

**Giant Food Stores, Inc. and Easton Development Company and United Food and Commercial Workers, Local 1357. Case 4-CA-15117**

June 15, 1989

**DECISION AND ORDER**

**BY CHAIRMAN STEPHENS AND MEMBERS  
JOHANSEN AND CRACRAFT**

On July 17, 1986, Administrative Law Judge Robert W. Leiner issued the attached decision, and on August 1, 1986, he issued the attached Erratum to that decision. The Charging Party filed exceptions and a supporting brief. The Respondents filed cross-exceptions and a supporting brief.

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

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,<sup>1</sup> findings, and conclusions only to the extent consistent with this Decision and Order.

Contrary to the complaint's allegations, the judge found that Respondent Giant did not violate Section 8(a)(1) of the Act by demanding that union pickets leave its Palmer Township, Northampton, Pennsylvania shopping center store premises or be arrested. The judge further found that the Respondents' maintenance of a lawsuit in the Pennsylvania state courts related to the picketing and handbilling that occurred at the Palmer Township store did not lack a reasonable basis in law. He therefore recommended that the portion of the complaint alleging a violation of the Act based on the maintenance of the lawsuit be dismissed, but that the Board retain jurisdiction over that allegation pending completion of the state court proceedings. For the reasons set forth below, we reverse the judge and find that Respondent Giant violated Section 8(a)(1) by causing and acquiescing in the police demand that the pickets move or face arrest. Additionally, for the following reasons, we agree with the judge's recommended dismissal of the complaint allegation regarding the lawsuit, but we shall retain jurisdiction over that allegation pending the disposition of the state court litigation.

**Background**

Respondent Easton Development Company is the developer and operator of a shopping center located in Palmer Township, Northampton, Pennsyl-

vania. Respondent Giant Food Stores, Inc. operates a chain of retail food stores, including one located in the Palmer Township shopping center being developed by Easton.

In 1983, Easton granted Giant a 20-year lease covering a 33,000 square foot store in Easton's then prospective shopping center. The store was leased to Giant, according to the lease, "together with the right to the non-exclusive use, in common with others, of all such automobile parking areas, driveways, footways and other facilities . . . designed for common use . . ." The lease further provided:

Landlord shall construct . . . the parking areas . . . approaches, entrances, exits, sidewalks, [and] roadways . . . all hereinafter referred to as "common areas", "common facilities", or "public areas", for the reasonable operation of the Shopping Center and Tenant's business in the Demised Premises, all of which Tenant, its customers, employees and all those having business with it, are hereby granted the right to use and enjoy, in common with other tenants, their customers, employees, and those having business with them. Landlord shall keep and maintain the foregoing in good repair and condition and reasonably free of snow, ice, refuse and other obstructions.

Giant's store is the largest store in the shopping center, which was planned to have about 15 stores when completed. There are two entrances into the store which are separated by a 25-foot vestibule. The entrances open onto a sidewalk running the length of the store front.

The shopping center is bordered by two highways. William Penn Highway runs roughly east to west and borders the shopping center to the south. Greenwood Avenue runs roughly north to south and borders the shopping center on the east. Both highways have a posted 35-mile-per-hour speed limit. There are two entrances to the shopping center, one from each road. The William Penn Highway entrance is located about 425 feet from the entrances to the Giant store. The Greenwood Avenue entrance is located about 200 feet from the entrances to the Giant Store.

In preparation for the scheduled May 14, 1985<sup>2</sup> store opening, Giant representatives and Giant's attorneys on May 6 met with Palmer Township Police Chief DiVietro<sup>3</sup> and Deputy Chief Lutz to

<sup>1</sup> The Respondents have excepted to the judge's exclusion of evidence regarding the cost and availability of mass media in the marketing area where the Giant store is located. In light of our decision below, we find it unnecessary to pass on the Respondents' exception.

<sup>2</sup> All dates are in 1985 unless otherwise indicated.

<sup>3</sup> The judge inadvertently misspelled Chief DiVietro's name. We correct this error.

review general security procedures. Giant informed Chief DiVietro that based on prior experience, Giant, whose employees are not represented by any labor organization, could expect mass picketing once the store opened. Giant told Chief DiVietro that police were not to bother pickets if they appeared even if they were on private property. Giant explained that it would handle the matter through a civil legal action.

Giant opened its store as planned on May 14. Between May 14 and June 21, Giant was the only store open in the shopping center. By March 1986, a total of 15 or 16 stores were open in the shopping center.

On May 15, union pickets distributed leaflets on the sidewalk in front of the Giant store's two entrances and in the parking lot. The police received a phone call on May 15 concerning the pickets and sent an officer to the store. The officer observed people with signs in front of the store and people putting leaflets on cars in the parking area.

On May 16, Police Chief DiVietro called Douglas Diehl, Giant's human resources representative, and asked if Diehl knew that there were pickets at the Giant store the previous day. Chief DiVietro urged Diehl not to be "wishy-washy" regarding the pickets. Diehl replied: "Chief, understand, we don't like that they are out there. We will call you if they reappear." Police Chief DiVietro's notes made after his conversation with Diehl indicate that "[t]hey [Giant] do not want these people outside the store . . . . If they return, Giant will call." Shortly thereafter, Chief DiVietro told Deputy Chief Lutz that if the police received a call from Giant, they would move the pickets from in front of the store to the parking area entrances.

On May 20, Giant and Easton as co-plaintiffs filed a civil lawsuit in Pennsylvania state court alleging that the Union was engaging in mass picketing and trespassing. The suit requested, *inter alia*, that the Pennsylvania court enjoin the picketing.

At 11 a.m. on May 24, six pickets arrived at the Giant parking area to picket and handbill in protest of Giant's failure to pay the prevailing "area standard" wages and benefits. Two pickets were stationed outside each of the two entrances to the Giant store and two more pickets were stationed on a "pork chop-shaped" island at the William Penn Highway entrance. None of the pickets was an employee of Giant.

Giant's district supervisor, Robert Motter, telephoned the police to report the arrival of the pickets. Responding to the telephone call from Giant, Deputy Chief Lutz arrived at the shopping center and told the pickets to move away from the Giant store entrances to the parking area entrances. Lutz

warned the pickets that they would be subject to arrest for criminal trespass if they did not move. The pickets complied with Lutz' demand. Lutz then went into the store to speak with Motter. Lutz told Motter that he had "taken care of your problem" and asked Motter what he wanted done. Motter replied, "Well, you're the policeman." Lutz said, "O.K.," and left.

In a subsequent telephone conversation that day, Diehl told Police Chief DiVietro that moving the pickets had not been authorized by Giant and that Giant had made clear at the May 6 meeting what it wanted done. Chief DiVietro said that thereafter the police would only act with respect to the pickets in an emergency such as their blocking traffic.

The pickets remained at the islands and sidewalks for the rest of May 24. However, within at most 3 days, they had returned to the Giant store entrances where they remained through the time of the hearing.<sup>4</sup>

On June 10, the Union filed a charge with the Board alleging that the Respondents had violated Section 8(a)(1) of the Act by filing "spurious legal actions designed to curtail or eliminate" the Union's picketing rights. On June 14, the Union filed an amended charge alleging that moving the pickets on May 24 also violated the Act.

On June 13, the Union filed "Preliminary Objections" in the state court proceeding initiated by the Respondents. The Union's objections asserted, *inter alia*, that the state court lacked subject matter jurisdiction based on preemption of the National Labor Relations Act because the Union had filed an unfair labor practice charge with the Board. On July 1, the state court issued its decision<sup>5</sup> holding that the court lacked subject matter jurisdiction over the mass picketing claim due to a failure of proof.<sup>6</sup> As to the Respondents' trespass claim, the court ruled that it was preempted from considering the issue by the Union's filing of a related charge with the Board. On November 29, the Respondents appealed the court's decision to the state appellate court.

#### The Union's Picketing

The complaint, as amended, alleges that Respondent Giant, acting through Motter and Lutz, violated Section 8(a)(1) on a specific day, *i.e.*, May 24, by demanding that the union pickets leave the

<sup>4</sup> The parties have different estimates of how long the pickets remained away from the front of the store. The judge did not resolve the dispute. The longest estimate was 3 days.

<sup>5</sup> The decision of the state trial court is reported at 120 LRRM 2024.

<sup>6</sup> The court ruled that there was insufficient evidence of mass picketing, violence, or intimidation and therefore Pennsylvania law prohibited the issuance of an injunction on this basis.

shopping center or be arrested. The judge, applying *Giant Food Markets*, 241 NLRB 727 (1979), enf. denied 633 F.2d 18 (6th Cir. 1980), concluded that Respondent Giant did not violate the Act. The judge found that the shopping center property was "open" to the public; and the Union's picketing and handbilling did not create a "nuisance." However, the judge further found that, because the Giant store was the only store in the shopping center open on May 24, the Union's intended audience was clearly identifiable, there was little risk of enmeshing neutral employers, and the impact of picketing and handbilling from the perimeter of the shopping center was not significantly diminished. Therefore, the judge concluded that the Respondent did not violate the Act on May 24 by requiring the pickets to move to the perimeter of the shopping center.<sup>7</sup> We do not agree.

Subsequent to the judge's decision, the Board issued *Jean Country*, 291 NLRB 11 (1988), in which it reevaluated the analytical approach for resolving conflicts between Section 7 and private property rights. In *Jean Country*, the Board stated that a "threshold question" in the accommodation analysis was whether the Respondent possessed "genuine interests" in the property. *Id.* at 16. The Board explained that:

[O]f course, there is an initial burden on the party claiming the property right to show . . . that it has an interest in the property and what its interest in the property is. A party has no right to object on the basis of other persons' property interests; and an employer's mere objection to having union pickets outside its establishment does not in itself rise to the level of a property interest. See *Barkus Bakery*, 282 NLRB 351 (1986), enf. mem. sub nom. *NLRB v. Caress Bake Shop*, 833 F.2d 306 (3d Cir. 1987).

*Jean Country*, supra at 13 fn. 7.

In this case, Respondent Giant has not established that it has any exclusory property interest in the sidewalk in front of the Giant store or in the shopping center parking areas, the areas where the picketing and handbilling occurred. The lease establishes that Respondent Easton gave Respondent Giant merely the "non-exclusive" right to "use" such common areas. Furthermore, the lease specifically provided that Respondent Easton, the landlord, would be obligated to maintain common areas

and keep them free of obstructions.<sup>8</sup> See also *Polly Drummond Thriftway*, 292 NLRB 331 (1989).

We agree with the judge that by its picketing and handbilling the Union was engaged in protected activity. We note that the language of the Union's picket signs and handbills communicated an area standards objective in protest of Respondent Giant's failure to pay prevailing area wages and benefits. The Union's overall conduct was in conformance with its stated area standards purpose, and did not indicate an organizational or recognition component. Area standards activity is a form of consumer publicity and is protected by Section 7 of the Act, albeit to a lesser extent than activity that furthers a "core" purpose of the Act. See *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 207 fn. 42 (1975). Thus, we find that the Union was engaged in picketing and handbilling protected by Sec. 7 of the Act.

