**Leslie Homes, Inc. *and* Metropolitan District Council of Philadelphia & Vicinity, United Brotherhood of Carpenters and Joiners of America, Inc.** Case 4–CA–18791

January 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

This is the first occasion for us to consider how the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), affects an employer's right to bar nonemployee union representatives from engaging in ''area standards'' handbilling on the employer's private property. The narrow issue before us is whether the Respondent violated the Act by refusing to permit representatives of the Union to distribute leaflets to potential home buyers on the Respondent's premises. For the reasons discussed in part II,D, below, we find that the Respondent did not violate the Act as alleged.

Procedural Background

On a charge filed by the Union on April 2, 1990, the General Counsel of the National Labor Relations Board by the Regional Director for Region 4 issued a complaint and notice of hearing on September 27, 1990. The complaint alleged that the Respondent violated Section 8(a)(1) when it interfered with the distribution by union representatives of union literature to prospective purchasers of residential condominiums built by the Respondent at the site known as Crestwood Condominiums. On October 11, 1990, the Respondent filed an answer admitting in part and denying in part the allegations of the complaint, and denying that it had violated the Act.

On February 25, 1991, the General Counsel, the Respondent, and the Union filed with the Board a stipulation of facts. The parties agreed that the charge, affidavit of service of the charge, complaint and notice of hearing, the Respondent's answer, the order postponing a hearing indefinitely, and the stipulation of facts with attached exhibits constitute the entire record in this case. The parties further stipulated that they waived a hearing and the making of findings of fact and conclusions of law and the issuance of a decision by an administrative law judge.

On June 6, 1991, the Board issued an order approving the stipulation of facts and transferring the proceeding to the Board. The General Counsel and the Respondent filed briefs. The Union joined the brief of the General Counsel.

On February 24, 1992, the General Counsel filed a motion to dismiss the complaint, asserting that the Supreme Court's January 27, 1992 decision in *Lechmere* precluded further prosecution of the complaint. On March 9, 1992, the Charging Party filed a response to the motion to dismiss. On April 17, 1992, the Board issued a notice inviting the parties to submit supplemental briefs concerning the impact of *Lechmere* on this case. The General Counsel and the Charging Party filed supplemental briefs.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Pennsylvania corporation engaged in the building and developing of residential real estate with its principal place of business in Holland, Pennsylvania. During the 12-month period preceding the execution of the parties' stipulation of facts, the Respondent derived gross revenues in excess of $500,000 and purchased and received materials and supplies valued in excess of $50,000 directly from points located outside the Commonwealth of Pennsylvania. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

We further find that the Union, Metropolitan District Council of Philadelphia and Vicinity, United Brotherhood of Carpenters and Joiners of America, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Facts*

The parties stipulated to the following background facts. The Crestwood project (Crestwood) is a development containing 288 residential condominium units. Construction began on the project in December 1988 and was expected to be completed in June 1991. At the time the stipulation was signed, approximately 200 of the 288 anticipated units had been completed and 180 were occupied. There are no commercial enterprises on or near the project.

Condominium owners own their own individual units. A condominium association composed of condominium owners and the Respondent owns the developed common space. The Respondent owns the controlling interest in the association. The Respondent also owns the undeveloped common space.

The evidence before us consists of a written stipulation of facts, a videotape made by the Union of several of the key sites, and an engineering blueprint (declaration plan) of the development. The physical layout of the project and its surroundings is described and illustrated in these items. The entire project sits on the north side of Oxford Valley Road, a two-lane thoroughfare (one lane in each direction) with a speed limit at that location of 45 miles per hour. Vehicles may enter and exit Crestwood only two ways, by Les-

lie Drive or Norwalk Drive. These two streets, privately owned by the condominium association, intersect only with each other inside the project, and with Oxford Valley Road at the entrances to the project.

Leslie Drive is the main entrance to Crestwood. A landscaped traffic island at this entrance separates the one lane entering Crestwood from two exit lanes, one for vehicles turning right onto Oxford Valley Road, and one for those exiting to the left. There is a stop sign at the Leslie Drive exit onto Oxford Valley Road. Vehicles turning right into the project may pull first onto a 9-foot wide shoulder of Oxford Valley Road before turning onto Leslie or Norwalk. The Norwalk Drive entrance from Oxford Valley Road is approximately 500 feet from the Leslie Drive entrance. Like Leslie Drive, Norwalk Drive's entering and exiting lanes are divided by a traffic island, although Norwalk has only one exit lane. Whereas the traffic island in Leslie Drive is entirely on Crestwood property, a small portion of the Norwalk Drive island extends beyond the property line.[1]

A public sidewalk 4 feet wide runs the entire length of the Crestwood property along Oxford Valley Road. The inner edge of the sidewalk and the Crestwood property line are separated by a grassy area 3 feet wide. Between the sidewalk and Oxford Valley Road is a public grassy verge, also 3 feet wide. Prior to the incidents giving rise to these charges, the project was posted with a no-trespassing sign, but its location and contents are not part of the record. The no-trespassing policy had been enforced prior to the date of the stipulation; most instances of enforcement involved adolescents. The Respondent contracts with a security company to provide security in the evenings.

At the time the stipulation was executed, a model condominium, located on Leslie Drive, 225 feet inside the entrance, was open for inspection by potential customers 7 days a week from 10 a.m. to 6 p.m. Approximately 12 to 35 persons visited the model home on Sundays, the busiest day. A substantial majority of potential buyers enter the development by vehicle, while a relatively small percentage enter on foot.

When construction commenced, union carpenters employed by Samuel Kaufman, Inc. worked on the first 50 units. In December 1989, however, the Respondent began to employ carpenters directly. The Respondent has not paid these carpenters prevailing union wages or benefits.

On April 1, 1990, the Union attempted to distribute handbills in front of the model condominium open to the public for inspection. The handbills communicated, among other messages, a complaint that the Respondent was paying some workers on the project below the area standards for such labor. The handbill stated:

> This is an appeal to the general public. Leslie Homes, Inc. employs foreign/immigrant workers at Crestwood, who are paid substantially less than the prevailing wage and benefit standards in the area. Leslie Homes, Inc. is destroying the fair wages and living standards of area tradesmen who return their earnings to the local economy by purchasing goods, services and housing, and by paying local and federal taxes.

The document then questioned the quality of the homes at Crestwood and ended with the exhortation, ''Exercise caution before signing an agreement of sale. Protect the American dream—don't buy at Crestwood.'' The number of handbillers is not in the record. The handbillers were peaceful. At times, they were within 5 to 10 feet of the door of the model.

