Sandusky Mall Company *and* Northeast Ohio District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America, AFL–CIO. Case 8–CA–25097

September 30, 1999

DECISION AND ORDER

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

The issue presented in this case is whether the Respondent violated Section 8(a)(1) of the Act by refusing to permit nonemployee representatives of the Union to distribute "area standards" handbills in the Respondent's shopping mall while permitting access for other commercial, civic, and charitable purposes. Based on the parties' stipulation of facts, we find that the Respondent violated the Act as alleged.

Procedural Background

The Union filed an unfair labor practice charge on December 17, 1992. The Regional Director for Region 8 issued a complaint on January 29, 1993, and an amended complaint on June 29, 1993. The Respondent timely answered, admitting in part and denying in part the allegations in the complaint and the amended complaint. In particular, the Respondent denied that it had engaged in unfair labor practices.

On July 26, 1995, the Respondent, the General Counsel, and the Union filed a motion to transfer proceedings to the Board and stipulation of facts. The parties agreed that the charge, complaint, answer, and stipulation, with attached exhibits, shall constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties. The parties further agreed that they entered into the stipulation for the purpose of the above-entitled matters only. The parties waived a hearing before an administrative law judge, the making of findings of fact and conclusions of law by an administrative law judge, and agreed to submit this case directly to the Board for findings of fact, conclusions of law, and the issuance of a Decision and Order.

On August 18, 1995, the Acting Executive Secretary, by direction of the Board, issued an order approving the stipulation and transferring the proceeding to the Board. Thereafter, the Respondent, the General Counsel, and the Employer submitted briefs.

On the entire record and briefs,[1] the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Sandusky Mall Company, is a limited partnership with an office and place of business in Sandusky, Ohio. At all material times, the Respondent has been engaged in the operation and management of its privately owned retail shopping center, the Sandusky Mall. In conducting these business operations, the Respondent annually derived revenues in excess of $100,000. More than $33,334 was derived from each of three companies—J.C. Penney Company, May Company d/b/a Kaufman's, and Sears—which lease retail store space in the Sandusky Mall. J.C. Penney Company, May Company d/b/a Kaufman's, and Sears each annually receive gross revenues in excess of $500,000 and receive goods valued in excess of $50,000 from points directly outside of the State of Ohio.

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

II. ALLEGED UNFAIR LABOR PRACTICE

A. Facts

The Sandusky Mall is an enclosed shopping center containing approximately 96 stores. A common area or concourse at the center of the mall provides access to the tenant stores, places to sit and rest, and space leased for additional "free standing" retail outlets, such as a mall information booth, a jewelry booth, and a watch kiosk. At all material times, David Montevideo was the Respondent's mall manager. In addition, the Respondent employs mall security guards, who, for the purposes of this case, acted as the Respondent's agents within the meaning of Section 2(13) of the Act.

On December 3, 4, 11, and 16, 1992,[2] Union Business Agents Paul R. Dalferro and Michael A. Kelleher handbilled at the entrance to the Attivo store, a mall tenant located in the east concourse. The handbilling was peaceful and did not block ingress to or egress from the Attivo store. Prior to the handbilling, the Union had ascertained that R.E. Crawford Construction Co., a company employed to remodel the Attivo store, was nonunion and did not pay the prevailing area union wage rate and benefits to its carpenter employees. The handbills distributed by Dalferro and Kelleher asked the general public not to patronize Attivo because "they are undermining construction wage and benefit standards in this area" by employing R. E. Crawford Construction.

On December 3, 1992, a mall security guard asked the handbillers to leave the Respondent's property. Dalferro and Kelleher left, but they resumed handbilling the next

[1] The Respondent has requested oral argument. We deny the request inasmuch as the record and briefs adequately present the issues and the positions of the parties.

[2] All dates are in 1992 unless otherwise noted.

day. Mall Manager Montevideo asked them to stop and gave them a letter from the Respondent's attorney. The letter, in pertinent part, gave "formal notice that if this activity continues, any and all persons handbilling or picketing on the privately owned property of the Sandusky Mall will be considered to be trespassing and dealt with accordingly." In response to Montevideo's request, the handbillers again left the mall.

The December 4 letter, and an earlier one sent to the Union on November 12, relied on a no-solicitation policy that the Respondent enacted upon hearing of the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In relevant part, that policy is:

> not to permit any soliciting (except by occupants strictly in accordance with their prior written agreements with the Shopping Center), handbilling, leafleting, picketing, or patrolling (collectively called "solicitation") by any persons on the privately owned property of the Shopping Center. . . . All persons engaging in such solicitation will be asked to leave the Shopping Center property and, if they refuse, may be arrested for criminal trespass.[3]

On December 16, Dalferro and Kelleher resumed handbilling in front of the Attivo store. A security guard told them to leave. The handbillers refused. Mall Manager Montivideo called the police, who arrested Dalferro and Kelleher. The Union's agents were charged with criminal trespass. On May 20, 1993, their motions to dismiss the criminal charges and to seal the arrest records were granted. The Respondent did not oppose this action.

The Respondent acknowledges that, both before and after the union handbilling, it has allowed charitable, civic, and other organizations to solicit within the mall concourse. In the months preceding the Respondent's denial of access to the Union, the Respondent permitted an Arthur Murray dance marathon, the Young American Miss Pageant, a United Way Donation Thermometer, a fire escape demonstration, a Fall Craft show, an Easter Seals cake auction, a Corvair show, a free car inspection sponsored by the American Lung Association, and a drug awareness display. During the month of December 1992 itself, when the Union unsuccessfully attempted to handbill, the Respondent permitted access by the Salvation Army, an American Red Cross Bloodmobile, a gift wrapping booth sponsored by the American Lung Association, and a "gift with purchase" booth sponsored by the Mall Merchants Association.

The Respondent promotes special events and community related events because it believes that they enhance the public image of the mall and provide a valuable service to the community. Organizations must apply to the mall manager for permission to solicit within the mall. The Respondent approves an organization's application based on its business judgment and discretion. If permission is granted, the applicant must sign a temporary display agreement. Among the factors the Respondent considers in reviewing an application are whether the Respondent is likely to receive an economic benefit, such as rent, "good will," or customer traffic, whether the display is consistent with the commercial retail purpose of the mall, whether the display conflicts with the business of a mall tenant, and whether the display concerns or creates a dispute, controversy or politically divisive issue.