Finally, the evidence reveals that Respondent Giant caused and acquiesced in the police demand that the pickets move to the shopping center perimeter or be arrested. It telephoned the police to inform them that the pickets had returned to the shopping center on May 24. After Deputy Chief Lutz demanded the pickets move, Lutz told Giant's district supervisor, Motter, that he had "taken care of your problem" and asked Motter what he should do. Motter replied, "Well, you're the policeman." Although Giant's human resources representative, Diehl, later told Chief DiVietto that Giant had not authorized the actions of the police, Respondent Giant did not repudiate those actions or inform the pickets that the actions had not been authorized.<sup>9</sup> Thus, we conclude that Respondent Giant is responsible for the demand that the pickets move.

Because Respondent Giant has failed to show that it had an exclusory property interest in the areas where the protected picketing and handbilling occurred, a threshold issue, we conclude that Respondent Giant violated the Act when it caused

<sup>8</sup> Unlike the situation in *Jean Country*, here Respondent Easton is not alleged to have taken any part in the demand for the pickets to move and there is no evidence to suggest any such involvement by Easton.

Although the lease gives Respondent Giant the right to "exclusive use and control of that portion of the 'common areas' . . . labeled Promotion Area," the lease introduced into evidence does not identify any "Promotion Area." The pertinent lease section refers to an "Exhibit A" as setting out the "Promotion Area." "Exhibit A," however, was not attached to the lease, which was entered into evidence without objection. Therefore, there is no proof that "Exhibit A" to the lease existed on May 24, the date of the alleged unfair labor practice. Thus, due to a failure of proof, we reject the contention that Respondent Giant had the exclusive use and control of the sidewalk in front of the store on that date. In any event, we note that the area immediately in front of Respondent Giant's store was only one of the areas to which access was denied.

<sup>9</sup> There is no evidence to suggest that Motter or any other Giant employee was acting as an agent of Easton. See fn. 8, above.

<sup>7</sup> In dismissing, the judge stressed that the complaint alleged a violation on only one day, i.e., May 24. Because he dismissed the complaint allegation, the judge did not pass on the alleged agency status of the police. We do so below.

and acquiesced in the Palmer Township police's moving of the pickets.

### The State Court Litigation

The complaint, as amended at the unfair labor practice hearing, alleges that Respondents Giant and Easton violated Section 8(a)(1) by maintaining and prosecuting since June 10, 1985, a retaliatory civil lawsuit seeking to enjoin the Union's picketing. Applying the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the judge concluded that the maintenance of the Respondents' state court lawsuit after the Union filed an unfair labor practice charge with the Board was not "baseless." The judge dismissed the complaint allegation and further recommended in his erratum that the Board retain jurisdiction over the complaint allegation concerning the lawsuit pending completion of the state court proceedings.

For the reasons set forth below, we agree with the judge that the Respondents' maintenance of the state court lawsuit after the Union filed an unfair labor practice charge did not lack a "reasonable basis." We therefore shall dismiss this complaint allegation but, like the judge, we shall retain jurisdiction over that allegation pending final disposition of the state court proceedings. In doing so, we find it unnecessary to pass on the judge's discussion of whether the Respondents' lawsuit was retaliatory.

In *Bill Johnson's Restaurants*, above, the Supreme Court, while acknowledging that lawsuits filed by employers may be powerful instruments of coercion or retaliation, nonetheless found that the first amendment right of access to the courts and the States' compelling interest in maintaining domestic peace prohibited the Board from enjoining as an unfair labor practice a well-grounded lawsuit regardless of the employer's motivation in filing it. The Court indicated, however, that the Board was empowered to enjoin a lawsuit that lacks a reasonable basis if the lawsuit was filed with the intent to retaliate against employees exercising their rights under the Act.

The Court further indicated that when confronted with an allegation that the filing and prosecution of a lawsuit violates the Act, the Board first must determine whether the suit has a "reasonable basis."<sup>10</sup> If it is found that the suit lacks a reasonable basis, the Board may then proceed with the unfair labor practice proceeding and determine whether the suit was filed with a retaliatory motive. Should the Board determine that the suit

has a reasonable basis, however, then the Board may not enjoin the suit, but must stay its unfair labor practice proceeding until the state court suit has been concluded. The Court further stated that if the state court ultimately finds merit in the employer's suit, the employer should also prevail before the Board because the filing of a meritorious lawsuit, even if filed for a retaliatory purpose, is not an unfair labor practice. Finally, the Court indicated that if the state court judgment goes against the employer or the suit is

withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor practice case.

*Bill Johnson's Restaurants*, 461 U.S. at 747.

Applying the Court's decision in *Bill Johnson's Restaurants* to the facts of this case, we must first examine whether the Respondents' maintenance and prosecution of the state court lawsuit after June 10, had a reasonable basis.<sup>11</sup> In doing so, we note that the record in this case shows that the state court proceedings are still pending.

The General Counsel, as explained at the underlying unfair labor practice hearing, takes the position that after the Union filed an unfair labor practice charge, the state court's jurisdiction was preempted and, therefore, the Respondents' maintenance of the suit after that date violated the Act. We find that the record evidence is insufficient to establish that the Respondents' maintenance of the suit after June 10 lacked a reasonable basis.

In *Longshoremen v. Davis*, 476 U.S. 380 (1986), the Supreme Court stated that when it is asserted that a state court lacks jurisdiction over a lawsuit because the suit has been preempted by the Act, "[the issue] must be considered and resolved by the state court." 476 U.S. at 393. As indicated above, the General Counsel did not allege that the filing of the lawsuit was an unfair labor practice, but merely that its maintenance subsequent to the filing of the charge by the Union violated the Act. Because the state court was obligated to consider the preemption claim once it was raised by the Union,<sup>12</sup> it cannot be said that the litigation of that issue or the subsequent appeal of the state court's

<sup>10</sup> The Court stated that the Board could apply the "genuine issue" test used in adjudging motions for summary judgment when making its reasonable-basis determinations 461 U.S. at 745 fn. 11

<sup>11</sup> Significantly, the General Counsel did not allege that the filing or maintenance of the lawsuit prior to June 10, the date the Union filed an unfair labor practice charge, violated the Act

<sup>12</sup> We note that the preemption claim was not asserted by the Union as a defense to the state court suit until June 13, 3 days after the charge had been filed with the Board.

resolution of that claim, without more, lacked a reasonable basis.<sup>13</sup>

Having concluded that the maintenance of the state court suit after June 10 had a reasonable basis, *Bill Johnson's Restaurants*, above, requires that the Board stay its hand pending completion of the state court proceedings. Accordingly, we dismiss the allegation of the complaint concerning the Respondents' alleged retaliatory lawsuit, but shall retain jurisdiction over this complaint allegation for further consideration on prompt notification by any party of a final, binding determination or resolution of the merits by the Commonwealth of Pennsylvania.<sup>14</sup> In light of our disposition here, we find it unnecessary to determine the remaining issues raised by the exceptions and cross-exceptions.

### ORDER

The National Labor Relations Board orders that the Respondent, Giant Food Stores, Inc., Palmer Township, Northampton, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting representatives of United Food and Commercial Workers, Local 1357, from engaging in peaceful picketing and handbilling protected by the Act in front of the Respondent's store in the Easton Shopping Center, Palmer Township, Northampton, Pennsylvania, and causing and acquiescing in the police threatening of such representatives with arrest for engaging in such picketing and handbilling as long as that activity is conducted by a reasonable number of persons and does not unduly interfere with the normal use of the facili-

ties or operation of businesses not associated with the Respondent's store.

(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) Post at its office at the Easton Shopping Center copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, 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.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegation not specifically found to be a violation is dismissed; provided, however, that jurisdiction over this allegation is retained for the purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that the state court proceedings have been completed.

<sup>15</sup> 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

<sup>13</sup> Chairman Stephens also notes that, in light of the Supreme Court's decision in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 207 fn. 42 (1975), the filing of a state court lawsuit for trespassory area standards picketing cannot be found to have been lacking any reasonable basis by virtue of the suit's legal theory. Further, there is no claim here that the suit was without a reasonable basis in fact, e.g., that the pickets did not actually trespass on the property in question. As for the contention that there was no reasonable basis for maintaining the suit after an unfair labor practice charge was filed against the Respondents with respect to their exclusion of the pickets, he notes that, although there is a strong argument based on the reasoning of the plurality opinion and the opinion of Justice Blackmun in *Sears* that the suit would be preempted on the filing of a charge, the Supreme Court did not reach that question. *Id.* at 206-207, 209. It cannot be said at this point that the Respondents acted without reasonable basis in attempting to persuade the state court that it should follow the reasoning of Justice Powell's concurring opinion in *Sears*, which took the view that state court jurisdiction over trespassory area standards picketing was not automatically preempted on the filing of an unfair labor practice charge with the Board challenging the exclusion of the pickets. *Id.* at 212-214. Indeed, even Justice Blackmun indicated that if a charge were filed with the Board, the state court suit need not be dismissed, but could be merely stayed pending final action by the General Counsel or the Board. *Id.* at 209.

<sup>14</sup> The judge entered a similar order in his erratum. The Respondents question his jurisdiction to do so subsequent to the issuance of his decision. We need not pass on the issue that the Respondents raise because in our review of the judge's recommended disposition of this allegation, based on the Charging Party's exceptions, we clearly have jurisdiction to enter this order.

WE WILL NOT prohibit representatives of United Food and Commercial Workers, Local 1357 from engaging in peaceful picketing and handbilling protected by the Act in front of our store in the Easton Shopping Center, Northampton, Pennsylvania, and cause and acquiesce in the Palmer Township police's threatening of such representatives with arrest for engaging in such picketing and handbilling, as long as their activity is conducted by a reasonable number of persons and does not unduly interfere with the normal use of the facilities or operation of businesses not associated with us.

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.

#### GIANT FOOD STORES, INC.

*Marvin L. Weinberg, Esq.*, for the General Counsel.  
*Eric Hemmendinger, Esq. (Shawe & Rosenthal)*, of Baltimore, Maryland, for the Employer.  
*Michael N. Katz, Esq. (Meranze and Katz)*, of Philadelphia, Pennsylvania, for the Union.

#### DECISION

##### STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard on March 10, 11, and 12 in Philadelphia, Pennsylvania, on the General Counsel's complaint,<sup>1</sup> as amended at the hearing, alleging, in substance, that Giant Food Stores, Inc. and Easton Development Company (the Respondents) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by maintaining and prosecuting, since on or about 10 June 1985, a civil action for an injunction (Court of Common Pleas, Northampton County, Pennsylvania) proscribing certain picketing<sup>2</sup> by the United Food and Commercial Workers, Local 1357 (the Union or the Charging Party); and that Respondent Giant Food Stores, Inc. (Giant), but not Respondent Easton, violated Section 8(a)(1) of the Act on 24 May 1985 by demanding that union pickets leave the Palmer Township shopping center store or be arrested.<sup>3</sup>

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, submit oral and written evidence, and to argue orally on the record. At the close of the hearing, the par-

<sup>1</sup> The Union's underlying unfair labor practice charge was filed on 10 June 1985 and served on 12 June 1985. Its amended charge was filed and served on 14 June 1985.

