at her next union meeting because he knew she had signed a union card. Shaffer, apparently with tongue in cheek, replied, "[Y]es, she had signed a card and was just waiting for her raise." She then asked why he suspected that she had signed a card when with her job she "had it made."

On May 3, Shaffer went public with the fact that she actually had signed a card.⁵⁴ Because Marshall was off, she told Wesley Pallet the new assistant store manager, both that she had signed

⁵³ Marshall acknowledged that Shaffer periodically made signs to reflect advertised prices, but he denied requesting that Shaffer make any of the above-described signs.

⁵⁴ On Sunday April 29, Shaffer, out of an alleged fear that she was being set up for dismissal, was to meet with two union representatives, including one of its attorneys, Jeffrey Lewis. Earlier, Marshall asked her to work that day, but she responded, *inter alia*, "How do you expect me to work here when I have a meeting with the Union?" Shaffer claims that this was stated by her and taken by Marshall as a joke, since he responded with laughter.

and that she supported union organization and would actively participate in the campaign if she could, but would not allow it to interfere with her duties or work performance in the store.

Marshall did not appear at the store until a half-hour after Shaffer spoke with Pallet. At 9:15 a.m., Shaffer repeated to Marshall what she had just told Pallet. The latter on hearing this account of Shaffer's intentions, turned to Wayne Kohl, who was just beneath Pallet in the hierarchy, stating laughingly, "[W]ell, I guess I ought to call off her permission now." Shaffer then allegedly inquired as to whether Marshall now would try to set her up. He simply laughed in response. In exiting her office, Marshall observed the union sticker on her door, and laughed. Shaffer testified that she believed Marshall thought she was "joking around" about the Union.

Shaffer testified that about 10 a.m., Marshall returned with Pallet and Kohl, and told Shaffer, "you weren't joking about the Union, were you?" Shaffer said she wasn't. According to Shaffer, Marshall inquired as to why she was for the Union, noting that she makes good money.⁵⁵ Shaffer responded, that certain people had been wronged and were treated unfairly.⁵⁶ According to Shaffer, Marshall responded, "God, don't you realize Mike Julian is going to close these stores down if we go union." She argued back that this is typical of rumors that circulate when a union campaign emerges, but that outside investors would not permit it to occur. In fact she stated:

If Mike Julian called Citicorp, our Japanese investors, and said he had a labor problem and wanted to close some stores, they would . . . [tell him to] . . . handle it or we will find someone that can.

She added that she personally was aware that the Company had just recently completed a major capital overhaul in this store. She testified that she was not threatened by this remark, which she regarded as "preposterous."

A couple hours later, Marshall returned to Shaffer's office, allegedly asking why she was "trying to burn his ass." When Shaffer sought clarification, Marshall referred to a letter that Shaffer had written to Wanzelak, complaining about security matters in the store.⁵⁷ Shaffer denied that she was trying to get him, and asked that he leave the room, or get a witness.⁵⁸ He

⁵⁵ Shaffer variously testified that this inquiry was made in either her second, or some later conversation that day. It is most likely, that if made at all, the remark would have been made as soon as Marshall became convinced that Shaffer really was serious in her revelations about the Union.

⁵⁶ Prior to this assignment Shaffer was on medical leave due to job-related stress from her position as deli manager, a salaried, apparently supervisory position. She was aggrieved at the Company because she was denied workmen's compensation benefits for the hospitalization. She denied, on cross-examination, that this issue was in her mind when she chose to become a union supporter. However, her prehearing affidavit states that when questioned by Marshall as to why she had gone to the Union, this was the precise reason she gave.

⁵⁷ On May 2, Shaffer, with assistance from Attorney Lewis, drafted a letter concerning security problems at Shore Drive to Al Wanzelak, the Respondent's vice president for human resources. R. Exh. 1. This letter was written because of Shaffer's fears for her job and to ensure that she was not blamed for these problems.

⁵⁸ On cross-examination, Shaffer described a slightly different sequence that more clearly conveyed that Marshall's remarks related exclusively to the Wanzelak letter. There, she confirmed that Marshall barged into her office, angrily inquiring as to why she had written the letter. He then asked why she had changed so much. He then said that

shut the door, and continued the discussion. According to Shaffer he became "very threatening." He allegedly said that he would have her "ass," that he would have her transferred to a remote, unfavored location in Hampton, called "Buck Row," and, finally, that he would have her fired--all the time inquiring as to why she would do this to him. Shaffer tried to explain that she was not trying to get him, but was trying to protect herself. She did, however, warn Marshall that if he ever threatened or intimidated her again that she would press charges against him.⁵⁹

Finally, he left, but returned a few minutes later, a camera in hand, whereupon he "ripped" a union bumper sticker that she had taped to the door to her office,⁶⁰ stating, "I've got you're ass now." (G.C. Exh. 6.) He charged that the posting was tantamount to "soliciting." Shaffer disagreed, but asked if Marshall wished to remove cartoons and other items she had posted on the door. (G.C. Exhs. 5(a)-(f).) He responded in the negative.

Shaffer adds that on May 4, the next day, she returned from lunch to find that the cord had been removed from her telephone, which among other things, disabled the communications function on her computer. She sought out Marshall, who admittedly was the culprit, having done so for the stated reason that he did not want her "calling . . . union buddies" and she was using the phone too much. When she described this action as "petty," Marshall rejoined, "I think it's real petty that you're running to the union with everything that's going on in this store."⁶¹ She denied that this was the case, and went on to point out that immobilization of the phone would hamper business operations, a point that eventually caused Marshall to reconsider; he put the cord back on the phone stating that it was "stupid" to have removed it.

According to Shaffer, this was a long conversation in which they continued to discuss the Union, with Shaffer volunteering

he wanted to know what was in the letter and why she was trying to burn my ass."

⁵⁹ Because of the numerous 8(a)(1) allegations scattered among the seven complaints, the General Counsel and the Charging Party, on December 18, 1991, were warned on the record by me, that unbrieffed allegations would be considered abandoned. The General Counsel's posthearing brief summarizes the testimony, but makes little attempt to isolate the evidence, together with rationale and relevant precedent, to specific nonaccess 8(a)(1) allegations. The Charging Party has not filled the gap. In this instance, I construe Shaffer's testimony concerning Marshall's anger and coercive remarks as having no relation to union sentiment, but generated solely by the Wanzelak letter. The General Counsel does not suggest that Shaffer's action in that regard was protected by the Act, nor does she provide guidance as to how one might rule otherwise. In these circumstances, even were I to believe Shaffer, I would find no violation based on Marshall's remarks during this confrontation.

⁶⁰ In her capacity as receiving clerk, Shaffer was the only person in the store conversant with the Employer's computerized system for receiving merchandise. The computer and other items routinely used by Shaffer in performing her duties were kept in a small 5 feet by 7 feet enclosed area in the rear stock room which is variously referred to by Shaffer as her "office" and her "primary work space." It was not accessible to the public. The postings were on the inside portion of the door and could not be seen when the door was closed.

⁶¹ On cross-examination, counsel for the Respondent elicited testimony from Shaffer concerning an incident that occurred a week later, on May 11, in which Shaffer did in fact contact a union representative in connection with something that had occurred in the store. The testimony in this regard is of no aid to the inquiry.

the reasons for her support. Marshall opined that Shaffer had ruined her career, and that he could not understand why this good employee would jeopardize everything by supporting the Union which was destined not to succeed. She was allegedly warned to watch her back, that she would not be with the Company very long, for they would find a reason either to fire or transfer her. At some point, Marshall again allegedly warned that she would end up at “Buck Row.”⁶² He did recall that he overheard Shaffer request that a cashier called her, and that he intervened to state that this could not occur on her “working time.” He denied telling her that he did not want her to give her phone number to any employee.

Marshall denied that he had ever asked Shaffer why she favored the Union, or that he had ever asked Shaffer whether she or any other employee had attended a spaghetti dinner sponsored by the Union. He admittedly asked why she had written Wanzelak about security in the store. Marshall claims that he had been alerted to the letter by Al Johnson, who showed him an exact copy or duplicate, and inquired as to the charges made by Shaffer. Marshall responded that he was unaware of any security problem. He then asked Shaffer why she had gone over his head without first reporting any problem to him.

Marshall also denied that he told Shaffer that she was foolish for supporting the Union and that it would change nothing. He also denied stating that she had ruined her career, would not succeed with the Company, or was jeopardizing everything by supporting the Union. He denied asking why she was trying to burn his ass, nor did he threaten to get hers or to fire her, or to have her fired. He denied having warned that she had better watch her back, or that she would not be with the Company very long, or that he would find a reason to transfer or fire her.

Marshall admittedly removed a union sticker from Shaffer’s door, but denied that in that connection, he told her that he now had her ass for soliciting, or that he used words to that effect. Marshall also admittedly removed her telephone, explaining that he was angered by the fact that Shaffer used it for personal calls frequently that particular day. Later he reactivated the phone because it was necessary to business operations. He recalled saying nothing to Shaffer other than she “needs to stay off that phone.” He denies any reference to the Union, or stating that Shaffer was using the phone “to call her union buddies.”

June 16. The complaint in Case 5–CA–21463 alleges that the Respondent on this date violated Section 8(a)(1) of the Act when Marshall threatened unspecified reprisal by stating that an employee would have been better off if she had not filed discrimination suits and that since the employee had been fired he could no longer provide help.

On May 23, Shaffer was interviewed on a local TV station offering comment as to why she was for the Union. She also mentioned actions taken against her because she did so, and explained her having offered evidence in support of unfair labor practice charges.

⁶² Despite references in her testimony that Marshall on separate occasions made such threats under conditions that suggest a coercive aura, the various prehearing affidavits executed by Shaffer failed to mention any such threat. Ultimately, on questioning by me, she related, “after I . . . gave my support for the Union, I was threatened with termination, not with transfer to Buckroe [sic].” This concession is consistent with the fact that there is no allegation that the Respondent violated Sec. 8(a)(1) in this respect.

She avers that on May 24, Marshall informed Shaffer that he had heard that she was up to her old tricks. He denied that this was the case.

According to Shaffer, in early June, Marshall entered her office and opened a conversation, stating, “[Y]ou know you really messed up . . . you would have been a lot better if you had never filed any of these charges.” He mentioned that she should have taken a job at the home office, but now she was “really fried.” Marshall denied having made any of these comments.

By June, Shaffer asserts that she had filed EEOC charges alleging that a promotion was denied on account of sex discrimination, and, on her own without involvement of any other employee, had filed a complaint with the Wage-Hour Division of the U.S. Department of Labor alleging timecard manipulation. At the time of the June conversation with Marshall, Shaffer admitted that these filings were made personally and solely in her own behalf.

She also testified that a charge had been filed with the NLRB naming her as a discriminatee. The record fails to contain evidence of any such charge.⁶³

The focus of the allegation is that the Respondent, to undermine union support, made coercive remarks concerning Shaffer’s “discrimination suits against Respondent.” The General Counsel offers no discussion, rationale, or precedent that would support a finding that her conduct in this regard fell within the protective mantle of Section 7. Since the evidence pertains solely to an immediate history of personal actions on her part, these allegation would be dismissed even had I believed Shaffer.

Testimony was also adduced that in late June, Shaffer was scheduled to take her vacation. The day before she was scheduled to leave, Marshall, with Kohl, entered her office to discuss a security problem involving a vendor. In the course of the discussion, Shaffer asked if she would have a job when she returned. Marshall allegedly replied that he did not know, “that all depends.” Shaffer asked if he was going to let her take her vacation in this uncertain state. He allegedly replied, “[T]hat’s right . . . You can just suffer this week.” The incident does not correspond to any time frame or allegation set forth in the complaints. Moreover, here again, the General Counsel’s responsibility to prove the violation is complicated by unexplained ambiguity. There is no clear suggestion on the face of Shaffer’s account that would link Marshall’s comment beyond his hostile reaction to the security issues she had raised in the Wanzelak letter, or her filings with Wage-Hour and the EEOC. Counsel for the General Counsel points to no evidence, nor offers a rationale or argument for concluding that his remark had any broader reach, or that these actions on the part of Shaffer fell within the protective mantle of Section 7 of the Act. Finally, I would note that there is no suggestion that this incident was

⁶³ At the hearing, the General Counsel represented that a charge in Case 5–CA–21361 was filed by the Union naming Shaffer as a discriminatee. On review of the formal papers, I found no such charge. In her posthearing brief, counsel for the General Counsel reiterates that “[b]y that time she [Shaffer] had filed . . . charges with the NLRB.” In support, the General Counsel cites G.C. Exh. 1(f), being a charge in Case 5–CA–21369. That charge was not filed by Shaffer, but does allege that Shaffer was victimized by union-related discrimination. More importantly, however, it was not filed until more than a month after the conversation in question, having been signed on July 19 and dated July 26. My independent investigation of the record failed to disclose any earlier filing by Shaffer or in her behalf.

“fully litigated,” nor is there specific request, on that basis, that these *alleged* matters be the subject of an 8(a)(1) finding.

July 7. The complaint in Case 5–CA–21463 further alleges that on this date Marshall unlawfully threatened loss of employment by stating that an employee would be out the door.

As events unfolded, it was Marshall that had been scheduled for transfer to Buck Row. On July 7, according to Shaffer, the employees were standing around because of a power failure. In an obvious reference to Marshall’s impending transfer, the employees during the outage joked about the difficult, daily commute to Buck Row. Marshall allegedly replied that Shaffer was to blame because “her union activity has got me thrown out of this store.” Later that day, Shaffer claims that she assisted Marshall in carrying items to his car. As she offered her best wishes, he allegedly responded, “[Y]eah, well, you do what you have to do and I’m going to do what I have to do . . . [b]ut sooner or later, you’re going to be out the door and I’m still going to be here.”