The Respondent has on numerous occasions refused persons access to the mall. It has, for instance, several times prohibited the distribution of flyers for commercial interests unrelated to or in competition with the mall's tenants, removed political campaign signs, denied permission to circulate political campaign stickers and pins, and notified a group seeking access to a health & fitness show at the mall that it could not distribute what the Respondent deemed to be sensitive material. The Respondent admits that it would have refused to give the Union permission to handbill even if the Union had offered to complete a temporary display agreement and to pay compensation to the Respondent.

B. Contentions of the Parties

The General Counsel and the Union argue that the Respondent has violated Section 8(a)(1) of the Act by its disparate treatment of protected union activity. They rely on the Supreme Court's statement in *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956), that "an employer may validly post his property . . . if [it] does not discriminate against the union by allowing other distribution." They rely further on several Board decisions, issued subsequent to *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), that found unlawful denial of access to nonemployee union agents under the *Babcock & Wilcox* discrimination exception.

The Respondent argues that it has both a statutory and Constitutional right to deny nonemployee union representatives access to its private property for the purpose of communicating an area standards message to the public. It further contends that none of the exceptions recognized in *Lechmere* or *Babcock & Wilcox* for requiring access apply in the circumstances of this case. In particular reference to the *Babcock & Wilcox* discrimination exception, the Respondent argues that it has consistently applied its no-solicitation guidelines to permit limited access by commercially compatible enterprises and by civic and charitable organizations but to deny access to commercial competitors or to controversial advocacy groups.

[3] Until the Respondent learned about the decision in *Lechmere*, it believed that it was legally obligated to permit peaceful distribution of union handbills on its premises. It therefore permitted such handbilling by the Union on several occasions.

C. Discussion

The statutorily protected right of union representatives to engage in peaceful area standards activity is well established. See *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978); *Food For Less*, 318 NLRB 646 (1995), enfd. in relevant part sub nom. *O'Neil's Markets, Inc. v. Commercial Workers*, 95 F.3d 733 (8th Cir. 1996). The Respondent does not contest this right as a general matter, nor does it contest the validity of the Union's area standards objective in handbilling at the Attivo store in the Respondent's mall. Indeed, the parties have stipulated that the Union knew that R.E. Crawford Construction did not pay its carpenter employees the prevailing area union wage rate and benefits and that the Union's handbills asked the public not to patronize the Attivo store because it employed a contractor "undermining construction wage and benefit standards."[4]

Relying on *Lechmere*, however, the Respondent contends that the nonemployee union handbillers had no protected right of access to the Respondent's private property. We disagree. Although the Supreme Court in *Lechmere* held as a general rule that an employer cannot be compelled to allow the distribution of union literature by nonemployee organizers on its property,[5] it did not disturb the discrimination exception articulated in *Babcock & Wilcox*. As correctly stated by the General Counsel in this case, the Board has frequently relied on that exception, in cases decided after *Lechmere,* in holding that an employer violated Section 8(a)(1) of the Act by denying union access to its property while permitting other individuals, groups, and organizations to use its premises for various activities.[6]

We are mindful that the United States Court of Appeals for the Sixth Circuit, in which this case arises, has rejected the Board's interpretation of "discrimination" as used in *Babcock & Wilcox*.[7] In *Cleveland Real Estate Partners*,[8] the Board adopted the administrative law judge's finding that the employer discriminatorily prohibited nonemployee union representatives from distributing handbills directed at shoppers to discourage them from patronizing a nonunion retailer in the mall because it permitted nonlabor related handbilling and solicitations by others in the mall. The Sixth Circuit denied enforcement of the Board's order, holding that, post-*Lechmere,* "discrimination" as used in *Babcock & Wilcox* "means favoring one union over another, or allowing employer-related information while barring similar union-related information."[9] We respectfully disagree with the Sixth Circuit's conclusion and adhere to our view that an employer that denies a union access while regularly allowing nonunion organizations to solicit and distribute on its property unlawfully discriminates against union solicitation.[10]

The Supreme Court stated in *Babcock & Wilcox* that "an employer may validly post his property . . . if [it]

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[4] Accordingly, the evidence in this case satisfies the burden of proof imposed by the Sixth Circuit on a union in *NLRB v. Great Scot*, 39 F.3d 678 (1994), denying enf. of 309 NLRB 548 (1992). Moreover, we note that the Board has respectfully disagreed with the court's analysis of the union's burden to prove the protected nature of facially legitimate area standards activity. *Food For Less*, supra at 648–649.

[5] In *Leslie Homes*, 316 NLRB 123 (1995), affd. sub nom. *District Council of Carpenters v. NLRB*, 68 F.3d 71 (3d Cir. 1995), the Board held that the principles of *Lechmere* apply to area standards activity.

Chairman Truesdale notes that he dissented in *Leslie Homes* and *Loehmann's Plaza*, 316 NLRB 109 (1995), and would apply a balancing test rather than the *Lechmere* strict inaccessibility test in cases involving Sec. 7 activity other than organizational activity. He finds it unnecessary to apply that balancing test in the instant case, however, as he agrees that the Respondent's denial of access here was unlawful under the discrimination exception articulated in *Babcock & Wilcox* and left undisturbed in *Lechmere.*

Members Fox and Liebman did not participate in *Leslie Homes* or *Loehmann's Plaza* and have not passed on the proper test to be applied in access cases involving nonorganizational Sec. 7 activity. They find it unnecessary to do so in this case as they also agree that the Respondent's denial of access was unlawful under the discrimination exception.

[6] E.g., *Price Chopper*, 325 NLRB 186 (1997), enfd. 163 F.3d 1177 (10th Cir. 1998); *Be-Lo Stores*, 318 NLRB 1 (1995), enf. denied in relevant part 126 F.3d 268 (4th Cir. 1997); *Lucile Salter Packard Children's Hospital*, 318 NLRB 433 (1995), enfd. 97 F.3d 583 (D.C. Cir. 1996); *Great Scot, Inc.*, 309 NLRB 548 (1992), enf. denied on other grounds 39 F.3d 678 (6th Cir. 1994); and *Davis Supermarkets, Inc.*, 306 NLRB 426 (1992), enfd. 2 F.3d 1162 (D.C. 1993).