At some point during that day, the Respondent told the handbillers that they were on private property and directed them to leave. The handbillers refused to do so. An agent of the Respondent then called the police, who at first declined to take action against the handbillers. After the Respondent's president contacted the district attorney's office, however, the police advised the union representatives that they were subject to removal and arrest if they did not leave the premises. The police then allowed the union representatives to leaflet on the shoulder of Oxford Valley Road.

After April 1, the Union twice attempted from the shoulder of Oxford Valley Road to leaflet vehicles as they entered the project. On both occasions, traffic was slowed on Oxford Valley Road. The Union has never picketed at Crestwood.

### B. *Issue*

The issue is whether the Respondent violated Section 8(a)(1) of the Act by refusing to permit the union representatives to engage in handbilling of potential home buyers on the Respondent's property and by calling the police to have the handbillers removed from the property.

### C. *Contentions of the Parties*

Before the Supreme Court issued its decision in *Lechmere*, the General Counsel and the Union contended that, under the method of analysis set forth in *Jean Country*, 291 NLRB 11 (1988), the union representatives should have been afforded access to the Respondent's property for the purpose of handbilling. The Respondent argued that, under a proper reading of *Jean Country*, it was not required to allow the union representatives on its property.

Since *Lechmere* issued, the General Counsel has taken the position that, under the Supreme Court's

[1] The declaration plan indicates that part of the Leslie Drive island may be outside the property line; however, the parties stipulated that the island is entirely on the Respondent's property.

analysis in that case, the Union was not entitled to access to the Respondent's property. The Union contends that, because *Lechmere* was concerned with union access to an employer's property for organizing purposes, the Supreme Court's decision does not apply to this case, which involves ''area standards'' handbilling of consumers rather than organizational activity. Accordingly, the Union argues that the Board should apply the *Jean Country* analysis, under which, in the Union's view, the Respondent violated the Act as alleged.[2]

### D. *Discussion*

The problem presented by this case is a familiar one. The union representatives attempted to engage in peaceful ''area standards'' handbilling, an activity that is protected by Section 7 of the Act.[3] The Respondent, by virtue of its controlling interest in the condominium association that owns the developed common portions of Crestwood and its sole ownership of the undeveloped common areas, as well as the street contiguous to the model home, has a legitimate private property interest in the Crestwood development.[4] The issue was joined when the Union attempted to assert the Section 7 right in contravention of the Respondent's right to prevent strangers from trespassing on its property.

The seminal authority in this area is the Supreme Court's decision in *Babcock & Wilcox*.[5] The issue in *Babcock & Wilcox* was whether, and under what circumstances, an employer is required to allow nonemployee union representatives access to the employer's property for the purpose of organizing his employees. The Court held that:

> [A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.[6] . . . Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. . . . [W]hen the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize. . . . [I]f 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, the employer must allow the union to approach his employees on his property. [351 U.S. at 112–113.]

Although the Section 7 activity involved in *Babcock & Wilcox* was organizational, the Court in later cases indicated that the ''accommodation'' analysis in Babcock should be applied in other contexts as well. See *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) (lawful economic strike activity); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, supra, 436 U.S. at 207 (area standards picketing). In *Hudgens*, the Court stated that:

> The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this ac-

[2] The Respondent did not file a supplemental brief on the applicability of *Lechmere* to this case.

[3] See *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978); *Red Food Stores*, 296 NLRB 450, 452 (1989).

[4] There is no contention that the Respondent lacked a property interest in the Crestwood development, or that the handbillers were employees of the Respondent (and thus were not trespassers). Had either of those conditions existed, this would be a different case. See, e.g., *Barkus Bakery*, 282 NLRB 351 (1986), enfd. mem. 833 F.2d 306 (3d Cir. 1987) (employer's attempt to eject union organizers from property not its own violated Sec. 8(a)(1)); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (distinguishing between organizational rights of employees and of nonemployee union organizers).

[5] See fn. 4, supra.

[6] There is no evidence that the Respondent's no-access policy was enforced against the Union but not against other solicitors. The General Counsel (and, derivatively, the Union) originally argued that the enforcement of the Respondent's no-trespassing policy chiefly against adolescents, combined with its erection of the more prominent no-trespassing sign only after the April 1 handbilling episode, ''suggests that Respondent did not exclude other solicitors prior to that date and that restriction to public access was limited.'' We decline to draw the inference ''suggested,'' which does not follow from the facts. In any event, neither the General Counsel nor the Union explicitly maintained that the Respondent discriminated against the Union by allowing others to engage in similar distributions. Indeed, had this been the General Counsel's theory of the case, we presume that he would not have moved to dismiss the complaint, since the Court's holding in *Lechmere* did not purport to detract from its earlier statement in *Babcock* that ''an employer may validly post his property . . . if he does not discriminate against the union by allowing other distribution.'' See *Davis Supermarkets*, 306 NLRB 426 (1992), enfd. on other grounds 2 F.3d 1162 (D.C. Cir. 1993). In short, there is no serious contention, and no evidence, that the Respondent engaged in disparate treatment of the union representatives.

> commodation must rest with the Board in the first instance. [424 U.S. at 522; citations omitted.][7]

In *Jean Country*, the Board set forth an analytical framework to be used in determining the accommodation to be made in all access cases. The Board announced that in each case it would consider the strength of the employer's property right, the centrality of the Section 7 right, and the availability of reasonable alternative means for the dissemination of the union's message:

> [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. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process. [291 NLRB at 14.]

In formulating its *Jean Country* analysis, the Board adverted to the Supreme Court's statement in *Hudgens*, quoted above, to the effect that ''there is a 'spectrum' of Section 7 rights and private property rights and that the place of a particular right in that spectrum might affect the outcome of a case.'' Id. at 13. Thus, the Board announced that when the employer has particularly compelling reasons for denying access and the Section 7 right asserted is less central than the right of employees to organize or protest unfair labor practices, ''we may more readily find that [nontrespassory] means of communication . . . constitute a reasonable alternative.'' Id.

The Supreme Court in *Lechmere* rejected the Board's *Jean Country* approach. The Court's majority found that the Board, in relying on the quoted language in *Hudgens*, had misconstrued *Babcock & Wilcox*. According to the Court, *Babcock* stands for the proposition that ''Where reasonable alternative means of access exist, Section 7's guarantees do not authorize trespasses by nonemployee organizers, *even* (as we noted in *Babcock* . . .) 'under . . . reasonable regulations' established by the Board.'' 502 U.S. at 537. Thus, the Court said that *Hudgens*, ''did not purport to modify *Babcock*, much less to alter it fundamentally in the way *Jean Country* suggests.'' Id. at 538. The Court then stated:

> To say that our cases require accommodation between employees' and employers' rights is a true but incomplete statement, for the cases also go far in establishing the *locus* of that accommodation where nonemployee organizing is at issue. *So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place*. [Emphasis added.] It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights as described in the *Hudgens* dictum. [Id.]

