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Simon DeBartolo Group a/w M. S. Management Associates, Inc. and Local 32B-32J, Service Employees International Union. Case 29-CA-23218

December 30, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

The primary issue in this case is whether the Respondent, Simon DeBartolo Group (Simon), violated Section 8(a)(1) of the Act by prohibiting employees of its maintenance contractor, Control Building Services (Control), from engaging in organizational handbilling at two shopping malls owned by Simon.¹ The judge found the violation, relying primarily on the Board's decision in *Gayfers Department Store*, 324 NLRB 1246 (1997), which treated the employees of contractors, like those of Control, as having the same access rights that employees of the owner have under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

¹ Administrative Law Judge Howard Edelman conducted the hearing in this case on June 20, 2000, and issued his decision on December 1, 2000. On May 31, 2006, the National Labor Relations Board remanded the case for reassignment to a different administrative law judge to review the record and issue a new decision. 347 NLRB 282 (2006). The Charging Party filed a motion for reconsideration of the remand, which the Board denied on June 30, 2006. On July 13, 2006, Administrative Law Judge George Carson II issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. On August 25, 2006, the Charging Party moved to submit an untimely answering brief. The Board denied this motion in an Order dated April 27, 2007.

We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified. We shall further modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

We adopt the judge's finding that the Respondent's security director, Angelo Scala, engaged in unlawful surveillance of the Control employees' meeting with union representatives on August 19, 1999. In excepting to this finding, Simon cites Scala's testimony—which it describes as undisputed—that he only asked the Control employees and union organizers not to congregate in the middle of the mall's common area. But the parties stipulated that, on August 19, Simon's agent (indisputably Scala) "approached the employees and informed them that soliciting was not allowed at the facility." In adopting the judge's conclusion that Scala's conduct violated Sec. 8(a)(1), we rely on the reasons stated by the judge. Our dissenting colleague, in accepting Scala's explanation that he watched the employee meeting with the union because he "wanted to make sure they wouldn't come down into the common area of the mall and congregate in the common areas of the mall," relies on testimony that Judge Carson expressly found "incredible" and that Judge Edelman, who presided over the trial, also found "not credible."

The Board has considered the decision and the record in light of the exceptions and brief and has decided to adopt the judge's conclusions consistent with our decision in *New York New York Hotel & Casino*, 356 NLRB No. 119 (2011) (*NYNY*), which overruled the rationale of *Gayfers*, supra,² and adopted a new test for determining access rights in cases like this one. Guided by *NYNY*, as explained below, we find that Simon violated Section 8(a)(1) by prohibiting the handbilling at issue.

Facts

The parties' stipulation of facts, which was admitted into the record at the hearing, establishes that, in July 1999,³ the Union began a campaign to organize Control employees at various Long Island shopping malls, including Simon's Roosevelt Field Mall and Smith Haven Mall. According to the stipulation, on three occasions, off-duty Control employees sought to distribute handbills to customers at the exterior entrances of Roosevelt Field and Smith Haven, as follows:

First, on August 28, a group of 5 to 8 off-duty Control employees who regularly worked at Smith Haven distributed leaflets on the sidewalk outside a Smith Haven entrance and in its parking lot.⁴ Agents of Simon directed the Control employees to stop distributing the flyer to the public and to leave the sidewalk and parking lot. Based on testimony, the judge found further that Simon agents threatened to call the police if handbilling continued; that Smith Haven Security Director Michael Trombino called the police, after which about four to six police cars arrived on the scene; and that Smith Haven Mall Manager Dennis Hejen asked the police to arrest Control employees and union representatives who did not stop handbilling.⁵

Second, on September 24, two off-duty Control employees who regularly worked at Roosevelt Field handed out union flyers on the sidewalk outside Roosevelt

² *NYNY*, 356 NLRB No. 119, slip op. at 7 fn. 27.

³ All dates are in 1999 unless specified otherwise.

⁴ That handbill—which was also distributed at Roosevelt Field on September 24—stated, among other points, "[w]e are appealing for your support in our effort to unionize because *Control Services is NOT TREATING US FAIRLY*" (emphasis in original) and "[p]lease show support by telling Simon that you support the cleaners in this mall." The handbill also stated "[n]o dispute with any other employer or Simon Administration. No request to any person to cease perform[ing] services or making deliveries. This is an appeal to [the] public."

⁵ The Control employees were not ticketed or arrested; however, the record reflects that the police required them to move off the mall's property.

The Control employees who handbilled at Smith Haven Mall on August 28 and October 23 were accompanied by union organizers who were not employed by Control or Simon. The General Counsel did not allege, and the judge did not find, that Simon acted unlawfully with regard to the union organizers.

Field's grand entrance and were told by a Simon agent that they were not allowed to hand out flyers on mall property and that if they continued to do so they would be arrested for trespassing.

Third, on October 23, off-duty Control employees who regularly worked at Smith Haven distributed leaflets to the public on the sidewalk outside one of Smith Haven's main entrances.⁶ Simon directed the Control employees to stop distributing union leaflets to the public and threatened to call the police if the leafleting continued. According to Simon's incident report regarding the October 23 events, the police were called but the Control employees had already stopped leafleting when they arrived.

Analysis

In *NYNY*, supra, the Board addressed the "situation where . . . a property owner seeks to exclude, from non-working areas open to the public, the off-duty employees of a contractor who are regularly employed on the property in work integral to the owner's business, who seek to engage in organizational handbilling directed at potential customers of the employer and the property owner." 356 NLRB No. 119, slip op. at 12–13 (footnote omitted).⁷ The Board held that:

[T]he property owner may lawfully exclude such employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline (as those terms have come to be defined in the Board's case law).

Id. at 13.

A property owner may prevent contractors' employees from engaging in otherwise protected conduct on its

⁶ The handbill distributed on October 23 said, "Control Building Services employees are organizing with Local 32 B-J SEIU for their rights, dignity and respect. Control has violated federal labor law when its workers organize and is continuing to do so. . . . No dispute with any other employer. No request to any person to cease performing services or making deliveries. This is an appeal to the public." The handbill also referred to cockroaches in the mall's food court, and one of the handbillers allegedly imitated a cockroach for about 20 seconds during the handbilling.

The judge found that the alleged cockroach imitation did not make the handbilling "unruly" and that neither that conduct nor the flyer's cockroach references were the basis for Simon's efforts to stop the handbilling; therefore, the judge found he did not need to decide whether the contents of the handbill might, under other circumstances, have rendered the exclusion lawful. Simon has not excepted to these findings; consequently, these issues are not before us.