[7] In addition, two other circuit courts of appeals have expressed doubt as to the Board's interpretation. In *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995), the Seventh Circuit held that an employer had not unlawfully discriminated against union solicitation where the employer allowed only "swap and shop" notices to be posted on its bulletin board and refused to allow the posting of notices of union meetings as inconsistent with its policy. The court found that the Board had failed to establish in what sense it might be discriminatory to distinguish between for-sale notes and meeting announcements. In *Be-Lo Stores v. NLRB*, 156 F.3d 268 (4th Cir. 1997), the Fourth Circuit found that the few solicitations that occurred at the employer's over 30 stores in the past year and a half were only "isolated and sporadic" and did not establish disparate enforcement of the employer's no-solicitation policy. In dicta, the court noted its "doubt" that, post-*Lechmere*, the *Babcock & Wilcox* discrimination treatment exception applies to nonemployees who do not propose to engage in organizational activities and that an employer's approval of limited charitable or civic distribution while excluding union distribution constitutes discrimination.

[8] 316 NLRB 158 (1995).

[9] *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996). Since under the court's view the *Babcock & Wilcox* discrimination exception addresses only those situations where an employer discriminates against the union in favor of other union or employer-related distribution, the court concluded that the owner of private commercial premises may forbid nonorganizational, informational handbilling by nonemployee union representatives directed at the general public unless the union is able to show that it is entitled to trespass on the owner's private property because of the inaccessibility to the general public to which the handbilling is directed. 95 F.3d 457, 464.

[10] To the extent our opinion in this case is in conflict with Sixth Circuit precedent, we note that our duty to apply uniform policies under the Act, and the Act's venue provisions for review of our decisions, make it, as a practical matter, impossible for us to acquiesce in every contrary decision by the Federal courts of appeals. *TCI West, Inc*., 322 NLRB 628 (1997) (citing *Arvin Industries*, 285 NLRB 753, 757–758 (1987); and *Insurance Agents*, 119 NLRB 768, 773 (1957)).

does not discriminate against the union by allowing other distribution." 351 U.S. 105, 112 (1956). Subsequently, in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, the Court reaffirmed the *Babcock & Wilcox* discrimination exception, noting that for nonemployee union organizers to gain access to an employer's property they must establish "that the employer's access rules discriminate against union solicitation." 436 U.S. 180, 205 (1978). As noted above, the Court's opinion in *Lechmere* left the "discrimination exception" undisturbed.[11] As the Sixth Circuit concedes in *Cleveland Real Estate Partners,* the Board has consistently applied its interpretation of the *Babcock & Wilcox* discrimination exception.[12] Thus, our finding that the Respondent in the instant case discriminated against union solicitation "is consistent with what is accepted in cases identified in *Babcock & Wilcox* as containing elements of 'discrimination.'"[13]

In the instant case, the Respondent permitted others to solicit in the mall concourse, before and after December 3, 4, 15, and 16, when it requested the union handbillers to leave the premises and called the police and had those handbillers arrested. The frequency and variety of permitted activities far exceeds the "tolerance of isolated beneficent solicitation" that the Board might regard as narrow exceptions to an otherwise valid, nondiscriminatory no-solicitation policy.[14] Accordingly, we find that the solicitation by various organizations is sufficient proof of disparate treatment.[15]

We further find no merit in the Respondent's argument that it did not discriminate against union activity per se, but that it denied access to the Union pursuant to a consistent discretionary policy of limiting access to those civic, commercial, or charitable operations that, in the Respondent's subjective judgment, might benefit and are consistent with the purposes of the mall and its tenants. In this regard, the Respondent cites evidence that it has prohibited various activities that it deemed controversial or in competition with mall businesses.

In *Riesbeck Food Markets*, however, the Board found that an employer's practice of reviewing and evaluating each message sought to be disseminated, and granting access only if in its judgment the solicitation did not adversely affect the employer's business, was unlawfully discriminatory vis-a-vis union solicitation of customers.[16]

[11] For this reason, we see no basis for our dissenting colleague's reliance on *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). In *Lloyd Corp.*, the Court merely held that a privately owned shopping center was not a public forum for first amendment purposes, so that an owner violated no Federal constitutional rights by excluding petitioners, handbillers, and the like. As the Court subsequently made clear in *Hudgens v. NLRB*, 424 U.S. 507, 521–523 (1976), however, the fact that union supporters had no first amendment rights to handbill at a large private shopping mall did not foreclose the possibility that they had access rights under the National Labor Relations Act. See also *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980), where the Court held that the California constitution could be invoked to protect access to a large shopping mall by persons seeking signatures on a petition. The Court reasoned that states were free to offer more expansive free speech rights than were granted by the first amendment to the U.S. Constitution and that the grant of such rights did not constitute a taking of property within the meaning of the 14th Amendment. By the same token, a grant of access under the *Babcock & Wilcox* discrimination exception preserved in *Lechmere* is not an unconstitutional infringement on property rights.

[12] 95 F.3d at 464. In a subsequent case, the Sixth Circuit noted that the Supreme Court's decision in *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996) (reviewing courts must defer to the NLRB's interpretation under test of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)), establishes the standard of review binding on the courts of appeals in reviewing the Board's interpretation of the Act. *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1119 (6th Cir. 1997). The court further stated that, to the extent its prior statement of the standard of review in *Cleveland Real Estate Partners* conflicted with the Supreme Court's decision in *Holly Farms*, it was overruled by that decision. Id. fn. 3. The Sixth Circuit also noted that deference under *Chevron* is inappropriate only when the Board has applied the statute inconsistently or has changed its construction of the statute without reasoned justification. Id. at fn. 4.

[13] *Be-Lo Stores*, 318 NLRB at 11 (citing *Babcock & Wilcox*, 351 U.S. 105, 111 fn. 4 (1956)). Thus, for example, in *Gallup American Coal Co.*, 32 NLRB 823, 829 (1941), enfd. 131 F.2d 665 (10th Cir. 1942), the Board based a discrimination finding on evidence that an employer allowed signs "of an advertising or religious nature" on its property, while obliterating signs giving information about the union. In *Carolina Mills, Inc.*, 92 NLRB 1141, 1166 (1951), cited in *Babcock & Wilcox,* the Board found that an employer's prohibition on the distribution of union literature on its property constituted unlawful discrimination since it had allowed distribution of certain other (unidentified) literature around the same time.

[14] See *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982).