The Court found that *Jean Country* impermissibly recast, as a ''multifactor balancing test,'' the general rule set out in *Babcock* that ''an employer may validly post his property against nonemployee distribution of union literature.'' Id., quoting *Babcock & Wilcox*, 351 U.S. at 112.

Thus, the Court explained, the threshold inquiry in *Lechmere* was whether *Babcock*'s inaccessibility exception could properly be applied in that case. Contrary to the Board, the Court found that the exception was not applicable. It emphasized that

> the exception to *Babcock*'s rule is a narrow one. It does not apply wherever nontrespassory 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. [502 U.S. at 539; emphasis in the original; quoting *Babcock & Wilcox*, 351 U.S. at 113.]

The *Babcock* exception, said the Court, was designed to safeguard the rights of ''those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society,'' such as employees in mining camps, logging camps, or mountain resort hotels. Id. at 539–540. (Citations omitted.) The union's burden of establishing such isolation is a heavy one,[8] the Court continued, and cannot be satisfied ''by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication.'' Id. at 540.

Turning to the facts of the case before it, the Court in *Lechmere* found that the union had failed to carry its burden. First, the Court held that because the employees who were the focus of the union's organizing efforts did not live on Lechmere's property, they were presumptively not beyond the reach of the union's message. Id. Nor had the union rebutted that presumption. The employees' accessibility, the Court found, was indicated by the union's having contacted a sub-

[7] In *Hudgens*, the Sec. 7 activity was picketing in support of an economic strike by employees of one of the tenants of a shopping mall (albeit employees at the employer's warehouse at a different location, not of its store at the mall).

[8] The Court quoted the following language from *Sears, Roebuck & Co.*, supra, 436 U.S. at 205: ''That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity.'' 502 U.S. at 535.

stantial percentage of them directly, through mailings, telephone calls, and home visits. Such direct contacts, however, were not the only, or even a necessary, means of communication; ''signs or advertising also may suffice.'' Declining to pass on the Board's finding that advertising in local newspapers (which the union had tried) was not reasonably effective because it was expensive and might not reach the employees, the Court found that other means of communication were ''readily available.'' Thus, the union could have placed signs on the public property abutting *Lechmere*'s parking lot to apprise the employees of the organizing campaign. In fact, the union had picketed the entrance to the parking lot for months as employees were arriving at and leaving work. In summary, the Court found that *access* to employees, rather than success in winning them over, is the critical issue,[9] and because the union had failed to identify any ''unique obstacles'' frustrating access to the employees,[10] the employer had not acted unlawfully in barring the union organizers from its property. Ibid.

In *Lechmere*, as we have noted, the Section 7 activity engaged in by the union representatives was organizational. In this case, the Section 7 activity is area standards handbilling. We turn now to a consideration of the effect of *Lechmere* in the present context. At least three issues have been suggested: (1) whether *Lechmere* applies at all outside the organizing sphere, (2) whether, after *Lechmere*, the *Babcock* exception for inaccessible employees may be invoked when the target of the union's message is the employer's customers instead of its employees, and (3) assuming the applicability of the *Babcock* exception, whether the Union here carried its ''heavy burden'' of showing that it faced ''unique obstacles'' that so frustrated its attempts to reach the customers that it should have been allowed to handbill on the Respondent's premises.

### 1. Does *Lechmere* apply to area standards activities?

The Union and our dissenting colleagues contend that *Lechmere* does not apply in the area standards context. They reason that Section 7 protects not only employees' organizational efforts, but also their right ''to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection,'' such as the handbilling in this case. The Court in *Lechmere* held that ''the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers,'' 502 U.S. at 532, and reiterated the distinction made in *Babcock* ''between the organizing activities of employees [to whom Section 7 guarantees the right of self-organization] and nonemployees [to whom Section 7 applies only derivatively].'' Id. at 533. The Union and the dissent, however, argue that the Court's rationale applies only in the organizational context, because only in that setting do union representatives who are not employed by the targeted employer possess only ''derivative'' Section 7 rights. They contend that the handbillers in this case were exercising their own (nonderivative) Section 7 rights, and also represented the Union's members who, though not employees of the Respondent, have exercised their Section 7 right to join a labor organization and to engage in ''other concerted activities for the purpose of collective bargaining or other mutual aid or protection.'' According to the dissent, ''*Lechmere*'s reasoning, which limited itself to the self-organizing guarantee of Section 7, does not address their activities.'' See *Loehmann's Plaza II*, 316 NLRB 109, 116 (1995) (Members Browning and Truesdale, dissenting).

We find no merit to this argument. In the first place, given the Court's concern in *Lechmere* with protecting employers' private property rights,[11] we can discern no reason to assume that it would apply its reasoning only in organizing cases. It is true, as the Union and the dissent observe, that the Court in *Lechmere* addressed

[9] The Court recognized, however, that success (or the lack of it) may be relevant in determining whether reasonable access exists. 502 U.S. at 540–541.

[10] See *Sears, Roebuck & Co.*, 436 U.S. at 205 fn. 41.

[11] The dissent asserts that the Court in *Lechmere* was concerned only peripherally with private property rights. See *Loehmann's Plaza II*, supra at 119 (Members Browning and Truesdale, dissenting). While it is true that we are construing the rights of employees under Sec. 7 of the Act, the issue before us in these cases is whether the employers violated the Act by preventing individuals who were not their employees from exercising their Sec. 7 rights *on the employers' property*. As the Supreme Court put it in *Sears*, ''The remaining question is whether under *Babcock* the trespassory nature of the [area standards] picketing caused it to forfeit its protected status.'' 436 U.S. at 204–205. Indeed, our colleagues themselves would apply an access test in cases like these which ''would, in every case, factor in the nature and strength of the employer's property interest versus the importance of the Sec. 7 right asserted by the union.'' *Loehmann's Plaza II*, supra at 121 (Members Browning and Truesdale, dissenting). They thus tacitly admit that the construction of employers' property rights is a critical consideration in these cases because under *Babcock*, the Board is required to make an accommodation between Sec. 7 rights and property rights when private property is the targeted locus of the Sec. 7 activity and persons deemed ''nonemployees'' by the Court are seeking access.

