

Albertson's, Inc. and Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production, Local 582 affiliated with International Brotherhood of Teamsters, AFL-CIO and United Food and Commercial Workers Union, Local 555 affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC. Cases 19-CA-24232, 36-CA-7702, and 36-CA-7763

October 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

On charges and amended charges filed by Driver Salesmen, Warehousemen, Foodhandlers, Clerical and Industrial Production, Local 582 affiliated with International Brotherhood of Teamsters, AFL-CIO (Local 582) and United Food and Commercial Workers Union, Local 555 affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC (Local 555), the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing in Case 19-CA-24232 on April 29, 1996, and a consolidated complaint and notice of hearing in Cases 36-CA-7702 and 36-CA-7763 on May 16, 1996. The General Counsel also issued an order consolidating cases and setting them for hearings with respect to both the complaint and consolidated complaint on May 16, 1996.

The complaints allege that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a rule that forbade Local 582 and Local 555 from entering the immediate exterior of the Respondent's retail grocery stores. Local 582 sought this access to distribute handbills to consumers asking them to boycott products of an employer with whom Local 582 had a labor dispute. The Respondent sells the products. Local 555 sought the same access to inform the Respondent's employees about Local 555 and to solicit those employees to become members of, or to request representation by, Local 555. The Respondent filed answers to the complaints denying that it violated the Act as alleged.

On October 18, 1996, the parties jointly filed a motion to transfer the proceeding to the Board together with two stipulations of facts (one for Case 19-CA-24232 and one for Cases 36-CA-7702 and 36-CA-7763) signed by the parties on September 30, 1996. The parties waived a hearing before an administrative law judge, and the issuance of an administrative law judge's decision and recommended Order. The parties agreed that the stipulations, with attached exhibits, including the charges and amended charges, the complaint and consolidated complaint, and the

answers, should constitute the entire record in this case and that no oral testimony was necessary or desired by any of the parties. The parties also stipulated that the Board might use both stipulations of fact in making its findings and decisions with respect to Case 19-CA-24232 and Cases 36-CA-7702 and 36-CA-7763.

On December 18, 1996, the Board issued an order approving the stipulations of facts and transferring the proceeding to the Board. The General Counsel, the Respondent, and Local 555 subsequently filed briefs.

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

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation engaged in the retail sale of groceries with offices and places of business in Spokane and Vancouver, Washington, and Bend and Redmond, Oregon. During the 12-month periods ending November 27, 1995,¹ December 4, and March 7, 1996, the Respondent derived gross revenues in excess of \$500,000, and it purchased and received goods valued in excess of \$50,000 directly from points outside the States of Washington and Oregon. 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 Local 582 and Local 555 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

This case involves 11 of the Respondent's grocery stores in Spokane, Vancouver, Bend, and Redmond. Local 582 sought access to the immediate exterior of Spokane area stores and Local 555 sought access to the immediate exterior of the other stores.

At all relevant times, the Respondent has had in effect a no-solicitation/no-distribution policy regarding both employees and nonemployees. It states:

Non-employees may not solicit, distribute literature or use sound devices on Company premises at any time.

Employees who are working should not be disturbed, interrupted or disrupted by solicitation or the distribution of literature. Unauthorized presence of any employee in the non-selling areas of the store or in other nonpublic areas of our facility for any purpose is strictly prohibited unless the employee is on

¹ All dates hereafter are in 1995 unless otherwise specified.

duty, preparing to come on duty, or preparing to leave after having been on duty.

No employee may engage in solicitation of any kind during working time, or while the person(s) he or she is soliciting is on working time. Further, no employee may distribute literature during working time or in working areas (note: working time does not include authorized periods of off-duty times—e.g., meal time, break time, etc.)

.....
The Company will not permit political candidates to solicit employees or customers on Company premises.