While Marshall denied that he was accompanied to his car by Shaffer, he admits to conversing in the parking lot with her as he was leaving. While they wished each other “good luck,” Marshall otherwise denied the remarks that Shaffer imputes to him on this occasion.

Concluding Findings. I find that the allegations set forth in Cases 5–CA–21369 and 5–CA–21463 are unsubstantiated by credible proof to the extent grounded on contested, uncorroborated testimony of Michele Shaffer. The latter was an argumentative and evasive witness, who contradicted sworn statements in her prehearing affidavit and a deposition offered in conjunction with another proceeding. It was my impression that she frequently passed on as fact her own interpretation of matters and events originating from secondary sources. While I was persuaded that she had violated the oath in numerous respects, it is entirely possible that some of the matters to which she testified might have been true. Yet, her overall testimony is so beclouded by the strains of unreliability as to make it impossible to separate fact from fantasy. Accordingly, it is concluded that her uncorroborated testimony, to the extent denied by Marshall, is insufficient to support the conduct imputed to him in either Case 5–CA–21369 or 5–CA–21463.

On the other hand, Marshall concedes to removal of the union sticker from Shaffer’s office door. He claims that, under the Respondent’s policies, postings were allowed only on a bulletin board in the employee lounge, being forbidden in all other areas. Shaffer testified that she was never instructed as to such a policy, noting that she consistently posted her door with personal items, yet, only on one occasion, posters were removed because of complaints about the content, namely, bikini-clad women. Marshall did not deny that other documents, at the time, were left in place.

This allegation is not even mentioned, let alone analyzed in terms of the precedent, in the argument section of the General Counsel’s brief. Once more, I have been left to my own devices with respect to a matter that was significant enough to allege and litigate. In this instance, I find that the 8(a)(1) violation has been substantiated in accord with the test set forth in *Dillingham Marine*, 239 NLRB 904 (1978):

It is well established that under Section 7 employees generally have a protected right not only to possess, but also to display, union materials at their place of work . . . absent evidence . . . that Respondent restricted the employees possession of any other personal items in the work area or that the employees’

possession of union materials interfered with production or discipline.

Marshall did not deny that in removing the pronoun posting, other documents unrelated to the Union were left undisturbed. See also *Benjamin Coal Co.*, 294 NLRB 572 (1989). Nor has the Respondent demonstrated that Shaffer’s pronoun posting impeded any aspect of its operations. Accordingly, the removal of the sticker violated Section 8(a)(1) of the Act.

Marshall also admittedly disabled Shaffer’s telephone, explaining that Shaffer used it for personal calls quite a bit that day, and for this reason he got mad and removed it. Later he restored it because it was necessary to business operations. He recalled saying nothing to Shaffer other than she “needs to stay off that phone.” He denies any reference to the Union, or stating that Shaffer was using the phone “to call her union buddies.” The incident is not mentioned in any of the seven complaints either by date or content. The facts are mentioned in the General Counsel’s brief, but discussed in conjunction with unfair labor practice allegations that do not fit this incident. There is no specific declaration that this conduct was unlawful, nor is their indication that, though unalleged, a remedy should be provided because fully litigated. Concerning the surrounding circumstances, particularly the remarks she imputes to Marshall, Shaffer was a dubious witness and it would be fundamentally inappropriate to allow any finding of illegality to hinge solely on her uncorroborated testimony. Had I believed her, however, I would find no violation considering the present state of the record.

(b) Restriction on solicitation

The complaint in Case 5–CA–21369 alleges that the Respondent violated Section 8(a)(1) of the Act by, on May 3, promulgating and maintaining a rule “prohibiting employees from distributing union cards on company time.” This allegation is not attributed to any particular supervisor or store. While it was my impression from reading the complaint that the “rule” was multistore in scope, the supporting evidence reveals that the allegation is founded on remarks imputed to George Marshall, on separate occasions by two different employees, at the Shore Drive store.

Betty Atkins, a part-time cashier, testified that at a meeting conducted by Marshall during the organization campaign, attended by 18 to 20 employees, Marshall stated that “at no time could we talk to Union representatives or sign Union cards as long as we were on company time or working hours.”⁶⁴ Atkins admittedly could not recall the precise words used by Marshall. On cross-examination by the Respondent’s counsel, the terminology shifted, when she related, “I don’t remember whether he said working time or working hours.” These distinctions are critical under the teachings of *Our Way, Inc.*, supra, and *Essex International*, 211 NLRB 749 (1974). See also *BJ’s Wholesale Club*, 297 NLRB 611 (1990). Yet, despite the fact that the witness testified that she could not recall what was said, the General Counsel insisted on revisiting her testimony on redirect, without use of independent means of refreshing recollection. At this juncture, Atkins averred that Marshall stated that the restriction applied during “company working hours.” Needless to say Atkins was not regarded as a reliable witness as to just what

⁶⁴ The witness, as a matter of coincidence, at this juncture, happened to select the precise verbiage that would establish a presumptive violation under Board precedent. See *Our Way, Inc.*, 268 NLRB 394 (1983).

was said and her testimony is rejected insofar as it suggests that the Respondent promulgated or maintained a presumptively invalid rule.

Through leading examination of Atkins, the General Counsel adduced testimony that there was no rule against selling Avon, candy, or fund raising. As the facts unfolded, however, it was Atkins, herself, that engaged in these solicitations; her efforts in this regard were confined to breaks. Beyond that she could not define “when” coworkers solicited on behalf of endeavors unrelated to the Union. Furthermore, her testimony on its face is insufficient to establish that such activity was waged in management’s sight and during working time. Hence, there is no basis for finding that such activity was condoned by the Respondent.⁶⁵

Shaffer also testified in support of this allegation. She claims that at the end of her confrontation with Marshall on May 4, as discussed above, Marshall’s parting words were that she was not to distribute union cards on company time. She understood that the Company maintained a rule prohibiting solicitation “during working time,” and that it was this rule that Marshall was referring to. In fact, she responded to Marshall’s admonition, by stating that “he wouldn’t have a problem with that from me because I could do it on my own time,” an expression in consonance with an understanding that his remark did not restrict union activity during breaks. Marshall denied referring to any restriction during “company time.” Here again, I regarded Shaffer as a witness too unreliable to credit, particularly with respect to so slender, yet material a refinement as is involved in the distinction between working time and company time.

As in Atkins’ case, testimony was elicited by the General Counsel from Shaffer that employees, while in the store, had solicited for other causes unrelated to unions. Thus, she related that an employee took orders for Avon products, while others had sold items to benefit schools attended by their “small children.” Shaffer testified that some of this took place on company time and some on breaks. She related no facts, however, warranting a conclusion that management was aware of the incidents or otherwise condoned the use of working time for such purposes.

In sum, there is no credible evidence that the Respondent imposed a ban on union activity during “company time,” and the 8(a)(1) allegation to this effect is dismissed.⁶⁶

⁶⁵ While the General Counsel pursued this line, the complaint is devoid of allegation of “discriminatory” maintenance or enforcement of any ban on union activity. See *Spartan Plastics*, 269 NLRB 547 fn. 4 (1984).

⁶⁶ The General Counsel offers no rationale or authority that would support a violation under this allegation. She simply states that the Respondent was found to have engaged in “similar conduct” by Judge Evans in his Supplemental Decision in the earlier case involving Farm Fresh. As the relevant sector of that decision is not spot cited, I was left to canvass the entirety of Judge Evans’ findings on my own. Having done so, it was discovered that the penultimate allegation treated in his decision did involve a no-solicitation rule. 305 NLRB 887. But that is where the similarity ends, for the legitimacy of that ban turns upon a body of precedent that is substantively distinct from that governing the instant allegation. Thus, apart from opportunity to chase the proverbial “wild goose,” counsel for the General Counsel has allowed the undersigned the carte blanche opportunity to research the controlling precedent and weigh the evidence in light thereof.

(c) By Sherrie Carroll

Carroll would replace Marshall as the manager at Shore Drive. The complaint in Case 5-CA-21463 alleges that on July 20, Carroll threatened loss of promotional opportunity if an employee persisted in union activity, but stated that the employee would be forgiven if the employee backed off of the charges filed against the Company. Here again, the allegations were substantiated only by testimony of Michele Shaffer.

On the date in question, according to Shaffer, Carroll stated that she knew of Shaffer’s role as a “union activist.” They then proceeded to engage in an extended conversation of the problems Shaffer faced with the Company, and why she chose to become a union supporter. The conversation at one point was moved to a backroom, wherein Carroll allegedly stated:

Michele you’ve got to know this—. . . they’re not going to do anything with you. You’re not going to get promoted. You’ve killed it. You’re not going to get promoted. You’re not going to get transferred. You know how they treat union activists, union supporters.

Shaffer asked what she was expected to do about having been wronged by the Company. Carroll allegedly stated, “[L]ook they want to know if you’ll just drop it [‘all these charges’] right now . . . it’s not too late to turn back . . . Just drop everything.” Shaffer asked what the Company was willing to do in return. Carroll allegedly replied “this is not negotiable . . . [t]hey are not going to negotiate with a union supporter.” Carroll also is alleged to have said,

[N]o one’s actually told me to get rid of you but you know you’re going to be tested. They’re not going to fire you as long as you’re a good worker. They’re not going to do anything stupid.⁶⁷

Carroll admitted to a discussion with Shaffer during this time frame. She further conceded that, on assuming her position at Shore Drive, she was alerted to Shaffer’s involvement with the Union, and was told to “watch out for her.” She also was informed that the store was a “hotbed of union activity.” As for Shaffer’s charges, Carroll testified that Shaffer told her about the EEOC and Wage-Hour filings. She denied knowledge of any others.

Carroll insists that it was Shaffer, and not herself, that stated that Shaffer would not get promoted. She also denied stating that Shaffer had “killed it,” or that Shaffer would not be transferred, or that she would be tested. Carroll further denied stating, “You know how they treat union activists.” She denied telling Shaffer that the Respondent wanted her to drop the actions she had filed, or telling Shaffer that the matter was not negotiable as the Company would not bargain with a union supporter.⁶⁸

Carroll was a straightforward witness who impressed as unwilling to compromise truth. I have already expressed Shaffer’s shortcomings, and as between the two, Carroll was easily the

⁶⁷ According to Shaffer, this statement was reiterated by Carroll in a conversation they had on or about August 20, when Shaffer proposed that a new salaried position be created so that she could work overtime, but at a reduced cost to the Company.

⁶⁸ The Respondent called District Manager Johnson, who denied being the source of the remarks imputed to Carroll. The testimony is beside the point, for, Carroll, quite possibly could have offered her own opinions as to the Company’s reaction to Shaffer’s actions—that is, had I believed Shaffer.

more believable. Accordingly, the latter's denials are credited, and the 8(a)(1) allegations in this respect are dismissed.

(3) Victory Boulevard (Portsmouth)

At this store, the complaint in Case 5-CA-21311 implicates four different supervisors in a quantum of unfair labor practices unparalleled at any other location. Other than nonemployee organizers, Cathy Reale, a former employee, who worked at this store as a cashier, was the primary witness to the alleged misconduct. The allegations as to each are separately treated below.

(a) *Captive meeting*

The complaint specifies a variety of 8(a)(1) threats by District Manager Jeff Thomas and Store Manager Vernon Riser during a mandatory antiunion meeting held at the Victory Boulevard store on May 25, 1990. By way of amendment at the hearing, the same conduct was attributed to alleged agents identified as "Hazel" and "Al."⁶⁹

Riser is charged with threatening that part-time employees would lose their jobs, the store would close, and that jobs and hours would be lost, all in the event of unionization. However, the only remark approaching a threatening statement on his part was a response to a comment by an employee, who declared that she had been assured by the Union that there would be no strike. The employee expressed concern that, if that were true, she could not understand how the Union could achieve anything. Riser replied, noting that an organized competitor, Super Fresh, was working without a labor contract. In consequence, the Union threatened to strike. According to Riser, Super Fresh responded to the Union, "Go ahead and strike and we'll close every store in Virginia." Riser concluded with an observation that Super Fresh was doing little business and that "the UCFW really did 'em well." His remarks have no resemblance to the threats described in the complaint.

In an apparent concession that the evidence does not substantiate the specific conduct attributed by the complaint to specific individuals, the General Counsel's posthearing brief argues that the allegations are to be considered as founded upon a "composite" of statements made by Thomas, Riser, Al, and Hazel.

In the final analysis, the issues of concern relate essentially to Thomas' remarks. In contrast with Riser, there is a closer parallel between the evidence and the alleged comments attributed to Thomas by the complaint; namely, that Thomas threatened that employees would lose their right to talk to management,⁷⁰ that there would be no part-time employees,⁷¹ that work

⁶⁹ The issues presented under this allegation turn on whether the precise words used were coercive, or within statutory guarantees of free speech set forth in Sec. 8(c) of the Act. The General Counsel insisted on adducing testimony that the 50-foot policy was enforced contemporaneous with this meeting. Despite the numerous 8(a)(1) allegations founded on enforcement of the 50-foot policy, no violation was alleged as to this incident. In the face of my appeals that she refrain, counsel for the General Counsel persisted, representing that the incident outside the store was relevant because it "flavored" content of the captive speech. I yielded reluctantly, but directed, however, that she explain the connection in her brief. The brief includes no argument, explanation, or rationale that would link this evidence to the validity of the speech.