Our colleagues concede that ''the Court in *Lechmere* did express some concern for private property rights[.]'' Id. at 119–120. In our view, they understate the case. The Court in *Lechmere* repeatedly indicated concern for employers' property rights, by stressing the limited circumstances in which those rights may be infringed by nonemployee union organizers. See 502 U.S. at 533: ''As a rule, then, an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property''; id. at 535 (quoting *Sears* with approval): ''While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule''; and id. at 538: ''We reaffirm . . . today . . . *Babcock*'s general rule that 'an employer may validly post his property against nonemployee distribution of union literature' (quoting 351 U.S. at 112).''

only the right of nonemployees to organize on an employer's property, and did not discuss nonemployee access for other purposes. We find no suggestion in the Court's opinion, however, that it focused on organizing activities for any reason other than that *Lechmere* was an organizing case, and that the Court was simply (and prudently) deciding the case before it. Moreover, given the Court's previous indications that the *Babcock* ''accommodation'' principle applies in nonorganizational settings,[12] we would not expect the Court to limit sharply that principle to organizing cases without some overt signal to that effect. We find no such signal in *Lechmere*. To the contrary, the Court quoted (and reaffirmed) ''Babcock's general rule'' that ''an employer may validly post his property against nonemployee distribution of union literature,'' 502 U.S. at 538. The Court omitted the arguably qualifying language in *Babcock* ''if reasonable efforts by the union through other available channels of communication will enable it to reach *the employees* with its message[.]'' 351 U.S. at 112 (emphasis added).[13] By phrasing the ''general rule'' against trespassory activity without reference to the language arguably limiting it to attempts to reach employees, the Court, if anything, was signalling that *Babcock* should continue to be applied outside the organizing context.[14]

The argument advanced by our colleagues and the Union is unsound for another reason. The dissenters urge that nonorganizational activities, such as area standards picketing and handbilling, are protected not by the Section 7 right of self-organization but by ''Section 7's guarantee of a right not treated in *Lechmere*—the right of employees 'to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.''' *Loehmann's Plaza II*, supra at 116 (Members Browning and Truesdale, dissenting). As the latter right is not derivative of the rights of the Respondent's employees, our colleagues contend, it is not reached by the Court's reasoning in *Lechmere*; accordingly, under their theory, the Board is free to require access under the ''other concerted activities'' rubric in nonorganizational cases, even after *Lechmere.*

The obvious problem with that position is that it would seem to have been equally applicable in the organizational setting, where the organizing could be seen as benefitting already organized employees against nonunion competition. Yet the argument can be made that it was implicitly rejected in *Lechmere*. As our colleagues point out, the Court in *Lechmere* did not discuss the possibility that the organizers' activities could be protected under the ''other concerted activities for the purpose of . . . other mutual aid or protection'' language of Section 7, yet it found that nonemployee organizers have only derivative Section 7 rights.[15] Thus, it is at least arguable to read the Court's decision as indicating that the organizers would have fared no better under the ''other concerted activities'' theory propounded by the dissent. Under that interpretation of *Lechmere*, trespassory nonorganizing activity would *never* be protected because, as our colleagues rightly point out, the Respondent's customers whom the nonemployees are attempting to reach with their area standards message have no Section 7 rights corresponding to the employees' right of self-organization, and thus the nonemployees would not even have the limited derivative rights possessed by nonemployees in the organizing setting.[16]

As our colleagues point out, the foregoing reading of *Lechmere* is not the only possible one. But even if their alternative rights theory is cognizable after *Lechmere*, our colleagues fail to explain why the *Bab-*

[12] See p. 126, supra. In this regard, the Court in *Sears* observed that ''Even on the assumption that picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation, it would be unprotected in most instances,'' 436 U.S. at 206 (fn. omitted), thus suggesting strongly that the accommodation analysis in *Babcock* (and reaffirmed in *Lechmere*) is applicable to area standards cases such as these.

The dissent suggests that we have inappropriately ignored what it characterizes as *Hudgens*' recasting of the *Babcock* test as applied in the nonorganizational context. *Loehmann's Plaza II*, supra at 120 (Members Browning and Truesdale, dissenting). We find no basis for the proposition that *Hudgens*, at least as construed in *Lechmere*, recast the *Babcock* test. In both cases, the Court emphasized the need to seek to accommodate Sec. 7 rights and property rights. In *Babcock*, the Court struck the balance markedly in favor of property rights in circumstances where nonemployee union agents were engaged in the Sec. 7 activity. In *Hudgens*, the Court suggested that a different balance might be struck in circumstances where, inter alia, the Sec. 7 activity was being conducted by employees of an employer at the shopping center (albeit they were employed elsewhere). We fail to see how *Hudgens* gives any support to the Union in this case where, like *Babcock* and unlike *Hudgens*, the activity is conducted by nonemployee union agents.

[13] Member Cohen notes that the Court's language set forth above may indeed suggest that trespassory activity which is not aimed at employees is simply barred without exceptions, i.e., it is not subject to the qualifying language of *Babcock*. See infra at fn. 18 for a full discussion of Member Cohen's position.

[14] The Union's argument that if *Lechmere* is applied to cases involving nonorganizational activities, employees will be deprived of the right to ''elect or otherwise delegate persons to conduct collective bargaining and other activities on their behalf'' is plainly without merit. *Lechmere* does not limit the scope of activities protected by Sec. 7; it only discusses the circumstances in which an employer may bar union representatives who are not his employees from carrying out their activities on the employer's private property.

[15] For that matter, it is arguable that the organizers in *Lechmere* were exercising their (own) Sec. 7 right ''to . . . assist labor organizations'' in attempting to organize the unorganized, but the Court's decision can be read as implicitly rejecting that theory as well.

[16] This appears to be the Ninth Circuit's reasoning in *John Ascuaga's Nugget, Inc. v. NLRB*, 968 F.2d 991 (1992) (construing *Lechmere* as affording access rights only to nonemployee organizers who are trying to contact an employer's employees, not to nonemployees attempting to communicate with the employer's customers). As we explain below, we find it unnecessary to decide that issue in this case.

*cock* analysis, as explicated in *Lechmere*, should favor access *more* for nonemployees engaged in nonorganizational ''other concerted activities'' than for nonemployee organizers. That failure is perhaps understandable in light of *Sears*' suggestion that nonemployee area standards activities are *less* favored under the *Babcock* analysis than nonemployee organizational efforts. 436 U.S. at 206 and fn. 42.

Our colleagues assert that ''*Sears*' access discussion cannot be regarded as conclusive'' because access was involved only tangentially in a preemption case. *Loehmann's Plaza II*, supra at 120 (Members Browning and Truesdale, dissenting). The latter assertion is somewhat startling, given *Lechmere*'s flat statement that ''If there was any question whether *Central Hardware*[17] and *Hudgens* changed Section 7 law, it should have been laid to rest by *Sears*[.]'' 502 U.S. at 534–535.