The Respondent often allowed nonemployees representing various organizations other than labor unions to solicit and distribute literature in the immediate exterior area of all 11 stores. Salvation Army bellringers solicited donations for about a month each year between Thanksgiving and Christmas. Representatives of the Camp Fire Boys and Girls Clubs, Boy Scouts, Girl Scouts, Brownies, public schools, other youth and school organizations, the Veterans of Foreign Wars, and the Disabled Veterans of America solicited donations at various times throughout the year.² The Respondent denied requests to solicit in the same areas by political groups, unfamiliar charitable organizations, and non-charities seeking selling opportunities.

The Respondent has a 40-year collective-bargaining relationship with Local 555 and its predecessors. Currently Local 555 represents the grocery and meat department employees in approximately 47 of the Respondent's stores. In the past, the Respondent allowed representatives of Local 555 or its predecessors to use the immediate exterior or interior of new stores to tell employees about Local 555 or to solicit those employees to join or request representation by Local 555. However, during the time at issue in this case, the Respondent did not allow any labor organizations to distribute literature or solicit employees or customers at the designated stores.

Local 555 commenced an organizing campaign among the employees of the Respondent's Vancouver stores sometime in April. The Respondent thereafter notified Local 555 in a letter dated May 1, that Local 555 representatives had entered the stores to talk to employees and distribute union literature and placed union literature on

² Girl Scouts sell cookies either twice a year for 2-week periods or once a year for a continuous 16-day period. Boy Scouts sell products twice a year in the spring and fall for about a month. The remaining organizations generally solicit donations for about 1 to 3 days annually.

Soliciting occurs more often than distributing. The Veterans of Foreign Wars distributed literature to customers on their request at one store. A Salvation Army bellringer gave a business card to a customer at the customer's request at one store. The Respondent neither authorized this activity nor became aware of it when it took place.

the windshields of cars in the parking lots. The Respondent stated that this conduct violated the Respondent's no-solicitation policy and emphasized that its private property was open to bona fide customers only, and that access to nonselling areas was prohibited for any purpose. The Respondent sought Local 555's cooperation with this policy.

On July 11, 12, or 13, the Respondent's supervisors³ denied access to the Vancouver stores to Local 555's representatives and asked them to leave the Respondent's property. In a letter dated July 13, the Respondent again noted Local 555's conduct, including attempts to pass out authorization cards to employees, and again advised Local 555 that its conduct violated the Respondent's no-solicitation policy. The Respondent reiterated that Local 555 had already been so advised in the Respondent's May 1 letter and orally "on a number of occasions in the past year," and complained that a Local 555 representative visiting one store had stated that he was in the store with the permission of the Respondent's labor relations manager. The Respondent stated that "union representatives are prohibited from entering our parking area as well as our stores."

About October 25, the director of one of the Vancouver stores requested the Local 555 representatives to leave the exterior areas of that store, denying them access to the employees. In a letter to Local 555 dated November 29, the Respondent stated that "union representatives were not permitted to be on Store Nos. 580 and 581 [Vancouver stores] private property for the purpose of union organizing, since this constituted a direct violation of [the Respondent's] no solicitation policy." The Respondent reviewed some incidents of trespassing by Local 555 representatives, including incidents of "alleged shopping." The Respondent then notified Local 555 that it would go to the police if Local 555's representatives sought access to Vancouver stores for any reason whatsoever.

Local 555 represents the meat department employees at three of the Respondent's Oregon stores. In a letter dated February 27, 1996, the Respondent noted that Local 555 representatives recently visited those three stores attempting to distribute union literature to nonrepresented employees. The Respondent stated that the contract allowed Local 555 representatives to be present at the stores to investigate "the standing of employees," but that the visits made by Local 555 representatives to the nonrepresented employees were not covered by the contract, and violated the Respondent's no-solicitation policy. The Respondent warned Local 555 that should those visits continue, the Respondent would have the police

³ All of the Respondent's representatives in these cases were supervisors within the meaning of Sec. 2(11) of the Act and/or acted as the Respondent's agents within the meaning of Sec. 2(13) of the Act.

evict Local 555 representatives from the stores, and would also revoke the contractually privileged visits.

