Waremart Foods d/b/a Winco Foods, Inc. *and* Local 588, United Food and Commercial Workers Union. Case 20–CA–29332

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On September 25, 2000, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in opposition, and the Respondent filed a reply brief.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

We agree with the judge, for the reasons set forth in his decision, that the Respondent violated Section 8(a)(1) of the Act by prohibiting nonemployee union representatives from engaging in consumer handbilling at the Respondent's Chico, California store. Critical to that conclusion was the judge's finding that, under California property law, the Respondent did not have a right to exclude union representatives from its property. *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 25 Cal. 3d 317 (1979). The Respondent contends, however, that California law itself is invalid because it (1) is preempted by the Act, (2) constitutes a denial of equal protection of the laws, in violation of the Fourteenth Amendment, and (3) constitutes a taking of property without just compensation, in violation of the Fifth Amendment. We reject these arguments for the reasons set forth below.

The Respondent asserts that the ability to exclude nonunion representatives from its property is the kind of economic weapon that Congress intended to be available to employers and thus is not subject to regulation by the States. Accordingly, the Respondent contends that the State's attempt to deprive it of that right is preempted under *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).[3] We reject that contention. As the judge noted, the Supreme Court has specifically stated that "The right of employers to exclude union organizers from their private property emanates from State common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 fn. 21 (1994). That statement defeats the Respondent's contention that *Machinists*, in effect, gives employers the right to exclude nonemployee union representatives regardless of State property and trespass law.

The Respondent also contends that California law violates the equal protection clause of the Fourteenth Amendment by giving unions, but not other organizations, access to employers' private property. At the outset, we believe that there is a serious question whether the Respondent has standing to raise an equal protection argument, presumably on behalf of groups that do not enjoy the access privilege under State law. But, even assuming that the Respondent could establish standing, it has not established its equal protection claim. "When interpreting State law, we are bound by the decisions of a State's highest court." *NLRB v. Calkins*, 187 F.3d at 1088. The Respondent has cited to no California authority sustaining an equal protection claim against this Sate property law, and we decline the Respondent's invitation to independently evaluate the constitutionality of the State law.

Essentially for the same reason, we reject the Respondent's Fifth Amendment "taking" argument. In any event, the Respondent has demonstrated no "taking" of its property. Cf., *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83–84 (1980) (rejecting "taking" argument). In fact, the Respondent has not even alleged that the value of its investment in the Chico store has been diminished as a result of California's policy of affording access to unions.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Board has taken administrative notice of recent decisions of the Supreme Court of California in *Golden Gateway Center v. Golden Gateway Tenant's Assn.*, 26 Cal. App. 4th 1013 (2001), and the California Court of Appeal, Third District, in *Young v. Raleys*, 89 Cal. App. 4th 476 (2001), and *Waremart, Inc., v. Progressive Campaigns, Inc.*, 85 Cal. App. 4th 679 (2000), pursuant to the Respondent's request. We find that they are inapposite to this case, as they address the right to engage in political speech pursuant to the free-speech provision of the California constitution. These cases do not involve union activity cognizable under the National Labor Relations Act, 29 U.S.C. Sec. 151–169. We agree with the judge that California cases arising in the context of such political expressive activities have "little if any relevance to cases arising in the context of labor-based expressive activities." Accordingly, we deny the Respondent's request that the Board hold in abeyance any action on the instant case pending review by the California Supreme Court of the lower court decisions in *Young v. Raleys* and *Waremart, Inc., v. Progressive Campaigns, Inc.*, supra.

[2] There were no exceptions to the judge's recommended dismissal of the complaint's allegations involving union activity at the Respondent's Redding store.

[3] The Respondent also argues that the California property law is preempted by *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). For the reasons fully discussed by the judge, we reject this argument. See also *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000), which squarely rejects this argument.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Waremart Foods d/b/a Winco Foods, Inc., Chico, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

William A. Baudler, Atty., for the General Counsel.
Mark Ross and *Christopher J. Pirrone, Attys. (Seyfarth, Shaw, Fairweather & Geraldson)*, of San Francisco, California, for the Respondent.
Timothy Sears, Atty. (Davis, Cowell & Bowe), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. The ultimate issue here is whether the owner of a warehouse supermarket chain violated Section 8(a)(1) by prohibiting nonemployee union agents from peacefully distributing consumer boycott handbills on the premises of one of its California supermarkets.