2. Is the *Babcock* exception applicable to area standards activities?

The Ninth Circuit has construed the Supreme Court's decision in *Lechmere* to mean that the *Babcock* exception, providing for access by union organizers to isolated employees, does not apply to union representatives who are attempting to contact, instead of an employer's employees, an employer's customers. *John Ascuaga's Nugget v. NLRB*, supra. This is a question we need not and do not decide today because, as we discuss below, we find that, under *Lechmere*, the Union did not demonstrate that the Respondent's customers were so isolated that the handbillers should have been permitted to approach them on the Respondent's premises.[18]

3. Did the Union have reasonable alternative means of contacting the Respondent's customers?

We assume, without deciding, that *Lechmere* permits a union to show that an employer's customers are not reasonably accessible by nontrespassory methods, and that union representatives therefore may be entitled to engage in area standards activities on the employer's property.[19] In *Lechmere*, however, the Supreme Court made it clear that, even in organizing cases, *Babcock*'s inaccessibility exception applies only in unusual circumstances. As we noted above, the Court stated that the *Babcock* exception applies only when, because of the location of a plant and the living quarters of the employees, the employees are beyond the reach of the union's reasonable attempts to communicate with them. 502 U.S. at 539. The union has the heavy burden of establishing that the employees, because of the nature of their employment, are ''isolated from the ordinary flow of information that characterizes our society.'' Id.at 540. Unless the Union can show that ''unique obstacles'' exist that frustrate access to the employees, the employer is entitled to bar the union from his property. Id. at 93. Employees who do not reside on the employer's property are presumptively not beyond the reach of the union's message. Id. at 540. We assume, for purposes of deciding this case, that the same principles apply when a union seeks access to an employer's property to communicate an area standards message to the employer's customers.

Applying the foregoing principles to the stipulated facts of this case, we find that the Union has not shown that the Respondent's customers are ''isolated from the ordinary flow of information that characterizes our society,'' or that it lacks reasonable alternative means of contacting them.[20] We arrive at that finding

[17] *Central Hardware Co. v NLRB*, 407 U.S. 539 (1972).

[18] For the purposes of deciding this case, Member Cohen agrees that *Lechmere*'s strict test for organizational activity applies to area standards activity as well. However, he wishes to express his view that the test for area standards activity may well be even more strict than that for organizational activity. In this regard, Member Cohen notes the Supreme Court's observation that area standards activity may be entitled to lesser protection than organizational activity. The latter is at the very core of Sec. 7; the former, while protected, does not lie at the core of Sec. 7. See *Sears* at fn. 42. Further, organizational activity is aimed at the employees of the employer-property owner. Area standards activity is on behalf of employees elsewhere. It therefore lacks a ''vital link'' to the employees on the property. Id.

Because of these considerations, the Supreme Court has asserted its serious doubt as to whether trespassory area standards activity is entitled to the limited protection afforded to trespassory organizational activity. Further, the Ninth Circuit has suggested that the *Lechmere/Babcock* exception does not apply to trespassory activity aimed at the public rather than at employees. *John Ascuaga's Nugget*, supra.

Because the Union's activity in this case did not fall within the *Lechmere/Babcock* exception, Member Cohen does not resolve the issues discussed above. However, he believes that there is substantial support for the argument that the exception should not be applied to trespassory area standards activity.

Finally, Member Cohen notes that the dissenters rely on the distinction between the organizational activity in *Lechmere* and the area standards activity herein. Based on the considerations set forth above, Member Cohen suggests that the distinction cuts with greater force against the position of the dissenters than it does in their favor.

[19] The Court in *Lechmere* held that, in the organizing context, if employees are shown to be inaccessible, the accommodation analysis moves to a second level, at which the employees' Sec. 7 rights are balanced against the employer's property rights, as indicated in *Hudgens* 502 at 538. Consequently, even where union organizing is concerned, a showing of employee inaccessibility does not mean, ipso facto, that the employer's property rights must yield. We assume, without deciding, that the same is true in nonorganizing cases.

[20] We agree with our dissenting colleagues that whether or not there are reasonable alternative means of contacting a union's intended audience depends in part on the nature of the audience. However, we reject their contention that this principle is a reason why *Lechmere* should not be extended to nonorganizational union activities. See *Loehmann's Plaza II*, supra at 119–120 (Members Browning and Truesdale, dissenting). *Lechmere* teaches that, where nonemployee organizers seek access to an employer's property to attempt to contact the employer's employees, access need not be afforded if the union has reasonable alternative means of contacting the employees. We find no reason in *Lechmere* for not applying that

*Continued*

for two reasons. First, the Union has not shown that it could not have adequately conveyed its message to the Respondent's customers by picketing or placing stationary signs on the public property between Oxford Valley Road and the Crestwood development.[21] (The Union never attempted to picket on the public property, and it does not contend that the essential message contained on the handbills could not have been satisfactorily rendered on picket signs.)[22] As we have noted, the public property extends the entire width of the Respondent's property, and abuts Leslie Drive and Norwalk Drive—the only two routes an automobile can take into the development. The public property is 10 feet wide, including a 4-foot wide sidewalk where pickets could safely patrol. In addition, although the speed limit on Oxford Valley Road is 45 miles per hour, it is apparent that cars turning into the development at either Leslie Drive or Norwalk Drive would have to slow down considerably to execute what is approximately a 90-degree turn into the Crestwood property at either point, and also (in the case of cars turning right into the development) normally would move onto the shoulder, nearer to any signs the Union might place on the public property. It appears, then, that either stationary signs or picket signs on the public property near the entrances to the property would be clearly visible to drivers slowing down to enter the Crestwood development. There is nothing in the stipulated record to suggest that picketing, or the placement of stationary signs, on the public property would have posed any safety hazard to either the union representatives or to passing motorists.

We further find that the Union failed to demonstrate that it could not have communicated its message to potential home buyers as they left the Crestwood property. We first observe that the condominiums sold on the Respondent's premises differ markedly, in the sheer size of the investment being contemplated, from groceries, blue jeans, and other nondurable items sold at retail. Experience thus supports the Respondent's common sense argument that potential home buyers are likely to engage in extensive comparison shopping before they make a purchase. The Respondent's potential buyers generally will not have already made their purchases at the time they leave the premises, and the Union therefore can effectively approach them as they leave, rather than only as they enter.[23]

In addition, the record establishes that union representatives stationed on public property outside the Leslie Drive entrance would have a clear, unobstructed view of the model home and the parking area in front of it. It would have been possible for those representatives to watch the parking area to identify the cars driven by individuals visiting the model home, and then to attempt to give them handbills as they left the development.[24] In this regard, it should be recalled that there is a stop sign at the Leslie Drive exit from the Crestwood property, the closest exit to the model home. It therefore would not have been necessary for union representatives wishing to handbill exiting customers to attempt to flag down moving cars or to station themselves in the middle of the intersection; they could have remained on the sidewalk or on the grassy

same analysis when the union is attempting to contact individuals who are not the employer's employees. In either case, the Board must determine whether, given the nature of the audience, reasonable alternative means exist for reaching it with the union's message. The same means may be reasonable for some audiences but not for others.