<sup>2</sup> At the hearing, the complaint was amended to allege that Respondent's lawsuit was maintained and prosecuted in retaliation for the Union's picketing. The General Counsel specifically refrained from alleging this conduct as constituting a violation of Sec. 8(a)(4) of the Act.

<sup>3</sup> All dates hereinafter will refer to 1985 unless otherwise specified. Respondents' answer admitted certain allegations, denied others, and denied the commission of any unfair labor practices.

ties waived final argument and elected to file posthearing briefs, which have been carefully considered.<sup>4</sup>

On the entire record, including the briefs, and from my observation of the demeanor of the witnesses as they testified, I make the following

#### FINDINGS OF FACT

##### I. RESPONDENTS AS STATUTORY EMPLOYERS

A. The complaint alleges, Respondent Giant Food Stores, Inc. (Giant) admits, and I find, that Giant, a Delaware corporation, operates a chain of retail food stores, including one in Palmer Township, Pennsylvania, and in the year ending December 1985, in the course of its business operations, received gross revenues in excess of \$500,000, and in the same period purchased and received materials and supplies in excess of \$50,000 from points outside Pennsylvania. Giant concedes that at all times material it is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. The complaint alleges, Respondent Easton Development Company (Easton) admits, and I find that at all material times, it has been and is a general partnership engaged in the development and operation of a shopping center in Palmer Township, Northampton, Pennsylvania; that in the past year, in the course of its business operations, it derived gross revenues in excess of \$250,000 and, in the same period, purchased and received materials and supplies in excess of \$50,000 from points outside Pennsylvania. Easton, however, denies the complaint allegation and conclusion that it is an "employer engaged in commerce" within the meaning of Section 2(2), (6), and (7) of the Act. In *Carol Management Corp.*, 133 NLRB 1126 (1961), the Board adopted a standard for asserting jurisdiction over operators of shopping centers: gross annual revenue in excess of \$100,000; in excess of \$25,000 annually other than indirect outflow or inflow. Easton's above admissions of the volume of its annual operations and direct inflow meet or exceed such Board standard. I conclude that its denial raises no material issue of fact; that the Board should assert jurisdiction over its operations, *El Conquistador Co.*, 231 NLRB 840, 841 fn. 6 (1977); and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. THE UNION AS A STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondents admit, and I find that at all material times, United Food and Commercial Workers, Local 1357 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

In 1983, Respondent Easton Development Company, as lessor (Landlord) granted a 20-year lease, with incre-

<sup>4</sup> The General Counsel also submitted, with his brief, a motion to correct transcript, consisting of 15 corrections. The unopposed motion is granted.

mental renewal options, to Respondent Giant covering a 33,000 square foot store in its prospective shopping center in Palmer Township, Northampton, Pennsylvania. Giant operates retail food stores in Pennsylvania, Maryland, Virginia, and West Virginia. Easton is a Missouri General Partnership and is the owner-developer of the shopping center. The lease (G.C. Exh. 6) discloses that the contemplated store was leased (G.C. Exh. 6, sec. 202) "together with the right to the nonexclusive use, in common with others, of all such automobile parking areas, driveways . . . and other facilities . . . designed for common use as shall be installed by Landlord."

The lease also provides (G.C. Exh. 6, sec. 901):

Landlord shall construct . . . the parking areas . . . approaches, entrances, exits, sidewalks, roadways . . . all hereinafter referred to as "common areas," "common facilities," or "public areas," for the reasonable operation of the Shopping Center and Tenant's business in the demised Premises, all of which tenant its customers, employees and all those having business with it, are hereby granted the right to use and enjoy, in common with other tenants, their customers, employees, and those having business with them.

The plan for the shopping center subdivision (G.C. Exh. 7), various photographs (G.C. Exh. 5 and subparts thereof) and testimony given at the hearing show that the Giant store is by far the largest store among the 15 planned stores in the approximately 10.6-acre tract, which contains over 400 parking spaces, 5.9 paved acres and 3.05 landscaped acres. The shopping center's centrally located parking lot (425 x 300 foot) services vehicles entering from William Penn Highway (running roughly east-west) and from Greenwood Avenue (running roughly north-south). The distance from the single William Penn Highway entrance/exit to the store's entrance is approximately 425 feet; the distance from the single Greenwood entrance/exit appears to be about 200 feet from the store's entrance area. The Giant store is in the north-east corner of the shopping center. The towns of Easton and Bethlehem, Pennsylvania, are 1-1/2 miles East and 6 miles West, respectively, from the shopping center along the William Penn Highway. Both Greenwood Avenue and William Penn Highway have 35-mile-per-hour speed limits.

At each of the above two entrances, there is an irregular "pork chop" shaped traffic island, which serves as a traffic divider for entering and exiting traffic. The pork-chop island at the William Penn entrance is about 38 feet long, with largest width of 21 feet, and a height of 5 inches. The pork-chop island at the Greenwood Avenue entrance is about 35 feet long with a maximum width of 20 feet and a smallest width of 3-1/2 feet. The record does not disclose its height. Except for the openings at these two entrances, there are contiguous, 5-foot wide sidewalks bordering the property along Greenwood Avenue and William Penn Highway. Along Greenwood Avenue, the sidewalk abuts the curb up to the entrances; thereafter, it is set back several feet by a grass border as it stretches into the right-angle junction with William

Penn Highway. Along William Penn Highway, the sidewalk is also set back from the curb by a similar grass border.

Right-hand turning vehicles from the two-lane, south-bound (northbound has one lane) Greenwood Avenue, drive past the "pork chop" island into the parking lot or directly into the "fire lane" in front of the Giant Store (G.C. Exhs. 5(c) and (7)). The innermost of the two Greenwood Avenue lanes is a deacceleration lane into the entrance. Left-hand turns for northbound traffic cannot be made because of a raised masonry traffic divider blocking the Greenwood Avenue entrance. Thus, entrance from Greenwood Avenue is only by right turn via a deacceleration lane. No entrance stop light or stop sign is present.

Entrance from the essentially two-lane, east-west William Penn Highway is either through a right turn (west-bound) from a similar deacceleration lane, to the right of a "pork chop" island divider; or a left turn from a separate left-turn lane, controlled by a traffic light, to the left of the island. Passages around the respective "pork chop islands" are wide enough to permit the passage of two cars abreast. The two deacceleration lanes can hold a line of at least one-half dozen waiting cars. Traffic on both roads is heavy at rush hours.

Pictures and a sketch of the parking lot disclose groups of slightly raised islands within the parking lot at various distances from the store but they appear to be covered, or at least bordered, by shrubbery and bushes.

The above facts existed on 24 May 1985 and at the time of the hearing.

On 6 May 1985, in preparation for 14 May opening, Giant agents and supervisors (Douglas Diehl and Schiano) and attorneys (Stitt and Hemmendinger) met with Palmer Township police (Chief De Vietro and Deputy Chief Lutz). The police, consistent with their practice on the opening of any new business in the town, reviewed security procedures such as retail theft and bank escorts. Diehl told the police that based on prior experience with this Union, Giant expected mass picketing when the store opened. Chief De Vietro, in turn, showed them a copy of an injunction issued against picketing of a local business. The Giant representatives told the police that if the pickets showed up, the police were not to bother them even if they were on private property; that they were not doing anything "wrong"; that Giant would deal with the matter through a civil legal action and did not want to make martyrs out of the pickets with arrests and publicity. The Giant employees are not represented by any labor organization.

The store opened on 14 May. At least through 21 June, it was the only store in the shopping center which was open. At the time of the hearing, March 1986, there were 15 or 16 stores open for business in the shopping center.

On the 2 days following the store opening, 15 and 16 May, the Union distributed leaflets on the sidewalks in front of the store entrances (Tr. 351, 353) and in the parking lot. The store has two entrances/exits. They are at either ends of a 25-foot connecting vestibule in front of the store. Abutting the vestibule there is a 10-foot

sidewalk, protected by an overhang. Adjoining the sidewalk, there is a "fire lane" area in the parking lot from which food from carts are loaded into customer automobiles (G.C. Exh. 5(d); C.P./G.C. Exh. 3). The front door of the store carries a sign: "Unauthorized solicitation for any purposes or the distribution of literature of any kind by nonemployees on company premises is not permitted."

Thus, on the first 2 days of the Union's appearance, 15 and 16 May, the Union passed out leaflets (Tr. 351). On 15 May, the police received a phone call from Giant concerning pickets and sent a police officer. He reported seeing in the parking lot in front of the store people with signs and people placing pamphlets on cars.<sup>5</sup>

On 16 May, Chief De Vietro telephoned Respondent's representative, Douglas S. Diehl, who was at the store. Diehl (director of human resources), corporate employee relations supervisor concerning Respondent's 4800 employees, recalled that De Vietro asked if Diehl knew that there were "picketers at your store last evening." He urged Diehl not to be "wishy-washy" and to call him if the pickets returned. Diehl, apparently responding to De Vietro's "wishy-washy" assertion, said (Tr. 493):

Chief, understand, we don't like that they are out there. We will call you if they reappear.

Chief De Vietro dictated his recollection of the conversation to the police dispatcher:

Chief De Vietro called Doug Diehl of the Giant Supermarkets reference to union organizers outside the Palmer store. They do not want these people outside the store. Car 15 (BF) responded to the store but the people had left about 1/2 hour prior. If they return, Giant will call.

Soon after his conversation with Diehl (Tr. 218), Chief De Vietro spoke with Charles V. Lutz, his deputy chief. He told Lutz that if they received a phone call from Giant, that the pickets were at the store, they would move the pickets from in front of the store to the driveway entrances (Tr. 219, 227).

On 20 May, Giant and Easton Development Company filed a lawsuit in the Court of Common Pleas, Northampton County, Pennsylvania, the complaint alleging the Union's engaging in mass picketing and trespassing. The remedy sought was an injunction against trespassing, blocking of ingress and egress, and intimidation of customers. The Union filed responsive "Preliminary Objections" to the complaint, inter alia, alleging NLRB preemption. The case did not come to hearing until 21 June.

