Roundy's Inc. ***and*** **Milwaukee Building and Construction Trades Council, AFL–CIO.** Case 30–CA–17185

November 12, 2010

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER, PEARCE, AND HAYES

On February 8, 2006, Administrative Law Judge Robert A. Giannasi issued his original decision in this case, finding that the Respondent violated Section 8(a)(1) of the Act by discriminatorily preventing union agents from distributing handbills at 26 of its store locations.[1] On September 11, 2006, the National Labor Relations Board remanded this case to the judge to give the Respondent an opportunity to establish that it had a property interest which entitled it to exclude the union agents from the areas where the handbilling took place.[2]

After inviting and receiving briefs from the parties, the judge, on March 28, 2007, issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.[3]

The National Labor Relations Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[4] findings, and conclusions only to the extent consistent with this Decision, and to adopt the recommended Order as modified and set forth in full below.[5]

1. We agree with the judge's supplemental findings that the Respondent failed to establish an exclusionary property interest at 23 of its store locations, and, accordingly, that the Respondent violated Section 8(a)(1) by prohibiting council representatives from handbilling in front of those stores.[6] See *Food For Less*, 318 NLRB 646, 649 (1995), enfd. in relevant part 95 F.3d 733 (8th Cir. 1996). Consequently, we find it unnecessary to pass on the judge's earlier finding that the Respondent unlawfully discriminated against the Council by permitting other solicitation and distribution in the same areas at those stores.

2. By contrast, the judge did not find a violation under the property-interest theory at the Respondent's stores located at 12735 West Capitol Drive, Brookfield, Wisconsin and 8151 West Bluemound Road, Milwaukee, Wisconsin.[7] Instead, the judge reaffirmed his earlier finding that the Respondent violated Section 8(a)(1) by unlawfully discriminating against the Council at those stores under *Sandusky Mall Co.*, supra. So that resolution of the questions related to the Respondents' actions at the Capitol Drive and Bluemound Road stores does not delay the issuance of a remedial order covering the other 23 store locations, the Board has decided to sever the allegations concerning the Capitol Drive and Bluemound Road locations and to retain them for further consideration. By separate notice, the Board is inviting all interested parties to file briefs regarding the question of what legal standard the Board should apply in determining whether an employer has violated the Act by denying nonemployee union agents access to its premises while permitting other individuals, groups, and organizations to

[1] The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Charging Party filed cross-exceptions and a supporting brief.

[2] The Respondent has excepted to the Board's earlier decision remanding this case to the judge. We find no merit in this exception. Under Sec. 102.46(a) of the Board's Rules and Regulations, a party may except only to the decision of an administrative law judge. Accordingly, the Respondent's exception to the Board's decision is procedurally invalid. Furthermore, had the Respondent wished to move for reconsideration of the Board's earlier decision, it could have done so under Sec. 102.48(d)(1) of the Board's Rules. As the Respondent did not file a timely motion for reconsideration, we will not consider its opposition to the Board's earlier Decision and Order.

[3] The Respondent has requested oral argument. The request is denied, but the parties and interested amici will have the opportunity to file supplemental briefs, consistent with our Notice and Invitation to File Briefs dated November 12, 2010.

[4] We reject the Respondent's exception to the judge's refusal to hear testimony from Michael Ostermeyer, a Wisconsin lawyer specializing in real property matters, regarding whether the Respondent had an exclusionary property interest under Wisconsin law. The judge acted within his discretion to exclude testimony pursuant to his obligation to make a complete but nonvoluminous record. As the judge explained, Ostermeyer sought to present his legal conclusions regarding Wisconsin statutes and case law that the judge was capable of interpreting on his own. Furthermore, the Respondent was free to include Ostermeyer's legal arguments in its posthearing brief to the judge.

[5] We reject the General Counsel's exception to the judge's refusal to order additional posting of the notice in locations accessible to the general public. The judge's proposed order is consistent with Board precedent. See, e.g., *Sandusky Mall Co.*, 329 NLRB 618, 623 (1999), enf. denied 242 F.3d 682 (6th Cir. 2001). We shall, however, modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

[6] The General Counsel has not excepted to the judge's decision to dismiss the allegation relating to the Respondent's East Pointe store located in Milwaukee, Wisconsin.