⁷⁰ In this connection, Thomas did inform the employees that with a union they would have to deal with him through a shop steward and not directly. The General Counsel cites no authority that supports a violation in this respect, nor does she argue that this is a matter within the employer's control, as distinguished from a requirement that inures basically by operation of law, in accord with Sec. 9(a) of the Act, as a

hours would be cut, and that the store would close, all in the event of unionization.

Thomas, as a district manager, was responsible for all operating and merchandising issues within his sector of the chain. At the instant meeting, he exploited the fact that two major food chains, Big Star and Safeway, both of which were union, had shut down their operations in the Tidewater area. He also referred to a store operated by a third chain, Super Fresh, which is also organized by UCFW, and which allegedly sustained a 50-percent cut in revenues. Thus, after Riser made the point that Farm Fresh felt strongly that the Union could interfere with its "ability to compete," Thomas stated:

....

We make no mistake what Farm Fresh's position on the Union is. We are not a Union company, we have never been a Union company and we do not intend to be a Union company. The reason for that is simple. We don't feel that we can be competitive and we can have continued growth and success by being a Union shop. I think that you'll see why in a few minutes but when you talk about growth I use an example of myself and I don't do it to brag or anything, I simply want to use an example. When I started with this company years ago, I started as a bagger and because Farm Fresh was successful and had growth opportunity and opened new stores--this one was opened I think 884 or so, opened a lot of stores and it allowed me to go to cashier and to night manager and through the channels and a lot of people have done exactly that. But you can't do that in an environment where there is no growth. There is no opportunity if there is no growth. So you need to be successful in order to have growth. We don't feel we can do that as a Union company. We've gotten where we are today--at Farm Fresh--by working together, by you guys working your butts off. And we've done it together, and that's the only way people can succeed is if you work together.

....

It's a team that can play together, that knows each other's strengths and weaknesses, and can mold together, gel together and they have common goals and then work towards them and that's how you accomplish success. You've got to work together and that's what Farm Fresh has done. We have been able to work together.

....

The Union is out there making promises. They are making promises about wages and about benefits, but let me tell you what--they cannot back those promises. The Farm Fresh would never negotiate a contract that would allow them to be uncompetitive in this market. Plain and simple--bottom line. Now, the Union, I would say, probably made those same promises to a company years ago called Big Star. As a matter of fact, thanks to the Union, God bless them, Farm Fresh is now number one in the

vestige of union recognition. Absent guidance, I am unable to distinguish this incident from an apparently dispositive body of precedent that negates a violation in such a context. See, e.g., *Pembrook Management*, 296 NLRB 1226, 1227 (1989); *Overnight Transportation Co.*, 296 NLRB 669, 671 (1989); and *Montgomery Ward & Co.*, 288 NLRB 126, and cases cited at fn. 3 (1988).

⁷¹ Here as in Riser's case, there is no evidence that Thomas made any references suggesting that part-time employees would be singled out for a loss of jobs or benefits in the event of unionization.

market because of them. I don't know, '81—is that about right, Al?

AL: About right, 191.

THOMAS: Overnight Big Star was history. It went from number one in the marketplace, the top dog, had the most business of anybody, just shut, 10,000 people of jobs. That morning Farm Fresh was number one in the market-place. Safeway another Union shop closed doors—I don't know—'85: '86

AL: '85.

THOMAS: They were pretty good competition in the market but all of a sudden they're gone. Super Fresh is still around. You've heard they're struggling. I have these facts for you. Mr. Riser came from the Super Fresh operation. He ran a Save-A-Center down on Newtown Road. Uh, I guess a little over a year ago, when you were employed there, it was doing about \$200,000.

RISER: About \$200,000 a little over \$200,000.

THOMAS: One year later, last week—fact: that store did \$89,000. Now, what would happen if this store's business was cut in half? You guys might have a job—you guys would be on the street. You guys who've got a job probably wouldn't have as many hours as you have now. You can't operate a business in the red. And that's what was happening. And when you cut your business in half, let me tell you, it dominoes. What happens is now my work force is here and I can't spend as many hours my sanitation goes down, my floors get dirtier, my shelves aren't as full, my service is terrible in my departments, and what does that do? It turns the customers off, it dominoes, it dominoes, it gets worse, it gets worse to a point and this is what happened at Big Star and Super Fresh or at Safeway, I'm sorry, that you've got to close your doors. You are just not profitable. And that's what we want to protect from happening. We do not want that to happen. We need to be competitive. We battle Food Lion; we battle Gene Walters Marketplace; we battle the commissaries; we battle a new competitor, Food 4 Less. And to be competitive, quite frankly, Super Fresh is not competitive and that's what's happening to them. So for us to be competitive, we need to work together and we can't have a third party interfering with our common goals. You'll hear Mr. Julian say that they (the union) are a wedge in between management and employee. It takes away that team atmosphere and makes it adversarial.

....

And two, probably also very selfish, is that I'm no longer a single man, I have a wife, and as I told my store a little while ago. . . . You know, if I lost my job as a single man I can take care of myself. But when you've got a wife and a kid, and I'm sure a lot of you have families, you can't do it without a job, I mean you just can't take care of your family. And I don't want to see what happened to Big Star and Safeway and is happening to Super Fresh happen to me where I'm not got to have a job and you're not going to have a job and you're not going to have hours to be able will take care of your personal needs—I don't want to see that.⁷²

⁷² The parties have agreed that the above remarks are based on a transcription of a tape recording surreptitiously made of the meeting by Reale. R. Exh. 7(a). That agreement includes the entire exhibit except

In assessing Thomas' remarks, the starting point is statutory awareness, pursuant to Section 8(c) of the Act, that employers have a right to propagandize against union organization, provided, they do so without promise of benefit or threat. Just as a union may flaunt its successes, *Gissel*, and its progeny, do not, in absolute terms, preclude an employer from educating employees as to past failures of collective bargaining.⁷³ Consistent therewith, references to strikes, loss of jobs and closures affecting unionized facilities do not give rise to a per se violation of Section 8(a)(1). See, e.g., *Golden Fan Inn*, 281 NLRB 226, 227 (1986); *EMR Photoelectric*, 273 NLRB 256, 257 (1984). Accordingly, free speech is not measured by the effectiveness of the propaganda as an appeal to emotion and fear, but whether references amount to a proscribed threat.

Economic propaganda as to the evils of union organization remain at the vanguard of efforts to combat unionization. The task of ascertaining the limits of Section 8(c) would be much simpler if management would content itself with an accounting of job losses in organized shops, a revelation which, without further embellishment, would transmit a lawful,⁷⁴ yet fear-inspiring message. The legal problems arise where the theme is carried one step closer by employers who would explicitly bring the message home by suggestion that the sufferings of employees elsewhere "might" foretell like losses for their own employees. This was the Respondent's strategy at Victory Boulevard. From the foregoing, it is clear enough that Thomas not only identified unionization as the cause of liquidations of competing chains, waning growth, reduced competitiveness, and declining revenues, he raised the question as to whether employees, and, indeed, himself, could maintain their hours, jobs, and livelihood under such conditions.

As I read the precedent, however, it does not follow that this linkage, without more, constitutes an unfair labor practice. The teachings of *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–620 (1969), have not ended debate as to what constitutes a permissible statement of adverse consequences.⁷⁵ In the years that have followed that decision, the Board has continued to struggle with campaign speeches and literature which push the outer limits of legitimacy. In *Harrison Steel Castings*, 293 NLRB 1158, 1159 (1989), the Board dealt with propaganda suggesting that unionization could make the employer noncompetitive,

sections denoted with a yellow marker; the disputed sectors relate for the most part to whether Hazel Lahey was the speaker associated with certain comments.

⁷³ This does not license employers to associate union organization with invented evils. A firm body of case law precludes reference to the specter of job loss and closure on the basis of speculation as to what a union would demand once designated. See, e.g., *Paul Distributing Co.*, 264 NLRB 1378, 1383 (1982), and cases cited therein; *Swan Co.*, 271 NLRB 862 (1984); *Crown Cork & Seal Co.*, 255 NLRB 14 (1981). See also *NLRB v. Lenkurt Electric Co.*, 438 F.2d 1102, 1106 (9th Cir. 1971), where the court stated that employers are not free to "in an excess of imagination and under the guise of prediction, fabricate hobgoblin consequences outside his control which have no basis in objective fact."

⁷⁴ See, e.g., *Blue Grass Industries*, 287 NLRB 274, 275 (1987); *Piliod of Mississippi, Inc.*, 275 NLRB 799 (1985).

⁷⁵ The General Counsel fails to recognize the uncertainty that remains in this area. The authority she cites barely scratches the surface, doing no more than to identify the governing standards set forth in *Gissel*, and to establish, generally, that they have been applied. *Farm Fresh, Inc.*, supra, 305 NLRB 887, and *John Ascuaga's Nugget*, 298 NLRB 524, 528–529 (1990).

petitive, leading to “loss of business and loss of jobs.” There, the employer’s theme shifted from theoretical, objective argumentation to speculation that its, perhaps, rational premise would produce dire economic consequences in the form of job losses for unit employees. The Board found a violation, but issued a strong caveat:

In a case devoid of union animus or unlawful threats, an employer might suggest as a general economic position the bearing that the administrative costs of collective-bargaining has on the price of the employer’s product and, as a consequence, the possible change in the employer’s competitive position in the market. But having manifested overt hostility to the union activists in its work force here, a hostility that was likely to continue in view of some of the evidence—the respondent could not lawfully go on to suggest the loss of jobs as a result of loss of business to the competition without demonstrating to employees that such a chain of causation would be brought about through forces beyond the respondent’s control. Without more specific objective data, the statement in question could just as well be taken to suggest that the Respondent might, purportedly on the basis of cost factors that are at least partly within its control and known only to it, discharge employees in the event they chose to be represented by a collective-bargaining union representative.⁷⁶

Thomas’ formal remarks were not uttered in such a context. Obviously, the hostility referred to by the Board in *Harrison Steel*, supra, requires more than simple opposition to unionization, but requires conduct which communicates a proclivity to effect reprisals. In this case, the violations ultimately found do not measure up to that standard. They could not reasonably be construed as suggesting that the Employer would be likely, in any remote sense, on its own, to reduce hours or eliminate jobs without sincere economic justification. Moreover, while it is true that the Respondent had engaged in more serious violations in the past, none took place at stores covered by the seven complaints in this proceeding, and in this light, together with turnover considerations, and the fact that the latest of these violations took place in 1987, it is considered unlikely that employees who witnessed the instant speech would have assessed its meaning in light of the Respondent’s history of unlawful conduct. 301 NLRB 907; 305 NLRB 887. Accordingly, on authority of *Harrison Steel Castings*, supra, I find that the remarks by Thomas did not violate Section 8(a)(1) of the Act.

After Thomas’ formal remarks, the employees were addressed, via video tape, by the Respondent’s CEO, Mike Julian. A question and answer session followed. In this connection, the General Counsel at the hearing amended the complaint in Case 5–CA–21311 to allege that Al (Kravitz) and Hazel (Fahey) were supervisors and agents within the meaning of the Act, and to further allege that they participated in the specific misconduct attributed to Thomas and Riser. There was no litigation of the authority individually held or exercised by either,⁷⁷ and I

⁷⁶ This standard was reaffirmed in *Somerset Welding & Steel, Inc.*, 304 NLRB 32 (1991), where the Board declined to pass on the legitimacy of certain remarks by the employer’s president, associating unionization with job loss, even going so far as to state that the closings of union shops “could happen in Somerset.” Cf. *Superior Coal Co.*, 295 NLRB 439, 461 (1989).

⁷⁷ The General Counsel contends that Kravitz was a supervisor because he was a second assistant grocery manager and, in another store, an admitted supervisor held this position. A similar argument is made

find that the General Counsel has failed to establish that either were supervisors within the meaning of Section 2(11) of the Act. I also reject the General Counsel’s argument that these employees were agents. No authority is cited for the proposition that, unless disavowed, management representatives are responsible for unlawful comments made by employees in the presence of coworkers. In any event, I see nothing in their statements that transcend the remarks of Thomas and Riser which heretofore have been deemed within protective guarantees of Section 7 of the Act.

(b) By Priscilla Pruden

A variety of 8(a)(1) statements are imputed to Pruden, the customer service manager at this location. It is alleged that during the first week of May, she threatened discharge, created the impression that union activity was subject to surveillance, and coercively interrogated “employees” concerning union activity.

Kathy Reale was the sole witness offered by the General Counsel to substantiate these allegations. Two incidents were involved, the first, a one-on-one conversation. Thus, according to Reale, in early May, she was discussing the Union in the snackbar, while on lunchbreak with organizers Fridely and Hepner. On returning to her station, she was approached by Pruden, her immediate supervisor, who stated that Store Manager Riser observed her talking to union representatives and wanted to know what they were discussing.⁷⁸ Reale replied that she was on her own time, whereupon Pruden asked whether she had signed a card. Reale indicated that she had not. Pruden allegedly stated, “[I]f you value your job, you’ll stay away from Union representatives⁷⁹ and you will not sign a Union card.”⁸⁰

Pruden insists that after the Union appeared, she never discussed the Union with Reale, and more specifically, that she never informed an employee that they had been seen talking to union organizers, or asked what had been said in such conversations. She also denied both that she asked if Reale had signed a card and that she told Reale that if she valued her job, she should stay away from union representatives.