At 11 a.m. on 24 May, in the parking lot, there were six union leafleters, wearing picket signs ("Giant unfair to workers. This picket line protests sub-standard area

wages. Do not patronize this unfair employer"). The bottom of the signs bore the name of the Union. The pickets distributed leaflets (Tr. 360) asking "neighbors" to not patronize Giant which was foreign-owned and was not paying "fair, competitive area wages and benefits to its employees" (G.C. Exh. 4(b)). These pickets were stationed two at each door at the store's entrance; and two on the "pork chop" island in the William Penn Highway entrance to the parking lot. The record does not show whether the "pork chop" islands are public property whether through dedication or otherwise. Respondents, on this record, do not in any case appear to object to the pickets occupying the "pork chop" islands, whether or not private property. The pickets were instructed by the Union not to block the store entrances/exits, not to harass customers and just to hand out leaflets. Of the six pickets, two were union organizers and four were paid, professional pickets (Tr. 355 et seq.). None were Giant employees.

Within a few minutes of the appearance of the pickets on the morning of 24 May, Giant District Supervisor Robert Motter (Respondent supervisor concerned with the store opening) telephoned the police to report the presence of the pickets and then telephoned supervisor Diehl to tell him that he had just called the police. About 20 minutes later, Diehl called Motter to find out what had occurred. Motter told him that the police had come, had moved the pickets from the parking lot to the street, and Motter had thanked them (Tr. 580). Diehl then telephoned Chief De Vietro for an explanation of the events. In the first of two telephone conversations on that day, De Vietro told Diehl that "we took care of your problem" (Tr. 583) and in the second, told him that "maybe his men overreacted." (Tr. 584). In any event, neither Diehl nor any other Respondent agent ever told the Union or the pickets that the police action removing the pickets to the street was beyond "what they should have done and [Respondent] was disavowing it" (Tr. 586).

What had occurred at the picket line was that at 11:15 a.m., Deputy Chief Lutz, responding to Supervisor Motter's phone call, came to the store and instructed the pickets to leave the store area and go to the parking lot entrances. He told them that if they did not leave the store area, they would be subject to arrest for criminal trespass. Lutz admitted that he observed no threats or intimidation by the pickets, but, nevertheless, told the pickets that "we" were "not going to tolerate any intimidation of customers walking in or out of the place" and that leaflets could be distributed at the parking lot exits (Tr. 251-153). He also testified that he would not have removed the pickets if Giant had not called the police.

Lutz then entered the store and told Supervisor Motter that: "I've taken care of your problem" by moving the pickets to the street entrances. When Lutz asked him "what he wanted done," Motter answered: "Well, you're the policeman." Lutz said "OK" and left.

It was at this point, above, that Chief De Vietro spoke by telephone with Supervisor Diehl, wherein De Vietro told Diehl that the store had called the police and that "we took care of your problem." In those conversations,

<sup>5</sup> The record (G.C. Exhs 4(a)-(e)) shows four, single-page leaflets distributed by the Union. All of them urge nonpatronizing of Giant, two of them name "fair" competitors. At least two assert that Giant does not pay its employees "fair, competitive area wages and benefits" and that it is "foreign" owned. It is not clear when in May all four of the leaflets were distributed and in what groups. The case proceeded on the assumption that all four leaflets were distributed in the parking lot prior to 24 May 1985.

Diehl asked De Vietro what he meant by that statement and De Vietro said that Lutz had removed the pickets. Diehl asked if he had talked to anyone in the store and De Vietro said that he spoke to the store manager after the action was taken. When De Vietro then asked for written authorization for his action and for future action regarding the pickets, Diehl told him that the police action had not been authorized and that before he gave him anything in writing, he would first consult counsel. Later that day, Diehl telephoned De Vietro, told him that he had consulted counsel, that there would be no written authorization for police action; that the police action had not been authorized; and that the Respondents' desires were made clear in the 6 May meeting with the police. De Vietro said that thereafter, the police would act only in emergency situations such as "blocking or traffic problems" (Tr. 498).

The pickets did not long remain at the street entrances to which they had been directed by the police. According to General Counsel's witnesses, they remained at the entrances and the islands only for the following 2 or 3 days. Respondent's witnesses uniformly testified that the pickets returned to the parking lot and the store's entrances the next day. In either event, after consulting union counsel, the pickets, with leaflets and pickets signs, returned to the store entrances in the parking lot, and also at the islands and entrances (Tr. 368-370), where they remained through the time of the hearing.

#### Safety; effectiveness of communications

Chief De Vietro testified that the leafletting from the "pork chop" islands at the two entrances would be safe with regard to oncoming automobiles, entering and leaving the parking lot. While he saw picketers occasionally distribute leaflets inside the parking lot, from the narrow median traffic dividers (only 2 feet of flat surface and no appreciable curb), he considered those to be unsafe platforms from which to distribute literature. Other, larger islands within the parking lot, as above noted, are covered by, or at least bordered by, plantings and shrubbery.

The testimony concerning both the actual effect on passers, in and out of vehicles, of leaflet distribution from sidewalks and islands at the entrances and on anticipated future traffic flow was in dispute. The credible evidence is that, notwithstanding exclusive access lanes for right-hand turns, and the traffic light at the entrance from William Penn Highway for left-hand turns (there is no left-hand turn into the Greenwood Avenue entrance) and notwithstanding the width of the passageways surrounding the "pork chop" islands at the entrances (allowing the passage of cars around a vehicle stopped at the island to accept a leaflet), there could well be future traffic problems. Chief De Vietro's testimony supported that conclusion. A vehicle stopped for a leaflet at a "pork chop" island, if not sufficiently "inboard" to the island (whether entering or exiting) could occupy sufficient space to effectively prevent parallel passage from the rear. A further complication arising from any such or similar blockage is that impatient entering drivers awaiting right turn entry even from the exclusive access lanes might attempt to leave the line and be struck from the rear. Similarly, at the William Penn Highway entrance,

where the traffic light provides an exclusive left turn under the protection of "green arrow" light, should a left-turning vehicle stop at (and fortuitously block) the passage at the "pork chop" island, the following left-turning vehicles seeking entrance, at the expiration of the "green arrow," would be "trapped" out on the highway, blocking oncoming William Penn Highway traffic.

On the other hand, with pickets stationed on the entrance islands as well as the store doors, there is no evidence that any traffic problems actually occurred either on 24 May or at any time up to the hearing. Furthermore, the record does not show the frequency of left-hand turns, any inconvenience to vehicles, or the observation of "lane jumping" from the access lanes. Indeed, based on the 21 June stipulation of the parties in the state court action (where the stipulation was that there were pickets both at the store's doors and at the street entrances), the Court of Common Pleas found, as of 29 July 1985 (R. Exh. 10, p. 6, Finding #14): "The picketing at the entrances to the parking lot from the public streets has not resulted in any blocking of traffic." To the extent that a picket (Frinzi) testified (Tr. 463, et seq.) that there were traffic problems when he was picketing at the island entrances, apart from occasional hornhonking against drivers stopped at the islands to talk to him, there is no evidence of vehicles improperly using entrances and exits, much less that they did so because of the presence or functioning of the pickets. In any event, absence of this material from the state court record and the present record leads me to conclude that any traffic problems occurred, if at all, after 29 July, or alternatively, were held by the state court to be immaterial.

With regard to the effectiveness of the Union's ability to communicate with persons approaching the store, the evidence showed that immediately after 24 May, when the policeman temporarily removed the leafleters to the street and islands, at least half<sup>6</sup> of the entering drivers stopped at the islands for the pickets. Over the succeeding 10 months (i.e., after the pickets resumed picketing at the store entrances), very few vehicles stopped to speak to the pickets stationed at the islands in the parking lot entrances (Tr. 461). Motorists rarely parked their cars and then returned to converse with the pickets. Motorists who stopped at the islands often hurried their conversations. As above noted, within a few days (at most) of the police action which removed the pickets to the street, and through the time of the hearing, the pickets had returned to picketing at the store's entrances, in the parking lot, out on the street and the "pork chop" islands.

When the pickets returned to picketing and leafletting at the store's doors,<sup>7</sup> the conversations were longer.

<sup>6</sup> Joseph Frinzi, a paid picketer, testified (Tr. 461) that when the pickets were exclusively at the islands, "approximately half, maybe more stopped" Union organizer Julie Nissey testified that in the same period, "less than half" the motorists stopped at the islands and a "lot less" than half stopped to talk and pick up leaflets (Tr. 376). Frinzi described the percentage stopping at the islands as "occasional" and then put the figure at "approximately half, maybe more." Frinzi's credible testimony makes Nissey's conflicting testimony less than trustworthy.

<sup>7</sup> Respondent's witnesses testified, as above noted, supported by the store "log," that the pickets returned to the parking lot, not after several

There, there was no opportunity for the driver of a vehicle, passing a picket at the island in the entrance, to leave his window rolled up and ignore the picket (Tr. 462).

### State Court Litigation

As above noted, Giant and Easton, on 20 May filed an action in equity seeking, inter alia, to enjoin the picketing and handbilling on the store's premises. On 10 June, the Union filed its charge alleging 8(a)(1) and (3) invasion of Section 7 rights by Respondents' "filing spurious legal actions designed to curtail or eliminate" its picketing rights. On or about 13 June, it filed its preliminary objections (and supporting memorandum) to Respondents' complaint, asserting in defense, the Court's lack of subject matter jurisdiction because, the Union having filed unfair labor practice charges with the NLRB, "exclusive primary jurisdiction" over the matters alleged in the state action rested in the NLRB. The Union's defenses also include alleged state law jurisdictional defects in the complaint. The theory of Respondents' requested injunction remedy included an invocation of the state's police power against union-caused customer intimidation, violence, blocking of ingress by mass picketing and destruction of property.

Trial in the Court of Common Pleas was 21 June. Before the hearing, union counsel asked Respondents' counsel why he was pursuing a police power aspect to the injunction. Respondent's counsel answered: "I know we really don't have much to go on, however, I am going to give it my best shot with whatever I have." The parties then stipulated, in the state court proceeding, that:

Since the picketing and handbilling commenced, the plaintiffs have received no threats of violence and there has been no violence, destruction of property or blocking of ingress or egress by mass picketing at the Easton store. There have been no threats or violence that plaintiffs are aware of.

Thereafter, Respondents called witnesses. Respondents contend before me (Br. 19) that they were seeking to establish in the state court that the "demeanor" of the pickets included cursing at and blocking customers; and that this conduct, even if not sufficient to justify the issuance of an injunction under the state police power, was "arguably relevant to the Union's claim of a right to trespass under state constitutional law," citing *Western Pa. Socialist Workers 1982 Campaign v. Conn. General Life Insurance Co.*, 485 A. 2d 1 (1984).<sup>8</sup>

days on the islands, but on the next day, i.e., 25 May. In view of the disposition hereafter, resolution of the issue is not necessary I have chosen to accept General Counsel's witnesses' testimony, arguendo, that the pickets did not return for 2 or 3 days to the parking lot, especially to give a broader time period to the alleged violation than the complaint allegation actually supports.

<sup>8</sup> The crucial holding in *Hudgens v. NLRB*, 424 U.S. 507 (1976), is that the accommodation of the competing rights to picket (statutory) and to be free from trespassory invasion (private property) was not to be analyzed under the U.S. Constitution but under the Act. Thus *Hudgens* held, reversing prior cases, that there is no federal constitutional right for a Union to picket on private property in furtherance of an economic strike.