Member Cohen does not join in those portions of the opinion infra which attempt to set forth the *existence of alternatives* available to the Union. In his view, it is sufficient, and more consistent with *Babcock* and *Lechmere*, to say only that the General Counsel has not met his burden of showing the *absence of alternatives* available to the Union.

[21] As the Union's actions were directed at the Respondent's own hiring practices and employment conditions, rather than those of another employer, the Respondent is not a neutral, but the ''primary'' employer. The Union thus would not risk being found to have violated Sec. 8(b)(4)(B) of the Act by picketing the Respondent instead of handbilling. See *NLRB v. Retail Clerks Local 1001 (Safeco)*, 447 U.S. 607, 609 and fn. 3 (1980).

[22] Our dissenting colleagues, however, contend that the Union's message was too detailed to be contained on a picket sign. We reject that contention (which, as we have noted, the Union does not raise on its own behalf). In *Red Food Stores*, supra, the Board found that a similar area standards message essentially was a request not to patronize, which was readily conveyed by pickets. 296 NLRB at 453. As the Union never picketed at the Crestwood property, it failed to demonstrate that its essential message could not be conveyed on a picket sign. Cf. *Loehmann's Plaza I*, 305 NLRB 663, 667 (1991), in which the union did picket and in which no exceptions were filed to the judge's finding that the area standards message on the union's handbills could not be contained on a picket sign. *Sentry Markets v. NLRB*, 914 F.2d 113 (7th Cir. 1990), cited by our colleagues, did not involve an area standards message and thus is inapposite to this case.

That the Union added to the complexity of its essential message by including a number of apparently speculative suggestions about workmanship at Crestwood does not require a different result. Our colleagues cite no authority for the proposition that a union may gain access to an employer's property, when access otherwise would be denied, merely by complicating an essentially simple message to the point at which it can no longer be rendered on a picket sign.

[23] The dissent contends that exit handbilling would be ineffective because some customers may have bought condominiums on their first visit, and others may have returned after having visited Crestwood on a previous occasion when the Union had no representatives present. Whatever the factual merits of these arguments may be (and the second suggests that the Union should be rewarded with access for being less than vigorous in attempting to communicate its message), they fail to take into account the fact that the Union has not shown that it could not convey its message, by means of stationary signs or picket signs on public property, to customers as they *enter* the Crestwood development. In any event, *Lechmere* plainly establishes that a union may be found to have reasonable nontrespassory access to its intended audience even if it is not able to contact all, or even most, members of that audience.

[24] Consequently, it would not have been necessary to stop everyone leaving the Respondent's property, but only those who had been seen leaving the model home.

areas next to Leslie Drive and approached the cars as they stopped for the stop sign.[25] Nor would the use of this tactic have required the handbillers to run continuously back and forth between the public property and the customers' cars; the parties have stipulated that even on Sundays, usually the busiest day of the week, only 12 to 35 persons visit the model home, between 10 a.m. and 6 p.m.—an average of, at most, between 4 and 5 per hour. Under these circumstances, we find that approaching individuals who had visited the model home as they left the Crestwood property would have been a reasonable alternative to handbilling on the property itself.

For all the foregoing reasons, we find that reasonable alternative means were available to the Union for communicating its area standards message to potential customers of the Respondent, and, a fortiori, that it has failed to carry its burden of showing the absence of such means. We therefore find that the Respondent did not act unlawfully by ordering the union representatives to leave its private property and by calling the police to have them removed, and we shall dismiss the complaint.

## CONCLUSIONS OF LAW

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

2. The Metropolitan District Council of Philadelphia & Vicinity, United Brotherhood of Carpenters and Joiners of America, Inc. is a labor organization within the meaning of Section 2(5) of the Act.

3. By ordering union representatives to leave and calling the police to have them removed from its property at Crestwood Condominiums, Bristol, Pennsylvania, the Respondent did not interfere with the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

## ORDER

The complaint is dismissed.

CHAIRMAN GOULD, concurring.

I join Members Stephens and Cohen in dismissing the complaint in this case and add the following additional comments.

The place of work is the one area where workers come together on a daily or regular basis and have an opportunity to share views and to discuss matters such as employment conditions and the question of whether they desire to be represented by a union through the collective-bargaining process, and to ''learn from others the advantages of self-organization . . . .'' Justice White dissenting in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 543 (1992). The same holds true of the union's ability to communicate its message to the consuming public when the latter is present on private property to which the public has access.[1]

As Justice Frankfurter noted in a concurring opinion, title to property does not properly control this issue. *Marsh v. Alabama*, 326 U.S. 501, 511 (1946). This view, expressed within the context of constitutional litigation, has always seemed to me to be relevant to the issues relating to the competing interests of the right to organize, to learn from others, and to communicate to the public, on the one hand, along with the employer's legitimate interest in its property. Gould, *The Question of Union Activity on Company Property*, 18 Vand. L. Rev. 73 (1964); Gould, *Union Organizational Rights and the Concept of ''Quasi Public'' Property*, 49 Minn. L. Rev. 506 (1965). Cf. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 Harv. L. Rev. 1394 (1971).

Regrettably, however, the majority opinion of the Supreme Court in *Lechmere* resolves the issue definitively. I am, of course, bound by the Supreme Court's view of this matter and, like the majority, I am of the view that *Lechmere* creates no distinction and sends no ''signal'' that union efforts to reach customers and the public ought to be treated differently from the initiatives undertaken in *Lechmere* itself. Under the circumstances of this case, the reasoning employed in *Lechmere* applies, and, therefore, I am required to join and concur in the majority opinion. If there is to be a different result, it must come from the President and the Congress and not the Board.

MEMBERS BROWNING AND TRUESDALE, dissenting.

Contrary to our colleagues, we would find that the Respondent violated Section 8(a)(1) of the Act by interfering with the Union's peaceful distribution of handbills in front of the Respondent's model home advising potential purchasers that the Respondent did not

[25] Of course, any picket signs or stationary signs placed near the exit also would be plainly visible to drivers who had stopped for the stop sign.

The dissent argues that motorists who stop for the stop sign are still on Crestwood property. Although it appears that the stop sign is located a few feet inside the property line, a motorist stopped at the stop sign would have to drive forward only those few feet to receive a handbill from an individual stationed on public property.