⁷ *NYNY* involved the employees of a food service contractor, Ark, who worked on the premises of a hotel and casino.

property to the same extent and for the same reasons that it may restrict its own employees' protected conduct. Id. But, under *NYNY*, to prevent contractors' employees from engaging in otherwise protected conduct on its property under circumstances when it could not lawfully restrict comparable conduct by its own employees, the owner must demonstrate that the greater restrictions are justified by a heightened risk of disruption or interference with its use of the property created by the fact that contractors' employees, rather than its own employees, are engaged in the conduct. See id. at 13 and fn. 49 (analogizing to *Hillhaven Highland House*, 336 NLRB 646 (2001), enfd. *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003), which accommodated rights of property owner and offsite employees based on recognition that offsite employees' "activities arguably caused the owner heightened concern" beyond the concerns caused by activities of onsite employees). This new test, the Board explained, would be applied retroactively. Id. at 14 and fn. 53.

1. The test announced in *NYNY* is properly applied here. The off-duty Control employees were regularly employed on Simon's property in work integral to Simon's business.⁸ They sought to engage in organizational handbilling directed at Simon's customers, in exterior, nonworking areas open to the public.⁹

⁸ The dissent suggests that the stipulated record in this case offers insufficient information about the regularity of the Control employees' work at the malls to support application of the *NYNY* analysis. But the parties stipulated that the employees worked "regularly" at the mall where they sought to distribute flyers. We can take administrative notice of the fact that the malls at issue are physically enormous enterprises. The Roosevelt Field Mall is the ninth largest in the country, with 270 stores, covering a total area of 2,162,600 square feet. See "Largest Shopping Malls in the United States," American Studies at Eastern Connecticut State University <http://nutmeg.easternct.edu/~pocock/MallsLarge.htm>; <http://www.simon.com/mall/?id=102>. Based on the parties' stipulation and the nature of the task performed by the janitors—cleaning these enormous malls—we find it is more likely than not that the janitors' work at the malls is not so fleeting or occasional as to take this case outside the holding in *NYNY*. To require that they work "exclusively" at the mall, as our colleague would do, is too strict a standard. The mall is the janitors' regular workplace whether they also work at a different location on weekends (or even less frequently) or not.

⁹ The dissent asserts that the mall's customers were "at best, only secondarily potential consumers of [Control's cleaning and maintenance] services." However, the malls' cleanliness and upkeep was at least as essential to Simon's ability to serve its customers as the food service provided at *NYNY*'s hotel and casino, and all mall customers enjoy (i.e., consume) the cleanliness of the malls.

In any event, as the Board explained in *NYNY*, "what matters here is less the intended audience of the [contractor] employees than that the [contractor] employees were exercising their own rights under Section 7 in organizing on their own behalf." *NYNY*, supra, slip op. at 9. Here, as in *NYNY*, the organizational purpose of the Control employees "rests at the core of what Congress intended to protect through Section 7 . . .

2. The issue, then, is whether Simon has been able to make the showing required by *NYNY*: that the Control employees' activity "significantly interferes with [Simon's] use of the property or [that] exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline." 356 NLRB No. 119, slip op. at 13. We find that Simon has not carried its burden here.

Simon asserts that, as the owner of the entire mall and its grounds, it "has legitimate business reasons for being concerned about activities and events on mall property which could interfere with the rights of tenants, the enjoyment by customers of shopping at the mall, or could lead to accidents or property damage resulting in liability to Simon." Simon adds that handbilling by Control's employees threatens "the interests of all of the other tenants and customers using the facility, who desire to avoid this type of hassle and disruption in connection with their shopping or work experiences." Although Simon contends that it need not show that such handbilling causes actual disruption and intrusion,¹⁰ it argues that it has made such a showing, stating:

Common sense dictates the conclusion that the mall's reputation would be impacted by Union allegations of cockroaches in the food court, and that the ability of shoppers and the employees of other tenants to come and go from the facility free from harassment or nuisance would be disrupted to some extent by handbillers standing in front of entrance doors. Likewise, shoppers likely would not call Simon to register a complaint, [sic] they would simply take their business elsewhere!

The abstract and generalized concerns expressed by Simon concerning the Control's employees' distribution of handbills on mall property could equally be expressed about its own employees' comparable activity. Never-

[and] [t]his is true regardless of the primary audience of the organizational communication." Id.

The facts here would seem to present an even stronger case for finding access rights than did *NYNY* in one respect. In contrast to the contractor in *NYNY*, Control had no leasehold on Simon's property. To engage in organizational activity at their worksite, then, the Control employees had no alternative but to station themselves on property owned and fully controlled by Simon.

¹⁰ Simon's primary contention is that *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), provides the applicable standard regarding the Control employees' right to access for handbilling, an argument we rejected in *NYNY*. 356 NLRB No. 119, slip op. at 6-7. Despite Simon's reliance on *Lechmere*, the applicable standard at the time of the handbilling at issue was indisputably that of *Gayfers*, supra, which required Simon to demonstrate that the handbilling interfered with production or discipline. While *NYNY* altered the *Gayfers* standard, retroactive application of *NYNY* is not unfair because Simon attempted to make the requisite showing of disruption.

theless, the law is clear that Simon's employees have a right to engage in such activity on mall property and thus, under *NYNY*, so do Control's employees.

The only argument advanced by Simon that might be understood to suggest that Control employees' handbilling on mall property posed a heightened risk of disruption is Simon's assertion that the risk of interference is heightened by the "multi-tenant, mixed-use" nature of its properties, where employees of multiple entities might seek to engage in handbilling in multiple nonwork areas of the mall. But this concern applies equally to Simon's own employees. Moreover, Simon has not demonstrated that its prohibition of the Control employees' handbilling was actually based on this concern,¹¹ or, more importantly, that a blanket prohibition of handbilling by contractor employees was necessary to prevent any such heightened risk of interference.¹² Such a blanket prohibition would clearly not be the sort of "reasonable, nondiscriminatory, narrowly-tailored restrictions on the access of contractors' off-duty employees, greater than those lawfully imposed on its own employees," that *NYNY* left open as a possibility. 356 NLRB No. 119, slip op. at 13.

While Simon argues that it has made a showing of actual disruption, the record simply does not support Simon's assertions. There is no evidence that the Control employees' handbilling interfered with customers' or tenants' access to or use of the malls.¹³ Nor has Simon explained how handbilling by Control's employees increased the risk of accidents or property damage.