The second incident related to remarks by Pruden as she conducted a meeting with cashiers. Reale testified that the meeting took place in mid-May. She claims that in the course thereof, when the cashiers sought information about the Union, Pruden declined to discuss the issue, but did state, “for every one of you there’s ten or more out there to replace you.”

in Hazel’s case. However, there is no evidence that the classifications involved, at best being low level in any chain of command, were entrusted with authority, universally, and without variance among different stores that vary in terms of size, employee complement and dollar volume. I reject the General Counsel’s position in this respect for the same reason that I shall reject a similar contention on the part of the Respondent in connection with the produce manager classification. There, the Respondent in furtherance of its claim that Glenn Campbell, an alleged discriminatee, was a supervisor presented testimony premised on faulty assumption that all produce managers in all stores possess identical authority.

⁷⁸ Riser denied telling Pruden that he had observed Reale talking to union representatives and wanted to know what she said and whether she signed a card.

⁷⁹ Any instruction that she stay away from union representatives did not deter Reale from subsequently meeting with Fridely in the snackbar during her lunchbreak.

⁸⁰ On cross-examination, Reale, when shown her affidavit, corrected herself, conceding that Pruden did not instruct her to refrain from signing a card.

Pruden denies that the Union was mentioned during the meeting with front-end personnel.⁸¹ She testified that in her tenure, she conducted only one such meeting, and that with a recollection aided by reference to timecards, she was certain that it was held on March 12, 1990, a date which preceded the opening of the organization campaign and the Union's appearance at the store. (R. Exhs. 6(a)-(i).) The time records tend to confirm that at least eight apparently unscheduled front-end employees clocked in at 9:30 a.m. solely to attend the meeting, then punched out that day at between 11 and 11:37 a.m. Pruden's testimony concerning the meeting was also confirmed by Dimitria Moon, a former cashier, later promoted to supervisor, and another cashier, Jacqueline Brown. They testified that the cashier's meeting was held long before appearance of the Union at this store, and that on that occasion there was no mention of the Union. Later, Moon claims that she ran into Reale at a midcity "Super Fresh," where Reale told her that she could not stand that lady, "Priscilla," and was out for revenge. A similar bias was attributed to Reale by Brown, who testified that Reale also told her that Pruden had not treated her right and she would get even.

Considering the highly material discrepancies between Reale's testimony and her prehearing affidavit, Pruden was regarded as the more trustworthy witness on all counts, and I conclude that there is no credible evidence to substantiate that the Respondent violated Section 8(a)(1) through any conduct on the part of Pruden.⁸²

(c) By Mike Kelter

Kelter, at times material, was the assistant store manager at Victory Boulevard. It is alleged that during the third week of May, the Respondent violated Section 8(a)(1) when he coercively interrogated an employee, while threatening discharge for union activity.

Here again, the allegations are based on Reale's uncorroborated testimony. Thus, Reale was involved in the effort by Fridely on May 15 to purchase "Visine." She states that on that date Fridely and Hepner came into the store and had a shopping

⁸¹ Reale's prehearing affidavit appears to confirm that the comment concerning replacements had nothing to do with the Union, but was Pruden's reaction to the cashiers' complaints "about various policies." Thus, the affidavit states:

About the first part of May there was a cashiers meeting during which employes were complaining about various policies. Pruden said, for every one of you there's ten people to take your place. Pruden was to make this remark over and again at various times.

As to this incident, the affidavit fails to attribute a single remark to Pruden concerning the Union, nor does it suggest a context in which the statement about replacements made reference to anything other than employee discontent in connection with newly revised work rules, a link consistent with her testimony on cross-examination.

⁸² Even were I to credit Reale, I would dismiss the allegation based on creating the impression of surveillance on legal grounds. The Board has recognized that "an employer's mere observation of open public, union activity on or near its property does not constitute unlawful surveillance." *Key Food Stores Cooperative*, 286 NLRB 1056 (1987); see also *Farm Fresh*, supra. Having met with union representatives in such areas, Reale, when apprised that she was observed by management, would have no reasonable basis for assuming that supervisors were engaged in a systematic form of impermissible surveillance. *California Dental Care*, 272 NLRB 1153, 1165 (1984); Cf. *Farm Fresh*, supra.

cart, with groceries.⁸³ They asked Reale where the eye drops were. She directed them around the corner. Kelter appeared and escorted Fridely and Hepner to the product.

Reale claims that shortly thereafter, Kelter approached her, and asked if she had talked to the union representatives and what they were talking about. She replied that "we were just talking, they asked where medication was, I told them where it was at." Kelter then asked if Reale had signed a card. When she denied that she had, Kelter allegedly stated, "[I]f you value your job, you will not sign a Union card and you stay way from union representatives."⁸⁴

Kelter could not recall Reale by name.⁸⁵ However, he denied ever asking an employee if they had signed a union card, or what they had discussed with union representatives. He denied ever telling an employee that, if they valued their job, to stay away from union representatives, or instructing them not to sign a card. Kelter is credited over the uncorroborated testimony of Reale, who was regarded as generally unreliable. The 8(a)(1) allegations based on statements imputed to him are dismissed in their entirety.

(d) Victor Riser, store manager

In addition to his comments at the May 25 mandatory anti-union meeting, 8(a)(1) conduct is attributed to Riser during the last week of May. In this respect it is alleged that Riser told off-duty employees not to associate with union representatives.

Kathy Reale testified that on one occasion when she was having lunch in the snackbar with Union Representative Fridely, Riser approached them, asking Fridely to leave, and telling Reale she was not supposed to be associating with Fridely. The remarks attributed to Riser apparently were ignored, for Fridely did not leave, they continued their lunch, and left only after they finished. Riser testified that union organizers frequented the snackbar, where they often talked with employees. He denied interfering with those encounters by ever telling any employee at this store that they could not associate with union representatives. Fridely was not examined with respect to this incident, and Reale's testimony was left to stand uncorroborated. Considering my expressed reservations as to Reale, the denials of Riser were believed. Accordingly, the 8(a)(1) allegation in this respect shall be dismissed.

(4) Virginia Beach Boulevard (Virginia Beach)

The 8(a)(1) allegations at this location implicate Cheryl Bond, the front-end supervisor, and Charles R. Brown, the assistant store manager, in intrusive behavior with respect to the execution of a union authorization card on August 2. At that

⁸³ Neither Fridely nor Hepner suggested that they sought to purchase anything other than eye drops. In any event, even their involvement was suspect. Fridely's affidavit states that on May 15, before entering the snackbar, she walked the selling area with Hepner for 15 or 20 minutes in search of "Visine." It strikes as a bit incredible that organizers would be so unfamiliar with grocery layouts generally that they could not locate this pharmacy item with immediacy.

⁸⁴ Reale imputes almost the same statement to Kelter that she had to Pruden. As in Pruden's case, when shown her affidavit, on cross-examination, Reale acknowledged that Kelter on this occasion did not instruct her not to sign a card. She in an argumentative vein attempted to excuse the discrepancy by testifying that she was told not to sign a card by both Pruden and Kelter on other occasions.

⁸⁵ Kelter is no longer employed by the Respondent. I would not however, imply any special objectivity in his case, for, in his current employment, the Respondent is his second biggest customer.

time, both allegedly asked a union representative, in the employee's presence, to return his signed union authorization card. The Respondent denied that Bond held supervisory status or that she served as its agent concerning issues in controversy. The Respondent also defends on grounds that Bond and Brown were merely protecting and assisting an inexperienced young man whom the Union had taken advantage of.

On August 2, Paul Evans and Lynn Curry were the union representatives engaged in organizational activity at the Virginia Beach Boulevard store. Garrick Balsly was the employee central to this controversy. At the time of the incident, he served as a "bagger" and had just turned 15 years of age. That afternoon, as he reported for work, a union representative (Evans) asked Balsly if he would like better wages. He said he would. The organizer identified himself as representing the Union and asked for his name and address and requested that Balsly sign the card so he could send him information in the mail. Balsly obliged, but admittedly was not sure what it meant. (G.C. Exh. 11.)

Balsly went on to testify that he entered the store a little confused and reported his conversation to Bond. She said, "Uh-oh, is that the Union?" He replied that he thought it was. She said that this means that each month you will have to pay dues. He asked what he should do, and she replied, "Well, if I were you I'd get your card back." Balsly went out and requested return of his card, but was told that it had already been dropped off at the office. He returned to the store and reported what he had been told to Bond. The latter asked if Balsly really believed that and offered to accompany him outside. Balsly, who did not believe the union representative, agreed. They went out, and Bond said to the union representative, "This young man right here told me he wants his card back, so you should give it to him."⁸⁶ The organizer replied that it had already been dropped off at the office. Bond replied that this was a "bunch of bull."⁸⁷ Evans stated that the card was none of Bond's business, and that if the young man wanted the card he can get it back.⁸⁸ An argument ensued, with the union agent using a "racial slur," and Bond calling him a shark. The last thing Balsly could recall was Bond ordering the union representative from the property. Balsly testified that the union representative did not accuse Bond of violating Balsly's rights. He recalled no profanities on either side.⁸⁹

⁸⁶ Evans testified that Bond told him that "she wanted the young gentlemen's card back." Curry variously testified that Bond asked that the card be returned to herself and to Balsly. I find that she asked that the card be returned to Balsly.

⁸⁷ Evans and Curry do not acknowledge that they offered this excuse. They were not questioned concerning the matter. I find that Evans did offer this incredible explanation.

⁸⁸ Bond insists that during the confrontation, Balsly requested the return of his card but was ignored.

⁸⁹ Bond testified that she reported to Lena Brown, the service manager. With 15 years employment, and 3 years as front-end supervisor, she punched a timeclock and earned \$6.80 per hour, about 50 cents more than the cashiers. She was in charge of the front-end operation, particularly the cashiers and the baggers, monitoring their performance and correcting their errors. She would provide the cashiers with change, give them breaks, and assure that they clocked in and out in accord with a prearranged schedule prepared by the service manager. She would call office personnel to assist with cashier lines when it gets busy. She does not hire, fire, or evaluate. With respect to lateness, she claims that, after two or three offenses, she would tell the employee to come in on time, or she would give them a written warning. She testified to one

The allegations against Brown relate to a separate incident that same day. According to Evans, as he and Curry subsequently left the store front to go to lunch, they were confronted by Assistant Store Manager Brown. Brown accused them of violating Virginia law by entering a contract with a minor. Evans debated the point, whereupon Brown advised that, if the card were not given back, he would file a lawsuit against Evans and the Union for entering a contract with a minor. Evans advised Brown that he had already told the latter that if Balsly wished his card back, he could call him that evening. According to Evans, Brown then got very close to Evans, shaking his fist in the latter's face, allegedly stating, "I'm going to get the card one way or another before you leave here." Eventually, Evans backed off, advising Brown that they did not want any problems and would leave. Evans and Curry walked off as a small crowd of employees watched from the sidewalk. He claims that they were able to distribute only a few handbills because of the stir concerning the authorization card. Curry's attempt at corroboration was abbreviated and unremarkable.

Brown testified that he was first alerted by a call from Bond, who indicated that she had just had an "altercation" in the parking lot with a union representative, as she attempted to retrieve the card that an employee had been duped into signing. After some discussion as to whether Bond should call the police and fill out a warrant, he avers that he went outside to get the Union's side of the story. In doing so, he observed Balsly in the parking lot. Brown identified himself to the union representative and stated that he was following up on an employee's complaint that there was bad language and name calling in the parking lot. The union representative denied that he was the offender, asserting that Bond had called him an "asshole."

Brown testified that he then addressed Balsly, asking whether he was on the clock, and on learning that he was, directed him back into the store. Balsly, according to Brown, then explained that he was trying to get back the card that "these guys made me fillout." Brown went on to testify that a union representative replied that if he wanted his card back, he would have to complete a form and it would be returned within 2 weeks. After Balsly again asked for the card, he asked Brown what he could do to secure its return, but Brown replied that he could do nothing because the organizer was not employed by Farm Fresh. Brown testified that he did not request the card or take any other measures in quest of its return. He insists that

occasion in her 3 years of service in this capacity when she did in fact issue a written warning. However, she denied that she had authority to recommend discipline. She did not attend management meetings. She testified that if time off was requested, she would let the employee go, if it was not busy. She wears a tag which bears her name and the appellation, "supervisor." She has called in employees when short-handed but only on the service manager's instruction. In the absence of the store manager, she would not assume the latter's duties. In this light, were it necessary, I would find that Bond lacked the requisite authority and was not a supervisor within the meaning of Sec. 2(11) of the Act. On the other hand, I would conclude that Bond, since clothed with lead authority, under the designated classification of "front end supervisor," was held out, and employees would rightfully believe that she was authorized to act on behalf of management. Accordingly, any action taken by Bond in connection with this campaign would be viewed as within her apparent authority and binding on the Respondent.

this was collateral to his purpose in leaving the store which was limited to the complaint about “bad language.”⁹⁰

On the question of whether Brown requested that the card be returned, I am inclined to credit Evans and Curry. I do so because Brown acknowledges that he was alerted to the issue, and that it arose, but attributes it to Balsly, who claims that he was not present. Because Balsly had no interest in the outcome, I believe that he was not involved and hence the probabilities suggest that it was Brown that demanded return of the card.