On 1 July, Presiding Judge Williams nevertheless issued his decision, *Giant Food Stores v. Food & Commercial Workers Local 1357*, 120 LRRM 2024, denying Respondents' request for injunction and holding, inter alia, that the state court lacked jurisdiction under the state police power (to protect the public health and welfare) due to failure of proof of violence, coercion, mass picketing or other unlawful behavior; and thus, under the state's Anti-Injunction Act (43 Pa. C.S.A. secs. 206 et seq.) (prohibiting Pennsylvania state courts from enjoining organized labor activities), he could not enjoin the instant picketing/handbilling.

With regard to enjoining the Union's trespass (as opposed to the element of violence or coercion) on private property, the Court held, that since the picketing, including the "trespass," was arguably a matter within the scope of Sections 7 and 8 of the NLRA, the Court was preempted from considering the subject (i.e., whether trespassory area standards picketing on private property was "protected" under the NLRA). Under the ruling in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, the exclusive initial jurisdiction for resolution of that issue resided in the Board.<sup>9</sup> It also held, that the exceptional circumstances necessary for the exercise of state court jurisdiction under *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), to restrain trespassory area standards picketing, in spite of the Garmon preemption, supra, did not apply because, in the instant case, unlike *Sears, Roebuck*, the Board's jurisdiction had been invoked (albeit after the filing of the Respondent's injunction action) by the Union's filing of the unfair labor practice charge. Finally, the Court rejected the argument that since, under Court decisions, statutory protection of "area standards" picketing is so tenuous, the Union's trespass ought to be enjoined, pending Labor Board determination of the unfair labor practice issue. The Court, under Garmon, held that the balancing of the competing private property right against the asserted invasive statutory right nevertheless was for the NLRB.

On 5 August, the court entered its decree denying the injunction.

On 29 November, having already filed exceptions, Respondents appealed the Common Pleas court denial of the injunction to the Superior Court of Pennsylvania, arguing, inter alia, that subject-matter jurisdiction had not been preempted by the Union's filing the unfair labor practice charge with the NLRB, under *Sears, Roebuck & Co.*, supra. Respondents' exceptions also related to the Court's failure to find that a picket cursed a store employee.

In regard to the former issue, Respondents are apparently alluding to the dispute, in *Sears, Roebuck & Co.*, supra, in the opposing opinions of Justices Blackmun and Powell. Justice Powell observed, on the question wheth-

Any right to such invasion of private property must be derived from the protection of the Act.

<sup>9</sup> In *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), the Supreme Court notices: "Where applicable, the *Garmon* doctrine completely preempts state court jurisdiction unless the Board determines that the disputed conduct is neither protected nor prohibited by the Federal Cat." (fn. 29). Accord: *Longshoremen v. Davis*, 476 U.S. 380 (1986).

er "state-court jurisdiction is preempted forthwith upon the filing of a charge by the union. I would not join the Court's opinion if I thought it fairly could be read to that effect" (Justice Powell, concurring, 98).<sup>10</sup>

In any event, the parties argued the appeal in the Superior Court of Pennsylvania on 4 March 1986, but no decision has been rendered to date.

### Discussion and Conclusions

#### A. Legal Background; Area Standards Picketing:

(1) The Board has addressed the issues presented by trespassory area standards picketing in shopping centers, *Giant Food Markets*, 241 NLRB 727 (1979), enf. denied 633 F. 2d 18 (6th Cir. 1980).<sup>11</sup> Whatever another forum may have observed or held on the same or similar issues, to the extent that the Board has spoken, as it has in *Giant Food Markets*, supra, I am, with due respect to such other forum, bound to the Board's view and am not bound by other opinions. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). This rule certainly applies to the Board's interpretation of decisions of the United States Supreme Court.

There is no dispute, as I understand the contentions of the parties, that although the Union here was denigrating the foreign ownership of Giant, it was, in any event, picketing and handbilling to protest Giant's failure to pay its employees the prevailing area wages and maintain area standards. This is "area standards picketing."<sup>12</sup> The handbill references to foreign ownership allege that inferiority of wages flows therefrom. Foreign ownership is thus part of the "area standards" assertion and not a different theme.

*Giant Food Markets*, supra (Giant), holds that "properly conducted area standards picketing [is not] only lawful but affirmatively protected under Section 7 of the Act" (*Giant* at 728).

Since the protection of Section 7 rights is not absolute, and since the Board, following *Hudgens v. NLRB*, 424 U.S. 507 (1976), has been directed to accommodate Section 7 rights and private property rights<sup>13</sup> "with as little

<sup>10</sup> Justice Blackum, concurring, stated "the logical corollary to the Court's reasoning was that if the Union *does* file a charge upon being asked by the employer to leave the employer's property and continues to process the charge expeditiously, state court jurisdiction is preempted until such time as . . . the Board, applying the standards of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) . . . rules against the Union and holds the picketing to be unprotected." In the instant case, the police removed the pickets to the street on 24 May; the charge was not filed until 10 June. Thus, there was a 16-day hiatus between removal of the pickets from the picketing lot to the Union's filing the charge. On the other hand, the handbilling started on 15 May and Respondents filed for the injunction on 20 May. With regard to the latter issue, the picket cursing an employee in the first days, of the picketing, Respondents appear to be aware of Mr. Justice Powell's "danger of violence" concern which flows from "sustained trespassory picketing," *ibid*.

<sup>11</sup> The Giant Food employer-respondent in the reported case *is not* related to the instant Respondent.

<sup>12</sup> *Giant Food Markets*, 241 NLRB at 728: "Area standards picketing is engaged in by a union to protect the employment standards it has successfully negotiated in a particular geographic area from the unfair competitive advantage that would be enjoyed by an employer whose labor cost package was less than those of employers subjected to the area contract standards."

<sup>13</sup> There has been no dispute before me that Giant is the lessee of property owned by Easton. The rights in shopping center private proper-

ty destruction of one as is consistent with the maintenance of the other" (*Giant* at 728), it is the Board's exclusive function (of course with Court review), in fashioning the accommodation in each case, to determine exactly where, on the "spectrum" of protection afforded by Section 7, the particular factual "locus" will fall (*Giant* at 728):

as the Court pointed out in *Hudgens*, the "locus" of the accommodation of these rights may fall at different points along the spectrum depending on the nature and strength of the respective Section 7 rights and private property rights asserted in any given context.

Although the Board firmly asserted that area standards picketing is protected by Section 7, it necessarily addressed (*Giant* at 729 fn. 11) the issue of the relative strength of that protection because of certain overtly hostile Supreme Court language on that point in *Sears, Roebuck & Co. v. San Diego Carpenters*, 436 U.S. 180 (1978). At footnote 11 in *Giant*, the Board stated:

The plurality opinion of the Supreme Court in *Sears*, although recognizing that it was the Board's task, in the first instance, to accommodate the competing interests involved, suggested (but did not specifically find) that area standards picketing may be entitled to less protection than was given the organizational solicitation involved in *Babcock* (436 U.S. at 205). For the reasons set forth above, we respectively consider that the Court did not fully examine and set forth the differences between such oral solicitation and consumer picketing and the Union's substantial justification for seeking to maintain area standards. See also the concurring opinion of Justice Blackman (437 U.S. at 210) and the dissenting opinion of Justice Brennan (436 U.S. at 231).

It might be noted that, in addition to the plurality opinion respecting the "locus" of protection to be granted to area standards picketing on the Section 7 "spectrum," a fifth Justice, Justice Powell, concurring, referred to such picketing as a "publicity campaign maintained by nonemployees and directed at the general public." He added that such "area standards trespassory picketing is certainly not at the core of the Act's protective ambit" (436 U.S. at 193).<sup>14</sup>

ty enjoyed by lessee Giant are not the same as those of proprietor Easton, when faced by a union picketing on such property *Holland Rantos Co.*, 234 NLRB 726 (1978), enf. sub nom. *Eisenberg v. Holland Rantos Co.*, 583 F.2d 100 (3d Cir. 1978). In the instant case, while it is true that Easton played no discernible part in the police ouster of the pickets from the parking lot, it has been, and is, a party-plaintiff in the state court injunction action designed to achieve the same result. Were Easton not thus responsible for the state court litigation, the two pleaded 8(a)(1) violations would not be so interrelated. Had Easton distanced itself from removing the pickets from the parking lot, the action would be solely that of Giant; and Giant's right, acting alone, to exclude pickets from the parking lot may be far different from Easton's Cf. *Holland Rantos Co.*, 234 NLRB at 736; *Hudgens v. NLRB*, 424 U.S. 507 (1976).

<sup>14</sup> The Board, in apparently rejecting Justice Powell's position, has concluded that the audience for such picketing includes Giant's employ-

*Continued*

In balancing "area standards" statutory, and competing private property, rights under the Supreme Court's *Hudgens* rule, the Board, in *Giant*, established five criteria as the framework to analyze the factual issues and secure an accommodating legal balance in that case. The five criteria are: the place of impact of the picketing; the intended audience of the pickets; the enmeshing of neutral employers in the dispute; the degree to which the private property is "open" to the public; and the extent to which the picketing creates a legal nuisance. The Board did not assign relative weights to any of these criteria. In addition, it is clear that some of the criteria at least, such as "impact" and "intended audience," are interrelated.

(2) *Applying the Giant rules:* As in *Giant*, the greatest impact of the picketing and handbilling on 24 May,<sup>15</sup> on the evidence herein, apparently was at the store's doors.

The General Counsel and the Union argue that, in any event, picketing at the store's doors is necessary because picketing at the street sidewalks and at the islands would "substantially dilute the Union's Section 7 rights since the effectiveness of the picket lines depends on the location." *Seattle-First National Bank v. NLRB*, 651 F.2d 1272 (9th Cir. 1980). I believe that the *Giant* precedent requires the conclusion that picketing at street entrances, only, would ordinarily unnecessarily dilute the Section 7 right and that picketing at the doors would have the greater impact in securing statutory rights.<sup>16</sup>

With regard to the fourth *Giant* criterion, the "openness" of the private property, there would appear to be little doubt that the store, as lessee, and Easton, as lessor, desired the greatest "traffic" consistent with shopping center business. Not only does the lease relate "parking

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ees and that such picketing, in any event, is for the protection of "employees," even if not employees of the picketed employer (*Giant*, at 728) It is the picketed employer, the Board observes, whose wage practices undermine the livelihood of unionized labor in the area. In support of this position, that "area standards picketing" is protected by Sec. 7, the Board notes that while it is dissimilar both to picketing by nonemployees for organizational purposes (*NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1965)) and to primary economic picketing by the employer's own employees (*Hudgens v. NLRB*, 424 U.S. 507 (1976)), it remains the Board's function to accommodate this Sec. 7 right to the private property rights of the Respondents

<sup>15</sup> The complaint, as amended, alleges as the first of two 8(a)(1) violations only a single event occurring on 1 day *Giant* causing the removal of the pickets under threat of police arrest on 24 May This is unlike the second allegation of 8(a)(1) violation—the maintenance and prosecution of a retaliatory lawsuit—which asserts a *continuing* condition: "Since on or about 10 June 1985," the Respondents engaged in alleged proscribed conduct. In short, the lawfulness of *Giant's* conduct under the first allegation, removing pickets, must be measured only on the day of the threat, i.e., 24 May. If that threat of arrest involved an interference with protected conduct, it would ordinarily be unlawful; if, on the other hand, the conduct, for any reason, was "unprotected," then the interference would not give rise to an infraction of statutory significance. The pleadings seem to me to properly reflect the record: if Respondents' witnesses are credited, the pickets returned to the positions at the doors of the store on private property on the next day (25 May), if the General Counsel witnesses are credited, they returned after about 2 or 3 days. The testimony, however, was clearly focused on what happened on 24 May, Tr. 458-460; see particularly, *Maintenance Service Corp.*, 275 NLRB 1422 (1985).