The Respondent has no bargaining relationship with Local 582. Between November 1 and January 26, 1996, Local 582 conducted an economic strike against Broadview Dairy of Spokane, Washington. By letter dated November 7, Local 582 informed the Respondent about its intention “to distribute literature at entrances to your establishments” in order to garner the support of consumers by asking them not to purchase Broadview Dairy products sold by the Respondent. On November 22 Local 582’s attorney and business representative spoke by telephone with the Respondent’s labor relations representative Mark DeMeester. DeMeester stated that the Respondent would summon the police, if necessary, to evict Local 582 representatives who entered the Respondent’s property to distribute leaflets at the entrances of the Respondent’s stores.

During late November and early December, Local 582 representatives attempted to distribute handbills to the customers of the Respondent’s Spokane area stores. The handbills urged the Respondent’s customers not to buy Broadview Dairy products sold by the Respondent.⁴ In each instance, the Respondent’s representatives ordered the Local 582 representatives to leave the Respondent’s property and at four of the six stores summoned the police to assist in evictions. At three of the stores, Salvation Army bellringers operated unimpeded while the Respondent was evicting the Local 582 representatives.

B. Issue

The issue is whether the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a no-

⁴ Local 582 commonly used the following handbill. Any others used were not materially different.

CONSUMER
BOYCOTT
BROADVIEW DAIRY
TEAMSTERS LOCAL 582
PLEASE DON'T BUY
JANET LEE MILK-TWIN-PAK GALLONS
ALBERTSON'S MILK-GALLONS
BROADVIEW DAIRY PRODUCTS
BROADVIEW DAIRY IS OFFERING WAGES AND
BENEFITS FAR BELOW THE INDUSTRY
STANDARDS.
UNTIL BROADVIEW OFFERS A PACKAGE THE
WORKERS CAN ACCEPT, WE ASK YOUR SUPPORT
BY NOT PURCHASING THESE PRODUCTS.
THANK YOU, TEAMSTERS LOCAL 582
THE UNION'S DISPUTE IS WITH BROADVIEW ONLY, IT HAS
NO DISPUTE WITH ALBERTSON'S. THE UNION ENCOURAGES
YOU TO SHOP HERE, AND ASKS ONLY THAT YOU NOT
PURCHASE THE ABOVE PRODUCTS. THE UNION ALSO IS
NOT SEEKING TO INTERRUPT ANY DELIVERIES TO THIS
STORE OTHER THAN DELIVERIES FROM BROADVIEW
DAIRY.

solicitation rule which forbade the Local 555 and 582 representatives from entering the immediate exterior, and its surroundings, of certain of the Respondent’s stores (1) to solicit the Respondent’s employees to seek representation by Local 555; and (2) to solicit the Respondent’s customers to boycott products sold by the Respondent but produced by another employer with whom Local 582 had a labor dispute.

C. Contention of the Parties

The General Counsel contends that the solicitation allowed by the Respondent at the designated stores far exceeded “a small number of isolated beneficent acts”;⁵ and that, therefore, the Respondent disparately enforced its no-solicitation rule when it excluded the representatives of Locals 555 and 582 from the stores and discriminated against them within the meaning of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).⁶

The Respondent contends that the charitable solicitation it allows on its property is not similar to the solicitation which the representatives of Local 555 and 582 seek to engage in on its property and, therefore, the Board’s disparate treatment/discrimination analysis is inapplicable. The Respondent notes that the Supreme Court found no “similarity of character” between unions on the one hand, and charitable, civic, and church organizations on the other hand in *Perry Education Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 48 (1983). The Respondent contends that not only are Locals 555 and 582 dissimilar in character from the charitable, civic, and educational groups which the Respondent allowed to solicit on its property, but also the Respondent excluded from its property all political groups, unfamiliar charitable organizations, and noncharities seeking selling opportunities. Hence, the Respondent argues, there was no discrimination based on Section 7 activities when the Respondent excluded the representatives of Local 555 and 582 from its property.⁷ The Respondent also contends that the Local 582 representatives were seeking to communicate with the Respondent’s customers rather than its

⁵ *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982).