Based on a charge filed by Local 588, United Food and Commercial Workers Union (Union or Local 588), on September 30, 1999,[1] the Regional Director for Region 20 of the National Labor Relations Board (NLRB or Board), issued a complaint on October 21, 1999. The complaint alleges that Waremart Foods, d/b/a Winco Foods, Inc. (Winco or Respondent), violated Section 8(a)(1) of the National Labor Relations Act (Act), by prohibiting union agents and members from peacefully handbilling in front of its supermarket stores at Chico and Redding, California, on April 14 and 15, respectively, and threatening the handbillers with arrest if they refused to cease handbilling. Respondent denies engaging in the unfair labor practices alleged.

Upon the consideration of the entire record and the briefs filed by the General Counsel and the Respondent, I have concluded that Respondent engaged in the unfair labor practice alleged as to the Chico facility but that the General Counsel failed to prove Respondent engaged in an unfair labor practice at the Redding facility on the basis of the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, an Idaho corporation, owns and operates retail supermarkets in various California cities, including Chico and Redding, the only stores involved here. During the 12-month period ending April 30, Respondent derived gross revenues in excess of $500,000 each from the operation of its Chico and Redding stores. During the same period it purchased and received at its Chico and Redding stores, goods valued in excess of $50,000 directly from outside the State of California. Based on the foregoing, I find that Winco is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that Local 588 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Chico store, located at 2060 East 20th Street in that city, stands alone adjacent to its parking lot on a 10.45-acre parcel. Winco owns the property and is its sole user. The building contains 79,324 square-foot of floor space, including 55,786 square feet of selling space open to the public for grocery shopping during normal business hours. The parking lot has space for nearly 500 automobiles. The property boundaries include East 20th Street, Forest Avenue, and Springfield Drive. Customers can only enter the store from the parking lot, rather than any public sidewalk. The parking lot has two vehicle entrances, one off Forest Avenue and the other off 20th Street. Winco maintains a 35-foot-wide "safety zone" between the parking lot and the sidewalk abutting the store's public entrances. The store averages about 27,500 register transactions weekly albeit some of those transactions are by the same customers.

The Redding store, located at 1345 Churn Creek Road, is part of a larger shopping center with several strip stores and a parking lot for use by customers of all stores. It too has a 35-foot-wide "safety zone" painted on the pavement in front of the store between the parking lot and the front sidewalk.

No evidence shows that Respondent has posted either of the two properties involved for the purpose of restricting access for limited purposes or to warn the public against engaging in particular activities while on the premises. The Chico store manager provided a sworn statement (R. Exh. 5), in another proceeding admitting that Respondent had tolerated the sale of Girl Scout cookies outside the entrances to that store for a short period after it initially opened but otherwise Respondent has strictly prohibited solicitors for political causes to engage in activities at the store premises. Indeed, on two occasions, Respondent has petitioned for and received injunctions from the Butte County Superior Court prohibiting professional initiative solicitors from soliciting Respondent's customers to sign initiative petitions as they entered and left the store. See *Waremart, Inc. v. Discovery Petition Management*, Case No. 121900 (R. Exhs. 6 and 7); *Waremart, Inc. v. Voter Revolt*, Case No. 119919 (R. Exh. 8). Whenever solicitors attempt to conduct their activities on store property, Respondent's managers initially attempt to identify and photograph the solicitors.

B. The April Handbilling

Six or seven Union agents and members peacefully distributed handbills to shoppers entering and leaving the aforedescribed Winco stores on April 14 and 15. Without question Local 588 conducted the handbilling on Respondent's private property at both locations. Neither Respondent nor any entity contracting to do business with the Respondent employed any of the handbillers. The handbilling did not cause any employee to cease work nor did it cause any disruption of deliveries and pickups.

[1] All further dates refer to the 1999 calendar year, unless shown otherwise.