<sup>16</sup> In *Seattle-First National Bank*, supra, the court, agreeing with the Board, permitted invasion of private property by picketing in support of an economic strike by employees. The Court cautioned, however, that a "different accommodation might be appropriate if some activity not at the core of Sec. 7, such as area standards picketing, were at issue." The Court cites, inter alia, *Sears, Roebuck & Co.*, supra, and *Giant*.

areas," "entrances," "exits" and "sidewalks" to "public areas," but the lease extends use thereof to customers, employees and "all those having business with it." Whatever else such generous lease terms include (there is no evidence of such lease terms in *Giant*), at the very least they provide the argument that Respondents themselves viewed the parking lot, sidewalks, entrances, and adjoining areas as "public" places and can not forcefully complain, after *Giant*, that "area standards" pickets are not among those having "business" with Respondent *Giant* on the sidewalks outside the two store entrances. If the Board granted "invitee" status to area standards pickets in *Giant*, then in the presence of the lease terms here, a fortiori, the Board should give the instant pickets the right to be on the parking lot, including the sidewalks at the store's entrances. In short, the terms of lease lead me to conclude that the parking lot, including the store entrance, are more "open" here than in *Giant*.

With regard to the fifth criterion in the *Giant* analysis, the creation of a "nuisance," I note that in the state proceeding, Respondents stipulated as of 21 June that there was no picket line violence, mass picketing or blocking of ingress or egress. Before me, however, they place emphasis on the alleged instances of a picket cursing an employee and of a picket placing himself in front of a shopping cart pushed by a store customer in the parking lot in order to place a handbill in the shopping cart. I am not at all satisfied that the record shows that both of these alleged (but denied by the General Counsel's witnesses) incidents occurred on or before 24 May. But even if they did, and even if they occurred as testified to by Respondent's witnesses, they would not, in aggregate, amount to the creation of a "nuisance," within the meaning of the fifth criterion in the *Giant* analysis. To the extent that the Respondents argue that the pickets have left food containers and other debris at and near the doors, there is no showing that the Respondents have objected to *Giant's* customers and strangers depositing such refuse at or near the store. The credited evidence is that Respondent treated all such conduct as part of its business activities. To complain only of the pickets' debris does not strengthen the "nuisance" aspect of the picketing. Certainly the deposit of such debris was not, on this record, proved to be of any different or greater nature than the debris left by others. As in *Giant*, I would conclude that the evidence fails to show that the picketing on the parking lot, in general, or at the doors, in particular, constitutes a "nuisance." Rather, if the criterion of "nuisance" was strictly observed, it would seem to me that a greater nuisance would occur if the pickets, on public property at the entrances, caused any sort of traffic jam or tie up where their presence inside the parking lot would not cause such a public problem.<sup>17</sup>

The second and third *Giant* criteria, the "intended audience" and the "enmeshing of neutrals," are interrelated, *Giant* at 728-729:

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<sup>17</sup> I assume that in analyzing the *Giant* criteria, supra, whether the Union's pickets created a "nuisance," I am not necessarily bound by the substantive law of the Commonwealth of Pennsylvania. But cf. *NLRB v. A. Duie Pyle, Inc.*, 730 F.2d 119, 126 (3d Cir. 1984) in which state law was the guide to determine the law of "self defense."

Here the audience which the pickets intended to reach with their message obviously include *Giant* and its employees. However, the primary intended audience consists of the potential customers of *Giant* who become readily identifiable only when they decide to enter the store . . . . In a situation such as this, where there is *more than one store in the shopping center* . . . this is particularly true. [Emphasis added.]

The Board then adds:

In this regard we find this case distinguishable from *Babcock and Wilcox* and other cases involving organizational solicitation. As noted in *Scott Hudgens*, supra, where, as in organizational situations, the audience is specific (the employees to be organized), means of communication other than direct entry onto the employer's property (use of mail, telephone, personal contact, etc.), may afford reasonable access to that audience. However, where, as here, the attending audience is *not readily identifiable* until the audience attempts to enter the store, such other means of communication cannot be considered "reasonable" in relation to their possible effectiveness.

In a similar vein, requiring that any picketing or handling be conducted off the private property, at entrances to the parking lot 250 feet or more from the store entrance (an approximation drawn from Joint Exhibit 1 in evidence), would too greatly dilute the Union's message for it to be meaningful. This result would follow *not only from the fact that Giant is not the only store located at the shopping center*, but also because motorists entering the parking lot from adjoining public road would be more concerned with safely making their entrance than with reading a picket sign or attempting to receive a handbill at the roadside.

Another fact to be taken into account is the likelihood of a union's picketing *enmeshing neutral employers in its dispute with a particular store* in a shopping center. With a momentary glance at the picketing, a potential shopper at the center might quite reasonably infer that the entire center was being picketed and refuse to enter the center at all. Indeed, it would seem that requiring the pickets to station themselves at the entrances to the parking lot in this case would be *more detrimental to neutral Kresge's business than if the pickets were stationed directly in front of the Giant store*. [Emphasis added.]

The distinction between *Giant* and the instant case is that here, as the General Counsel concedes (Br. p. 18), on 24 May (at least through 21 June), Respondent's store was the only store in business in the shopping center. This fact, alone, I believe, substantially eliminates *Giant* as a legal support for the statutory intrusion (area standing picketing) into Respondent's private property rights and brings into play the ordinary *Babcock & Wilcox* and *Sears, Roebuck* elements: that with regard to private property intrusions by organizational picketing nonemployees, relying on protected Section 7 rights as a de-

fense or justification for such intrusion, the burden imposed on the Union "is a heavy one," *Sears, Roebuck & Co.*, supra, 436 U.S. at 190.

To gain access, the Union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exist. . . .

Even on the assumption that picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation,<sup>42</sup> it would be unprotected in most instances.

Footnote 42 appearing in the above-indented quotation, 436 U.S. 180, 206, begins:

This assumption, however, is subject to serious question.

Whatever else the Supreme Court has established, it has insisted on rules distinguishing between the picketing rights of employees and of nonemployees in measuring intrusions on private property. "The distinction is one of substance." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956); *Hudgens v. NLRB*, supra.

Respondent's brief forcefully argues, and I conclude, that because there was only one store open on 24 May, when the alleged Section 8(a)(1) threat of arrest occurred, the *audience* (which the Union was seeking to address) entering the parking lot, especially by automobile, on that day, was clearly identifiable. While in theory, the audience might include *Giant* employees, sightseers, trespassers, and construction crews (of the incomplete stores), more likely, as the evidence here shows, the large majority was customers or potential customers of the *Giant Food Store*. If the handbills are credited, the object of the Union's communication, in any event, was only to customers of *Giant* and thus any attempt at communication with trespassers, *Giant* employees or others, was coincidental. Unlike *Giant*, therefore, the *intended audience* was identifiable because, with regard to its "area standards" message, the arriving automobiles and pedestrians could only patronize one place: the *Giant Market*.

Whatever other arguments exist in favor or placing pickets on private property, the *impact* element is here, as opposed to *impact* in *Giant*, largely diminished for the same reason. The handbilled persons at the entrances almost necessarily were *Giant* customers. There was no store open for business except *Giant*. The Union was attempting to communicate basically with *Giant* patrons.<sup>18</sup> There is no reason why drivers and their passengers cannot read a sign or accept a leaflet at the pork-chop islands. As Respondents point out, the Union voluntarily used these pork-chop islands as points to station pickets all during the period up to and after 24 May. There was no showing why the pork chop islands lost their impact

<sup>18</sup> In *Giant*, the Board, acknowledging that the audience is primarily *Giant's* potential customers, also includes as audience the *Giant* employees, *Giant* at 728. *Audience*, of course, is different from the group the Union is seeking to protect (its members) and is thus different from the avowed object of the picketing (maintain area standards).

utility. The Board's conclusions, above, in *Giant*, with regard to dilution of the pickets' message and the ineffectiveness of positioning pickets at the street entrances to communicate with incoming vehicles and pedestrians, are belied by the Union voluntarily stationing its pickets at those islands in order to impart messages. Thus, the actual experience of the Union in the instant case in gaining the attention of its intended audience must take precedence over the Board's conclusion in *Giant*, supra.<sup>19</sup>

As with the *Giant* elements of *impact* and *audience*, there is no *enmeshing* of other stores in the shopping center. This argument of "unwanted secondary effects" is not available to General Counsel and the Union since there was no other store open on 24 May, the date when the alleged unlawful act occurred. Thus, other businesses could not be "emmeshed."

The General Counsel and the Union also rely on the potential safety hazards to the pickets and public which might occur with heavy inflowing traffic notwithstanding that, at each island, there is room for the passage of two cars abreast. Regardless, however, of the anticipated hazards which Chief DeVietro reasonably foresaw, the General Counsel's complaint is so framed as to cause me to find such arguments of anticipated traffic hazards to be largely irrelevant. The removal of the pickets under threat of arrest occurred only on 24 May and the complaint addresses unlawful restraint of Section 7 rights only on that day. Within a day—or 3 days—the pickets had returned to the parking lot, the store front (doors) and wherever else on private property, outside the store, the pickets desired to leaflet and picket, including the islands at the entrances. On 24 May, however, the date on which the alleged unfair labor practice occurred because of police action, the picketing-leafleting caused none of the traffic problems anticipated in the testimony. The complaint allegation regarding unlawful restraint of the picketing presents no assertion of a continuing violation. The problem raised by the pleading and proof is whether the removal under threat of arrest on 24 May was lawful. The answer to that question turns on whether the Union was then engaged in protected conduct, and not whether it thereafter was engaged in protected conduct. Had there been other or similar police threats, or even if the effect of the single threat had resulted in the Union refraining from picketing on private property, the continuing nature of the threat might be inferred, requiring scrutiny of the Union's rights over a broader time focus, i.e., on whether events after 24 May were relevant.