[15] To the extent our dissenting colleague, Member Brame, suggests that, in *Nicks*', 326 NLRB 997 (1998), the Board departed from its long-standing view that prohibiting union solicitation and distribution while permitting other solicitation and distribution constitutes unlawful discrimination, we disagree. In *Nicks*', the Board majority dismissed complaint allegations that the respondent unlawfully ejected nonemployee union organizers from its grocery store snack bar. The Board stated once again that *Lechmere* does not disturb the *Babcock & Wilcox* discrimination exception and that, under that exception, an employer can deny access to nonemployee union organizers unless "the employer's access rules discriminate against the union by allowing other organizations to solicit." 326 NLRB 997, 1000. Applying the discrimination exception to the facts in *Nicks'*, the Board majority recognized a difference between permitting access to the general public for meals and permitting outside entities access to seek money or membership. Id. Accordingly, in this context, the Board majority stated that it would find a violation under the discrimination exception only if the General Counsel established that the respondent refused nonemployee union organizers admittance while at the same time allowing other individuals, groups, or organizations to solicit or engage in promotional activity in its snack bar. Id. Unlike Member Brame, we see nothing inconsistent between the Board's application of the *Babcock & Wilcox* discrimination exception in *Nicks*' and in the instant case. In each instance, the Board looks to whether the employer permits nonunion organizations to solicit and distribute on its property while denying access to the union to engage in solicitation and distribution.

[16] 315 NLRB 940 (1994), enf. denied 91 F.3d 132 (4th Cir. 1996) (unpublished decision). Although we continue to adhere to the Board's decision in that case, we note that the facts of that case are distinguishable from this one. In *Riesbeck*, the union attempted to picket and handbill on the employer's premises with a "do not patronize" message. The employer, which had previously permitted the union to engage in organizational solicitation of its employees on its premises, excluded the union pursuant to a consistently enforced policy specifically prohib-

Similarly, in the instant case, we find the Respondent's policy of permitting access based on its discretion and business judgment is unlawfully discriminatory vis-a-vis union solicitation of customers. The Respondent prohibits the dissemination of a message protected by the Act while at the same time permitting the dissemination of a wide range of other messages. In prohibiting the Union's protected area standards handbilling, the Respondent is distinguishing among solicitation based on its own assessment of the message to be conveyed according to its purely subjective standard. This practice "amounts to little more than an employer permitting on its property solicitation that it likes and forbidding solicitation that it dislikes."[17] As the D.C. Circuit has observed, "to allow such a subjective criterion to govern access would eviscerate [S]ection 8(a)(1)'s purpose of preventing discriminatory treatment of unions by employers who permit other nonemployee entities to solicit on the employer's property."[18]

Finally, it is of no consequence that the Respondent has used the same policy to deny access to other nonunion individuals and groups whose messages it dislikes or considers bad for business. The Act does not protect those nonunion activities, so the Respondent may ban any or all of them. What the Respondent cannot do, however, is prohibit the dissemination of messages protected by the Act on its private property while at the same time allowing substantial civic, charitable, and promotional activities. That is exactly what the Respondent did. We therefore find that it violated Section 8(a)(1) of the Act by discriminatorily prohibiting the Union's representatives from distributing area standards handbills on the mall property and by summoning the police to have the representatives arrested.

CONCLUSION OF LAW

By discriminatorily prohibiting representatives of the Union from handbilling in the mall concourse, through its conduct of requesting that they leave the mall premises and summoning the police and having the handbillers arrested, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act, we shall order it to cease and desist and to take certain affirmative action that will effectuate the policies of the Act. Specifically, in accord with the remedy for similar unfair labor practices in *Schear's Food Center*, 318 NLRB 261, 266 (1994), we shall require the Respondent to notify the Sandusky Municipal Court, Perkins Township Police Department, and appropriate court authorities in writing, with a copy to union representatives Paul Dalferro and Michael Kelleher, that the Board has determined that the arrest of Dalferro and Kelleher on December 16, 1992, violated the Act. The Respondent shall further request, in writing with a copy to Dalferro and Kelleher, that the department and the court expunge all records of the unlawful arrest. Finally, the Respondent shall make Dalferro, Kelleher, and the Union whole, with interest, for all reasonable legal fees and expenses incurred as a result of the arrest. Interest shall be computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Sandusky Mall Company, Sandusky, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily prohibiting representatives of Northeast Ohio District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America, AFL–CIO from distributing handbills within the Sandusky Mall by demanding that they leave, by calling the police to remove them, by having them placed under arrest, or in any other way interfering with them.

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

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

(a) Within 14 days from the date of this Order, notify the Sandusky Municipal Court, Perkins Township Police Department, and appropriate court authorities in writing, with a copy to Union Representatives Paul Dalferro and Michael Kelleher, that the Board has determined that the arrest of Dalferro and Kelleher on December 16, 1992, violated the Act; further, request, in writing with a copy to Dalferro and Kelleher, that the department and the court expunge all records of the unlawful arrest; and make Dalferro, Kelleher, and the Union whole, with interest, for all reasonable legal fees and expenses incurred as a result of the arrest.

(b) Within 14 days after service by the Region, post in the Sandusky Mall copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's representative, shall be posted by

iting any solicitation involving a "do not patronize message." In the instant case, the Respondent relies on a policy giving itself so much discretion to define what is bad for its business that it effectively is able to prohibit all union solicitation directed at customers or the public, even though it allows other types of solicitation.

[17] *Riesbeck*, 315 NLRB at 942.

[18] *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583, 591 (D.C. Cir. 1996).

[19] 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."

the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility 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 December 17, 1992.

(c) 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.

MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I would find that the Respondent acted lawfully by prohibiting nonemployee union agents from engaging in "area standards" handbilling on its property. In this regard, I note particularly that the union agents sought to persuade the public to boycott a mall tenant. Accordingly, I would dismiss the complaint.

The majority concludes that the Respondent discriminated against the Union's activity by prohibiting such activity while allowing other types of distribution. I do not agree that the Respondent discriminated on the basis of union activity.

In deciding whether to permit activity on its property, the Respondent makes a judgment as to whether an economic benefit to mall tenants will outweigh an economic detriment. In deciding this matter, the Respondent considers whether the activity is consistent with the commercial and retail purposes of the mall; whether the activity would conflict with the business of a tenant of the mall; and whether the activity would concern, or is likely to create a dispute, controversy, or politically divisive issue.

The list of permissions and denials, set forth in the majority opinion, are all consistent with this approach. And, significantly, the instant exclusion of persons seeking a boycott of a mall tenant is consistent with this approach. Just as the Respondent denies access to persons who wish to compete with a mall tenant, so a fortiori would the Respondent deny access to persons who seek a boycott of a mall tenant. Such denial of access is without regard to the *identity* of the persons engaged in the activity. That is, persons who seek to economically injure mall tenants are excluded from the mall, irrespective of whether they are union persons or not. Accordingly, the Respondent's actions were not discriminatory within the meaning of the Act.[1]

The court cases are consistent with my analysis. In *Riesback v. NLRB*, 91 F.3d 132 (4th Cir. 1996), the employer rejected union agents who asked the public to boycott the employer. Since the employer acted on the basis of this activity, rather than on the basis of the union's being the actor, there was no discrimination.