Local 588 officials authorized this handbilling to encourage consumers to shop at unionized stores rather than Winco because they believed that "the standards in the industry [were] set by contracts negotiated through the United Food and Commercial Workers in Northern California, and [Winco] ha[d] no such contracts." Darin Ferguson, the union agent who supervised these handbilling activities, also claimed that Winco did not pay "their people what everyone else [was] making," nor did Winco "provide the benefits that everybody else receive[d]." At least one of the handbills (Local 588 Handbill, below), contains a message consistent with Ferguson's claim. It states:

Local 588 Handbill

> PLEASE DO NOT SHOP WINCO FOODS. The owner of this market is not a friend of this community. Winco Foods has set out to destroy the wages, hours, and working conditions of food store workers in this area.
>
> We request that you spend your hard-earned dollars with a fair-minded food market that operates under a UFCW union contract. Albertsons, Bel Air, Super Saver, Safeway, Raley's, Food Outlet, Rite Aid.
>
> Thank you for your support. UFCW 588 NORTHERN CALIFORNIA. [General Counsel Exhibit 10].

The handbillers distributed two other handbills at both locations that make similar appeals on behalf of an entity named "Mothers Against Winco" (MAW). The MAW handbills make no reference to Local 588 or to a dispute between Local 588 and Winco. Both Ferguson and Michael Gentry, a Local 588 agent in the Chico area, exhibited considerable reluctance to provide information about MAW and its relationship to Local 588. Their posturing concerning MAW coupled with the failure of the Charging Party's counsel—who also entered an appearance on behalf of MAW—to provide any explanation whatsoever leads me to suspect that MAW amounts only to a phantom created by Local 588 strategists to appeal to those consumers who might be sympathetic to working mothers but not to traditional union boycott pleas. No evidence shows that MAW is a labor organization within the meaning of the Act. Regardless, the MAW handbills contain the following messages:

MAW Handbill 1

> (Front side) Mothers Against Winco Urge You To Shop at Stores That Treat Their Workers Right! Endorsed for fair treatment of working people. Albertsons, Lucky Stores, Safeway, Rite Aid.[2] The Coalition Against Exploitation of Working Mothers. [GC Exh. 9.]
>
> (Backside) You do the math 2 + 2 = Exploitation of Winco Workers. A mother working for Winco makes less than $10,000 a year.* These are poverty wages. *Based on an average of 25 hours per week at Winco's starting wage. [GC Exh. 8]

[2] The address of each store was also listed on the handbill underneath the respective store name. They have been omitted here as a matter of convenience.

MAW Handbill 2

> M.A.W. says . . . STOP WINCO From: Lowering community standards, Exploiting working mothers, Spying on citizens, Funneling dollars out of the community, Misleading the public. *PLEASE* DO NOT SHOP WINCO FOODS. The Coalition Against Exploitation of Working Mothers. [GC Exh. 7][3]

The handbilling at Chico commenced at approximately 3 p.m. on April 14. Three union representatives (Ferguson, Gentry, and Terry Kilmire, a new Local 588 agent), and four volunteers from the Union's membership in the Chico area conducted it. Before the handbilling started, Ferguson provided instructions to the handbillers about the manner in which they were to conduct themselves and the locations where they were to be stationed. Approximately three or four handbilled immediately in front of the stores and two or three positioned themselves at the edge of the safety zone adjacent to the parking lot. No evidence indicates that any of the handbillers blocked entrances, impeded customers or were the least bit discourteous.

About 15 minutes after the handbilling began, Chico Store Manager Richard Bryant came out of the store and spoke initially to Gentry. Seeing that, Ferguson approached Bryant and Gentry and overheard Bryant tell Gentry that they "were trespassing" and if they did not leave he would call the police to have the handbillers removed. The handbillers ignored that request. Bryant then returned to the store and telephoned Fred Andre, Chico's city code enforcement officer. Based on Bryant's report, Andre opined that the Union had no lawful right to handbill in front of the store and recommended Bryant call the police if the handbilling continued. Bryant then went back to Gentry's location outside, informed Gentry of Andre's advice, and again requested, without success, that the handbilling cease.