There is no evidence, for instance, that on 24 May, any activity at the island at any time caused a traffic or safety problem or was in any way a nuisance to the public. Indeed, as I have noted above, before 24 May, the Union voluntarily chose to handbill from the islands with no safety problem incurred by the pickets and no nuisance problems created for the vehicles or the public. For instance, there was no suggestion of left-turning vehicles being dangerously exposed on the expiration of the

green light and there was no evidence of line jumping in either of the right-turn deceleration lanes.

While the General Counsel recognizes the significance of the fact that on 24 May there was only one store open (Br. p. 22), he defends only with the citation of *Montgomery Ward Co.*, 265 NLRB 60 (1968), in which the employer was the sole occupant of a shopping center and the Board found an 8(a)(1) violation where union handbilling was not allowed on private property. But that case (a) involved *only* handbilling; and, more important, (b) involved a *consumer boycott by the employees* in a *primary* dispute with their employer on the premises of a neutral employer. Here, there was no dispute between the employer and his employees. Neither of these distinguishing basic elements is present here, where there was *nonemployee*-picketing, and area standards picketing at that. These are fundamental differences: *Hudgens v. NLRB*, supra; and *Sears, Roebuck & Company*, supra. I have taken seriously the Supreme Court's *Babcock & Wilcox* admonition that the difference between employees and nonemployees in their rights to trespass under the protection of Section 7 of the Act is "one of substance." *Hudgens v. NLRB*, supra. Likewise, there is a difference between handbilling and picketing, *Montgomery Ward Co.*, 265 NLRB 60 (1968) (Chairman Van de Water, concurring).

The General Counsel proved that on 24 May, Supervisor Motter telephoned the police and the police moved the pickets from the parking lot to the street entrances, i.e., from private to public property. The police action was accompanied by threat of arrest for noncompliance.<sup>20</sup> Assuming, arguendo, both that the police were Respondents' agents in the removal of the pickets and that, contrary to the Supreme Court's suggestion, area standards picketing by nonemployees deserves protection on the "spectrum" of Section 7 rights at the same "locus" as organizational picketing by nonemployees, *Hudgens v. NLRB*, supra; *Sears, Roebuck & Co. v. San Diego Carpenters*, 436 U.S. at 190 (1978), the General Counsel, nevertheless, pursuant to the Board's analysis in *Giant Food Markets, Inc.*, 241 NLRB 727, enf. denied 633 F.2d 18 (6th Cir. 1980), has failed to sustain his burden—his "heavy burden" (*Sears, Roebuck & Co.*, supra at 190)—of showing that no other reasonable means of communicating the Union's "area standards" message to its intended audience exists (*Sears, Roebuck*, supra at 190). In view of the present facts, particularly the narrow focus of the pleaded violation, the complementary narrowness of the the supporting evidence, proof of adequate communication with the intended audience from the islands, no traffic problems and the unique fact that there was only one store open for business when the police removed the pickets, and notwithstanding the generous terms of the lease concerning the "public" nature of the parking lot and other facilities, I cannot conclude that, on 24 May, with the pickets having already effectively picketed from the entrance islands, with at least

<sup>19</sup> Picket Frinzi, for instance, testified that "half, maybe more" of the drivers, on 24 May stopped when he was at the island entrance (Tr. 461) I accept his testimony

<sup>20</sup> To perfect a violation of Sec. 8(a)(1), no such threat is required; only a police "demand" addressed to the pickets to leave, *Giant*, at 729.

one-half of the vehicles pausing at the street entrances<sup>21</sup> with no possibility of enmeshing other shopping center stores in the controversy, with the intended audience clearly identifiable, "other means of communication cannot be considered 'reasonable' in relation to their possible effectiveness." *Giant* at 729.

In short, the Union, on 24 May, on this record, particularly balancing the several *Giant* criteria, could and did adequately communicate an "undiluted" and effective message to its audience from the public sidewalks and the islands, without undue interference to the general public, and the General Counsel, having the burden of proof, *Babcock & Wilcox*, supra, has not proved otherwise.<sup>22</sup> I therefore conclude that a balance of the *Giant* criteria shows that no violation of Section 8(a)(1) by Respondent Giant occurred on 24 May 1985 when the police, with threat of arrest, removed the Union's pickets from the shopping center parking lot. The complaint allegation thereof should be dismissed.<sup>23</sup>

<sup>21</sup> As Respondent observes (Br. p. 31), the Board, in organizational solicitation cases, has denied access to private property under *Babcock & Wilcox*, supra, in which handbilling at entrances reached 9 of 25 vehicles and in which, unlike here, reaching the occupants "presented some difficulty." *Monogram Models*, 192 NLRB 705, 706 (1971). Not only has the Union here freely chosen to use the islands (whether or not private property, Respondents have not objected to their use) and public entrances at the street as distribution points for its handbills, but Respondents are not obliged to provide the best location for distribution to the Union. *Farah Mfg. Co.*, 187 NLRB 601, 617 (1970). The issue therefore is whether the Union's messages can be effectively delivered from the islands and public property. The Union has, in part, answered this question by freely choosing the islands as picketing and distribution points. The fact that drivers may not stop at the islands or sidewalks and may choose to ignore the pickets does not militate in favor of an invasion of private property. The pickets have the right, by their physical presence, by signs and by proffered leaflets, to communicate with occupants of vehicles or pedestrians. Nothing in the Act requires that vehicles (or persons) stop, much less roll down their windows, converse with the pickets or accept literature. The pickets must have the opportunity to reasonably communicate. The occupants of vehicles and pedestrians have no corresponding obligation to stop or listen. To the extent, under *Giant*, picketing at entrances dilutes the message because incoming vehicles at the entrances are more interested in negotiating a safe entrance than listening to the pickets' message or reading the signs, such *Giant* language must be read in the context of the preceding condition "[Giant] is not the only store located in the shopping center." Furthermore, the pickets voluntarily chose the islands all during the picketing. They cannot now argue that the islands have become ineffective points for communication.

<sup>22</sup> Again, in view of this disposition, I need not rule on the "agency" of the police since the Union, on 24 May, in picketing on private property, was not then engaged in activity protected under Section 7 of the Act.

<sup>23</sup> I have taken into account the existence of shrubby-bordered, or covered, islands of substantial size within the parking lot. Permitting the pickets to have occupied these islands on 24 May might raise other property and indemnification issues which, I believe, need not be resolved in view of the above findings and conclusions: that the Union's area standard message was adequately delivered on the islands and sidewalks. The same result should obtain for permitting the pickets to roam at will on the parking lot. The ultimate finding of the unprotected nature of the 24 May picketing-handbilling herein is supported by the Supreme Court observation, regarding *organizational* trespassory activity, that the union's right of access has "generally been denied except in cases involving unique obstacles to non-trespassory methods of communication with the employees" *Sears, Roebuck & Co.*, supra at 205 fn. 41. In the instant case, any uniqueness in the factual framework, i.e., only one open store, therefore militates further against allowing the right of trespassory access. Moreover, whether or not, under the Board's view in *Giant*, supra, area standards picketing is properly granted the same Sec. 7 protective locus as organizational picketing under *Babcock & Wilcox*, supra, there can be no question that the Supreme Court's openly unsympathetic views of the

### The State Court Litigation

The complaint, as amended, alleges in substance that since 10 June 1985, by maintaining and prosecuting its retaliatory civil action to enjoin the Union's picketing<sup>24</sup> on the shopping center property, Respondents violated Section 8(a)(1) of the Act.

The General Counsel, of course, could not, and did not, allege that Respondents' initiation of the action was unlawful since his legal foundation must be supported both in *Sears, Roebuck & Co. v. San Diego Carpenters*, 436 U.S. 180 (1978), which held, that notwithstanding that area standards picketing is arguably protected under *Garmon*, thus preempting state court jurisdiction yet, since the store-owner (the injured party) could not file a charge and thus bring the dispute before the Board. See *Longshoremen v. Davis*, 476 U.S. 880 fn. 10 (1986), the state court is not preempted from exercising jurisdiction and ruling on the lawfulness of trespassory area standards picketing; and in the recent *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), which held, that the Board may not enjoin a pending state law suit, regardless of retaliatory motive, unless the suit lacks a reasonable basis in fact or law. *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303 (1986). There cannot be any dispute that the initiation of the suit by Respondents was entirely proper, for at that time, 20 May 1985, there was no union charge filed (the Union's ULP charge was not filed until 10 June),<sup>25</sup> and Respondents could not themselves allege that the Union's trespass constituted an unfair labor practice. In the absence of a union charge filed with the Board, and refraining from the wholly undesirable self-help option of *vi et armis* eviction of the pickets, Respondents could obtain an orderly resolution of the question whether the Union had a right to remain on their private property only by a proceeding in state court. *Sears, Roebuck & Co. v. San Diego Carpenters*, 436 U.S. 180, 202.

Here, however, the General Counsel argues that Respondents, after filing of the Union's charge, have not

protected standing of area standards picketing in *Sears*, fn. 42 at 206, and *Hudgens*, 424 U.S. at 513, suggest that it be accorded no superior status to organizational picketing in competition with trespassory access.

Similarly, I have taken into account the fact that a shopping center parking lot, for purposes of balancing private property rights with statutory rights, is in some ways "open to the public," whether by practice, or as in this case, by lease. The instant parking lot, indeed, may not be quite as "private" as the private parking lot driveway in *Babcock & Wilcox*. While one may concede that the instant shopping center parking lot does not present the strongest case for the protection of "private property," certainly not as strong as in *Babcock & Wilcox*, yet Easton has not by its lease so far turned the property into such a "public" area as to permit First Amendment considerations to intervene. *Hudgens v. NLRB*, 424 U.S. 507, 512-514. The Union is not a third party beneficiary. Easton may still interpret its lease so as to restrict the meaning of persons "doing business" with the tenants. Whether it could exclude picketing employees of Giant is, or course, a far different matter.

<sup>24</sup> Again, Respondents filed their lawsuit on 20 May. The Union filed its unfair labor practice charge on 10 June. Hence, according to General Counsel, *preemption* occurred only with the filing of the charge on 10 June; and it was only on and after 10 June that the General Counsel alleges that Respondents' conduct became unlawful.

<sup>25</sup> To the extent that the Union argues (Br. p. 22) that the initial filing of the injunction action was part of the unfair labor practice, that argument is rejected. It is contrary to law and to the allegations of the complaint.

only not withdrawn their lawsuit, but have appealed the Common Pleas court preemption ruling. *Garmon*, as Presiding Judge Williams correctly held, and as the parties conceded before him, *Giant Food Stores v. Food & Commercial Workers Local 1357*, Penna. Court of Common Pleas, 120 LRRM 2024, 2027 (1985), gives exclusive jurisdiction to the NLRB for the ultimate disposition of the pickets' right to function on Respondent's property.<sup>26</sup> Where, as here, the Union's right to picket on Respondent's private property is "arguably protected" by Section 7 of the Act, the rule preempting state court jurisdiction to decide the trespass question (the identical matter would be submitted within the 8(a)(1) unfair labor practice hearing) is invoked with even greater force than where the disputed conduct is merely "arguably prohibited" by the Act. In the former case, the constitutional element of Federal supremacy is involved. *Sears, Roebuck & Co.*, supra at 196-200.