⁶ The General Counsel cites *Schear’s Food Center*, 318 NLRB 261 (1995); and *Be-Lo Stores*, 318 NLRB 1 (1995).

Local 555 filed a brief in support of the General Counsel in Cases 36-CA-7701 and 36-CA-7763. Local 555 generally repeats the General Counsel’s contentions and cites *Big Y Foods*, 315 NLRB 1083 (1994); and *Great Scot, Inc.*, 309 NLRB 548 (1992), enf. denied on other grounds 39 F.2d 678 (6th Cir. 1994).

⁷ The Respondent further cites those cases where appellate courts declined to enforce Board orders in access cases. See *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996); *Riesbeck Food Markets v. NLRB*, 91 F.3d 132 (4th Cir. 1996); *NLRB v. Payless Drug Stores Northwest*, 57 F.3d 1077 (9th Cir. 1995); *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995).

employees and that therefore any question of statutory discrimination is irrelevant.

D. Discussion

The Supreme Court stated in *Babcock & Wilcox* that “an employer may validly post his property against non-employee distribution of union literature . . . if [it] does not discriminate against the union by allowing *other* distribution.” 351 U.S. 105, 112 (1956) (emphasis added).⁸ Subsequently, in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Court characterized the *Babcock & Wilcox* holding as establishing a general rule that an employer is entitled to bar nonemployee union organizers from his property.⁹ The Court did not, however, disturb the “discrimination” exception articulated in *Babcock & Wilcox*, recognizing that this general rule does not apply where it is shown that “the employer’s access rules discriminate against union solicitation.” 502 U.S. at 535 (quoting *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978)). In cases decided after *Lechmere*, the Board has frequently relied on the “discrimination exception” in finding that an employer violates 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.¹⁰

⁸ The instant case raises only the question of whether the Respondent violated the Act by discriminatorily denying the Unions’ access to its premises. There is no allegation that the denial of access violated the Act on the grounds that the Respondent did not possess a sufficient property interest in its premises at any of the stores involved in this proceeding to entitle it to deny access.

⁹ In *Leslie Homes*, 316 NLRB 123 (1995), *affd.* sub nom. *Dist. 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*.

Member Liebman did not participate in *Leslie Homes* or *Loehmann’s Plaza* and has not passed on the proper test to be applied in access cases involving nonorganizational Sec. 7 activity. She finds it unnecessary to do so in this case as she also agrees that the Respondent’s denial of access was unlawful under the discrimination exception.

¹⁰ E.g., *Sandusky Mall Co.*, 329 NLRB 618 (1999); *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); *Davis Supermarkets*, 306 NLRB 426 (1992), *enfd.* 2 F.3d 1162 (D.C. Cir. 1993).

The Board¹¹ has consistently found an employer that denies a union access to its property while regularly allowing other individuals, groups, and organizations to use its premises for various activities unlawfully discriminates against union solicitation. *Sandusky Mall Co.*, 329 NLRB 618, 620 (1999), and cases cited therein. This definition of discrimination “is consistent with what is accepted in cases identified in *Babcock & Wilcox* as containing elements of ‘discrimination.’”¹² Further, where other nonemployee solicitation is frequently allowed, the fact that much of that solicitation is charitable or otherwise noncontroversial does not preclude a finding of discrimination against union solicitation.¹³

In the instant case, the Respondent allowed various organizations to have regular and frequent access to the immediate exterior of its stores to solicit both employees and customers in fund-raising endeavors. As the facts show, Salvation Army bellringers solicited donations for about a month annually. In addition, youth and student groups, and veterans groups engaged in the same activity for periods ranging from a few days to a fortnight or an entire month. We find that the solicitation permitted by the Respondent in the immediate exterior of its store ex-