As has been the pattern, no precedent is cited by the General Counsel in support of this allegation. As I view the incident, this is not a case where an employer has initiated assistance, officiously, as part of a campaign to foster employees, either individually or as a bloc, to repudiate their union support. Cf. *American Linen Supply Co.*, 297 NLRB 137 (1989); *Arkansas Lighthouse for the Blind*, 284 NLRB 1214, 1220-1221 (1997). The allegation turns on an isolated event in which Brown and Bond urged a union representative to return an authorization card signed by Balsly, a 15 year old. At the same time, the latter’s testimony makes it clear that he was confused as to the meaning of this gesture, and for that reason had apprised Bond that he had signed the card, but did not understand what he had done. Assistance was provided to Balsly only after he was unsuccessful in attempting to secure a return of the card on his own, with Evans having provided him an evasive, unlikely explanation that it was unavailable at the time. At that point, believing Evans to be lying, Balsly authorized Bond to help him retrieve the card. The assistance was in the form of a demand addressed directly to union representatives by Bond, and then Brown, that the card be returned. This step was taken on the youthful card signer’s request after facts had emerged suggesting that the union representatives were guilty of sharp practice. In these circumstances, absent clear authority to the contrary, it is concluded that the Respondent did not violate Section 8(a)(1) by the intervention of Bond or Brown to appeal for return of the card, as requested by the employee involved, and without suggestion of any broader scheme. The alleged 8(a)(1) violations in their cases are dismissed.

(5) Chimney Hill Center (Virginia Beach)

The complaint in Case 5–CA–21463 alleges that Robert Grigsby, the first assistant manager at this store, informed an employee that a coworker was a “union plant” from New York, thereby violating Section 8(a)(1) of the Act.

This allegation turns on testimony of Robert Puchalski, a former employee of the Respondent. At times material, Puchalski was a journeyman meatcutter at this location. His employment with the Respondent began on June 2. Previously he operated a meat business for 20 years in Long Island, New York.

According to Puchalski, during his first week of employment, Assistant Manager Grigsby told the former that “being from New York,” Puchalski was “probably a plant for the union.” Grigsby, having made the comment, then laughed. The conversation ended at that point without further comment from Puchalski.

Puchalski claims to have met with union representatives in front of this store, where he signed a union card. He believed that Grigsby and Freeburgh, the assistant manager, had ob-

served him talking to union organizer, James Green.⁹¹ Puchalski’s prehearing affidavit confirms that he informed Mark Garner, the meat department manager at Chimney Hill, that he supported the Union.

Grigsby admitted that Puchalski manifested a pronoun “attitude.” He explained that Puchalski did not come out and state that he was for the Union, but that he raised the topic so much more than other employees that Grigsby deduced his sentiment. He denied that they had discussed the fact that he was from New York, or that he observed Puchalski in conversation with union representatives. He denied that he raised the Union in any discussion with Puchalski, and also denied commenting to the latter that he had the impression that Puchalski was a union plant from New York.

I am inclined to credit Puchalski. Though uncorroborated, the conduct he attributes to Grigsby is minor and not of the type likely to have sprung from imagination. Puchalski’s testimony receives indirect blessing from testimony by Larry Green, the manager of the store at General Booth Boulevard, that immediately after Puchalski’s transfer to his store, Puchalski mentioned that “there’s some people in the Company who believe I’m a union organizer.” Although the General Counsel offers no guidance as to just how the “union plant” remark would offend Section 7 rights, that would appear to be the case. See *D.J. Electrical Contracting*, 303 NLRB 820, 827 fn. 56 (1991). Accordingly, on Puchalski’s credited testimony, I find that the Respondent violated Section 8(a)(1) of the Act when he was accused by Grigsby of being a union plant.

(6) General Booth Boulevard (Virginia Beach)

Puchalski was also the sole witnesses to the allegation that, following transfer to this store, he was coercively interrogated by Larry Green, the store manager at this location, in mid-August, and again in late-August.

Puchalski testified that on arrival at Chimney Hill, Green called Puchalski to his office where he expressed an interest in the latter’s “background,” inquiring where he expected to go with Farm Fresh and whether he believed he had a future with the Company. As Puchalski put it, Green inquired as to his “concerns about the union, whether I was involved with the Union, if my store was union in New York.” On cross-examination, Puchalski related that he informed Green that he belonged to the Union in New York for a short period of time and that his father is a retired union member.⁹²

Green acknowledged that he spoke with Puchalski that day, but avers that, with new employees, he does so routinely. He claims that Puchalski first mentioned the Union, stating that “there’s some people in the Company who believe I’m a union organizer.” Green claims that he replied, “Well, being you mentioned it, are you.”⁹³ Puchalski allegedly replied in the

⁹¹ James Green testified that this store had been his responsibility since May 25. He claims that Puchalski, a meatcutter at this store signed a union card on June 1.

⁹² Puchalski’s prehearing affidavit recites that on this same day, Green watched as he was engaged in conversation with union organizer, Denise Perry, outside the store. This factor, however, would not unambiguously convey that Puchalski was a union supporter, nor would it necessarily demonstrate that it was improbable that he would have been questioned on that issue.

⁹³ Green’s testimony on direct examination was capped by inquiry from the Respondent’s counsel as to whether he had ever during Puchalski’s employment at this store, “ask[ed] him about his feelings regarding the Union?” Counsel succeeded in exacting a negative response. Apparently neither the witness, nor the attorney were sensitive

⁹⁰ Although named as present by all witnesses to the incident, Balsly denies that this was the case. He therefore was unable to cast light on what actually occurred.

negative. Green testified that there was no further mention of the Union in that conversation.

A few weeks later, Puchalski sought out Green to discuss a paycheck discrepancy. He claims that he was at that time asked point blank to identify his "feelings" about the Union. He claims to have offered an evasive response. Green denied that this was the case. He asserts that when Puchalski initially complained, he checked, and found that Puchalski had been shorted by 8 hours while employed at Chimney Hill. He claims that he submitted an additional 8 hours' "irregular pay" for that week to the payroll department. When the shortage had not been corrected in Puchalski's next check, Green offered a cash advance. Puchalski declined, but the 8 hours did appear in his next check. Green asserts that there was no reference to the Union in this connection.

Here again, I credit Puchalski. His credited testimony indicates that that he was questioned twice concerning his union sentiment, initially on his arrival at the store in the store manager's office, and, the second time, while attempting to enlist the store manager's cooperation in resolving a grievance. Neither his history of union membership in New York, nor his encounters with union representatives outside the store, in my opinion, were the equivalent of an overt declaration of union support. See *Rossmore House*, 269 NLRB 1196 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). In context, the inquiries by the store manager were coercive and violative of Section 8(a)(1) of the Act.

C. *The Alleged Discrimination*

1. The discharge of Glenn W. Campbell

a. *Preliminary statement*

Campbell was hired in July 1989. He was terminated on April 28, 1990. As heretofore indicated, he was employed at all times as the produce manager at the High Street store,⁹⁴ which was among the facilities operated by the Respondent under the trade name, Nick's. The General Counsel contends that shortly after union representatives appeared at his store, Campbell executed a union authorization card, and became an employee organizer. It is argued that he was discharged in reprisal only a few days later. The Respondent rejects any such notion, claiming that Campbell quit and that, in any event, he was a supervisor.

b. *The supervisory defense*

Campbell was immediately responsible for stocking and sales of produce at High Street. He replenished stock from existing inventories and ordered merchandise from designated warehouses through a Telex machine.⁹⁵ He received and verified deliveries, assuring that product is properly stored and then displayed so as to generate sales and profits.

to the possibility that others might view that response as inconsistent with Green's concession in the above text.

⁹⁴ The General Counsel's asserts in her brief that Campbell was assigned to this classification as part of a scheme whereby the Respondent intended to evade overtime responsibilities under the Fair Labor Standards Act. This accusation is totally without support in this record. Moreover, since irrelevant to any issue in this proceeding, it is taken as a gratuitous, totally unfounded accusation.

⁹⁵ Campbell testified that he was required to order from a single distributor, Camillia, unless his superior authorized purchases from local farmers.

Campbell's autonomy and opportunity to run the produce section with independent judgment was limited in several respects. The store manager, who would determine Campbell's hours, and the assistant store manager regularly monitor the produce operation for quality and quantity. Moreover, the layout of the department was structured by Mel Grandy, a "floating" produce director, whose responsibility extended to all Nick's stores in the Tidewater area, including High Street. Grandy would appear at High Street several times per week to critique Campbell on the quantities ordered, both in the area of too much or too little, the volume of display and freshness of product. Campbell is required to operate in accord with a "planigram," which apparently maps out the location of produce in a fashion calculated to assure consistency in layout from store-to-store.

Campbell was salaried,⁹⁶ earning \$401 weekly.⁹⁷ Unlike hourly employees he was eligible for annual bonus. He at least once attended a meeting of department managers.

No full-time employees worked under Campbell, nor was anyone other than Campbell assigned exclusively to the produce department. Periodically, Campbell was assisted by two part-time employees—Mike Smith and Gladys Jenkins.⁹⁸ Camp-

⁹⁶ Campbell testified that when he was hired, he was told by a district manager named Patterson that he was to punch a timeclock. At the hearing, following close of the General Counsel's case-in-chief, I announced my disbelief of Campbell's testimony that he punched a timeclock. The General Counsel in her posthearing brief would make this barely marginal issue a "cause celebre." She asserts that this "ruling" was in error because based on my desire to avoid the inconvenience to Patterson were he compelled to testify. In attempting to make her point, counsel confuses cause and effect. My reasons for rejecting Campbell's uncorroborated testimony in this respect were founded on recollection of precise factors and rationale stated on the record, and others unmentioned that could not be recalled precisely but undoubtedly contributed to my impression. Thus, Campbell insisted that he continued to punch the timeclock until his discharge on April 27. There is no discernible reason offered on this record that would justify any requirement of this nature. Campbell's own affidavit states that timeclocks are used by hourly employees, but not by salaried employees. Though any requirement that he do so would be an exception to this representation, and a highly unusual one at that, the affidavit does not state that Campbell ever punched a timeclock. The store manager, DeVinney testified that he never saw Campbell punch a timeclock. District Manager Johnson testified that he never saw a timecard in the rack with Campbell's name, and while present on several occasions when Campbell left work, he never saw him punch the timeclock. DeVinney's predecessor, Dennis Walker, testified that Campbell did not do so. Not a single employee was offered to corroborate Campbell on this point. It was one of several where his testimony was not believed. For reasons stated by me at the hearing, I was unimpressed with the Charging Party's interpretation that R. Exh. 6(h) establishes that Priscilla Pruden, also a salaried department head punched a timeclock. The General Counsel's opinion that Campbell did punch the timeclock is no substitute for corroborative proof and rational interpretation of the record.

⁹⁷ He had received a raise in mid-March.

⁹⁸ Campbell claims that this occurred, only once or twice per month for about 3 or 4 hours. Smith testified that he was scheduled to work in produce every other Sunday between December 1989 and April 1990. He avers that when assigned to that department, Campbell was always present and he was "the boss." The Respondent's assignment schedules confirm that Smith was assigned to produce on seven occasions in that time frame, never in the afternoon, and for a shift up to 6-1/2 hours. R. Exhs. 4(a)-(f). Smith testified that he worked according to these schedules unless he called in sick. His testimony also suggests that when he worked on Sundays, it was always in produce except the day before inventory was scheduled.

bell, as required, would instruct these assistants as to stock processing, display, and rotation. Smith and Jenkins, worked in other departments as well. While Campbell would participate in their performance evaluations with other department heads, he avers that his input was limited to only about 20 percent.

Campbell would not substitute for other department heads or managers. He denied authority to hire or fire, and asserts that he was never told that he could do so or recommend such action. He did not layoff or recall. He did not discipline, but could report problems to the store manager, an experience he never had. His attire consisted typically of blue jeans, shirt, and tie. His name tag contained no title, but simply identified him by first name, "Glenn."

Bill DeVinney became store manager in April, only a week before Campbell's separation. Through a colloquy pregnant with leading questions on the part of the Respondent's counsel, DeVinney testified that Campbell was regarded as a supervisor and a member of the management team. He testified that the produce manager at this store has authority to schedule "anybody working under him," to effectively recommend hiring, to direct and correct those assigned to him, and to recommend discipline, including formal reprimand and suspension.⁹⁹ Moreover, as a department head, the produce manager shares responsibility with all other members of the management team for general supervision of the store.

Dennis Walker preceded DeVinney as the High Street manager, having held that post from November 1989 to April 14. He testified that as produce manager, Campbell was in charge of the department and the part-time employees that assisted him. On his days off, he would prepare a list of things for them to do. He suggested that Gracie Jenkins fill in for him, and trained her. He had authority to "purchase" produce, and would determine when to discard deteriorated fruits and vegetables. Walker, consistent with DeVinney, claimed that Campbell scheduled Jenkins and Mike Smith for work in the produce department.¹⁰⁰ It is a fact that Campbell attended meetings for departments heads.

In the key area of discipline, Walker seemed less assured than DeVinney. Despite the fact that his working relationship with Campbell was considerably longer, he was aware of no instance in which the latter recommended discipline in any form. He did not testify that he was ever informed that Campbell possessed such authority.¹⁰¹ Moreover, if Walker honestly

held to the belief that he would expect Campbell to correct any indiscretion on the part of Smith or Jenkins, a situation which never arose, there is no evidence that Campbell was ever informed that he was entrusted with such authority. Considering the absence of foundation, either in the form of written company policy, or verbal definition from a superior, I reject the hypothetical testimony by DeVinney and Walker suggesting that Campbell held such authority.¹⁰²

District Manager Al Johnson went further. He described the authority of all produce managers in stores within his bailiwick as follows:

Their responsibilities . . . are to hire, recommend hiring, training new employees, developing new employees, indoctrinating new employees on policies and procedures, disciplinary actions from just counseling with employees or seeing that other disciplinary actions are taken, be it written warnings or reprimands or up to and including discharge.

He added that this precise authority exists in the case of all department managers. In virtually the same breath, Johnson, when asked to define just who was supervised by Campbell, replied:

He supervised various employees that would be assigned to his department either by the store manager and possibly in some cases by the assistant store manager in the store managers absence, and from time to time either myself or the produce merchandiser would transfer in people from other stores to help out depending on where our weaknesses were, where the issues were, so, yes, a number of people he would have been supervising and directing and giving instructions to.