As above noted, the General Counsel urges that (1) with the 10 June filing of the unfair labor practice charge, the state court's jurisdiction to decide the trespass question has been preempted; (2) that with the parties stipulating before the state court that there was no mass picketing to block ingress-egress, no violence, intimidation or coercion, there was no basis on which to invoke the state court's residual police powers on which the state court injunction would rest; and that (3) the Respondents' pressing their retaliatory case after the 10 June filing of the charge, certainly in appealing the Common Pleas final preemption decree, in the face of the stipulations (based on Respondents' concessions) and Presiding Judge Williams' findings (120 LRRM at 2026) of the absence of violence, threats, and blocking by mass picketing, all demonstrate that, within the meaning of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), Respondents were "prosecuting a baseless lawsuit with the intent of retaliating against [the Union and its employee members] for the exercise of rights protected by Section 7 of the NLRA," which conduct is an unfair labor practice enjoined by the Board.

Respondents argue (Br. at 36 et seq.) principally that its lawsuit was not preempted and thus was not "baseless" within the meaning of *Bill Johnson's Restaurants*.<sup>27</sup> Respondents also argue that there was no proof of the necessary "retaliatory" motive, required in *Bill Johnson's Restaurants* (461 U.S. at 737). They admit that their lawsuit was caused by the picketing but assert that this consequence is not proof of "improper motive." The short

<sup>26</sup> The complaint allegation of an 8(a)(1) violation due to Respondents' maintenance and prosecution of the injunction suit is not mooted by my conclusion, above, that Respondents did not violate the Act when they removed the pickets from their property. Here, Respondents are contesting the Pennsylvania court's conclusion that the trespass issue is for the Board under *Garmon*, *Hudgens* and *Sears, Roebuck*. The Respondents' continuation of a retaliatory suit, if baseless, would constitute a violation of Sec. 8(a)(1) whether or not the Union, under Sec. 7, was privileged to picket in the parking lot. Put another way, Respondents' maintenance of a lawsuit, retaliating against the Union's successful unfair labor practice charge (the General Counsel issued a complaint), forcing the Union to litigate a baseless preemption case, constitutes a statutory violation regardless of the merits of the Union's picketing rights.

<sup>27</sup> Respondents also repeat the argument, rejected above, that Respondent Easton is not an "employer" within the meaning of Sec. 2(2), (6), and (7) of the Act.

answer is that "retaliatory intent" need not have an improper motive and surely need not be accompanied, as the further argument is made, by intimidation or punitive desire. I conclude that Respondents' lawsuit was intentionally "retaliatory," caused by and intended to limit or eliminate the effectiveness of the Union's handbilling and picketing. The Supreme Court's test for retaliation, *Bill Johnson's Restaurants*, 461 U.S. at 736, is a "but for" test. That test is met here. There need be no proof of intimidation or punitive design.

Were not my conclusions, below, on the preemption issue dispositive on the issue of "baselessness," I would conclude that the allegation of baselessness is supported by Respondents' unsubstantiated pleading of "police power" allegations (violence intimidation, blocking ingress-egress, etc.) to sustain state court jurisdiction, counsel's admission that there was no evidence thereof, and then stipulating to the contrary before Presiding Judge Williams. With regard to the remaining basis for the exercise of state court jurisdiction, i.e., that the state court restrain the trespass, Judge Williams, under *Hudgens v. NLRB*, supra, concluded that the "trespass" and the competing Section 7 protection were preempted matters exclusively for the Board. He thus correctly declined subject matter jurisdiction, 120 LRRM at 2028. See *Longshoremen v. Davis*, 476 U.S. 380. Thus, the otherwise clear application of *Garmon* preemption is further evidence of Respondents' baseless lawsuit.

In *Bill Johnson's Restaurants*, supra at 737, the Supreme Court, on one hand held that "baseless litigation is not immunized by the First Amendment right to petition." On the other hand, however, the Court held (461 U.S. at 736) that:

The filing and prosecution of a well-founded lawsuit may not be enjoined as unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act.

In determining what steps the Board may take in evaluating whether a retaliatory lawsuit nevertheless has a "reasonable basis," the Board, while it is not confined to the four corners of the plaintiff's complaint, yet it may not determine the merits of the state court claims if there are material issues of fact, *Bill Johnson's Restaurants*, supra at 738. While I am tempted, at the urging of the General Counsel and the Union, in view of preemption and other evidence, above, to find that Respondents' assertions, in support of state court jurisdiction over the trespass, are so inconsequential as to be frivolous, it is ultimately unnecessary for me to pass on this question.<sup>28</sup>

*Bill Johnson's Restaurants* nevertheless contains a further restriction on Board action:

Just as the Board must refrain from deciding genuinely disputed material factual issues . . . it likewise

<sup>28</sup> I am saying that no reasonable lawyer would seek an injunction based on an isolated instance of cursing and momentary stopping of a customer to give him a leaflet, much less to prosecute an appeal based thereon. See, for instance, *Local 39 v. W. H. Bower Spangenberg, Inc.*, 120 LRRM 3455, 3456 (4th Cir. 1984).

must not deprive a litigant of his right to have genuine state law legal questions decided by the state judiciary.

Among Respondents legal, as opposed to factual, exceptions to the state court decision is the state court's very conclusion of preemption. There has been no court decision on the merits of whether there has been a trespass, only (for present purposes) that the Respondents' lawsuit has been preempted. The lower Pennsylvania court has held that the filing of the charge preempted state court jurisdiction. Respondents have appealed the question of preemption. Respondents argue that they have a right to such an appeal and thus their continuation of their action for injunction is not "baseless" within *Bill Johnson's Restaurants*.

There is no case cited to me suggesting that the Pennsylvania courts have resolved the question of when preemption of state court subject matter jurisdiction occurs upon the filing of a charge.<sup>29</sup> Respondents point to the fact that this is the question on which Justices Powell and Blackmun differ in *Sears, Roebuck & Co.*, supra, and on which Justice Brennan observed that the Supreme Court has avoided holding that resort to the Board will oust state court jurisdiction. Indeed, I regard the footnoted problems raised in his *Sears, Roebuck & Co.* dissent by Justice Brennan as dispositive here (*Sears, Roebuck, Co.*, at 233 fn. 14). Justice Brennan particularly notes that one of the open preemption questions is: "What if the Section 8(a)(1) charge is filed after the employer files the state-court complaint . . .?"

Area standards picketing has been protected under Section 7 at least since *Hod Carriers (Calumet Contractors)*, 133 NLRB 512 (1961). Given the peculiar facts in this case that there was only one store open on 24 May (through 21 June) and that the pickets were successfully communicating, on that day, more than 400 feet from the store entrance, to 50 percent or more of incoming vehicles (the intended audience) from their "pork chop island" and from public property; and whether or not this results, under *NLRB v. Hudgens*, supra, *Giant*, supra, and *Babcock & Wilcox*, supra, in the conclusion that this area standards picketing was unprotected, is it baseless for Respondents to argue in the state court that, for instance, state court jurisdiction, lawfully invoked on 20 May, should not be ousted by the filing of the 10 June charge?<sup>30</sup> And that it should not be ousted because the

<sup>29</sup> I necessarily conclude that the ousting of state court jurisdiction under *Garmon* and the recent *Longshoremen v. Davis*, supra, is a question the state court may consider and is thus a "genuine state law" legal question within *Bill Johnson's Restaurants*.

<sup>30</sup> While the recent *Longshoremen v. Davis*, supra, holds that a valid claim of *Garmon* preemption forecloses the state court's subject matter jurisdiction and is not merely a waivable affirmative defense, I do not regard that case as eliminating the existence of the *Sears, Roebuck* exception which grants state courts jurisdiction over the trespassory invasion of area standards picketing, even in the face of an otherwise valid claim of *Garmon* preemption, where by virtue of the failure of the Union to file a Board charge (and the inability of the injured landlord to file a charge),

delay in the Union's filing its charge, after the Respondents filed their injunction suit, results in a 3-week, legally "free ride" for the picketing especially since the charge may have been filed only to defeat the state court jurisdiction?<sup>31</sup> While the legal question raised by Respondents (whether the state Court's jurisdiction was ousted by a subsequently filed charge) may be given short shift in the Pennsylvania courts (and elsewhere), it cannot be said, in view of the disputes among the justices in *Sears, Roebuck & Co.*, supra, and the explicitly open question posed by Justice Brennan therein, that there does not exist a "genuine" state law legal question within *Bill Johnson's Restaurants v. NLRB*, 113 LRRM at 2654. Thus, Respondents continuing their action and prosecuting the state court appeal is not "baseless" within the meaning of *Bill Johnson's Restaurants*.

It is therefore my recommended<sup>32</sup>

### ORDER<sup>33</sup>

That the complaint be dismissed in its entirety; *provided*, however, that the Board retain jurisdiction of the complaint allegation concerning Respondent's retaliatory lawsuit, commenced 20 May 1985, so that it may dispose thereof (including a conclusion that Respondent violated Section 8(a)(1) of the Act) upon prompt notification by any party of a final, binding determination or resolution of the merits thereof by the Commonwealth of Pennsylvania or otherwise.

there is no forum in which the injured landlord may seek relief. Here, there was charge filed after the initiation of the state court action. Here, for 20 days (May 20-June 10) the injured landlord was without Board remedy. Is the application of *Longshoremen v. Davis* automatic? Does the filing of the charge on June 10, ipso facto oust state court jurisdiction because, if so, it ". . . [forecloses] the state court's very jurisdiction to adjudicate." *Longshoremen v. Davis*, supra.

<sup>31</sup> Respondents argue (Br p. 38), using the language of Justice Blackmun (*Sears, Roebuck & Co.*, 436 U.S. 180, 210) that "the real question is who should bear the burden of delay" where a charge is filed in the face of a state court injunction action. the employer, during the time before issuance of Board complaint or dismissal of the charge (where the state action is preempted or halted), or the Union where the state court issues a restraining order pending Board decision and limits the place of picketing? The extraordinary federal injunctive writ under *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971), is available to the Board if any state court order is deemed to intermediately interfere with the Board's jurisdiction or processing of the charge. Justice Blackmun's statement of the issue implies preemption upon the Board's issuance of complaint. Justice Powell, above, warmly disagrees and Justice Brennan notes that that issue is unresolved.

<sup>32</sup> I have included in the record, on posthearing motions by and insistence of, Respondent and the General Counsel, along with CP-C.G. Exh. 3, certain unworthy correspondence between Respondents and the General Counsel inconsistent with the high quality of the litigation and their excellent briefs.

<sup>33</sup> 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.