Bryant next called a Chico police dispatcher and requested police assistance to stop "people on my property who were handing out leaflets." By about an hour after the handbilling began, the first Chico police officer arrived at the premises. In separate conversations, Bryant told the officer that he did not "want them handing out the leaflets on our property" and Ferguson asserted to the officer that the Union had certain "privileges" under the labor laws that permitted them to handbill. For this reason, Ferguson suggested to the officer that he speak first with his desk sergeant before taking further action. Nothing further occurred until shortly after 5 p.m. when Chico police sergeant Fred Potter arrived at the scene. Although Potter initially told Bryant that the union representatives had the right to handbill, he later informed Ferguson that the Company in-

[3] Based on store manager Richard Bryant's testimony, Respondent contends that Local 588 distributed only this handbill at Chico. I reject that claim and credit Ferguson's testimony on this point. At best, Bryant's testimony permits only the conclusion that, when he asked for a handbill, he was provided with this particular handbill. Moreover, I would be reluctant to credit Bryant otherwise in view of his apparent conclusion that the handbill constituted advertising for other businesses in violation of a local Chico ordinance. Unlike the other two handbills that specifically name other supermarkets, this handbill only asks customers to refrain from shopping at the store they were about to enter.

sisted that he stop the handbilling and that "You guys are either going to have to go or I'm going to be forced to arrest you."[4] Because the handbilling by then had gone on for as long as originally planned, the Union agents and their volunteers complied with Potter's request and left.

At approximately 3 p.m. the following day, Ferguson, Kilmire, Redding area union agent Brett Slesser, and three or four volunteers from the Union's membership handbilled at the Winco store in Redding.[5] About 40 minutes after this handbilling commenced, a woman wearing a Winco uniform came out of the store, spoke with Kilmire briefly and then approached Ferguson. She identified herself as the head clerk or, perhaps, head clerk in charge, and told Ferguson that the handbillers were trespassing and that she would call the police if they did not leave immediately. The woman then returned to the store without further discussion. The handbilling continued without interruption until shortly after 5 p.m., the time established by Ferguson to finish handbilling for the day. No police official ever arrived.

At the time, Respondent employed two females, Charity Borges and Judy Cabral, in a department head capacity at Redding. Pay records and Cabral's testimony establish that both were absent from work on vacation at the time of the April 15 handbilling. The General Counsel never established the actual identity or the capacity of the person who approached Ferguson, accused him of trespassing, and threatened to have him arrested.

C. Further Findings and Conclusions

Ordinarily an employer may bar nonemployee union agents from distributing literature on its property except in the rare cases—not applicable here—involving inaccessible employees. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). While *Lechmere* requires "appropriate respect" for an employer's property rights, the Board does not accord an employer "any greater property interest than it actually possesses." *Bristol Farms*, 311 NLRB 437, 438 (1993). Hence, in nonemployee access cases, the property owner seeking to bar nonemployee union agents engaged in Section 7 activity has the "threshold burden" of establishing that "it had, at the time it expelled the union representatives, an interest which *entitled* it to exclude individuals from the property." *Indio Grocery*, 323 NLRB 1138, 1141 (1997), enfd. *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999).

In California, an employer enjoys no right to exclude nonemployee union representatives engaged in peaceful picketing or handbilling from the premises surrounding a retail establishment. After reviewing the lengthy evolution of this subject in the California courts and in its legislature, the California Supreme Court summarized its definitive holding on this subject in *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 25 Cal. 3d 317 (1979), in the following manner:

> [T]he sidewalk outside a retail store has become the traditional and accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store. Recognized as lawful by decisions of this court, such picketing likewise finds statutory sanction in the Moscone Act, and enjoys protection from injunction by the terms of that act. In such context *the location of the store whether it is on the main street of the downtown section of the metropolitan area, in a suburban shopping center, or in a parking lot, does not make any difference.* Peaceful picketing outside the store, involving neither fraud, violence, breach of the peace, nor interference with access or egress, is not subject to the injunction jurisdiction of the courts. [Emphasis added.]

At first blush, this case appears to be indistinguishable from *Indio Grocery* and *Sears* but Respondent advances several contentions that require discussion.[6] First, Respondent contends that the General Counsel failed to establish that the handbillers here were engaged in activity protected by Section 7. Respondent fashions this argument from its belief that Local 588 handbilled for an "area standard" object. Starting from this premise, Respondent then asserts that no finding may be made that this handbilling is protected by Section 7 because the General Counsel failed to prove that the Union's "area standard" assertion had any basis in fact. This contention lacks any substantial factual support.