¹¹ Although each mall maintained a rule stating "[p]icketing, distributing handbills, soliciting and petitioning require the prior written consent of mall management," the judge found that Simon did not cite these rules when it informed the Control employees that they could not distribute flyers, and thus Simon did not enforce these rules in its dealings with the Control employees. Simon did not except to this finding or to the judge's related finding that Simon's rule was not addressed to persons working on the mall property.

¹² The dissent suggests that we have insufficiently analyzed the extent of Simon's control over the Control employees. But, in contrast to the owner in *NYNY*, Simon did not argue that it lacked sufficient non-employment-based means to protect its property rights. More importantly, as the Board explained in *NYNY*, an owner's "ability to protect its operational and property interests in relation to its contractors' employees is the rule, not the exception Our experience suggests that . . . a relationship [between employer/contractor and property owner] ordinarily permits the property owner to quickly and effectively intervene, both through the employer and directly, to prevent any inappropriate conduct by the employer's employees on the owner's property." *NYNY*, supra, slip op. at 11. We have no doubt whatsoever that Simon, one of the largest commercial real estate firms in the country, could have secured in its contract with Control any provisions needed to ensure that Control exercised its authority as the janitors' employer to protect Simon's property rights and other interests.

¹³ As discussed in footnote 6, Simon does not except to the judge's finding that the cockroach-related message was not the basis for Simon's actions against the Control handbillers. Thus, we need not decide whether that message would have justified the exclusion.

Our colleague attacks with considerable rhetorical gusto a holding he suggests the Board reached in *NYNY*. But the holding he describes is not one found in that decision. First, our colleague states that in *NYNY*, “the existence of a contractual employment relationship with the property owner is of no significance.” But *NYNY* clearly states: “We leave open the possibility that in some instances property owners will be able to demonstrate that they have a legitimate interest in imposing reasonable, nondiscriminatory, narrowly-tailored restrictions on the access of contractors’ off-duty employees, greater than those lawfully imposed on [their] own employees.” 356 NLRB No. 119, slip op. at 13. Indeed, *NYNY* further states that the holding permits a “property owner to impose reasonable, narrowly tailored restrictions on access [by contractors’ off-duty employees] when demonstrably necessary.” *Id.*

Second, our colleague states that in *NYNY*, “[i]f the contractor employees work ‘regularly’ on the property, there is no case-specific balancing or accommodation of competing rights.” But *NYNY* clearly states that if a property owner places “unique restrictions on contractor employees’ access,” they “will be evaluated consistent with the accommodation of interests we have engaged in here. . . . on a case-by-case basis.” *Id.* at 13.

Third, our colleague states that in *NYNY*, “all the property owner is left with . . . is the limited management right to maintain ‘production or discipline.’” But *NYNY* clearly states,

the property owner may lawfully exclude such employees . . . where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline (as those terms have come to be defined in the Board’s case law). Thus, any justification for exclusion that would be available to an employer of the employees who sought to engage in Section 7 activity on the employer’s property would also potentially be available to the non-employer property owner, as would any justification derived from the property owner’s interests in the efficient and productive use of the property.

Id. at 13.

We think it is worth making clear, in conclusion, the very modest exercise of fundamental statutory rights at issue in this case: janitors who clean the Respondent’s two shopping malls attempted to peacefully pass out fly-

ers at the exterior entrances to the malls.¹⁴ The janitors did not attempt to pass out flyers in any stores in the malls. In fact, when engaged in that peaceful expressive activity, they did not even enter the malls, according to the judge’s findings. Our colleague recoils from the notion that “the welcome mat is apparently out for organizational activity,” but “organizational activity” is precisely what Congress sought to protect by passing the National Labor Relations Act in 1935. That congressional policy remains unaltered as expressed in Section 7 of the Act today. Accordingly, the decision in *NYNY* appropriately protects employees’ right to engage in peaceful organizational activity at their own workplace while fully recognizing and balancing the legitimate rights and interests of property owners.

Conclusion

Accordingly, we find that Simon violated Section 8(a)(1) by prohibiting the Control employees from engaging in public-directed organizational handbilling at the entrances to Roosevelt Field and Smith Haven Malls.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Simon DeBartolo Group a/w M. S. Management Associates, Inc., Garden City and Lake Grove, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

“(a) Engaging in surveillance of off-duty employees engaging in the union activity of meeting with representatives of Local 32B–32J, Service Employees International Union, or of any other union.”

2. Substitute the following for paragraph 2(c).

“(c) Within 14 days after service by the Region, post at its Roosevelt Field Mall, Garden City, New York, and Smith Haven Mall, Lake Grove, New York, copies of the attached notice marked “Appendix.”⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent’s authorized representative, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet

¹⁴ Our colleague suggests that under his test, these janitors might have a right to distribute flyers “in or at the perimeter of mall parking lots.” But it is not at all clear how moving the janitors to a slightly different exterior, nonwork area open to the public would affect any of the legitimate rights and interests carefully balanced in *NYNY*.

site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 August 19, 1999.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 30, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I. INTRODUCTION

In *New York New York Hotel & Casino*, 356 NLRB No. 119 (2011) (*NYNY*), the majority purported to create a *new* access test for contractor employees who are “regularly” employed on a private property owner’s premises. It required no clairvoyance to predict, as I did in my dissent, that in future cases the majority’s test would reflexively vest such contractor employees with the same broad access rights enjoyed by employees of a property owner under the Supreme Court’s decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The majority does just that in this case.¹

¹ In addition to dissenting from the majority’s application of the *NYNY* test here, I also dissent from the majority’s finding that the Respondent engaged in surveillance violative of Sec. 8(a)(1) of the Act. The evidence showed that Respondent’s Director of Security Scala informed off-duty employees in a mall corridor outside a restaurant that solicitation was not allowed in the facility. There is no allegation that this prohibition was unlawful. Scala then watched through a restaurant window (without listening) for 4 or 5 minutes while the employees met and dined with union organizers. Scala testified that he did so because he “wanted to make sure they wouldn’t come out into the common area of the mall and congregate in the common area of the mall.” Judge Carson found this explanation incredible, reasoning that Scala could have accomplished the claimed purpose by positioning himself where he could simply observe the restaurant door, rather than watching the employee and organizer group inside the restaurant. Judge Carson was not the presiding judge at the hearing, and his credibility assessment of Scala’s testimony was based on the written record, not demeanor.