[7] The General Counsel conceded that the Respondent had a sufficient property interest at the Capitol Drive location and has not excepted to the judge's finding that the lease language at the Bluemound Road store was too ambiguous to support a violation under the property-interest theory of the case.

use its premises for various activities. The Board will issue a supplemental decision regarding these allegations at a later date.

ORDER

The National Labor Relations Board orders that the Respondent, Roundy's Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting representatives of the Milwaukee Building and Construction Trades Council, AFL–CIO, from distributing handbills at the Respondent's stores where the Respondent does not have an exclusionary property interest by demanding that they leave the area, by reporting them to the police, or by interfering with them in any other way.

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

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

(a) Within 14 days from the date of this Order, notify the appropriate law enforcement authorities, in writing and with copies to the Council, that the citations issued to Steven Schreiner and Gerald Rintamaki based on the events in this case were unlawful, and ask the authorities to expunge those citations and any related records.

(b) Within 14 days after service by the Region, post at all of its stores at which council representatives were unlawfully prohibited from handbilling, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the stores involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent since April 6, 2005.

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

IT IS FURTHER ORDERED that the allegations pertaining to the Respondent's stores located at 12735 W. Capitol Drive, Brookfield, Wisconsin and 8151 W. Bluemound Road, Milwaukee, Wisconsin are severed from this case and retained for separate resolution.

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit representatives of the Milwaukee Building and Construction Trades Council, AFL–CIO, from distributing handbills at our stores where we do not have an exclusionary property interest by demanding that they leave the area, by reporting them to the police, or by interfering with them in any other way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them in the words above.

WE WILL, within 14 days of the Board's order, notify the appropriate law enforcement authorities, in writing and with copies to the Council, that the citations issued to Steven Schreiner and Gerald Rintamaki based on the events in this case were unlawful, and ask the authorities to expunge those citations and any related records.

ROUNDY'S INC.

[8] 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."

Andrew S. Gollin, Esq., for the General Counsel.
Scott A. Gore, Esq. and *Mark L. Stolzenburg, Esq. (Laner, Muchin, Dombrow, Becker, Levin & Tominberg, Ltd.)*, of Chicago, Illinois, for the Respondent.
Ying Tao Ho, Esq. (Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C.), of Milwaukee, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on November 15 and December 22, 2005.[1] The complaint alleges that Respondent violated Section 8(a)(1) of the Act by prohibiting handbilling by nonemployee agents of the Charging Party (hereafter the Union or the Council) on property owned or leased by it, while permitting nonunion solicitations and distributions on such property. The complaint also alleges that Respondent violated the Act by having the handbillers removed from its property and having two of them issued citations. The Respondent filed an answer denying the essential allegations in the complaint. After the trial, the parties filed briefs, which I have read and considered.

Based on the entire record, including the stipulations of the parties, and the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

Jurisdiction

Respondent, a corporation with an office and place of business in Milwaukee, Wisconsin, operates grocery stores throughout southeastern Wisconsin. During a representative 1-year period, Respondent derived gross revenues in excess of $500,000, and received goods and materials valued in excess of $50,000 directly from points outside Wisconsin. Accordingly, I find, as Respondent admits, that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

The Alleged Unfair Labor Practices

Background

The Council, a central body comprised of construction industry local unions in the Milwaukee area, coordinates the activities of its member unions. For some time, the Council has been concerned that Respondent, which operates grocery stores in the Milwaukee area under the name Pick N Save, has constructed new stores and expanded or remodeled existing stores by using nonunion contractors, who do not pay their employees the prevailing area standard wage rates and benefits. The Council believes that using contractors who pay less than prevailing wages and benefits undercuts and jeopardizes the wages and benefits collectively bargained by their member unions. Among the offending contractors, according to the Council, were Performance Roofing, Northern Roofing, Glass, Inc., and Merit Painting, all of whom have been used to perform work on Respondent's stores.[2]

Respondent, whose own employees are represented by labor organizations, leases all but one of the locations at which it has stores in the Milwaukee area. At its leased locations, Respondent has arrangements with its landlords, whereby the landlord agrees to construct and remodel stores to Respondent's specifications. Respondent, however, retains the authority to approve the contractors selected to perform the work. Since the lease arrangements essentially provide that construction costs are passed through to Respondent in rental charges, Respondent is interested in holding down construction costs. It therefore insists on the selection of contractors who provide the low bid on construction projects both with respect to its leased locations and with respect to the location it owns outright. But, even with respect to its leased premises, Respondent retains the authority to approve the contractors selected to perform the work on its stores; indeed, even on its leased premises, Respondent sometimes contracts directly for remodeling work. Thus, Respondent may deviate from using low-bid contractors where the quality of the work is a more significant concern or where local ordinances provide that minority contractors are to be used for some construction work. Respondent also sometimes prefers that contractors be used who have some familiarity with its type of business.