My colleagues seek to distinguish *Riesback* on the basis that the employer there acted on the basis of a policy specifically denying access to boycotters. However, this is a distinction without a difference. The Respondent's policy here is to exclude those who seek to interfere with the business of a mall tenant. Clearly, a boycotter falls within that policy.

Similarly, in *Cleveland Real Estate Patterns v. NLRB*, 95 F.3d 457 (6th Cir. 1996), the mall owners forbade access to union boycotters, while permitting charitable solicitations. Since the distinction was based on the character of the activity, rather than on the identity of the actor, there was no unlawful discrimination.[2]

Finally, in *Guardian Industries*, 49 F.3d 317 (3d Cir. 1995), the employer permitted "swap and shop" notices on its bulletin board. The court held that the union's announcements of meetings were not comparable to "swap and shop" notices, and thus there was no discrimination.

Based on the above, and consistent with court law, I conclude that the Respondent did not discriminate against union activity. It forbade boycott activity by the union, just as it would forbid boycott activity by anyone. Such boycott activity is clearly detrimental to the business of the mall tenants, irrespective of the identity of boycotter.

Finally, my colleagues assert that the Respondent's policy is based on subjective criteria. Assuming arguendo that this is so, that does not make the policy unlawful. The Act does not require that a property owner have a precise set of objective criteria for ousting trespassers. The Act only requires that the owner not discriminate on a "union" basis. As discussed above, the Respondent did not discriminate on this basis.[3]

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[1] For example, if an employer had a policy against the display of obscene signs on its property, and the union (and others) were ejected because of such language, there would be no unlawful discrimination, even though a union was ousted.

[2] The court in *Cleveland Real Estate* said that "discrimination" means only favoring one union over another or allowing employer-related information while prohibiting similar union-related information. I do not pass on whether this is a correct interpretation of "discrimination." I conclude only that the Respondent did not discriminate by forbidding the union boycott activity, i.e., there is no evidence that it permitted nonlabor groups to boycott. In light of this, I need not pass on the issue of whether the court applied an incorrect standard of review in *Cleveland*. See fn.12 of majority opinion.

[3] My colleagues assert that the Respondent's policy gave it discretion "to prohibit all union solicitation directed at customers or the public, even though it allows other types of solicitation." In response, I

MEMBER BRAME, dissenting.

The majority finds that the Respondent's no-solicitation rule is discriminatory under Board law in part because, in applying it, the Respondent must make a *subjective* assessment of the impact of the solicitation on its tenants and patrons of the mall. However, ironically the majority decision today is susceptible to the same criticism. As a result, the parameters of the Board's application of the so-called "discrimination exception" first articulated in *NLRB v. Babcock & Wilcox*[1] are so vague that the Board too must resort to subjective, "I know it when I see it" criteria to decide whether its requirements have been met, thus leaving employers without fair notice of what they may lawfully do.

Factual Background

The relevant facts have been stipulated and are not in dispute. The Respondent is a limited partnership which owns and operates a shopping mall containing about 96 stores in Sandusky, Ohio. The mall includes a common area with access to tenant stores, places to sit and rest and space which is leased to free standing retail outlets in kiosks or the like.

On December 3, 4, 11, and 16, 1992, two union business agents handbilled at the entrance to the Attivo store, one of the mall tenants. The handbills asked the general public not to patronize Attivo because "they are undermining construction wage and benefit standards in this area" by employing a nonunion company which was assertedly not paying prevailing wages and benefits to carpenters who were remodeling the store. The handbillers were asked to leave by a mall security guard on December 3 and were given a letter on December 4 saying that the activity was considered trespassing and would be "dealt with accordingly."

On December 16, after the handbillers rejected yet another request by a security guard to leave, the Respondent called the police. The police arrested the two union agents and charged them with criminal trespass. The Union filed an unfair labor practice charge and the General Counsel issued a complaint alleging that the Respondent violated Section 8(a)(1) by excluding the union representatives from its property. The parties agreed on a stipulation of facts and the case was transferred to the Board for decision. It is in this posture that the case comes before us.

Of particular interest for our inquiry are the stipulations demonstrating how the Respondent's no-solicitation policy was enforced.[2] Under this policy, the Respondent requires that organizations seeking access to the mall obtain permission and sign a temporary display agreement. The Respondent approves organizations which, in its business judgment, enhance the public image of the mall and provide service to the community. In considering applications for access, the Respondent also looks to whether the Respondent is likely to receive an economic benefit, such as rent, "good will," or increased customer traffic, whether the activity is consistent with the commercial retail purpose of the mall, whether the activity conflicts with the business of a mall tenant and whether the activity concerns or would generate controversy.[3]

Under its policy, the Respondent admittedly permitted a variety of charitable, civic, and even commercial organizations to enter the mall for solicitation, displays, and presentations. For example, the following took place at the mall: an Arthur Murray dance marathon, the Young American Miss Pageant, a United Way Donation Thermometer, a fire escape demonstration, a Fall Craft Show, an Easter Seals cake auction, a Corvair show, a free car inspection sponsored by the American Lung Association, an American Red Cross Bloodmobile, and a drug awareness display. Using its criteria, the Respondent excluded certain organizations and activities. Thus, it prohibited the distribution of flyers for commercial interests unrelated to or in competition with the commercial interests of its tenants, precluded political campaign signs, stickers, and pins, and declined approval of a health and fitness show that proposed to distribute sensitive material. In the same month that the union representatives were excluded, the Respondent allowed a gift wrapping booth sponsored by the American Lung Association and a "gift with purchase" booth sponsored by the Mall Merchants Association.

Legal Background

The most recent Supreme Court case addressing Board law on the right of employers to post their property against nonemployee distribution of literature is *Lechmere*, supra. In *Lechmere*, the Board had held that the store unlawfully excluded nonemployee union organizers from its parking lot where they had attempted several times to place handbills on the windows of parked cars. The Union was attempting to organize Lechmere's employees. Reversing, the Supreme Court rejected the Board's balancing test in unequivocal terms.

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note that there is no evidence that the Respondent has acted in this way. I would not find a violation based on speculation as to what the Respondent may do.

[1] 351 U.S. 105 (1956).