The majority’s decision today suffers from the same flaws as the *NYNY* decision upon which it is based. First, my colleagues continue to fail to observe what the Supreme Court has repeatedly reiterated is the “critical distinction” between the access rights of a property owner’s employees and those of nonemployees (e.g., contractor employees), *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992), a distinction the Court has admonished is “one of substance.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). In my colleagues’ analysis, the existence of a contractual employment relationship with the property owner is of no significance. So long as an individual is somebody’s employee, that person’s “regular” presence at a worksite is sufficient alone to cloak the individual with the same access rights as employees of the owner of that worksite.

Second, the majority’s *NYNY*-based analysis defies the Supreme Court’s mandate to accommodate Section 7 rights and the owner’s property rights “with as little destruction of one as is consistent with the maintenance of the other.” *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976). As this case demonstrates, under the majority’s test, the owner’s private property rights do not figure into the equation at all; nor does the availability of nontrespassory alternative means of communication. If the contractor employees work “regularly” on the property, there is no case-specific balancing or accommodation of competing rights. The contractor employees’ Section 7 interests simply trump the property interests of the owner, and access for handbilling or other Section 7 activity is mandated unless the property owner can carry the heavy burden of proving that the activity significantly interferes with his use of his own property. In essence, all the property owner is left with under the majority’s test is the limited management right to maintain “production or discipline.”

Third, the majority’s ruling contravenes the very guidelines under which the District of Columbia Circuit reversed and remanded the Board’s first two *NYNY* decisions. *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002) (reversing and remanding *New York New York Hotel & Casino*, 334 NLRB 762 (2001) and *New York New York Hotel & Casino*, 334 NLRB 772 (2001)). The court made clear that the Board’s reasoning in *Gayfers Department Store*, 324 NLRB 1246 (1997), which afforded contractor employees the same extensive,

Accordingly, the judge was in no better position than I to make this assessment. Whether or not Scala *could* have positioned himself differently, I would not find his explanation incredible. I would further find the evidence insufficient to prove that he engaged in actual surveillance of union activity by standing where he did and observing the employees inside for a brief time.

full-access rights as the property owner's employees, was "lacking" and that the Board's reliance on *Gayfers*² in *NYNY* failed to take "account of the principle reaffirmed in *Lechmere* that the scope of Section 7 depends on one's status as an employee or nonemployee." *New York New York*, 313 F.3d at 588–590. The court's remand instructions to the Board left no room for fabrication of a revised test that simply dresses *Gayfers* in a shiny new frock. That is exactly what my colleagues did in *NYNY*, and they repeat the error here.

In contrast, my *NYNY* dissent proposed an access test for contractor employees that hews both to the D.C. Circuit's remand opinion and to applicable Supreme Court precedent. That test, a variant of the *Babcock & Wilcox* test applicable to nonemployees, acknowledges the "critical distinction" between employees of the property owner and those of a contractor, and more appropriately balances the property interests and Section 7 rights at stake. And, in contrast to the majority's *NYNY*-based ruling, my proposed test would give due weight to the owner's property rights and consider reasonable alternative means of communicating the contractor employees' organizing message. Because the parties did not have the opportunity to litigate this case under the test I propose, I would remand the case for an appropriate hearing.

In short, my colleagues, while paying lip service to controlling precedent and the D.C. Circuit's rebuke on review in *NYNY*, adhere to the essence of the discredited position articulated by the Board in *Gayfers*. Because their decision flouts applicable law and fails to conduct the careful balancing of property and Section 7 rights directed in the *NYNY* remand, I respectfully dissent.

II. FACTUAL BACKGROUND

Briefly, this case arises out of an SEIU Local 32B–32J (Union) effort during the summer of 1999 to organize the cleaning and maintenance workers at shopping malls on Long Island, New York. The Respondent Simon DeBartolo Group (Simon) owned two of those malls—the Roosevelt Field Mall and the Smith Haven Mall. Control Building Services, Inc. (Control) had a contract with Simon to do cleaning and maintenance at the malls. Control employed the workers who did those tasks. They had no employment relationship of any kind with the Respondent. The stipulated record reflects only that the Control employees worked "regularly" at the two malls;

² The judge's ruling in this case, which the majority adopts, was based on *Gayfers*. The D.C. Circuit also rejected the Board's decision in *Southern Services v. NLRB*, 300 NLRB 1154 (1990), enf'd. 954 F.2d 700 (11th Cir. 1992). *Southern Services* was another case in which the Board had applied the *Republic Aviation* test to contractor employees. The *NYNY* Board purported to overrule the *Gayfers* and *Southern Services* rationales. 356 NLRB No. 119, slip op. at 7 fn. 27.

there is no evidence of how often they reported to the malls, how long their shifts were, whether they worked "exclusively" at a particular mall, whether they were assigned to specific locations within the malls, whether Control had an office or other fixed facility at either mall, or whether the employees reported initially to some other location. Control apparently had no leasehold or other form of tenancy at the malls.

On three occasions—in August, September, and October 1999—off-duty Control employees distributed leaflets or flyers to patrons at one of the malls where they "regularly" worked. In each instance, the distribution was done on Simon's private property. Also in each instance, the Respondent directed the off-duty Control employees to stop distributing the leaflets or flyers. In two instances, the Respondent threatened to call the police if the off-duty Control employees did not stop the distribution.

III. ANALYSIS

My substantive objections to the test applied by my colleagues, summarized above, are set forth in more detail in my *NYNY* dissent. When applied to a different set of facts, the flaws in that test are magnified.

For instance, as noted in that dissent, Board cases on access rights had, prior to *NYNY*, properly required that contractor employees work "regularly" and "exclusively" on a property owner's premises in order to have greater Section 7 access rights to the property. See, e.g., *Postal Service*, 339 NLRB 1175, 1177–1178 (2003). Even though the restaurant employees in *NYNY* did work regularly and exclusively on the hotel/casino operator's property, the majority dropped the exclusivity requirement from its test. This case highlights the consequences of that change. We know virtually nothing about the extent of time Control's employees spend at the Respondent's properties, as opposed to other facilities, or whether there is a home base, owned by Control, to which employees report, and at which they could engage in organizational activities without impinging upon the property rights of third parties. Simply put, the "regularly work" factor alone is far too imprecise and ambiguous to serve as a reliable indicator of where to draw the line on access rights. Absent any indication from the majority as to whether there is some minimum degree of regular presence (once a week, once a month, once a quarter?), the welcome mat is apparently out for organizational activity by persons who may have only a fleeting working relationship with the property owner's site.