[1] Although the Court stated that ''the constitutional guarantee of free expression has no part to play'' in resolving conflicts between Sec. 7 rights and private property rights under the Act (*Hudgens v. NLRB*, 424 U.S. 507, 521 (1976)), this does not mean that it is inappropriate for the Board to consider constitutional principles, particularly those inherent in the First Amendment, when devising a statutory standard for access issues. Cf. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). (In balancing employer and employee rights in a union organizational campaign, the Board must ''take into account'' the fact that ''an employer's [First Amendment] free speech right to communicate his views to his employees,'' as embodied in Sec. 8(c) of the Act, ''cannot outweigh the equal [First Amendment] rights of the employees to associate freely, as those rights are embodied in § 7 . . . .'')

pay the carpenters it employed prevailing wages and benefits. In dismissing the complaint, our colleagues erroneously extend *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), to nonorganizational activity, such as the area standards handbilling involved in the instant case. In our joint dissent in *Loehmann's Plaza II*, 316 NLRB 109 (1995), issued today, we discussed in detail the many flaws we find in the majority's approach. We will not repeat that entire discussion here, but rather we will summarize below the principles we consider controlling and will then apply those principles to the facts of this case.

I.

We stated in our *Loehmann's Plaza II* dissent that *Lechmere* must be understood in its setting. *Lechmere* presented the question whether the employer violated Section 8(a)(1) by denying nonemployee union representatives access to its property for the purpose of persuading the employer's unorganized employees to select the union as their bargaining representative. *Lechmere*'s holding is explicitly limited to ''nonemployee organizational trespassing,'' 502 U.S. at 536, and its rationale is entirely dependent on the existence of organizational activity.

The *Lechmere* Court focused on the Section 7 right to self-organization guaranteed to employees. Nonemployee union organizers do not themselves possess this Section 7 right. Rather, Section 7 applies ''only derivatively'' to nonemployee union organizers because their role is essentially one of communicating information to the unrepresented employees. Id. at 533. However, where, as in *Loehmann's Plaza II* and the instant case, nonemployee union representatives are engaged in area standards protests and appeals to the public, a different Section 7 right is involved (the right to engage in concerted activity for mutual aid and protection). In this context, the rights of the union representatives are not derivative of those of the audience they are trying to reach. ''Rather, the rights of nonemployee union representatives engaged in nonorganizational Section 7 activities are their own rights or those that arise from their role as agents of employees who have *already* exercised their Section 7 right to select a labor organization as their representative.'' *Loehmann's Plaza II*, supra at 116 (dissenting opinion) (emphasis added). Therefore, *Lechmere*'s emphasis on derivative rights is wholly inapposite.

In addition, we pointed out in our *Loehmann's Plaza II* dissent that *Lechmere*'s rationale is largely grounded on the finite and easily identifiable nature of the audience that the nonemployee organizers were attempting to reach. The Court's analysis simply does not apply when the intended audience cannot be readily identified and is geographically diffuse, as in the case of a consumer boycott and area standards protest.

Accordingly, we stated in our *Loehmann's Plaza II* dissent that we would limit the *Lechmere* access analysis ''to the circumstances to which the Court limited it in the *Lechmere* case itself: access by union organizers to an employer's property for the purpose of organizing that employer's employees.'' Id. at 119. In other access cases, we would apply the following test:

> [W]e would seek to determine in every case involving union protests which are directed at purposes other than organizing the employees of the employer on whose property the union is seeking access, whether the union representatives or members had reasonable alternative means of communicating their message to their intended audience. In making these determinations, we would consider the nature of the audience to whom the message is targeted and the impediments which the union faces in getting its message to that audience without the access to the property which it is seeking. In addition, we would, in every case, factor in the nature and strength of the employer's property interest versus the importance of the Section 7 right asserted by the union. This is similar to the analysis which the Board applied to union protests which were directed at either the general or the consuming public prior to its *Jean Country* [291 NLRB 11 (1988)] analysis, and prior to *Lechmere.* [Id. at 121.]

II.

Turning to the facts of the instant case, the parties stipulated that the Respondent is the builder and developer of Crestwood Condominiums (Crestwood), a 288-unit residential condominium development located in Bristol, Pennsylvania. The Respondent owns the undeveloped common areas and the controlling interest in the condominium association, which, in turn, owns the developed common areas.

No public streets run through Crestwood; the two streets within the project, Leslie Drive and Norwalk Drive, are privately owned by the condominium association. Only one public street borders Crestwood: Oxford Valley Road, a two-lane thoroughfare that runs parallel to the project's southern border and has a 45-mile-per-hour speed limit. From Oxford Valley Road, automobiles may enter Crestwood one of two ways: (1) at the Leslie Drive entrance (the main entrance); or (2) at the Norwalk Drive entrance.

Crestwood's model home is located about 225 feet from the intersection of Oxford Valley Road and Leslie Drive. The model home is open 7 days a week from 10 a.m. to 6 p.m.

Construction of Crestwood's first 50 units was performed by union carpenters employed by a subcontractor. Thereafter, however, the Respondent hired car-

penters directly and did not pay them prevailing union wages or benefits.

On April 1, 1990, union representatives engaged in peaceful handbilling on the walkway leading to, and on the sidewalk in front of, the Crestwood model home. The handbill stated:

-- This Is An Appeal To The General Public --

LESLIE HOMES, INC.

Employs foreign/immigrant workers at CRESTWOOD, who are paid substantially less than the prevailing wage and benefit standards in the area. LESLIE HOMES, INC. is destroying the fair wages and living standards of area tradesmen who return their earnings to the local economy by purchasing goods, services and housing, and by paying local and federal taxes.

The great AMERICAN dream is fulfilled with the purchase of a home!

Ask Yourself These Important Questions Before You Buy At CRESTWOOD . . .

Will LESLIE HOMES, INC. Cut-Rate Pay Policy Result In A Discount In Your Purchase Price?

Does Cut-Rate Craftsmanship Result From Cut-Rate Wages?

Will The Units Be Adequately and Efficiently Heated and Air Conditioned?

Will Cracks Appear In The Walls Immediately?

Are These Apartments Properly Wired Or Will You Be Forever ''Blowing A Fuse''?

Are The Entry Doors Strong And Secure?

Is There Hidden Shoddy Work That Could Cost You Money And Grief After You Buy?

EXERCISE CAUTION BEFORE SIGNING AN AGREEMENT OF SALE.