There was no mention of Campbell's involvement in the assignment process, either by hire, designated transfer, or recommendation in such areas.

Johnson, as in the case of DeVinney and Walker, could not testify that this authority was defined in writing. He chose to argue that all department managers are aware that they held such authority. He even went so far as to initially testify that he had a conversation with Campbell in which his authority was delimited, a position from which he retreated when questioned closely by me. Moreover, if Johnson had accurately depicted Campbell's authority, it would be presumable that the store managers would also be aware of the level of authority held by

⁹⁹ DeVinney could not recall a single instance in which a produce manager informed him that an employee had violated company policy.

¹⁰⁰ This testimony was not believed. Walker testified that he and the assistant manager "prepared" the work schedules that are in evidence as R. Exhs. 4(a)-(f). However, Walker would have me believe that Campbell could "schedule someone else from another department" without his approval. Contrary to Walker, I cannot accept that Campbell, or any other department head for that matter, whose knowledge of demands would customarily be tailored to their own responsibility in their own department, could preempt employees such as Jenkins and Smith, by independently scheduling employees who also were used elsewhere. Coordination would be essential. I would also note in this regard the testimony of District Manager Johnson that the individuals supervised by Campbell were limited to those assigned by his superiors.

¹⁰¹ Counsel for the Respondent adduced testimony, on redirect examination, that a deli manager had cosigned with the store manager a write-up for tardiness. The details are unclear, but the department head did not act alone. The affirmation of a warning by signature on a single, isolated occasion would not alone establish supervisory authority under Sec. 2(11) of the Act. *Phelps Community Medical Center*, 295 NLRB

486, 492 (1989); *Riverchase Health Center*, 304 NLRB 861 (1991); *Highland Superstores v. NLRB*, 927 F.2d 918 (6th Cir. 1991).

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¹⁰² To the extent that Walker, when led by the Respondent's counsel, suggested that the deli managerial exercises the same authority as the produce manager, I regarded his testimony as bootstrap, insubstantial, argumentative and unworthy of credence. Supervisory determinations be made on an ad hoc basis, rather through any presumption that all departments in an enterprise are operated with the same degree of managerial autonomy. Even where homogeneous, different departments in the same or different stores will be run and manned differently depending upon such variables as marketing experience, customer preference, square footage, and dollar volume.

their own department heads. Neither DeVinney, nor Walker testified that Campbell or other department heads could hire or fire. Surely Johnson was aware of Campbell's role in the store, and just who did and who did not exercise the authority he imputed to Campbell. It was my decided impression that Johnson, in his direct examination, overstated the authority held by the latter and that his erroneous testimony in this respect, being in an area of personal expertise, ought not be lightly excused as possibly attributable to misunderstanding.¹⁰³

The foregoing casts a shadow of unreliability on the effort by the Respondent to establish that Campbell was a supervisor within the meaning of Section 2(11) of the Act. For the reasons given, critical aspects of the testimony of DeVinney, Walker, and Johnson, are discredited and I conclude that Campbell never was informed that he possessed the authority specified therein, that he never exercised such authority, and that his periodic leadership role with respect to two part-time employees did not suffice to disqualify him from protective guarantees of the Act.

c. The merits

Before learning of the union campaign, Campbell was unhappy with his hours and a disgruntled employee. When hired as the High Street produce manager, he worked a 5-day week. In February, Al Johnson became the district manager. Johnson increased Campbell's tour to 6 days, with Sundays off. However, according to Campbell, he soon was working 5 to 6 hours on Sunday as well. He claims that in consequence of this heavy schedule he became ill. Thus, as of April 8, he asserts that he had worked 29 out of 30 consecutive days, running 15 or 16 hours per day.¹⁰⁴ He took off 2 weeks in consequence of his rundown condition.

He returned to work on Monday, April 23. That morning he confronted Produce Director Grandy concerning his plight. According to his own version of their conversation, Grandy was informed that Campbell's doctor said he was "overworked" and needed at least 1 day off per week to rest or he would have a relapse.¹⁰⁵ Grandy said he could not oblige. Campbell said that he "had no choice," that he needed a day off or would get sick again. Grandy, according to Campbell, replied that he did not give a damn what the doctor said, "either I worked seven days a week or that's it." Campbell testified that he told Grandy that he "couldn't do it . . . you're making me

¹⁰³ On cross-examination by the Charging Party, Johnson conceded that the store manager would be involved virtually to a dispositive degree in any hiring, disciplinary recommendations, or actions by any department head.

¹⁰⁴ Campbell's sworn prehearing affidavit states that during this time frame he "averaged" 11 hours per day. Later, while insisting on the 15-16 figure, he testified that the affidavit should have reflected that 11 hours was a "minimum." Dennis Walker, who was the store manager when Campbell went on sick leave, denied that any of this was accurate. Moreover, Walker testified that Campbell never complained about his hours or requested additional time off. Instead, according to Walker, it was he that complained that Campbell was working too few hours, to accommodate another part-time job, with his department suffering in consequence. Campbell was not recalled on rebuttal and there is no denial that he was moonlighting in a second job while assigned to High Street. Campbell's testimony seemed exaggerated and was not believed.

¹⁰⁵ His condition actually was diagnosed as acute bronchitis.

choose between my health and my job."¹⁰⁶ Campbell testified to adding:

You're not giving me any choice whatsoever, . . . I'll have to . . . step down. I don't want to, but you're forcing me to.

Thus, Campbell's own account signifies that Grandy was informed that he would no longer work the hours required of a produce manager and would "step down" from that position. It is a fact that, at High Street, there was no other position in the produce department. Nevertheless, Campbell's testimony seeks to negate any impression that resignation as produce manager in any sense compromised his tenure, by further testimony that Grandy agreed to an accommodation whereby Campbell would step down to a part-time job for 1 week until a full-time position as produce "clerk" opened in another store. For his part, Campbell agreed to continue as produce manager "for three more weeks . . . until [Grandy] found somebody . . . capable of running the department."

Grandy denied that he made any such agreement, and the conflict is determinative of whether Campbell on April 23 declared an unqualified intent to quit. Before considering Grandy's testimony in this regard, it is noted that Campbell's initial description of the alleged agreement seemed garbled and illogical. Attorney VanderMeer exacted an account on cross-examination which, whether true or not, was at least understandable. There, the alleged agreement anticipated that Campbell would stay on as produce manager at the High Street store for 3 weeks, then step back for 1 week as part-time produce clerk, and then would be given a full-time position as a "produce clerk" in another store. All versions are materially distinct from Campbell's sworn prehearing affidavit. There, Campbell described Grandy's promise as follows:

I said that I could not keep this pace up. . . . I will just become part-time. Grandy said, "Fine." I asked if there would be any problem with me going part time in the evening. Grandy said that he had plenty of room, especially in the store that I was at to work part time in the evening. Grandy asked if I would stay on at least three more weeks as Produce Manager. I said I would. Grandy said he appreciated me doing that. This was the end of our conversation."

This description is at variance with Campbell's sworn testimony in major respects. It suggests that Grandy merely offered employment at High Street, not another store, and it conveys that only a part-time position was discussed, and hence that a full-time, permanent position as a "produce clerk" was never offered. No explanation was provided for these highly cogent discrepancies in Campbell's sworn affidavits. Moreover, this latter version is burdened with implausibility, for, it assumes authority and willingness on Grandy's part to increase payroll at this store by adding a part-time position solely to accommodate Campbell. These questions weigh heavily in my unfavorable assessment of Campbell's overall testimony.

Grandy testified that before talking with Campbell that day he was alerted by a cashier (possibly Gracie Jenkins) that Campbell was leaving. She, as well as the Deli Manager Mary Leedingham indicated that Campbell had given his notice. When Grandy sought out Campbell, the latter allegedly stated,

¹⁰⁶ Mike Smith, a coworker and witness for the General Counsel, testified that he was aware a month before Campbell's separation that Campbell was looking for another job.

I guess you've heard. I've given my notice to quit. . . . I'm tired of working weekends and holidays. . . . I'm giving you my two weeks. . . . I'll leave now or work the 2 weeks, whatever you want.¹⁰⁷

Grandy claims to have replied, "Glenn, if you have come to that conclusion you are doing the right thing." As I understand Grandy's testimony, Campbell then offered to work the 2 weeks or leave right then and there. Grandy said nothing, but went to a phone, calling District Manager Allen Johnson, informing him Campbell had given notice and it was necessary to find a replacement.¹⁰⁸

Grandy denied that there was any reference to a part-time position or the possibility of his taking an hourly position. Campbell's resolve, according to Grandy, was evident in Campbell's statement that he was going into the welding business with his father.¹⁰⁹ Grandy testified that he turned away from Campbell and left without replying to Campbell's offer to work 2 weeks until a new produce manager could be found. Grandy claims to have been "finished" with him at that time and he simply notified the store manager¹¹⁰ and the district

¹⁰⁷ In earlier testimony as a 611(c) witness, Grandy did not impute to Campbell usage of the actual term, "notice" or words that as strongly carry that connotation. Nevertheless, while precise language may be amiss, as Grandy's initial version is compatible with a mutual understanding on their part that Campbell elected to quit, there is no material internal inconsistency. Also reconcilable with the existence of notice is Grandy's testimony that he had no idea "who" Campbell had given notice to prior to their April 23 conversation. In context, this latter response is in consonance with the possibility that Grandy was unaware that anyone other than himself had received such notice. There was no clear inconsistency.

¹⁰⁸ Grandy apparently made no record of this conversation. Initially, Grandy claimed to have entered the episode in the store's logbook, charging that it was unavailable because Campbell, as he had done in the past, tore out the relevant page. Later, he would acknowledge that this would have been an inappropriate entry on the logbook and the incident would not have been recorded there.

¹⁰⁹ DeVinney also testified that that on the morning of April 23, Campbell inquired if the former was aware that he had given his notice.

¹¹⁰ DeVinney was questioned as a 611(c) witness as to whether he had a conversation with Grandy concerning Campbell's alleged departure before April 27. He replied that he could not recall, but Grandy could have come in that week. Later when specifically asked whether Grandy reported that Campbell had given him notice, DeVinney did recall that Grandy had made that statement. These lapses are not alarming. Recollection is often refreshed when the examination shifts from that the vagaries of a general reference, to that which is specific and discrete. Indeed, it has always been and always will be my judgment that an element of latitude is warranted where an adverse witness called early in a hearing is questioned sharply concerning a sequence of events that make up a complex fact pattern without opportunity to anticipate just what will prove of interest to the inquisitor. Where the seemingly redundant and minutia are involved, the courtroom itself frequently will furnish the first opportunity for the witness to test his or her recall. This is especially true in the case of DeVinney, who, having been informed directly by Campbell of his intention to quit, would have no reason to attach special import to similar information emanating from Grandy.

manager¹¹¹ that it would be necessary to obtain a replacement.¹¹²

A few days later, Grandy spoke with Johnson reminding that they had to find a replacement as soon as possible. Grandy states that he had no further conversation with anyone concerning the circumstances under which Campbell's employment actually terminated.

The testimony that Campbell had given notice to quit was also mentioned in testimony by Store Manager DeVinney and District Manager Johnson. DeVinney was initially assigned to High Street while Campbell was on sick leave. On April 23, when Campbell returned, DeVinney introduced himself and reminded that Campbell had to inventory the produce department. Later that morning, as he passed Campbell, DeVinney claims that the later stated, "I guess you have heard, I have given my notice." He could recall nothing further about the conversation. Johnson testified that on April 23, Grandy notified him that Campbell had given notice. He avers that he sought confirmation immediately from DeVinney, who advised that Campbell had given notice to both Grandy and himself.¹¹³ According to Johnson, his information was that Campbell would work "one week, two weeks or whatever was convenient for us until we found a replacement."¹¹⁴

Campbell was unmindful of union activity until the next day, April 24. While there is no question that later that week, the Respondent received reports that Campbell was speaking favorably about the Union, the scope of his involvement arouses concern as to the credibility of certain testimony offered by the General Counsel in this respect.¹¹⁵ Campbell testified that he signed an authorization card on April 26. The General Counsel presented Union Representative Gino Renne to bolster the claim of discrimination. There were several differences in their respective accounts. Renne testified that Campbell agreed to take on responsibility as a "key contact" whose "primary" responsibility was "to sign up coworkers on authorization cards."

¹¹¹ District Manager Johnson testified that he was informed to this effect by both Grandy and DeVinney on April 23. DeVinney could not recall such a conversation or its content, but appears to concede that it could have occurred, testifying that if he had made such a report it would have been on April 23.

¹¹² According to Grandy, he walked out in pique, without knowledge of whether or for how long his department in this store would go unmanned. He explained that this was not his problem to resolve. The next day, he was to leave for Richmond to work on new store reopenings in that area for a period of about 1 month. He would be in the Tidewater area only on weekends. Thus, the location of a replacement would be left to DeVinney and Alan Johnson. While it would seem that Grandy would, nevertheless, remain acutely concerned with interim manning of the department, this possible flaw in Grandy's testimony, when considered against Campbell's basic unreliability, is not dispositive of the overall question of credibility.

¹¹³ Although DeVinney did not corroborate such a conversation, his recollection was hazy concerning the surrounding circumstances, and it is entirely possible that Johnson's testimony in this respect was accurate.

¹¹⁴ Although Campbell continued to work after April 23, there is no evidence that he ever discussed this offer with either DeVinney or Johnson. It is conceivable that Johnson could have learned of this arrangement from Grandy.