The *NYNY* majority also seemed to place great stock in the fact that the hotel/casino property owner there exerted significant contractual control over its restaurant subcontractor's employees. 356 NLRB No. 119, slip op.

at 11–12. This case shows the ephemeral nature of that factor. There is no evidence that Control maintains company policies or rules requiring its employees to adhere to mall property rules. There also is no evidence that such rules as may exist are incorporated or otherwise referred to in its service contract with Control. Indeed, the judge found that mall property rules did not apply to Control’s off-duty employees or others who worked on the mall premises. The majority’s opinion is silent on the point, demonstrating that a property owner’s regulatory or contractual personnel control is not really a meaningful factor at all in the majority’s analysis. If anything, the absence of evidence that Simon had any effective means of regulating off-duty Control employees’ conduct on mall property—short of excluding them altogether—should be a factor that weighs *against* giving Control employees the same access rights as Simon employees.

This case also illustrates the fallacy of defining the majority’s *NYNY* standard as a “balancing test.” As I argued in *NYNY*, the only appropriate way to achieve a truly equitable balancing of interests is to use a variant of the *Babcock & Wilcox* test applicable to nonemployees. In particular, such a test would ensure that, as the Supreme Court and D.C. Circuit cases require, the lack of an employment relationship between the Control employees and Simon is considered. Such an even-handed test also would ensure that an owner’s property interests (as opposed to just its management interests) receive weight. Further, in sharp contrast to the majority’s approach, such a test would assess whether there are reasonable nontrespassory alternative means for communicating the Control employees’ organizing message to the employees’ intended audience.

This is not to suggest that Control’s off-duty employees’ statutory rights of access to private property should be restricted to the limited circumstances in which non-employee union organizers have such rights under *Lechmere*. I recognize that Control’s employees are not complete “strangers” to Simon’s property and that they assert direct, rather than derivative, organizational rights. These factors are entitled to some weight in assessing the employees’ access rights, but they should not invariably outweigh the property rights of the Respondent and its many tenants. And again, the “accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.” *Hudgens*, 424 U.S. at 522.

As my *NYNY* dissent indicated, I disagree that contractor employees’ organizing rights are as strong, or stronger, if their intended audience are members of the public patronizing the property owner’s premises rather than other contractor employees whom they are trying to

organize. 356 NLRB No. 119, slip op. at 16. At least in *NYNY*, the appeal to the public for support of the organizational campaign targeted persons who were, or reasonably could be, direct consumers of the restaurant contractor’s services. In this case, Simon and its tenants were direct consumers of Control’s services. The Control off-duty employees were appealing to members of the public who were, at best, only secondarily potential consumers of those services. Thus, the employees’ relationship to this target audience was even more attenuated than in *NYNY*, and the need for access to Simon’s property to reach this audience was correspondingly entitled to even less weight.

In *NYNY*, I stated that I would put the burden on the property owner to show that there were reasonable alternative means for communicating the contractor employees’ organizing message. 356 NLRB No. 119, slip op. at 18. It may be that the absence of nontrespassory alternatives would require the Respondent’s property interests to yield to some extent, perhaps requiring it to permit handbilling in or at the perimeter of mall parking lots. There is no evidence in the record on this point. That is not the Respondent’s fault. The case was tried using the *Gayfers* test, which, like the *NYNY* test, gives no consideration to the existence of reasonable alternative means of communication. For that very reason, it cannot produce a fair and refined balancing of the interests of Control employees and the Respondent. It is impossible to know how much, if at all, the Respondent’s property rights should yield to accommodate the Section 7 rights of Control’s employees. Consequently, I would remand this case for further hearing on the issue of alternative means.

IV. CONCLUSION

My colleagues’ decision lays bare and magnifies the fundamental flaws in the analytical framework they fashioned in *NYNY*, and proves that their test is simply *Gayfers* in disguise. I continue to reject their analysis as inconsistent with precedent. I also adhere to the view that the appropriate balance can be struck by application of the test I proposed in *NYNY*, which is premised on decisional authority dealing with the access rights of individuals who are not employees of the property owner. As *Hudgens* requires, this test would achieve a true balancing based on the facts of specific cases. 424 U.S. at 522.

Dated, Washington, D.C. December 30, 2011

Brian E. Hayes,

Member

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 a 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 engage in surveillance of employees engaging in the union activity of meeting with representatives of Local 32B–32J, Service Employees International Union or of any other union.

WE WILL NOT prohibit employees on their nonworking time from engaging in solicitation and leafleting in non-working areas.

WE WILL NOT threaten off-duty employees with intervention by law enforcement authorities if they disobey our unlawful prohibition of their protected leafleting activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

SIMON DEBARTOLO GROUP A/W M. S. MANAGEMENT ASSOCIATES, INC.

Haydee Rosario, Esq., for the General Counsel.

Douglas J. Heckler, Esq., for the Respondent.

Rebecca A. Schleifer and Larry Engelstein, Esqs., for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Brooklyn, New York, on June 20, 2000, before Administrative Law Judge Howard Edelman.¹ The charge was filed on December 23, and the complaint issued on March 24, 2000. The complaint alleges violations of Section 8(a)(1) of the National Labor Relations Act affecting employees of a contractor at two of the Respondent's malls. The Respondent's answer denies any violation of the Act.

¹ All dates are in the year 1999 unless otherwise indicated

Judge Edelman issued his decision on December 1, 2000. On May 31, 2006, the Board remanded this case to the chief administrative law judge for reassignment to a different administrative law judge with the instruction to "review the record and issue a reasoned decision." *Simon DeBartelo Group*, 347 NLRB 282 (2006). On June 8, 2006, Chief Administrative Law Judge Robert A. Giannasi reassigned this case to me pursuant to the Board's remand. On June 13, 2006, the Charging Party filed with the Board a Motion for Reconsideration of its remand order. On June 30, 2006, the Board denied that motion. I find that the Respondent did violate the Act substantially as alleged in the complaint.

On the entire record made before Judge Edelman,² and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Simon DeBartelo Group a/w M. S. Management Associates, Inc., Simon, is a Delaware corporation engaged in the ownership and management of shopping malls including Roosevelt Field Mall, Garden City, New York, and Smith Haven Mall, Lake Grove, New York. Simon annually derives gross rent revenues in excess of \$100,000 from stores located in the malls including Federated Stores, Inc., from which Simon derived of in excess of \$25,000. Federated Stores, Inc. is engaged in the retail sale of goods at Smith Haven Mall and Roosevelt Field Mall, and it annually purchases and receives at those facilities goods valued in excess of \$50,000 directly from enterprises located outside the State of New York. Simon admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Control Services, Inc., Control, is a corporation that provides building maintenance services pursuant to a contract with Simon at various locations, including the Roosevelt Field Mall and the Smith Haven Mall.