¹¹ Discrimination was not actually present in either *Babcock & Wilcox* or *Lechmere*. In *Babcock & Wilcox*, the employer asserted that it maintained a consistent policy of refusing access to all kind of pamphleteering and the Board found that the local Chamber of Commerce, the Odd Fellows, and a church had been denied permission to distribute literature. 109 NLRB 485, 492 (1954). In *Lechmere*, the Court noted that the employer “prohibited solicitation or handbill distribution of any kind on its property” and “consistently enforced this policy against, among others, the Salvation Army and the Girl Scouts.” 502 U.S. at 530 fn. 1. The Board made similar findings. *Lechmere, Inc.*, 295 NLRB 92, 97–98 (1989).

¹² *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.

¹³ *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 230–232 and 239 fn. 1 (1949) (upholding Board’s finding that a union had been discriminatorily denied the use of a meeting hall based on evidence that the hall had been used for church banquets, meetings of a “Ladies Aid” society, and a school Christmas party); *Lucile Salter Packard Children’s Hospital v. NLRB*, 97 F.3d 583, 589–590 & fn. 8 (D.C. Cir. 1996) (upholding Board’s finding of discrimination where both commercial and charitable solicitations were frequently permitted); and *Price Chopper*, 325 NLRB 186, 188 (1997) *enfd.* sub nom. *Four B Corp. v. NLRB*, 163 F.3d 1177, 1184 fn. 6 (10th Cir. 1998) (finding discrimination where Salvation Army and Shriners were allowed to solicit contributions several times per week, a community group sold tickets once for a pancake supper, and Cub Scouts once sold mugs or cups).

ceeds the small number of isolated beneficent acts that the Board regards as a narrow exception to an otherwise valid, nondiscriminatory no-solicitation policy.¹⁴ Contrary to our dissenting colleague, we decline to expand this narrow exception to hold that an employer may lawfully justify the restriction of union solicitation on the grounds that it permits only charitable solicitation. Such an expansion would contradict the language of the Supreme Court in *Babcock & Wilcox* and the Board's consistent interpretation of that language.¹⁵ Accordingly, we find that the Respondent's disparate enforcement of its no-solicitation rule against the representatives of Locals 555 and 582 violated Section 8(a)(1) of the Act.¹⁶

In so finding, we are mindful of the Supreme Court's decision in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983). But, as we have stated in prior cases, it does not require a contrary result. *Be-Lo Stores*, 318 NLRB 1 at 11 (1995), enf. denied 156 F.3d 268 (4th Cir. 1997). Contrary to the suggestion of the Respondent and our dissenting colleague, the Court's holding in that constitutional case¹⁷ does not govern the statutory issues pre-

¹⁴ See *Sandusky Mall*, supra, slip op at 4 and fn. 14 (citing *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982)). See also *Price Chopper*, supra, 325 NLRB 186 at 188 (1997) (finding that exceptions made by the respondent to its no-solicitation policy were too extensive to enable the respondent to deny access to the union on similar terms under *Hammary*).

¹⁵ It is possible, as our dissenting colleague suggests, that some employers may choose to prohibit all solicitation on their property to keep the union out. We have been given no reason to believe, however, that this has or will become a common practice. In any event, it would be inconsistent with the protections of Sec. 7 to permit an employer to prohibit pronoun solicitation on its property while at the same time allowing a wide variety of other types of solicitation, charitable or otherwise. An employer's judgment of worthiness of purpose cannot claim priority over the statutory guarantee provided for union solicitation.