¹¹⁵ As heretofore indicated, Store Manager DeVinney admittedly received reports that Campbell was expressing prouinion sentiment to coworkers. He credibly testified that, on belief that Campbell was part of the management team, DeVinney confronted Campbell to correct misconceptions about management's position.

It strikes as odd that Campbell, who was not averse to portraying his cause in the strongest light, failed to mention that he had agreed to do so, or that he had ever solicited a coworker to execute an authorization card.

Campbell and Renne were at odds with respect to another incident later that week. On that occasion, Campbell allegedly was conversing outside the store with union representatives when DeVinney appeared. Campbell testified that DeVinney stood only “four feet behind me, staring right at me and listening to the conversation.” Campbell claims that he told the union representatives, “He’s watching, I’m breaking it off.” According to Campbell, he then went to the pharmacy, which is next door. Renne offered a much different account, testifying that “the manager” came out of the store “and observed us walking into the drug store.” Thus, Renne did not confirm that DeVinney was standing 4 feet away, while staring and listening, or that their meeting was broken off by Campbell. Differences are also reflected in Campbell’s apparent sensitivity to overt union activity and Renne’s testimony that Campbell did not hide his “participation in the Union,” but rather, “[h]e was very open about it.”

As for this latter incident, as I understand Campbell, when he returned from the drug store, he observed DeVinney make “a bee line” to the office where he made a phone call. Campbell testified that he followed DeVinney to the office area “to listen to what he [DeVinney] was saying.” DeVinney allegedly reported on the phone that he knew Campbell was the focal point for the Union in the store.¹¹⁶

It is the General Counsel’s position that Campbell was discharged subsequently on Saturday, April 28. On that date, at noon, Campbell was summoned to the break room in the rear of the store where, according to Campbell, District Manager Johnson opened the conversation, stating, “Well, you’re leaving, huh?” Campbell denied that this was the case, whereupon Johnson repeated the question. To this, Campbell allegedly replied, “No, I’m not leaving . . . I’m stepping down. . . . I’ve been working seven days a week and I’ve been out sick as you well know and the doctor said that I have to have time off . . . You all won’t give it to me, so I’ve got to step down.”¹¹⁷

Campbell claims that he then referred to his agreement with Grandy, which was rebuffed by Johnson’s reply, that it is he, not Grandy who makes the decisions. According to Campbell, Johnson next stated, “You’re fired.” Campbell argued back that his work record was excellent,¹¹⁸ that he could not be fired, and

¹¹⁶ DeVinney denied that he observed or was told by anyone at the store that they had seen Campbell sign a union card. He denied that he regarded Campbell as the focal point of union activity in the store. He testified that he never reported such a belief on the telephone to anyone. I credit DeVinney. Campbell’s own testimony establishes that he left the union representatives to enter the drug store alone. His contact with the union organizers had broken off and DeVinney would have had all the information he needed. It seems unlikely that DeVinney would have delayed until Campbell emerged from the pharmacy alone and then rushed to make a phone call—all the time unalert to the possibility that someone might be listening. Campbell’s testimony did not ring true.

¹¹⁷ At a minimum, this concession reaffirms that Campbell had previously informed Grandy that he would no longer work as “produce manager,” the only position in produce available at the High Street store.

¹¹⁸ He admits to declaring that he had just been evaluated 2 months’ earlier, with “outstanding” ratings in all areas. This was not exactly the case. R. Exh. 5. He received this rating in only one of eight categories, and his overall rating was “good.” The exaggeration itself was mislead-

ing. To make matters worse, Campbell went on to argue under oath that a “good” rating was considered “outstanding or excellent.” On the contrary, outstanding is one of several possible ratings evident on the face of the evaluation. Moreover, a “good” rating would be more indicative of acceptable performance, since anything less would be “below standard.” The scheme set forth on the face of the document is preferred over Campbell’s testimony that he was told something different by Johnson.

that he was protected by law. He reiterated that he was forced to step down due to excessive hours, and then threatened: “I’ll go to the Labor Board. . . . I’ll file suit against you.”¹¹⁹ Recriminations followed on both sides, with conflicts as to who did and said what, when, and how. These issues are unworthy of pursuit. It is enough to point out that the confrontation ended with Campbell being told to leave the store.

According to DeVinney, Johnson opened by telling Campbell that he had heard that Campbell was leaving and that “he came out to wish him well.” After Johnson stated that a replacement was to start the ensuing Monday, he inquired as to Campbell’s plans and then informed him that he could work out the day or leave. It is the sense of DeVinney’s testimony that Campbell questioned Johnson about unpaid sick leave and a quarterly bonus, and became loud at this juncture because dissatisfied with Johnson’s explanation that he was paid all the benefits due, nothing was held back, and he had been treated fairly.¹²⁰ According to DeVinney, as Johnson attempted to explain, he was cut off loudly by Campbell. As the latter grew hostile, Johnson let him know that the conversation was going nowhere and it was time for it to end. DeVinney asserts that he then asked Campbell to leave. Apparently, in leaving, Campbell predicted, “I’ll see you in court.”

According to Johnson, he met with Campbell essentially to let him know that a replacement had been found.¹²¹ He allegedly opened their discussion by stating that he was aware of Campbell’s decision to leave, and then inquired as to whether Campbell intended to remain in the retail grocery field. The latter allegedly replied that he would not as he did not like the weekend and holiday work. Johnson asked if he would need contacts in other areas of endeavor. Campbell at some point mentioned that he had asked Grandy for a part-time position, whereupon Johnson replied that he had none available.¹²²

ing. To make matters worse, Campbell went on to argue under oath that a “good” rating was considered “outstanding or excellent.” On the contrary, outstanding is one of several possible ratings evident on the face of the evaluation. Moreover, a “good” rating would be more indicative of acceptable performance, since anything less would be “below standard.” The scheme set forth on the face of the document is preferred over Campbell’s testimony that he was told something different by Johnson.

¹¹⁹ Campbell later confirmed that this was in reference to State authorities, rather than the NLRB. Once more, Campbell’s point that he was forced out of his job by intolerable conditions bolsters the interpretation that he had already communicated an intention to leave that position.

¹²⁰ On direct examination, Campbell did not mention that issues were raised on April 28 concerning the unpaid sick leave and bonus. On cross-examination, he admitted to raising the sick leave issue at that time and after that to requesting that, if they could not pay for the full 2 weeks he was off sick, to give him his bonus check for the last quarter. Johnson told him no, that he had to be working when the bonus was paid to be eligible. Campbell then complained that he would not receive a bonus check. After Johnson repeated that Campbell had to be working, Campbell allegedly stated that he expected to be working when the bonus checks were paid.

¹²¹ Johnson testified that the Respondent had no formal policy regarding the duration of “notice” to quit, but that employees normally provide 1 or 2 weeks. He claims that it was not unusual to secure a replacement head before the 2 weeks had expired and that he had done so in two cases in the past.

¹²² Johnson testified that later that day, or on the following Monday, he asked Grandy whether Campbell had made such a request of him. Grandy stated that the matter never came up.

Campbell asked a number of questions, interrupting if he didn't like Johnson's response, cutting him off, without allowing a complete answer. For example, Campbell inquired about the bonus, but once informed that eligibility was restricted to those on payroll when bonus checks were cut, he argued back that he knew he had earned his bonus and that he was entitled to it. In consequence, according to Johnson, Campbell became "quite angry." Johnson claims that the conversation ended with him advising that the discussion no longer was fruitful. He directed Campbell to leave the store, noting that he would be paid through the end of the day. In leaving, Campbell threatened some form of legal recourse, the nature of which Johnson could not recall.

DeVinney and Johnson insist that Campbell was not fired, or told that he was fired during this meeting. They both acknowledged that he was informed that he had been replaced. The replacement, Pallet, a transferee, according to Johnson, previously had been scheduled to report at 7 a.m. on Monday, April 30.¹²³ Apparently due to an unforeseeable event, Pallet did not in fact report that Monday.¹²⁴

Campbell claims that as he returned for his radio, a co-worker, Michael Smith, asked if he had been fired. Campbell allegedly said he had, adding, "They fired me for no reason I can think of." Smith confirmed that Campbell told him that he had been fired. He added that about 5 minutes earlier he observed Campbell, Johnson, and DeVinney leave the back room and heard Campbell tell Johnson, "You think you're bad for firing me like this." In response, Johnson instructed Campbell to leave the store.

To further make the point, the General Counsel presented union organizer, Renne, who testified that Campbell telephoned, also telling him that he had been fired.¹²⁵ Renne testified that after this conversation he, together with Ron Rackey, another organizer, went to the store where he protested the dismissal to the "store manager," asserting Campbell's right to engage in union activity. DeVinney allegedly replied, "Well, Glenn got what he deserved," adding that the Union would never organize this store.

DeVinney acknowledged the visit, testifying that one of the union representatives stated:

¹²³ DeVinney confirms that if Campbell had given Grandy 2 weeks' notice, Johnson's offer was cutting him back a week.

¹²⁴ Grandy testified that he had no role in finding a replacement for Campbell as he was working in Richmond at the time. He related that he received information that Pallet was given the job, but was delayed in reporting for 2 weeks after separation of Campbell. In other words, according to his information, no one worked as produce manager at High Street during the week immediately after Campbell's separation. According to Johnson, Pallet, as of April 28, was working as a temporary replacement for a produce manager at another store. The latter was on sick leave but scheduled to return on Monday, April 30, thus, enabling Pallet to report to High Street on that date. However, on Monday, Johnson was informed that Pallet would be unavailable because the produce manager's absence had been extended another week.

¹²⁵ Renne, who was not a believable witness, asserts that Campbell reviewed what had occurred at his meeting with DeVinney and Johnson. Renne asserts that Campbell stated that he was called to the back-room where "they started talking about his-Union activities." However, there was no testimony by anyone who was privy to that conversation, including Campbell, that the Union was even mentioned. Moreover, it strikes as odd that Campbell would have allowed that subject to pass had he been truthful in testifying that only a few days earlier he overheard DeVinney report that he was the leading proponent of the Union.

We are going to get you. You fired Glenn Campbell and I am going to kick your ass.

DeVinney relates that he replied that he would not countenance threats and directed them to leave.¹²⁶ After he called the police, the union representatives left. He denied stating that Campbell had gotten what was coming to him.¹²⁷

Campbell denied that he quit, or that he told anyone that he intended to do so. He also denied that he had an interest at that time in another vocation. He claims that he would not have done so as he had an infant child (7 weeks old), and had just purchased a house in 1989, as well as a new car. This apparently did not affect his determination to no longer work as "produce manager" in a store that, according to his testimony, only sporadically employed others in that department. Indeed, by his own account he announced to Grandy that he would no longer work that job before obtaining any assurances of alternative employment.

To bring the issue into perspective, it is noted that Campbell's having "stepped down" as "produce manager," even were he subsequently discharged, would narrow the scope of any possible discrimination to the Respondent's repudiation of the alleged agreement with Grandy, and the denial, through discharge, of the preference, allegedly conferred therein, for transfer when a vacancy arose in another store in the "produce clerk" classification.

It is concluded that no such agreement was entered. This critical aspect of the General Counsel's case turns on Campbell's uncorroborated testimony. While the Respondent's overall presentation is not without flaw, I find that Campbell, being unable on April 23 to obtain a commitment for a reduction in his hours, elected to quit, rather than continue to sustain the intolerable, health threatening demands of his job as "produce manager." Beyond that, Campbell's testimony concerning the agreement that allegedly prolonged his tenure was shifting and inconsistent. It also struck as implausible. It assumes that Grandy would make an on-the-spot commitment to a full-time position elsewhere without consulting with superiors. And this after having callously spurned Campbell's health oriented plea for a shortened workweek. It makes no sense that Grandy's sensitivity level would have been raised instantly from damning Campbell's health to willing accommodation of the latter's complaint that he had been overworked. These questions are magnified by Campbell's shortcomings as a witness.¹²⁸ In sum,

¹²⁶ Ed Hamilton, a dairy and frozen foods clerk claimed to have witnessed the incident. Hamilton testified that the union representative pointed his finger in the face of DeVinney, accusing him of effecting the discharge, and then invited DeVinney outside. DeVinney told them to leave the store if they were not going to make a purchase.

¹²⁷ I credit DeVinney over Renne. The latter was a thoroughly unimpressive witness. He went further than Campbell in the effort to paint a picture of union-inspired discrimination. His portrayal of the latter's role in the campaign was excessive, and his alleged April 28 arguments on behalf of Campbell included references to the Union that Campbell himself did not make a part of his case. My confidence in his grasp for what actually occurred was shaken by the several instances in which he sought to pass off as fact matters which could not be reconciled with Campbell's account.

¹²⁸ The General Counsel attacks the credibility of the Respondent's witnesses, asserting that "[t]hey all contradicted each other regarding how they had learned that he had quit and on what arrangements were made to replace him." In the main these discrepancies were peripheral to the basic issue and were within an area where recollection on the part

his testimony was unworthy of credence unless confirmed by independent credible sources or matched against incredulous testimony by Respondent's witnesses on an issue within its burden.¹²⁹ Neither exists here, and I find that the General Counsel has failed to establish that Campbell was a victim of any form of detrimental action proscribed by Section 8(a)(3) of the Act. Accordingly, the allegations to this affect are hereby dismissed.