Simon admits, and I find and conclude, that Local 32B–32J, Service Employees International Union, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

In July 1999, the Union began organizational activities among the maintenance employees of Control at various malls located in the area of Long Island, New York. The complaint allegations relate to events that occurred on August 19 and September 24, at the Roosevelt Field Mall, and on August 28 and October 23, at the Smith Haven Mall. Almost all of the facts relevant to the alleged violations of the Act are stipulated

² The transcript index does not reflect receipt of General Counsel's Exhibit 2, a stipulation, into the record. At page 25, after Counsel for the Respondent stated that he concurred with the stipulation, Judge Edelman stated, "I'm going to admit the stipulation to the record." The reporter marked General Counsel's Exhibit 2 as "received."

and set out in General Counsel's Exhibit 2, hereinafter cited as Stipulation.

B. Facts

1. Events at Roosevelt Field Mall

The complaint alleges that, on August 19, the Respondent, by Security Director Angelo Scala at the Roosevelt Field Mall, informed employees of Control that union solicitation was not permitted at the facility, and that he engaged in surveillance of Control employees while they were engaged in union activity. The complaint further alleges that, on September 24, the Respondent directed employees of Control to stop distributing union leaflets to the public and to leave the Roosevelt Field Mall area and threatened them that it would summon the police if they did not do so.

On August 19, a group of between five and eight off-duty Control employees, who when on duty performed maintenance at the Roosevelt Field Mall, met with organizers for the Union on the first floor of the mall in the mall corridor adjacent to a Sbarro's restaurant. Angelo Scala, Security Director for Simon at Roosevelt Field Mall, approached the group. Although Scala testified that he cautioned the group against "congregating," the parties stipulated that "the Simon agent approached the employees and informed them that soliciting was not allowed in the facility." [Stipulation, paragraph 12.] The group then entered Sbarro's restaurant and ordered pizza. The parties stipulated that "Simon representatives observed the workers through the glass windows of the restaurant which separated the restaurant from the mall corridor. The workers observed the Simon representative looking at them." [Stipulation, paragraph 12.] The stipulation does not specify for how long the Simon representative observed the employees and union representatives.

Although the briefs of the General Counsel and Charging Party state that the observation occurred for 15 minutes, there is no probative evidence to support that argument. Union Representative Kevin Stavris testified that "representatives" stood outside the restaurant and observed for "about 15 minutes." He did not identify Scala nor did he identify the "representatives" as Simon representatives.

Scala, an admitted supervisor for Simon, admits that he remained for "four or five minutes." He testified, "I guess I wanted to make sure they wouldn't come out into the common area of the mall, and congregate in the common area of the mall." Scala, who normally makes his reports to Mall Manager Joseph Silia, reported "who was there, that they were union, their representative was there and some of the employees of Control." Scala denied reporting names. He did not recall to whom he made his report.

On September 24, on the sidewalk outside the Grand Entrance to the Roosevelt Field Mall, two off-duty Control employees who worked at the Roosevelt Field Mall were handing out leaflets relating to the Union at 3:30 p.m. The parties stipulated that a Simon agent, presumably Security Director Scala, observed the workers and informed them "that they were not allowed to hand out flyers on mall property and that if they continued to do so they would be arrested for trespass." [Stipulation, paragraph 9.]

2. Events at Smith Haven Mall

The complaint alleges that, on August 28, the Respondent, by Security Director Michael Trombino at the Smith Haven Mall, directed employees of Control to cease distributing union leaflets to the public and to leave its parking lots and summoned Suffolk County Police to remove the employees of Control from its parking lot. The complaint alleges that, on that same date, Mall Manager Dennis Hejen asked the Suffolk County Police to arrest the Control employees who were distributing union leaflets to the public. The complaint further alleges that, on October 23, Trombino directed employees of Control to cease distributing union leaflets to the public and threatened to call the police and report the employees of Control if they continued to distribute union leaflets to the public.

On August 28, shortly after 11:15 a.m., a group of between six and eight off-duty Control employees, who when on duty performed maintenance at the Smith Haven Mall, together with five representatives of the Union, prepared to distribute leaflets on the outdoor sidewalk and parking lot near an entrance to the Mall. Security Director Michael Trombino approached the group. The parties stipulated that "[a]gents of Simon responded by directing Control employees to stop distributing . . . to the public and to leave the sidewalk and the parking lot." [Stipulation, paragraph 7.] Union Representative Kevin Stavris recalled that Trombino informed the employees, "This is not going on here today."

Trombino informed Stavris that law enforcement officers were present, although, at that point, none were visible. Stavris informed Trombino that it was the right of the employees "to leaflet in front of the mall." Shortly thereafter several police cars, between four and six, drove up. Stavris spoke with the sergeant in charge. As he was doing so, Mall Manager Dennis Hejen approached the group. The sergeant informed the group, which included the off-duty Control employees, that they could not leaflet on mall property, that it was private property. Stavris overheard Hejen tell the police officers "to arrest us if we stay on mall property."

Trombino admitted calling the police, saying that he did so after hearing that the Union planned a demonstration, the nature of which he was unaware. He went to the group in the parking lot after being informed that the group was gathering and that they had flyers. He testified that "we [Simon] don't allow soliciting or hand-billing on the property." Although Trombino denied making any statement regarding arrests, he did not deny that Hejen informed the police officers that they should arrest any members of the group, which included the off-duty Control employees, if they stayed on mall property.

On October 23, off-duty Control employees, accompanied by representatives of the Union, again went to the Smith Haven Mall and began distributing union leaflets to the public on the sidewalk outside of the main entrance to the mall. The parties stipulated that "Simon directed these Control employees to stop distributing union leaflets to the public and threatened to call the police if they continued to distribute leaflets to the public." [Stipulation, paragraph 10.]

Paragraph 10 of the Stipulation also states: "The parties do not stipulate that the Union's conduct was 'unruly.'" There is no evidence that any conduct was unruly. Security Director

Trombino recalled that, prior to the employees and union representatives leaving, one individual stood on a bench and then “got down . . . on his stomach . . . trying to emulate a cockroach.” The significance, if there be any, to the cockroach impersonation, relates to the claimed fear of the Control maintenance employees that they might be disciplined for unsanitary conditions at the mall, conditions that were beyond their control. The foregoing concern was expressed in a letter delivered to James Lundgren, one of Simon’s Mall Managers at Smith Haven Mall, on October 20, in which the employees set out various deficiencies for which they had no responsibility including broken urinals and a broken toilet, leaky ceilings, and “[r]oaches in the food court area.” The leaflet the employees were distributing on October 23, noted the cockroach problem, explained that the employees were seeking representation by the Union, and did not want “to lose their jobs because of consumer dissatisfaction.”