¹⁶ With respect to Local 582's area standards activity, we reject the Respondent's argument that the D.C. Circuit Court of Appeals decision in *Davis Supermarkets v. NLRB*, 2 F.3d 1162 (1993), cert. denied 511 U.S. 1003 (1994), requires a contrary result. The court suggested, in dicta, that communications by nonemployee union agents with customers do not involve employee rights. 2 F.3d at 1177. We note, however, that a union's peaceful area standards activity is protected by Sec. 7 of the Act. See *Sears, Roebuck & Co. v. San Diego County District Council Carpenters*, 436 U.S. 180, 206 fn. 42 (1978). When a union advises customers to boycott an employer because the employer does not pay union wages and benefits, the union's conduct benefits employees of unionized employers. The Respondent does not contest the validity of Local 582's area standard objective.

¹⁷ The Court held, first, that a school's mail system did not become a "limited public forum" for First Amendment purposes simply because the schools allowed groups such as the YMCA, Cub Scouts, and other civic and church organizations to use it. 460 U.S. 37 at 47. In dicta, the Court noted that, even if the mail system did constitute a "limited public forum" because these charitable and civic organizations were granted access, "the constitutional right of access would in any event extend only to entities of a similar character." *Id.* at 48.

sented in this case. At issue here is whether the Respondent has interfered with employees' statutory rights under Section 7 of the Act. The Court's reference in dicta to "entities of a similar character" addresses the question of First Amendment access to a "limited public forum." In *Babcock & Wilcox*, as noted above, the Court explicitly addressed the interplay of employees' Section 7 rights and employer's property rights and found discrimination where an employer prohibited union distribution and permitted "other distribution."

The Respondent and our dissenting colleague also argue that the Respondent is not discriminating against union activity, but is prohibiting all solicitation by political groups, "unfamiliar charitable organizations," and non-charities seeking selling opportunities. We find no merit in this argument. As the Board stated in *Sandusky Mall*, such a policy "amounts to little more than an employer permitting on its property solicitation that it likes and forbidding solicitation that it dislikes." 329 NLRB 618, 622 (quoting *Reisbeck Markets*, 315 NLRB 940, 942 (1994), enf. denied 91 F.3d 132 (4th Cir. 1996) (unpublished decision)).¹⁸ By lumping union solicitation with other solicitation by unfamiliar charitable organizations, political groups, or non-charities seeking sales opportunities to which it has denied access, the Respondent ignores the fact that the Act does not protect those nonunion activities. In the instant case, by exercising its discretion to pick and choose the type of solicitation it likes, the Respondent is able to permit a wide variety of solicitations while banning union-related solicitation outright. We find that such a policy cannot be squared

¹⁸ Although we continue to adhere to the Board's decision in *Reisbeck*, we note that the facts of that case are distinguishable. In *Reisbeck*, 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 prohibiting 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 business that it effectively is able to prohibit all union solicitation directed at customers or the public even though it allows other solicitation. Further, the instant case involves both an organizing campaign by Local 555 at the Respondent's Vancouver stores and three of the Respondent's Oregon stores as well as an appeal to consumers by Local 582 at the Respondent's Spokane area stores. In this consumer appeal, although Local 582 asks consumers not to purchase certain Broadview Dairy products, the handbills also state that "the union encourages you to shop" at the Respondent's stores.

The dissent also relies on *Guardian Industries v. NLRB*, 49 F.3d 317 (7th Cir. 1995), in which the court found that the employer had not unlawfully discriminated against union solicitation by maintaining a policy allowing only "swap and shop" notices to be posted on its bulletin board and refusing to allow the posting of notices of union meetings as inconsistent with this policy. No such neutral policy is at issue in this case where the Respondent has permitted a broad range of activities but prohibited union activity. See *Be-Lo Stores*, 318 NLRB at 11-12.

with *Babcock & Wilcox* or the protections of Section 7 of the Act.

Accordingly, we find that an employer may not justify discrimination against labor organizations in allowing access to its property on the ground that it does so only in favor of familiar charitable organizations, and excludes unfamiliar charities, political groups, and noncharities seeking selling opportunities, without discriminating under *Babcock & Wilcox*. Therefore, we find that the Respondent has violated Section 8(a)(1).