2. The reprimand to Michele Shaffer

As previously indicated, since March 1989, Shaffer was the "receiving clerk" at the Respondent's Shore Drive store. She was known by the Respondent to be an early employee protagonist for the Union. On April 26, she had informed Store Manager George Marshall that she would assist the Union during the campaign. District Manager Johnson concedes that he was aware of Shaffer's sentiment. In July 1990, when Sherrie Carroll replaced Marshall as store manager, Johnson admittedly alerted Carroll to this fact in order to assure that Shaffer be treated in accord with governing rules and regulations. Carroll agreed that she had been so informed and also asserts that the store was described by her as a "hot bed of union activity," with Shaffer being an "activist."

On October 1, Shaffer admittedly was 10 or 15 minutes late. That morning Carroll presented her with a "constructive advice record." (G.C. Exh. 7.) The document noted Shaffer's "tardiness" as the subject matter. It included the following inscription:

Michele has been late several times recently. Late 15-20 minutes 10-1-90.

When asked by Carroll to sign it and then to give the document to Johnson, Shaffer refused. She testified that the reprimand sat on her computer table for 2 days, but then appeared on a bulletin board in an office not generally accessible to employees, but used by the front-end supervisors. No witness was offered to confirm that this was the case. Carroll claims that after Shaffer refused to sign, the document was forwarded to District Manager Johnson for signature. Carroll denied that the document was posted on the bulletin board.

It does not appear that this corrective action was timed to correspond to any recent organizational activity on Shaffer's part.¹³⁰ However, there had been a recent development affect-

of an adverse witness is likely to stumble. They by no means measure up to the contradictions and omissions on which the affirmative case is structured. Witnesses for the General Counsel were at odds on the extent of Campbell's union activity. Most important, however, is the conflict between Campbell's testimony concerning the agreement reached with Grandy on April 23, and the terms set forth in his sworn prehearing affidavit, a document prepared in a far more comfortable setting than the General Counsel was willing to extend to Grandy, DeVinney, and Johnson. Finally, it was my distinct impression that Campbell had a strong tendency to exaggerate and pass on his interpretation of events, as fact, where necessary to support his cause.

¹²⁹ Obviously, Campbell told others on the heels of the April 28 meeting that he had just been discharged. However, consistent with my assessment of his credibility, it would not have been out of character for him, in angry reaction to what had transpired, once the harsh reality of unemployment had been driven home, to vent frustrations by twisting the news of his replacement into an involuntary termination.

¹³⁰ Shaffer testified that prior to October 1, she had a difference of opinion with Carroll about her duties. Thus, District Manager Johnson had previously indicated that in the interest of avoiding overtime, it was important that Shaffer complete her work within a 40-hour week. This

ing Shaffer's claim for backpay filed earlier in the year under the Fair Labor Standards Act. Initially that action was maintained individually. In August, Shaffer learned that other employees had retained counsel in quest of similar relief. They were represented by Carey R. Butsavage, an attorney who appeared on behalf of the Union in this proceeding. Shaffer, after consultation with Butsavage, agreed to consolidate her individual claim with other Farm Fresh claimants, and on September 12, the pending Butsavage lawsuit was amended to include Shaffer as a party-plaintiff.¹³¹ In furtherance of the suit, Shaffer inquired of coworkers as to whether they wished to join the suit, or gather evidence and witnesses.

Carroll, in defense of her action, testified that she opted for disciplinary action only after verbal requests which, according to Carroll started out as a joke, but then became serious as Shaffer's lateness persisted.¹³²

The Respondent's time records are maintained in a computer bank. They confirm Carroll's testimony that, prior to the disciplinary notation, Shaffer's problem had become chronic, with lateness on September 10, 13, 14, 17, 19, 20, 21, 26, 27, 28, and 29, and again on October 1. (R. Exhs. 3(a)-(i).) Shaffer testified that it was possible that certain of the time records were altered.¹³³ At the same time, she acknowledged that she was 10 minutes late on October 1, but, beyond that she could neither affirm nor deny the accuracy of the computer entries for September. Instead, she explained that if she was late on these dates, she would have been within the Company's grace period.¹³⁴ She also testified that others were late, including Linda Raudimacher, Linda Koontz, and a woman named Diane, who did not work there too long. She would have had no firsthand

produced differences as to what tasks Shaffer should prioritize. On October 1, 15 minutes before receiving the warning, Shaffer claims to have advised Carroll that she wished to meet with Johnson concerning their disagreement. I am unaware of the significance of this testimony, and while outlined in the General Counsel's brief, there is not the slightest intimation as to its relevance.

¹³¹ On that same date, she was accompanied by Butsavage in a visit to company headquarters to obtain a copy of the summary description of the Farm Fresh retirement plan. According to Shaffer, she had previously requested this information and had made several unsuccessful trips to company headquarters to secure it.

¹³² She could not recall consulting anyone before taking this step. District Manager Johnson's recollection was more acute. He testified that Carroll informed him that Shaffer was having trouble getting to work on time. He suggested that she talk with Shaffer to uncover the cause. Carroll subsequently informed Johnson that she had spoken with Shaffer, but her lateness continued. Johnson claims that he instructed Carroll to write the reprimand.

¹³³ The time records in question were originally marked by the General Counsel and identified as G.C. Exhs. 8(a)-(d). According to the latter, this step was necessary to furnish Shaffer an opportunity to "dispute" the time records. Later, during Shaffer's cross-examination, in reference to these documents, the General Counsel stated, "We don't think they're reliable." That of course was her privilege. Shaffer's attack on the time records was purely speculative. A composite of all the conflicting testimony that was offered as to the meaning of the "stars" has an important common denominator, namely, that it would also appear in circumstances where no change to the time records had been made or even contemplated. However, as indicated, Shaffer's testimony goes no further than to establish that, as would be true of many documents, alteration was a possibility.

¹³⁴ To be more precise, Shaffer testified that her lateness exceeded the so-called grace period on only two occasions during Carroll's entire tenure at Shore Drive.

knowledge as to how the attendance problems of these individuals compared to her own.

Carroll acknowledged that Shaffer was not the only employee with a lateness problem. She agreed that Raudimacher, a cashier, also had an imperfect record in that area, but, according to Carroll, it was not chronic. In any event, she expected more from Shaffer, who held a responsible position, being the employee immediately responsible for checking in all vendors, a process that began with the opening of the store at 7 a.m. Thus, Shaffer's duties required that she check in the arriving merchandise, and enter quantity and pricing on the computer system. If Shaffer was unavailable, Carroll had to check in the merchandise manually, or the vendors had to wait for Shaffer's arrival. Drivers would complain about the delays. Finally, Carroll testified that she would be more alert to lateness on Shaffer's part, for she was the only person that could fill in for Shaffer while others were available to replace shortages in other departments.

From my overall view of the record, apart from my belief of Carroll's testimony that punctuality was an important aspect of Shaffer's job responsibilities, I was not persuaded that affirmative evidence establishes that Shaffer was a victim of disparate treatment.

The October 1 discipline was not the only instance in which Shaffer was cited for lateness. It apparently was, however, the subject of an unfair labor practice charge filed on October 10. (G.C. Exh. 1(fff).) While that matter was pending, Carroll issued an additional tardiness citation to Shaffer on December 4. (R. Exh. 2(b).) The complaints do not contest the lawfulness of this additional disciplinary act. In this connection, the General Counsel faults me, stating that the December citations were received "erroneously" over her objection. However, since the second offense was unchallenged though issued only "two months" after that which is under scrutiny, the testimony and documentation was certainly relevant to suggest that Shaffer was guilty of an ongoing pattern of lateness that she did bring under control even after reprimand.¹³⁵

Of interest to any question of Carroll's credibility is Shaffer's testimony concerning a telephone call she received from the former on November 5, 1991, shortly before the instant hearing. Some months earlier, in February 1991, Carroll had been transferred to the Respondent's store in Urbana. The telephone conversation was described by Shaffer as about 4 hours in duration. It opened with Carroll's statement that she had just met with the Company's attorneys and was curious as to the

¹³⁵ Carroll had that same day issued a separate citation against Shaffer for insubordination. R. Exh. 2(a). Shaffer, as a rebuttal witness basically claimed that she was wronged by these citations. As for the insubordination, she asserted that because Al Johnson had told her on November 7 to personally price beer, she decided on December 4, when no one else was available to do the pricing, that she would do so as other vendors waited to be checked in. I was not impressed by her professed innocence, for instead I suspect that she reacted to this added responsibility with poor judgment, misunderstanding, or deliberate smarting, to precipitate an encounter with Carroll. It was not beyond anticipation that discipline could ensue. Shaffer also disputed Carroll's reference to ongoing lateness, insisting that it was not possible that she could have been late on the occasions itemized in R. Exh. 2(b). However, Shaffer claims that she did not keep records of her attendance and that she was unaware of the lateness warning until November 1991, about a year after its issuance. Parenthetically, it is noted that Carroll did not recall personally discussing the lateness citation with Shaffer and confirms that it could have been left on the latter's computer.

to the NLRB procedures. Carroll expressed that, during the trial, she would provide information that the Respondent would not like to hear, and that she was concerned about that eventuality.¹³⁶ Shaffer advised that she just tell the truth. Carroll informed Shaffer that although she had never been told to take action against Shaffer because she supported the Union, three individuals (John Sweet, Cal Morand, and John Robbins), according to Carroll's assessment, would give a different answer if asked whether they were told to take such reprisals.¹³⁷ In addition, Carroll inquired as to who was subpoenaed, expressing concern that a Ms. Taylor might have been called, stating that Taylor had a propensity to misrepresent and had "lied."¹³⁸

On analysis, there can be no question that Shaffer was known as a key advocate of the Union, and that, as of October 1, her wage/hour lawsuit, assumed the character of protected activity, when joined with related actions pending on behalf of coworkers. Also relevant is testimony by Marshall that he never had problems with Shaffer's attendance, and never issued a corrective notice concerning her performance. Moreover, there is evidence that the Respondent did not always operate within the framework of legitimacy in opposing organization, and in fact as part of that process, discharged union supporters. *Farm Fresh*, supra, 301 NLRB 907. In this light, the proof is deemed sufficient at least to support a preliminary inference that union activity was "a" part of the motivation for the action taken against Shaffer. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

However, any such inference on this record is rebutted by the credible facts. The time and attendance records during the period immediately preceding the October warning, considered in conjunction with Shaffer's job duties, on their face evidence a pattern of lateness that would warrant disciplinary intervention. Contrary to the General Counsel, I do not regard these documents with suspicion, nor would I buy into any assumption that Carroll, in league with others, would have compromised these business records merely to lend facial validity to a disciplinary notice. Above all, Carroll impressed me as a trustworthy witness, and as previously indicated her testimony was far more persuasive than that of Shaffer. At every turn, Carroll's material testimony was explainable in logical terms and was devoid of the earmarks of pretext. As indicated, Shaffer's own version of her private conversations with Carroll in August 1990 and November 1991 attest to the latter's sense of integrity and concern for truth, while at odds with any notion that she would endorse falsified records in furtherance of a conspiratorial design to blemish Shaffer's work record. In this light, it is concluded that the Respondent has demonstrated by credible proof that Shaffer would have received the reprimand even had she not engaged in activity protected by Section 7 of the Act, and, accordingly,

¹³⁶ Carroll testified to a slightly different version, namely, that she stated that she would tell the truth "whether they liked them or not." She denied expressing concern that she would be made out to be a liar.

¹³⁷ Carroll denied this, noting that the names in question were not mentioned at all. Neither Sweet, Morand, nor Robbins were implicated in misconduct in the seven complaints that frame this proceeding.

¹³⁸ This evidence adduced by the General Counsel actually enforces my positive impression of Carroll's credulity. She initiated the conversation, which as depicted by Shaffer, was a gesture of friendship and possibly even support. The content was far more indicative of Carroll's commitment to truth than suggestive that Carroll ever held malice toward Shaffer, that she would willingly conspire against her, or that she ever would lie to cover any such conspiracy.

the allegation that the Respondent violated Section 8(a)(3) and (1) of the Act in this respect shall be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. The Respondent violated Section 8(a)(1) of the Act by, on May 3, 1990, promulgating and threatening to enforce a ban on union activity by nonemployees in areas not shown to be subject to its ownership or any exclusive possessory interest.

4. The Respondent violated Section 8(a)(1) of the Act by accusing an employee of being a "union plant," and by coercively interrogating an employee concerning his union support.

5. The Respondent violated Section 8(a)(1) of the Act by removing a pronoun sticker from an employee's office door under disparate conditions.

6. The Respondent violated Section 8(a)(1) of the Act at its store on Shore Drive when nonemployee, union representatives, were denied access to areas within 50 feet of the entrance to Respondent's leased property, and by threatening arrest if they did not vacate.

7. The Respondent violated Section 8(a)(1) of the Act at its Victory Boulevard store by threatening union representatives with arrest because they were engaged in organizational activity in public areas in which the Respondent held no property interest.

8. The Respondent violated Section 8(a)(1) of the Act at its Mercury Boulevard store by denying nonemployee, union representatives access to areas in which it held no possessory property interest, and by calling police to enforce their removal.

9. The Respondent violated Section 8(a)(1) of the Act at its Colonial Avenue store by directing nonemployee organizers to an area 50 feet distant from the store entrances and by threatening to call the police because of their refusal to do so.

10. The Respondent violated Section 8(a)(1) of the Act at its store on West Norfolk Road (Portsmouth) by directing union representatives to cease organizing within 50 feet of store entrances and by causing police to threaten arrest when they refused.

11. The Respondent violated Section 8(a)(1) of the Act at its Merrimack Trail (Williamsburg) store by directing union representatives to cease organizing within 50 feet of store entrances and by threatening arrest if they refused.

12. The above unfair labor practices are unfair labor practices having an affect on commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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

[Recommended Order omitted from publication.]