Although Ferguson misused the term "area standards" during the course of his testimony, his testimony read in its entirety and in conjunction with the wording of the handbills, particularly Local 588's handbill, merits the conclusion I have reached that this handbilling amounted to nothing other than publicizing a consumer boycott predicated on the undisputed fact that Winco does not have a contract with Local 588.[7] The 8(b)(7)(C) publicity proviso permits precisely this type of publicity unless it causes employees to cease work or it causes persons engaged in commerce to refuse to pick up or deliver goods to the boycotted employer. No evidence shows that this handbilling had that effect. Accordingly, I find that Local 588's handbilling at Chico and Redding was protected by Section 7. *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983); *Indio Grocery*, supra.

Second, Respondent contends that neither Bryant, admittedly its supervisor and agent on April 14, nor any of its Redding supervisors or agents interfered with, restrained, or coerced any

[4] Under Section 142 of the California Penal Code it is a crime for a peace officer to refuse "willfully" to receive or arrest "a person charged with a criminal offense." One California Attorney General's opinion indicates that California peace officers may have no discretion to refuse a citizen's arrest request even where the officer is satisfied that there is insufficient grounds for a criminal complaint against the arrested person. 73 Op. Atty. Gen. Cal. 291 (1990).

[5] MAW Handbill 1 at Redding contained the same message, however the stores it listed varied slightly. It did not list Albertsons or Lucky Stores, but instead listed Raley's. All other stores listed remained the same. (GC Exh. 11.)

[6] As is the case here, the Chula Vista Sears store was a stand-alone retail establishment. *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 17 Cal. 3d 893, 895 (1976).

[7] For what it is worth, the charge which gave rise to this dispute in the first place alleges that Respondent sought to "prevent the peaceful and lawful distribution of handbills informing the employees and the public (including consumers), that the Employer does not have a collective-bargaining agreement with the Union[.]"

of the union agents in violation of Section 8(a)(1). As to Bryant, Respondent contends:

> [H]e simply approached the Union's representatives, told them that their handbilling was in violation of a Chico ordinance banning commercial advertising on private property… and asked them to stop their unlawful activities. When those entreaties failed, Bryant telephoned and sought the police to enforce the Chico ordinance. Moreover, there is virtually no evidence even remotely showing that Winco ever threatened the Union representatives with arrest.

I reject Respondent's contention as to Bryant. Although there is no evidence that Bryant specifically requested that Sergeant Potter or the other policeman arrest any of the handbillers, I am satisfied General Counsel need not provide evidence that specific to prevail. Instead, I find that Bryant, by telephoning the police and expressing his desire that the handbillers be removed from Respondent's Chico property, became responsible for the arrest threat ultimately uttered by Sergeant Potter. Moreover, Bryant's remark to Ferguson that he would call the police and have the handbillers removed is tantamount to a threat to have them arrested.

As to the April 15 Redding incident, Respondent contends that the General Counsel failed to show that "anyone speaking on behalf of the Company or authorized to speak on its behalf" uttered the complained of remarks to Ferguson. In essence, the General Counsel argues that the anonymous person who spoke to Ferguson acted with apparent authority to speak on Respondent's behalf. In support of this contention, the General Counsel points to facts showing that this individual wore a Winco uniform, identified herself as a "head clerk;" conducted herself as someone "having authority to order the union agents and members off of Respondent's premises . . . [in a manner consistent], with Respondent's policy," and the lack of evidence showing that Respondent repudiated that conduct when the Union filed an unfair labor practice charge. I reject General Counsel's argument. Simply put, the General Counsel failed to prove one of the critical elements of a violation in cases of this kind, to wit, the agency status of the person who spoke to Ferguson at Redding. For this reason, I will recommend dismissal of complaint paragraph 7.