[2] In response to the Supreme Court's decision in *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), the Respondent had drafted a no-solicitation policy which, as stated in pertinent part, was:

> not to permit any soliciting (except occupants strictly in accordance with their prior written agreements with the Shopping Center), handbilling, leafleting, picketing, or patrolling (collectively called ''solicitation'') by any persons on the privately owned property of the Shopping Center . . . . All persons engaging in such solicitation will be asked to leave the Shopping Center property and, if they refuse, may be arrested for criminal trespass.

[3] The Respondent admits that it would have refused permission to the union agents even if the Union had sought permission and offered to sign a temporary display agreement.

As an initial matter, the Court stated that "[b]y its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers."[4] While acknowledging that nonemployee union agents nonetheless have some, albeit, extremely limited rights to solicit on private property, the Court faulted the Board for "failing to make the critical distinction 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)."[5] The Court then explained that presumptively an employer cannot be compelled to allow distribution of literature by nonemployee organizers on his property while noting that the presumption might be rebutted if, consistent with the Court's earlier decision in *Babcock & Wilcox,* supra*,* the employees are otherwise inaccessible. The *Lechmere* Court stressed that "*Babcock*'s rule is a narrow one. It does not apply whenever nontrespassory access to employees may be cumbersome or less-than-ideally effective."[6] In reversing the Board's holding, the Supreme Court also rejected the Board's application of its decision in *Jean Country*[7] in which the Board had established, for all access cases, a test which would balance the strength of the Section 7 rights being asserted with the nature of the property rights at stake. Thus the Court held, "[s]o long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. 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."[8]

In subsequent decisions applying *Lechmere*, the Board and courts which have addressed the issue have concluded that *Lechmere* left undisturbed an additional exception to the employer's presumptive right to exclude nonemployee union agents from its property, the so-called discrimination exception alluded to in *Babcock & Wilcox*.[9] Under this exception, an employer may be found to have engaged in discrimination under Section 8(a)(1) if it denies union access to its property while allowing comparable activities by other nonemployee entities. Delineating the scope of this discrimination exception is crucial to providing employers with practical guidance for rules, which they have every right to promulgate, that would limit nonemployee access to their property. Thus far, as set forth below, the Board's efforts to provide decisional rules have failed.[10]

The Board, "uniquely among major federal agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking."[11] In effect, the Board develops its rules on a case-by-case basis.[12] The Supreme Court has endorsed this method of formulating Board policies as within the Agency's discretion, though not always with great enthusiasm.[13] The Court has cautioned, however, that fashioning rules by adjudication, no less than by notice and comment, must meet requirements of the Administrative Procedure Act (the APA).[14]

According to the Supreme Court, the APA "establishes a scheme of 'reasoned decisionmaking'" and requires that agency policies articulated through decisions "must be logical and rationale."[15] More particularly, a rule issued by way of adjudication must permit consistent application by "subordinate agency personnel (notably administrative law judges) and effective review by the courts."[16] Thus, Board rules must be sufficiently consistent and clear to enable courts to perform the "substantial evidence" review required under the APA.[17]

Further, when the Board finds an employer or union in violation of the law, it has an obligation to avoid vagueness in the rule, which it purports to apply. "To pass constitutional muster a regulation must provide a fair and reasonable warning of what is prohibited."[18] Case-by-case rulemaking presents some inherent notice problems particularly to the respondent in a case where the Board breaks new ground.[19] While these are not insurmountable, they are pertinent because the choice by the Board to proceed in this manner particularly begs for added attention to clarity and specificity. "The dividing line between what is lawful and unlawful cannot be left to conjecture."[20]

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[4] *Lechmere,* supra at 532.

[5] Id. at 533.

[6] Id. at 539.

[7] 291 NLRB 11 (1988).

[8] Id. *Lechmere*, supra at 538.

[9] *Babcock,* supra at 112 ("an employer may validly post his property . . . if [it] does not discriminate against the union by allowing other distribution.").

[10] Since the Board continues to adhere to its policy of nonacquiescence in the law of individual circuits and indeed here declines to follow precedent in the Sixth Circuit where this case will most likely be heard if enforcement proceedings ensue, it is particularly incumbent on the Board to fully articulate the rule it is applying and the underlying rationale.

[11] *Allentown Mack Sales & Service v. NLRB,* 118 S.Ct. 818, 827 (1998).

[12] *NLRB v. Textron Inc.,* 416 U.S. 267, 294 (1974).

[13] See, e.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

[14] *Allentown Mack*, supra at 827. See 5 U.S.C. § 706 (1976).

[15] *Allentown Mack,* supra at 827.

[16] Id.

[17] Id. at 828.

[18] *Georgia Pacific Corp. v. Occupational Safety & Health Review Commission,* 25 F.3d 999, 1004 (11th Cir. 1994). See generally *Allentown Mack*, supra.

[19] Cf. *Wyman-Gordon,* supra.

[20] *Connally v. General Construction Co*., 269 U.S. 385, 393 (1926). (Referring to a penal statute, the Court said "that the terms . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the

Board law on no-solicitation rules is of particularly wide practical application to employers. Since much of Board law only comes into play once a union is on the scene, only a subset of all employers are directly affected by it. However, a far greater number of employers will draft no-solicitation rules to conform to our Act and the Board must fashion rules in this area so that "ordinary people can understand what conduct is prohibited."[21]

Moreover, since *Lechmere* reiterated the *general* rule that an employer may exclude nonemployee union agents from its property, the Board must explain fully the reasons why it has chosen to define the scope of an *exception* to the rule in a particular way. Stated another way, when the discrimination exception is used to justify an incursion on an employer's otherwise broad property rights the Board must adequately describe the exception's scope and fully rationalize such a determination.

Little room has been left for doubt or debate by the clear language in the Supreme Court's decision in *Lechmere*. In that case, the Court unquestionably erected a high barrier to the Board's invasion of employer property rights. It might be argued that the discrimination exception provides a means to avoid the broad sweep of *Lechmere,* particularly if its scope is left both malleable and broad. However, as set forth above, leaving the definition of discrimination vague in this context flies in the face of the requirements of the APA and fundamental tenets of due process, and defining it broadly is inconsistent with both the clear meaning and spirit of *Lechmere*. I fault the majority here both on their failure to articulate a clear definition of their discrimination rationale and therefore on their failure to address fully how, based on the facts of this case, the General Counsel has established discrimination.