CONCLUSION OF LAW

By ordering the representatives of Locals 555 and 582, who were engaged in peaceful soliciting protected by the Act, to leave the immediate exterior of its stores 230, 233, 235, 240, 246, 248, 580, 581, 587, 588, and 589, and by causing the police to remove the representatives of Locals 555 and 582 from these properties in some instances, the Respondent has violated Section 8(a)(1) 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.

ORDER

The National Labor Relations Board orders that the Respondent, Albertson's, Inc., Spokane and Vancouver, Washington, and Bend and Redmond, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Ordering the representatives of Locals 555 and 582 who are engaged in peaceful soliciting protected by the Act to leave the immediate exterior in front of its stores 230, 233, 235, 240, 246, 248, 580, 581, 587, 588, and 589, and causing the police to remove the representatives of Locals 555 and 582 from these properties.

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

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

(a) Within 14 days after service by the Region, post at stores 230, 233, 235, 240, 246, 248, 580, 581, 587, 588, and 589 copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Directors for Region 19 and Subregion 36, after being signed by the Respondent's authorized representa-

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."

tive, shall be posted by the Respondent 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 November 27, 1995.

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

MEMBER HURTGEN, dissenting.

I do not agree that Respondent discriminated against employees *based on union or other Section 7 activity*.¹

The National Labor Relations Act protects union activity. Thus, a policy or practice which differentiates on the basis of such activity is unlawful. On the other hand, a policy or practice which differentiates on some other basis is not unlawful.

My colleagues say that the Act forbids access rules which "discriminate" against solicitation. However, the fact is that the Act does not broadly forbid access rules which discriminate against solicitation. It forbids "access rules [which] discriminate *against union solicitation*" (emphasis added). *Lechmere v. NLRB*, 502 U.S. 527, 535 (1992).

My colleagues also assert that the Respondent simply chooses to permit what it likes and to forbid what it dislikes. The answer to this contention is that, under the Act, an employer is free to make this choice. If it "likes" solicitations for the American Cancer Society, but "dislikes" solicitations to combat AIDS, it can permit solicitation by the former and forbid it by the latter. Similarly, the Act does not forbid employer exercise of discretion. To repeat, the Act's prohibition is against discrimination based on union activity. I show below that Respondent did *not* discriminate on the basis of union solicitation.

In the instant case, Respondent has drawn a line between (1) solicitations by charitable groups which are well known to the community and (2) solicitations by political groups, commercial groups which seek to sell goods or services, and charitable groups which are unknown to the community. Consistent with this distinc-

¹ As the Sec. 7 activity involved herein is union activity, I shall hereafter use this phrase.

tion, Respondent permits solicitation by the former groups and denies permission sought by the latter groups.

Under this policy, the Union is not permitted access. It is not seeking charitable contributions. Rather, it seeks to persuade Respondent's employees to "buy" its representational services, and it seeks to persuade Respondent's customers to assist it in its economic battle with Broadview Dairy, i.e., to persuade them not to buy Broadview Dairy's products.

Clearly, the line drawn by Respondent is not an anti-union line. If a nonunion organization (e.g., group favoring a political candidate) solicited for public support, that would be prohibited under Respondent's policy. By contrast, if a union sought to raise money for the American Cancer Society, that would be permitted under Respondent's policy. In short, the policy is not based on "union" considerations.²

My colleagues condemn this nondiscriminatory policy of Respondent. In their view, if an employer opens its property to groups seeking charitable contributions, that employer must open the property to unions with non-charitable aims. This view is contrary to the public interest. The consequence of this view is that some employers will simply close their doors to charitable groups. The public, and (more importantly) the beneficiaries of the public's largesse, would suffer.