Third, Respondent claims, in effect, that the *Babcock/Lechmere* rule establishes the scope of a union's Federal property access rights and an employer's Federal obligations that preempt State law. For this reason Respondent believes that it is improper to rely on State law in determining whether a property owner has an interest sufficient to exclude nonemployee union agents engaged in Section 7 activity on its premises. Seemingly, Respondent asserts that *Babcock* and *Lechmere* expands an employer's property rights, ordinarily determined by State law, to include an absolute right to exclude nonemployee union organizers except where employees are inaccessible, State law notwithstanding. The Ninth Circuit rejected this argument in the *Indio* case.[8] That court provided this explanation of the relationship between State law and the *Babcock/Lechmere* rule:

> At first blush, *Lechmere* appears to create a bright line rule that in all cases, employers may exclude nonemployees from their property (subject to the rare inaccessibility exception). *Lechmere* does not suggest, however, that the NLRA mandates exclusion; the decision simply recognizes that "arguable Section 7 claims do not pre-empt state trespass law." 502 U.S. at 535, 112 S. Ct. 841 (citing *Sears, Roebuck & Co.*, 436 U.S. at 205, 98 S. Ct. 1745). The Court has since clarified this aspect of *Lechmere*, explaining that employers may exclude union organizers in deference to state common law, but not because the NLRA itself restricts access. See *Thunder Basin Coal*, 510 U.S. at 217 n. 21, 114 S. Ct. 771. "The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it." Id., *Thunder Basin Coal* thus makes plain what *Lechmere* left implicit: although the NLRA's protection of Section 7 rights does not trump state property rights, state property law is what creates the interest entitling employers to exclude organizers in the first instance. Where state law does not create such an interest, access may not be restricted consistent with Section 8(a)(1).
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> . . . .
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> Lechmere did not speak to the situation where, as here, an employer's state law property right does not entitle it to exclude organizers. The Board has recognized that in such cases, nonemployees' exercise of Section 7 rights creates no conflict as against any right of the employer. Although an employer's property rights "must be given appropriate respect, an employer need not be accorded any greater property interest than it actually possesses. Thus, the analysis that applies when Section 7 rights and property rights conflict is not appropriately invoked as to an employer that possesses only a property right that, under the law that creates and defines the employer's property rights, would not allow the employer to exclude the individuals." *Bristol Farms*, 311 NLRB at 438 (citing *Johnson & Hardin Co.*, 305 NLRB No. 83 (1991), WL 251699 (1991), enforced in relevant part, *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 241–42 (6th Cir.1995)). Accordingly, "an employer's exclusion of union representatives from private property as to which the employer lacks a property right entitling it to exclude individuals . . . violates Section 8(a)(1), assuming the union representatives are engaged in Section 7 activities." Id.; see also *O'Neil's Markets, d/b/a Food For Less*, 318 NLRB 646, 649, (1995), WL 511396 (1995), *enforced*, 95 F.3d at 738–39.

Accordingly, in view of the clear precedent of the Board (that I am bound to follow), and of the Ninth Circuit where this dispute arose, I reject Respondent's claim that the *Babcock/Lechmere* rule preempts State law in nonemployee access cases.

Fourth, Respondent argues that even assuming that State law applies here, the Butte County Superior Court decisions in the *Voter Revolt* and *Discovery Petition Management* cases estab-

[8] Similarly, it is contrary to the view expressed in the Eighth Circuit's opinion in *O'Neil's Markets v. NLRB*, 95 F.3d 733 (8th Cir. 1996).

lish specifically that Respondent has a right to exclude nonemployee solicitors at its Chico property. This claim lacks merit. *Voter Revolt* and *Discovery Petition Management* were decided by the Butte County Superior Court within the framework and context of the California constitutional right to engage in political expressive activities on the premises of privately owned shopping centers first recognized in *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979). Although the *Pruneyard* and its progeny share some similar characteristics with the line of labor cases culminating in *Sears* decided 6 months after *Pruneyard*, any attempt to apply a *Pruneyard* analysis to the labor cases decided by the California Supreme Court quickly demonstrates the distinctions found in California law between constitutionally protected political activity and statutorily protected concerted activities in support of collective bargaining.