Security Director Trombino recalled that the cockroach impersonation lasted a total of 20 seconds. A videotape made by the Union shows the leafleting during portions of the period that it was occurring from about 12:42 p.m. until about 1:12 p.m., when the employees and union representatives complied with the request to leave, accompanied as it was by the threat to call law enforcement officers to which the parties, as recited above, stipulated. Although the General Counsel, in her brief, notes that the foregoing event was not on the videotape, there are several gaps in the tape, including a gap of over 90 seconds between 1:06:01 p.m. and 1:07:35 p.m. in which the foregoing 20 second incident could have occurred. I do not find that the foregoing 20 second incident of street theater rendered the peaceful leafleting unruly. Trombino did not testify that the foregoing actions by one individual had any bearing upon the request that the leafleting cease.

The General Counsel and Charging Party, in their briefs, argue that the leaflet distributed at the Smith Haven Mall on October 23, was neither false nor malicious and that it was protected. I need make no determination in that regard. Employees have a protected right, during nonworking time in nonworking areas, to distribute literature in order “to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations.” *NCR Corp.*, 313 NLRB 574, 576 (1993). The Respondent did not assert to the employees or at the hearing that the contents of the leaflet related in any way to the direction that the employees cease leafleting. Even if that issue had been raised and decided adversely to the General Counsel, my recommended order would be unaffected because no issue was raised with regard to the contents of the leaflets that the Respondent directed not be distributed on August 28, at the Smith Haven Mall or on September at the Roosevelt Field Mall.

An incident report prepared by Simon, Exhibit 7 attached to the Stipulation, states that Trombino asked the employees to leave, that they did not comply, that SCPD, presumably the Suffolk County Police Department, was notified, but that by the time the police arrived the employees had ceased leafleting. The report makes no comment regarding the content of the leaflets or any “unruly” conduct by any of the individuals engaged in the leafleting.

B. Analysis and Concluding findings

1. The surveillance allegation (Roosevelt Field Mall)

On August 19, Security Director Angelo Scala informed the union representatives and off-duty Control employees that they would not be permitted to solicit in the mall corridor. The group departed from the mall corridor, entered Sbarro’s restaurant, and ordered pizza. Thus, they complied with Scala’s request not to solicit and left the mall corridor. Scala thereafter remained for 4 or 5 minutes observing the “workers through the glass windows of the restaurant . . . [and] [t]he workers observed the Simon representative looking at them.” Scala’s purported justification for his action, “I guess I wanted to make sure they wouldn’t come out into the common area of the mall,” is incredible. Watching the group through a window as they sat together for the time to which he admitted gave Scala the opportunity to observe the interaction of the employees with the union representatives. He could see whether any documents were being exchanged. See *Farm Fresh, Inc.*, 301 NLRB 907 (1991). Scala made a report of what he observed. He did not report cautioning a group against soliciting. He reported “who was there, that they were union, their representative was there and some of the employees of Control.” If, as he claimed, Scala was seeking to assure that the employees did not return to the common area of the mall, Scala could have positioned himself so that he could observe the door of the restaurant. Observing the door of the restaurant would establish whether the group was coming back out into the common area. There was no justification for observing the interaction of the employees with the union representatives through the window of the restaurant.

In *Dayton Hudson Corp.*, 316 NLRB 85, 86 (1995), employees who were in the company of union representatives left a department store and entered a nearby restaurant. Managers followed and also entered the restaurant. The Board held that there was “no legitimacy to the Respondent’s surveillance” once the employees left the department store. In this case, the employees left the corridor common area and entered the restaurant. Although Scala did not enter the restaurant, just as in *Dayton Hudson*, management’s observation of “employees who chose to associate with union organizers on their free time . . . revealed the Respondent’s intention to observe at close range the Section 7 activities” of those employees. In this case, as in *Dayton Hudson*, “[t]his intrusion on their statutory rights constitutes unlawful surveillance and violates Section 8(a)(1) of the Act.” *Ibid.* I find that the Respondent engaged in surveillance as alleged in the complaint.

2. The interference with solicitation and distribution allegations

The stipulations of the parties and testimony establish that, at the Roosevelt Field Mall on August 19, the Respondent directed off-duty employees of Control to cease soliciting and on September 24, directed off-duty employees of Control to cease leafleting in nonwork areas and threatened that, if they continued to do so, law enforcement officers would be summoned. The stipulations and testimony further establish that, at the Smith Haven Mall on August 28 and October 23, the Respon-

dent directed off-duty employees of Control to cease leafleting in nonwork areas and threatened that, if they continued to do so, that law enforcement officers would be summoned. On August 28, Mall Manager Dennis Hejen requested law enforcement officers to arrest Control employees and union representatives who did not comply with the direction not to leaflet.

The Respondent argues that this case is controlled by *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and, citing *Oakland Mall*, 316 NLRB 1160 (1995), points out that the employees of Control were not its employees, thus it had the right under *Lechmere* to bar these nonemployees from its property. *Oakland Mall* is inapposite. In that case, the Board specifically held the individuals engaged in handbilling, who were laid-off employees, were “nonemployees” because “they were neither employees of any of the employers whose property interests are at issue in this case nor employees with any right to enter to property in the course of their employment under a subcontract.” *Id.* at 1163, fn. 12.

The General Counsel contends that this case is controlled by *Gayfers Department Store*, 324 NLRB 1246, 1250 (1997), in which the Board, citing *Southern Services*, 300 NLRB 1154 (1990), enf.d. 954 F.2d 700 (11th Cir. 1992), held that employees of a cleaning contractor who “regularly and exclusively work on the premises of an employer other than their own . . . are not strangers to the property” and that they had the right to engage in Section 7 activity during nonworking times in nonwork areas of the Respondent’s property.

The complaint herein is clearly and carefully drawn. The only violations alleged relate to employees, not the nonemployee union representatives who were present at each of the alleged incidents.

When the rights being asserted by employees are rights protected by Section 7 of the Act, it is immaterial that the employer seeking to deny those rights is not the employer of the affected employees. In *Fabric Services*, 190 NLRB 540 (1971), in which the employer argued that it could not, as a matter of law, be found to have violated the Act because it was not the employer of the employee who it had required to remove union insignia as a condition of performing services in its plant, the Board affirmed the decision of the administrative law judge which stated:

. . . [T]he specific language of the Act clearly manifests a legislative purpose to extend the statutory protection of Section 8(a)(1) beyond the immediate employer-employee relationship. Thus Section 8(a)(1) makes it “an unfair labor practice for an employer [...] to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7.” And Section 2(3) declares, “The term employee shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise.” *Id.* at 541, 542.