It is no answer to say that Board law has an exception for "a small number of isolated beneficent acts."³ In the first place, the phrase is not a model of clarity, and employers will be uncertain as to the parameters of that fuzzy line. I fear that some will err on the side of caution, and will not permit any beneficent acts. We should encourage employers to be as generous as they wish with respect to allowing access for beneficent acts. As discussed above, my approach is in the public interest, and it does not discriminate against unions.

In any event, my colleagues refuse to give Respondents the benefit of the exception mentioned above. They say that Respondent has exceeded the number of permissible acts. However, in my view, Respondent has not done so. As discussed above, *all* of its actions have been nondiscriminatory.⁴

As I noted in my dissenting opinion in *Sandusky Mall Co.*, 329 NLRB 618, 623 (1999), my position has been upheld by the courts. In *Riesbeck Food Markets*, 315

NLRB 940 (1994), *enf. denied* 91 F.3d 132 (4th Cir. 1996), the employer differentiated between solicitations (permitted) and appeals for a boycott (forbidden). Thus, a union could solicit employees for membership, and a nonunion organization (e.g., NAACP) could not ask for a boycott. Since the employer did not differentiate along union lines, the Fourth Circuit held that Respondent's policy was not unlawful.

Similarly, in *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995), the employer differentiated between "swap and shop notices" (permitted) and announcements of meetings (forbidden). Thus, anyone could post a "swap and shop notice," and no-one (unions or other organizations) could announce a meeting. Since the policy did not differentiate along union lines, the Seventh Circuit held that the policy was not unlawful.

In *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996), the Sixth Circuit went even further. It held that the term "discrimination," as used in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), is confined to situations where the employer favors one union over another, or allows employer-related information while barring similar union-related information. Thus, it would appear that, in the Sixth Circuit, an employer would not violate the Act even if it allowed the NAACP to solicit for membership and denied a union the opportunity to do so.

I need not go as far as the Sixth Circuit. Rather, consistent with more limited views of the Fourth and Seventh Circuits, I find no unlawful discrimination in the instant case.

Perry Education, Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983), adds further support to my view. The case arose in the public sector, and thus, constitutional considerations were involved. However, the Court found that the school mail facilities were not a "limited public forum," just as the Respondent's private property here is not a public forum. The Court permitted the school administrators to exclude a union from the mail facilities, even though such facilities were generally open to groups like the Girl Scouts and the Boys' Club. Surely, if this disparity is permitted under the strict scrutiny of constitutional considerations, a fortiori it would be permitted under the statutory considerations of the National Labor Relations Act.⁵

Finally, the majority argues that union activity cannot be lumped with other banned activities because the former are protected by the Act. The argument has no merit in this case. It is undisputed that the nonemployee union agents had no *right* to go on the Respondent's premises. They had only the right to be free from antiunion discrimination.

² There is no allegation or evidence that Respondent formulated its rule with an antiunion motive, i.e., that it intentionally rigged its rule to keep out unions. As noted above, if a union sought to raise money for the Cancer Society, it would be permitted to do so.

³ *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982).

⁴ In view of this, my colleagues are incorrect in saying that I seek to expand the exception.

⁵ My colleagues appear to suggest that discrimination under the Act has a stronger meaning than discrimination under the Constitution. I do not agree.

In sum, Respondent has drawn a permissible line, i.e., one that is not condemned by the Act. The Union falls on the forbidden side of the line, i.e., it is not a charitable organization. Accordingly, there is no violation of the Act.

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 order the representatives of United Food and Commercial Workers Union, Local 555 affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC, and Driver Salesmen, Warehousemen, Foodhandlers, Clerical and Industrial Production, Local 582 affiliated with International Brotherhood of Teamsters, AFL-CIO, who are engaged in peaceful soliciting protected by the Act, to leave the immediate exterior of our stores 230, 233, 235, 240, 246, 248, 580, 581, 587, 588, and 589, and WE WILL NOT cause the police to remove the representatives of Locals 555 and 582 from these properties.

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.

ALBERTSON'S, INC.