A comparison of *Pruneyard* and *In re Zerbe*, 60 Cal. 2d 666 (1964), one of the earliest labor related access cases in California, illustrates this point. Thus, *Pruneyard* rests solely on a constitutional foundation that seeks to protect speech and associational rights in modern commercial settings on private property that compares to the traditional town center where political expressive activities routinely occur. *Zerbe*, by contrast, reversed the trespass conviction of a union agent who entered on private land of a nonparticipating party in order to picket adjacent to a railroad spur leading to the Chris Craft yacht manufacturing plant where the union was on strike.[9] The court's reversal is based on its perception of California public policy favoring concerted activities in support of collective bargaining and the State's trespass law that exempts peaceful activities permitted by the National Labor Relations Act, in that case, primary picketing. This core *Zerbe* rationale serves as the godfather of all subsequent California Supreme Court labor access decisions through *Sears*, the last definitive word from that court addressing the right of nonemployee union agents to picket or handbill on private property. See *Schwartz–Torrence Investment Corporation v. Bakery and Confectionery Workers' Union, Local No. 31*, 61 Cal. 2d 766 (1964); *In re Lane*, 71 Cal. 2d 872 (1969). As is abundantly clear, *Pruneyard* simply has no application in *Zerbe*-like situations and absolutely nothing in *Pruneyard* even remotely suggests that the California Supreme Court intended to sweep away the protections it had previously accorded labor expressive activities. To the contrary, the Court's *Sears* decision that followed unmistakably applied a significantly different rationale to the labor expressive activities involved there than it earlier applied to the political expressive activities present in *Pruneyard*.

Accordingly, I conclude that California cases arising in the context of political expressive activities that perforce look to *Pruneyard* for resolution have little, if any, relevance to cases arising in the context of labor-based expressive activities. For this reason, I find the prior decisions by the Butte County Superior Court as well as the California court of appeals opinion in the *Trader Joe's* case[10] cited by Respondent inapplicable to this or like cases.

Having concluded that Respondent failed to establish its threshold burden of showing that it had a right under California law to exclude the Local 588's agents from its property, I find that Respondent violated Section 8(a)(1) by prohibiting the Union's handbillers from peacefully distributing consumer boycott handbills at its Chico store on April 14 and by summoning Chico city police to enforce this prohibition.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By prohibiting Local 588 agents from engaging in the peaceful distribution of consumer boycott handbills at its Chico store on April 14, and by summoning the Chico city police to enforce its prohibition, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1).
4. The General Counsel failed to prove that Respondent engaged in any unfair labor practice in connection with Local 588's handbilling at the Redding, California, Winco store on April 15, 1999.
5. The Respondent's unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in a certain unfair labor practice, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent will be required to post the attached notice in places at its Chico store where notices to employees are normally posted. However, in order to assure that the employees, whose rights would be vindicated by this decision, will have a greater opportunity to receive information about the disposition of this matter, my recommended Order will require that Respondent also provide the Union with signed and dated copies of the attached notice for posting by the Union if it so chooses.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Waremart Foods, d/b/a Winco Foods, Inc., Chico, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting Local 588, United Food and Commercial Workers Union, from peacefully distributing consumer boycott

[9] Mr. Zerbe had been convicted of violating a municipal trespass ordinance. The California Supreme Court's reversal in *Zerbe* makes it plain that the State's labor policy in tandem with the state trespass statute preempts conflicting municipal ordinances. For that reason, I find the Chico ordinance, whatever its meaning and purpose, inapplicable here.

[10] *Trader Joe's Co. v. Progressive Campaigns, Inc.*, 73 Cal. App. 4th 425 (1999).

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

handbills on the sidewalk abutting the public entrances to its store at Chico, California, and in that portion of the parking lot surrounding that store outside the designated safety zone, and summoning the Chico city police to enforce such a prohibition.

(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 its Chico, California, store copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 September 30, 1999.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union, if willing, at places where it customarily posts notices to its members and employees it represents.

(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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[12] 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."

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit Local 588, United Food and Commercial Workers Union, from peacefully distributing consumer boycott handbills on the sidewalk abutting the public entrances of our Chico, California, store and in that portion of the parking lot surrounding that store outside the designated safety zone, and WE WILL NOT summon the Chico city police to enforce such a prohibition.

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

WINCO FOODS, INC.