The Board distinguishes between the rights of employees and nonemployees vis-a-vis an employer’s property rights. The Supreme Court has recognized the substantive difference of activity by employees “already rightfully on the employer’s property, since the employer’s management interests rather than his property interests were there involved.” *Hudgens v.*

NLRB, 424 U.S. 507, 522 at fn. 10, (1976), citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Thus, when the Section 7 rights of employees “rightfully on the employer’s property” are involved, the employer’s managerial rights, not the employer’s property rights, are the focus of the inquiry.

In *International Business Machines Corp.*, 333 NLRB 215 (2001), a case involving the respondent’s prohibition of the display in its parking lot of a large hand painted sign soliciting support of a union, the Board affirmed the administrative law judge who pointed out that:

In an unbroken line of decisions, this Board and the Supreme Court have stated that where an employee exercises his Section 7 rights while legally on an employer’s property pursuant to the employment relationship, the balance to be struck is not vis-a-vis the employer’s property rights, but only vis-a-vis the employer’s managerial rights. The difference is “one of substance,” since in the latter situation Respondent’s managerial rights prevail only where it can show that the restriction is necessary to maintain production or discipline or otherwise prevent the disruption of Respondent’s operations. . . . *Id.* at 219, 220.

In the instant case, as already noted, the complaint is carefully drawn and relates only to employees, albeit employees of Control rather than Simon. There is no evidence of any disruption of the Respondent’s operations. I find, consistent with the holding of the Board in *Gayfers Department Store*, *supra*, and as alleged in the complaint, that the Respondent violated Section 8(a)(1) of the Act by prohibiting the off-duty Control employees from soliciting during their nonworking time on August 19, at the Roosevelt Field Mall, from distributing union leaflets on nonworking time in nonworking areas at the Roosevelt Field Mall on September 24, and from distributing union leaflets on nonworking time in nonworking areas at the Smith Haven Mall on August 28 and October 23. I further find that the Respondent violated Section 8(a)(1) of the Act on September 24, at the Roosevelt Field Mall and on August 28 and October 23, at Smith Haven Mall by threatening employees with intervention by law enforcement officers if they engaged in leafleting in contravention of its unlawful directive to cease doing so.

3. The solicitation/distribution rule

The General Counsel and Charging Party argue in their briefs that a rule prohibiting distribution and solicitation at the malls is overly broad and violates the Act. The Stipulation, paragraph 8, recites that “Simon maintains posted rules concerning solicitation and distribution at these malls” and maintains “an access permit policy for individuals wishing to solicit or distribute at the malls.” Paragraph 8 further recites that “it is not contended that Simon selectively enforced these rules.” The rules in question, attached to the stipulation, are headed, “Welcome to Roosevelt Field” and “Welcome to Smith Haven Mall, respectively. They then state: “In order to assist in our effort to provide a safe, secure and pleasant shopping environment, we ask for your cooperation with the following.” Thereafter eight numbered “rules” are stated including “1. Appropriate non-offensive attire, including shirts and shoes must be

worn,” “2. Conduct that is disorderly, disruptive or which endanger others is prohibited. Such conduct may include running, use of skateboards, rollerblades, bicycles, radios, etc.” and “4. Picketing, distributing handbills, soliciting and petitioning require the prior written consent of mall management.”

There is no evidence that the foregoing rules were cited by representatives of Simon when it informed Control’s off-duty employees that they could not solicit or distribute in nonwork areas. There is no complaint allegation addressing any posted or unposted rules. The complaint states that employees were “informed” that solicitation was not permitted and “directed” to cease distributing union leaflets. There is no allegation of enforcement of an unlawful rule.

Despite the foregoing, both the General Counsel and Charging Party argue in their briefs that rule number 4 is overly broad and violates the Act. No amendment of the complaint was offered at hearing or in the General Counsel’s brief. The rules are addressed to the customers who are being served by employees and for whom Simon seeks “to provide a safe, secure, and pleasant shopping environment.” Customers, although invitees, are strangers to the property. The Control employees who “regularly and exclusively work on the premises . . . are not strangers to the property.” That distinction is the controlling factor in this decision. The rules are addressed to customers. The record does not establish that the Respondent relied upon the foregoing rules when directing the off-duty Control employees not to solicit or distribute. I have found that the foregoing conduct violated the Act. The Respondent was not, pursuant to the allegations of the complaint or any amendment thereto, placed on notice that the rule addressed to customers was in issue. This matter was not fully litigated. I shall make no finding regarding the foregoing rule.

CONCLUSIONS OF LAW

1. By engaging in surveillance of off-duty employees engaging in the union activity of meeting with representatives of the Union, 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.

2. By prohibiting employees on their nonworking time from engaging in solicitation and leafleting in nonworking areas, activities protected by Section 7 of the Act, 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.

3. By threatening off-duty employees with intervention by law enforcement authorities if they disobeyed the Respondent’s unlawful prohibition of their protected solicitation and leafleting activity, 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 has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.³

ORDER

The Respondent, Simon DeBartelo Group a/w M.S. Management Associates, Inc., Garden City and Lake Grove, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance of off-duty employees engaging in the union activity of meeting with representatives of Local 32B–32J, Service Employees International Union.

(b) Prohibiting employees on their nonworking time from engaging in solicitation and leafleting in nonworking areas.

(c) Threatening off-duty employees with intervention by law enforcement authorities if they disobeyed the Respondent’s unlawful prohibition of their protected leafleting activity.

(d) 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 Roosevelt Field Mall, Garden City, New York, and Smith Haven Mall, Lake Grove, New York, copies of the attached notice marked “Appendix.”⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, 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 Control Services, Inc., at any time since August 19, 1999.

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

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

Dated, July 13, 2006

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

³ 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.

⁴ 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.”

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board had 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 a 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 engage in surveillance of employees engaging in the union activity of meeting with representatives of Local 32B-32J, Service Employees International Union.

WE WILL NOT prohibit employees on their nonworking time from engaging in solicitation and leafleting in nonworking areas.

WE WILL NOT threaten off-duty employees with intervention by law enforcement authorities if they disobey our unlawful prohibition of their protected leafleting activity.

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.

SIMON DEBARTELO GROUP A/W M. S. MANAGEMENT ASSOCIATES, INC.