Protect the American Dream -- Don't Buy At Crestwood

THE METROPOLITAN DISTRICT COUNCIL OF CARPENTERS OF PHILADELPHIA AND VICINITY

Thanks You For Your Support

Also on April 1, 1990, the Respondent advised the handbillers that they were on private property and directed them to leave the premises, but they refused. The Respondent summoned the Bristol Township Police, who initially concluded that the handbilling was proper and refused to interfere with it. However, the Respondent's president then telephoned the Buck's County District Attorney's Office. Thereafter, the police advised the union representatives that the district attorney had concluded that they were subject to removal and arrest if they remained on the property.

III.

Applying our access analysis to the facts of this case, we would find that the Union had no reasonable nontrespassory means of communicating its area standards protest to its intended audience. The Union's message was directed at a diverse population, potential purchasers of Crestwood condominiums, a group which is not readily identifiable and thus could not reasonably be reached away from Crestwood by direct personal contact, telephone, or mail. The Union should not be required to undertake the burden and expense of a public media campaign when there is no reasonable expectation that such a campaign would even reach its intended audience.

The majority contends that the Union possessed reasonable alternative means of communicating its message to potential home buyers because it could have picketed or placed signs on the strip of public property between Oxford Valley Road and Crestwood, and could have attempted to give handbills to motorists leaving Crestwood at the intersection of Leslie Drive and Oxford Valley Road. We find these purported alternatives illusory and wholly inadequate.

The message the Union was attempting to communicate was relatively detailed. The Union sought to give potential purchasers information to guide their decision as to whether they should purchase a home from the Respondent. The Union wanted to inform potential purchasers that the Respondent was paying workers on the project below the area standards and that the Respondent's conduct adversely affected other area employees, the local economy, and tax revenues. The Union's handbill emphasized the importance of the home buying decision. The Union advised the potential purchaser to consider seven specific questions before signing an agreement of sale at Crestwood. The handbill concluded with an appeal not to buy at Crestwood and with a statement of the Union's name.

All this information could not be fully contained on a picket sign or other sign that could be read and understood by motorists traveling at 45 miles per hour along Oxford Valley Road or negotiating the approximately 90-degree turn into Crestwood. A more detailed statement, such as the handbill, was necessary to impart the full message.[1]

[1] See the Board's original decision in *Loehmann's Plaza I*, 305 NLRB 663, 667 (1991), in which the Board similarly found that a detailed area standards message set forth in a union leaflet ''could not be fully contained on a picket sign.'' See also *Sentry Markets v. NLRB*, 914 F.2d 113, 117 (7th Cir. 1990) (''picket signs could not contain all the information the Union wished to disseminate'').

In concluding otherwise, the majority errs in belittling the information the Union sought to communicate and in reading too much into *Red Food Stores*, 296 NLRB 450 (1989), a case that is factually distinguishable. In *Red Food Stores*, unlike here, the union handbilled and picketed at the public perimeters of the respondent's stores for

*Continued*

The majority's suggestion that the Union could have distributed handbills to prospective home buyers departing Crestwood on Leslie Drive is equally unavailing. Although there is a stop sign at the Leslie Drive exit onto Oxford Valley Road, motorists stopping there are still on Crestwood property. Thus, handbillers would have to trespass on Crestwood property in order to handbill such motorists. In addition, union representatives who step into Leslie Drive at the stop sign to proffer handbills to motorists would subject themselves to the danger of being struck by exiting vehicles, particularly because Leslie Drive has two lanes exiting onto Oxford Valley Road (one for vehicles turning right and one for vehicles turning left). A handbiller approaching the driver-side window of a car in the right-turn lane would risk being struck by a vehicle advancing in the adjacent left-turn lane. Similarly, a handbiller approaching the passenger-side window of a car in the left-turn lane would risk being struck by a vehicle advancing in the adjacent right-turn lane.

Handbilling motorists leaving Crestwood would also be ineffective because, contrary to the majority, home buyers may well have already made their purchase by that time. These individuals may be purchasing a condominium on their first visit or they may be returning to Crestwood after having inspected the project on a prior occasion when no union representative was present. In either case, handbilling such home buyers when they leave Crestwood has little chance of conveying the Union's message to them at a time when they might still heed it.

The conclusion we would reach is further supported by an examination of the nature and strength of the employer's property interest versus the importance of the Section 7 right asserted by the Union. The Respondent offers condominium units for sale to members of the public generally. For 8 hours a day, 7 days a week, the Respondent opens to the public the walkway leading to, and the sidewalk in front of, the model home. Especially in view of the peaceful nature of the handbilling and the total absence of evidence of interference with ingress or egress at the model home, the fact that the public is invited onto the premises significantly diminishes the strength of the Respondent's property interest.

The majority concedes, as it must, that the area standard activity in which the Union engaged is protected by Section 7 of the Act. Indeed, in our *Loehmann's Plaza II* dissent, we cited to and quoted from *Giant Food Markets*, 241 NLRB 727 (1979), enf. denied on other grounds 633 F.2d 18 (6th Cir. 1980), as a leading case articulating the protected nature of area standards activity and the crucial role it plays in advancing the interests of represented employees. When the union representatives engaged in that activity here, they were exercising their own Section 7 rights and those of the employees whom they are authorized to represent. In our view, the interest of the Union and its members in publicizing its assertion that the Respondent was undercutting negotiated area standards outweighs the Respondent's diminished property interest.

IV.

In sum, we conclude that neither the use of picket signs or other signs along Oxford Valley Road, nor the handbilling of motorists departing Crestwood, constitutes a reasonably effective alternative means for the Union to communicate its message to potential purchasers of Crestwood condominiums. In contrast, the Union's distribution of handbills on the walkway leading to, and on the sidewalk in front of, the Crestwood model home impinged only modestly on the Respondent's property rights, because the union representatives were located in an exterior area to which the Respondent invited the public. Accordingly, we would find that the Respondent violated Section 8(a)(1) of the Act by refusing to permit the union representatives to engage in peaceful handbilling at this location and by summoning the police to have them removed from the property.

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approximately 3 months. Although the union contended that it could not effectively handbill from the perimeters, the Board compared the union's picket signs to the union's handbill and found that they addressed the same subjects. The record did not show that customers were unable to read the picket signs as they entered the stores' parking lots. In addition, in *Red Food Stores*, unlike here, while the picketing and handbilling were on going, the union conducted an extensive media campaign. The Board emphasized that although it would be ''reluctant to impose the cost of a media campaign on a union, the Union here in fact utilized a media campaign.'' Id. at 453. On the basis of all these considerations, the Board concluded that the General Counsel did not meet his burden of showing that the alternatives actually employed by the union were not effective.

Contrary to the majority's apparent contention, *Red Food Stores* did not establish a broad rule that an area standards message is ''essentially simple'' and can always be contained on a picket sign. As noted above, the Board held to the contrary in the subsequent case of *Loehmann's Plaza I.*