Representatives of the Council have met with representatives of the Respondent about the Council's concerns that Respondent was using nonunion contractors in the construction and remodeling of its stores. The parties met on several occasions in the winter and spring of 2005. The efforts of the Council to have its union contractors be given an opportunity to bid on Respondent's construction work were rebuffed by Respondent's representatives, who took the position that the selection of contractors was up to its landlords and that Respondent was either restricted to or preferred using only the low bidders. As a practical matter this policy excluded using union contractors who usually paid higher wages and benefits. When the meetings proved unsuccessful in resolving the differences between the Council and the Respondent, the Council authorized and began a campaign of handbilling at Respondent's retail stores.

The Council Handbills at Respondent's Stores

From about April 6, 2005 through about the end of June 2005, agents of the Council distributed informational handbills in front of 26 of Respondent's stores. The handbilling, which took place on Respondent's private property, was peaceful.[3]

[1] By agreement, the December 22 session was held via videoconference; the witness and counsel were in Milwaukee and the judge was in Washington, D.C.

[2] The relevant prevailing or area standard wage and benefits rate for the construction work sought by the Council is, in effect, the wage and benefits rate in the collective-bargaining agreements of the Council's member unions. The prevailing wage rates and benefits, which apply to public construction projects, are determined by the State of Wisconsin after surveying and analyzing wage rates and benefits paid by representative contractors in the particular crafts. The area standard rates and benefits are set annually.

[3] In his brief, counsel for the General Counsel asserts that Respondent has not shown that the handbilling took place on property in which Respondent had a sufficient interest to prohibit the handbilling (GC Br.

The Council did not picket. Respondent's agents undertook to expel the handbillers. They were responsible for contacting police or having the landlord contact police to expel the handbillers, who left the premises as a result. Two handbillers, Steven Schreiner and Gerald Rintamaki, were issued citations and were required to appear in court to contest the citations. The legal matters were resolved without a criminal conviction, and the handbillers had the assistance of counsel employed and paid by one of the constituent union members of the Council.

The Council's handbills identified Respondent or Pick-N-Save as using nonunion contractors, who did not pay their employees prevailing wages and benefits, to build or remodel its stores. The handbills asked consumers not to patronize Respondent, accusing Respondent of saving money by using cheap labor to build and remodel its stores and not passing those savings on to consumers. The Council suggested that consumers could achieve savings of their own by shopping at competitor stores, pointing out price differences favoring products sold by competitors. It also urged consumers to contact Respondent in support of the Council's efforts to protect the prevailing wage rates and benefits of its member unions.[4]

The parties stipulated that Respondent permitted widespread solicitation and distribution of literature on private property both inside and outside its stores for at least the last 3 years. For example, Respondent permitted Salvation Army bellringers to solicit donations, annually, from November through December; it permitted the Boy Scouts to sell cornstalks, popcorn and other items, and the Girl Scouts to sell cookies and other items, at multiple times throughout the year; it permitted the Veterans of Foreign Wars to sell poppies, and the Shriners to sell onions, multiple times throughout the year; and it permitted the Hunger Task Force, the Red Cross and Second Harvest to solicit donations at various times.

The parties also stipulated that Respondent regularly allows various other civic, political and/or charitable solicitations, inside or outside several of its stores, and that Respondent maintains bulletin boards inside many of its stores, whereby the public may solicit items for sale or advertise community and organizational events. There was uncontradicted testimony that an environmental group solicited support and contributions, and a judicial candidate handed out campaign literature, outside of its stores; and that Respondent also permitted a state senator to set up a table inside of one of its stores in order to distribute campaign literature or otherwise meet with potential voters.