Analysis

Turning to the majority's articulation of the test for discrimination, it states merely that an employer who "denies a union access while regularly allowing nonunion organizations to solicit and distribute on its property discriminates against union solicitation." The majority additionally notes that a no-solicitation rule "might" escape the discriminatory label if it permits only "narrow exceptions" that amount to "isolated beneficent solicitation," citing for this proposition *Hammary Mfg., Corp*., 265 NLRB 57 fn. 4 (1982). Thus the majority is, in effect, telling employers that a rule that permits *any* solicitation while excluding union solicitation is unlawful unless the only solicitation permitted is of the "isolated beneficent" variety.[22] Absent from this formulation completely is any mention of the Board's most recent pronouncement on the subject which stated that the General Counsel proves discrimination only if he is able to make a showing that the employer "treat[ed] *similar* conduct differently" or, stated another way, that "the employer . . . refused nonemployee union organizers admittance while at the same time allowing other groups or organizations to engage in *comparable* conduct." (Emphasis added.)[23] Even were this concept of distinguishing among similar types of solicitation somehow implicit in the majority's formulation here, there is no accompanying articulation of what types of conduct would be considered comparable for purposes of this analysis, much less the reasons for such distinctions. In short, to paraphrase an old advertising jingle, "What's an employer to do?"

The gaps in analysis are particularly telling when one examines the facts of this case. On the one hand, the Respondent here has concededly allowed a variety of charitable, civic, and commercial organizations access to the mall concourse for solicitations and presentations of various kinds. On the other hand, it is stipulated that on numerous occasions the Respondent refused access to the mall to groups that it felt would undermine the commercial interests of the mall and its tenants. Thus the Respondent prohibited distribution of flyers for commercial concerns in competition with mall tenants as well as political or commercial activity which it determined would provoke controversy. The majority opinion fails to provide any analysis as to why the Union's activity here is more like the solicitation permitted by the Respondent than the type of solicitation that it consistently excluded.

In the simplest terms, the Respondent here has attempted to use its rights as a property owner to exclude the Union. It is evident that *Babcock*'s discrimination exception still lies after *Lechmere.* It is further evident that, at a minimum, the formulation of the test articulated in *Nicks'*, supra, which requires that discrimination be among *comparable* groups or activities, must be the starting point for the exception's application.[24] Signifi-

doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the essential due process of law." at 391).

[21] *Chemical Waste Management, v. U.S. Environmental Protection Agency,* 673 F. Supp. 1043, 1057 (D. Kan. 1987).

[22] The majority thus turns *Lechmere* on its head. The Court there established a sweeping general rule that an employer may exclude third parties from its property. This broad rule, in turn, has two very narrow exceptions applicable only when employees are truly otherwise inaccessible or a no-solicitation rule is found to be discriminatory. The majority, however, has transformed the narrow discrimination exception into one that is really quite broad by, in effect, defining it by reference to an extremely narrow exception within the exception for isolated beneficent activity. The effect of this exception-within-the-exception is that if an employer *permits* almost any solicitation other than isolated appeals by charities, it will be found to have an unlawful discriminatory rule if it would under the same rule *exclude* solicitation by union representatives. The exception thereby swallows up the general rule and *Lechmere's* broad sanction of employer no-solicitation rules is reduced to a narrow one.

[23] *Nicks*', 326 NLRB 997, 1001 (1998).

[24] By way of analogy, in the 8(a)(3) context the D.C. Circuit has stated, "the essence of discrimination in a violation of 8(a)(3) is treating like cases differently." *Midwest Regional Joint Board. v. NLRB,* 564 F.2d 434, 442 (D.C. Cir. 1977).

cantly, the burden is first on the General Counsel to show that the Respondent's actions were unprotected because they were discriminatory, i.e., that similar nonemployee solicitations were treated disparately and, second, on the Board to fully explain its finding that permitted activities were indeed comparable to activities which have been excluded.

The key question, then, is what are comparable solicitations within the meaning of the exception. Although the majority has not offered guidance on this question and it is perhaps presumptuous for a dissent to propose to do so, I offer at least a first step toward a consistent analysis of comparability.

On its face, comparability has at least two obvious components: the nature of the persons or organizations being excluded and the nature of the activities which the property owner would prohibit. Discrimination must be established by the General Counsel on both grounds. By the same token, if the General Counsel cannot establish that comparable groups or activities were affirmatively permitted to solicit while the Union was excluded, the alleged violation must fail.

Having established the two components, we must discern the principle which would enable us to take their measure for purposes of a comparability determination. In this regard, it is important to note that the shopping mall is decidedly not a public forum. Rather, it is essentially a privately owned commercial enterprise built on private property.[25] The public is invited to the mall for the purpose of doing business with its commercial tenants, and the mall owner may insist that those coming to its property use it in ways that are consistent with and beneficial to that purpose. This principle is properly derived from *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), in which the Supreme Court found that a shopping mall, while excluding people distributing anti-war handbills, could, consistent with the first amendment, permit activities that would "bring potential shoppers to the Center, to create a favorable impression, and to generate goodwill. There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve."[26] In short, the Supreme Court held that the shopping mall's consistently applied no-solicitation rule could distinguish between those forms of expression that would have a positive effect on mall business and those that would not precisely because the public is invited onto the private property of the mall only in order to do business with the establishments there.

Moreover, under the Act an employer/property owner must be able to make an exception from a policy broadly permitting solicitations for those solicitations which undermine the very health or maintenance of its business.[27] There is some precedent under this Act for recognizing the right of an employer to, essentially, preserve his business even in the face of competing policies under the Act such as the union's right to strike.[28] Similarly, by way of analogy, the long-established rule confining employee union solicitation to nonwork hours and nonwork areas, recognizes that even employee rights under Section 7, which are far more compelling than the derivative rights the Union is asserting here,[29] must be limited by the employer's right to maintain plant discipline and production—in short, to maintain his business.[30] Thus, provided it is consistent, the employer may discriminate among different entities and types of conduct when one would alienate customers or otherwise disrupt or retard business and the other would not. Further, the employer may distinguish among those solicitors that would educate patrons or stimulate commerce from those that would undermine the very purposes of the premises to which they would gain admittance, for example by urging a boycott of the property owner, it's tenant or a tenant's products.

Having outlined the components and guiding principle of our analysis, I suggest the following questions as a framework for determining whether, consistent with that principle, the distinctions an employer makes in its no-solicitation rule are unlawfully discriminatory.

First, the Board must ask whether the person or group which is claimed by the General Counsel to have been afforded disparate treatment is composed of mall employees or agents. An employer/property owner may distinguish between outside solicitors and its own em-

[25] Cf. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), in which the Supreme Court found that even a public school district was permitted to restrict public property, which is not by tradition or designation a public forum, to its intended purposes.

[26] *Lloyd Corp. v. Tanner*, supra at 564 (while excluding antiwar solicitors, the mall permitted charitable solicitations and other meetings and promotional activities to take place on its premises).

[27] See *Hudgens v. NLRB*, 424 U.S. 507 (1976), in which the Supreme Court found that warehouse employees of a company which operated a retail store in a shopping center had no right under the first amendment to advertise their strike at the mall and the employees rights must, instead, be determined under the National Labor Relations Act.

[28] *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333, 345 (1938). ("Although section 13 of the act . . . provides 'Nothing in this Act . . . shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business".)

Similarly, the Civil Rights Act requires that even certain first amendment religious freedoms must yield if accommodation of their exercise would impose undue hardship on an employer's ability to conduct his business. *Ansonia Board of Education. v. Philbrook,* 479 U.S. 60 (1986).

[29] See *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996).

[30] See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

ployees and agents.[31] Permitting one's own employees and agents to communicate and solicit is consistent and compatible with operating a business in ways that permitting the same conduct by outsiders simply is not.

Second, consistent with the operative principle, the Board must ask what is the relationship of the solicitation to the business of the mall. Thus, an employer may except solicitations for its core business purposes and functions from a broad no-solicitation rule. For example, an employer could permit "sidewalk sales" by its tenants or a holiday gift-wrapping booth to encourage sales.[32] Such solicitations are at the core of the employer's reason for being, i.e., the operation of the mall, and have a clear and direct relationship to the actual functioning of that business. Hence it is appropriate for the employer to distinguish them from other requests for access.

Third, the Board must consider what is the likely effect of the solicitation on mall customers and, derivatively, mall businesses. Illustratively, a popular display of current interest to the community or a "guest appearance" by a celebrity whether contracted for by the mall itself or volunteered by a third party can be expected to draw patrons to the mall and thereby to increase mall business. By contrast, animal rights activists urging a boycott against one of the mall's tenants because it sells furs or cosmetics tested on animals would reasonably be expected to produce a negative impact on mall business. Hence, such activities might be found comparable to other activities harmful to the commercial interests of the mall or, as the Supreme Court framed it in *Lloyd Corp. v. Tanner*, "incompatible with the interests of both the stores and the shoppers whom they serve." In this regard, it also is clear that an employer must be able to distinguish solicitations by charitable organizations, whether ongoing or "isolated" in nature, from other solicitations likely to have a negative effect on mall business. An appeal by a charity to the generosity of mall patrons is more like the type of activity described in *Lloyd Corp. v. Tanner* which "create[s] a favorable impression and . . . generate[s] goodwill."[33]

Finally, the Board must ask what is the nature of the conduct for which access is sought and what effect would this type of conduct reasonably be expected to have? Certainly, employers must be able to make distinctions based on the time, place, and means of solicitation to the extent that mall business may be negatively affected by one and not another. For example, outside solicitors from an organization sitting quietly at a table in a remote section of the mall would likely have a far different impact than if they were distributing handbills while roaming the common areas or picketing within the mall.

Turning to the facts of this case I would find that the General Counsel has not carried his burden of showing discrimination on the part of the Respondent. Most significantly, the General Counsel has not established that the no-solicitation rule was unlawfully discriminatory. Addressing the four questions outlined above, comparisons must be limited to third parties to the mall and tenants. Further, the prohibited solicitation had no direct relation to maintaining or promoting the operation of any business in the mall nor were the Union's handbills urging a boycott of a mall tenant likely to be beneficial to that business or the mall as a whole. Finally, the nature of the union conduct is neither compatible with or likely to promote the commercial interests of the mall. Accordingly, the Respondent's rule which, in application affords access to charitable organizations and commercial ventures not in conflict with the interests of the mall and its tenants is not unlawful because it operates to exclude solicitation by organizations, such as the Union, whose avowed objective is to undermine one of the businesses in the mall.

Moreover, there is no evidence that the Respondent's valid no-solicitation rule was not consistently applied. Indeed, it is undisputed that the Respondent consistently excluded solicitation that was detrimental to the commercial interests of its tenants. These solicitations involved either controversial subject matter or activity on behalf of its tenants' competitors. Without doubt, the Union's activity here, urging a boycott of one of the tenants, is more comparable to the other excluded activities under this rubric than the activities permitted. More specifically, the General Counsel has not shown that the Respondent permitted other organizations to gain access in order to promote a boycott of any business at the mall or other similar activity.

In light of all of the above, the record therefore does not establish that the Respondent's conduct in excluding the Union comes within the narrow "discrimination exception" to its right to exclude nonemployee solicitations from its property, and I respectfully dissent.

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[31] *Hale Nani Rehabilitation,* 326 NLRB 335 (1998) (employer's supervisors could hand out flyers in areas and at times when others were precluded from doing so).

[32] See, e.g., *Lucille Salter Packard Children's Hospital at Stanford v. NLRB*, 97 F.3d 583, 587–588 (D.C. Cir. 1996) (solicitations by entities intimately related to the fringe benefits the hospital offered its employees and sales of medical textbooks were found distinguishable from union solicitations on the grounds that they related to the business' purposes and functions).

[33] See also *Cleveland Real Estate Partners*, supra at 465. "[T]he Court could not have meant to give the word 'discrimination' the import the Board has chosen to give it. To discriminate in the enforcement of a no-solicitation policy cannot mean that an employer commits an unfair labor practice if it allows the Girl Scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so."

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 discriminatorily prohibit representatives of Northeast Ohio District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America, AFL–CIO from distributing handbills within the Sandusky Mall by demanding that they leave, by calling the police to remove them, by having them placed under arrest, or in any other way interfering with them.

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

WE WILL, within 14 days from the date of the Board's Order, notify the Sandusky Municipal Court, Perkins Township Police Department, and appropriate court authorities in writing, with a copy to Union Representatives Paul Dalferro and Michael Kelleher, that the Board has determined that the arrest of Dalferro and Kelleher on December 16, 1992, violated the Act.

WE WILL further request, in writing with a copy to Dalferro and Kelleher, that the department and the court expunge all records of the unlawful arrest, and WE WILL make Dalferro, Kelleher, and the Union whole, with interest, for all reasonable legal fees and expenses incurred as a result of the arrest.

SANDUSKY MALL COMPANY