Discussion and Analysis

Let me begin by stating what this case does and does not involve. It does not involve organizing activities, either by employees or non-employee union representatives. And it does not involve a bargaining dispute between union-represented employees and their employer. It deals with nonemployee union representatives publicizing a dispute between a union and an employer over using contractors, in the construction or remodeling of its stores, who do not adhere to area wage standards. It involves peaceful handbilling, not picketing, on private, not public, property. In addition to publicizing what is described as an area standards dispute with the employer over its store construction policy, however, the handbilling on the employer's property also urged a consumer boycott of the employer. The case does not involve protest or boycott messages emanating from newspapers, radio or TV or from handbilling on public property. It involves messages of protest about an area standards dispute and a suggested boycott disseminated by handbilling on Respondent's private property. It is not disputed that the Respondent took steps to oust the handbillers from its private property or that it permitted other nonunion nonboycott solicitation and distribution on its property.

The General Counsel alleges that, by permitting widespread charitable, political and other solicitation and distributions on its private property, the Respondent could not ban what is allegedly similar conduct by the union handbillers. This is essentially an argument that Respondent discriminated against the handbillers. But nothing in the complaint or in the General Counsel's presentation suggests that the Respondent's ouster of the handbillers was based on an antiunion motive. Indeed, the complaint does not allege a violation of Section 8(a)(3) of the Act. Rather, the General Counsel relies on Board cases which find, after balancing competing interests and on an essentially disparate treatment analysis, that banning union activity on private property while permitting other solicitation or distribution on that same property interferes with protected activity under Section 8(a)(1) of the Act. See *Sandusky Mall Co*., 329 NLRB 618 (1999), enf. denied in relevant part 242 F.3d 682 (6th Cir. 2001), and cases cited therein. The Charging Party makes essentially the same points.

The Respondent makes a multipronged attack on the General Counsel's case. Its essential argument, however, is that the handbilling was not protected by the Act because it used Respondent's property to seek a boycott of Respondent's business. Respondent also alleges that permitting solicitation by charitable, civic or political groups is not the same as urging a boycott of a business and therefore there is no discrimination as alleged by the General Counsel. Respondent also urges that the Board reverse its ruling in *Sandusky Mall* and adopt the reasoning of Member Hurtgen's dissent in *Sandusky Mall* as well as the contrary position of several circuit courts which more narrowly

20–22). That is not an issue in this case. The General Counsel's complaint alleges that Union agents handbilled "on Respondent's property and/or property leased by Respondent." The gravamen of the complaint was that Respondent's prohibition of the handbilling was unlawful because it permitted similar activity by nonunion entities on that same property. This is essentially a disparate treatment theory, and the theory upon which the case was tried. The parties assumed at all stages of this litigation that the Respondent had a property interest sufficient to oust the handbillers. Indeed, the General Counsel's basic argument was that the Respondent, having such a property interest, permitted similar conduct by nonunion entities. It is too late now—and a potential due process problem—for the General Counsel to change the theory of the case on brief.

[4] The evidence shows that several of the contractors used by Respondent, including those referred to in the handbills, did, in fact, fail to pay prevailing wage rates and benefits. The Council adequately researched those wage rates and benefits and knew they were below the prevailing standards before it prepared the handbills. Respondent submitted no evidence to the contrary; and it also conceded that the price comparisons in the Council's handbills were accurate.

describes the kind of discrimination needed to justify union activity on private property.

In my view, the Board's decision in *Sandusky Mall* is controlling and the decision cannot be distinguished in any meaningful way. In that case, the Board held, in a 3-2 decision, that a shopping mall owner violated Section 8(a)(1) of the Act by prohibiting peaceful union handbilling by union representatives on its property and by having the handbillers arrested and charged with criminal trespass. The handbilling targeted a mall tenant accused of using a nonunion contractor, who did not pay prevailing area wages and benefits, to remodel its store. The handbills asked the public not to patronize the tenant because its employment of the nonunion contractor undermined area standards. The mall owner had allowed charitable, civic and other organizations to solicit on its premises, in accordance with its policy to permit such solicitation only where it benefits the business interest or good will of the mall or its tenants and does not create controversy or political divisiveness, a policy which it consistently followed.

The Board majority, citing applicable authorities, including the Supreme Court's decision in *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), found that the handbilling was protected by the Act, notwithstanding that it was undertaken on private property, and the mall owner's prohibition of the handbilling was discrimination because the mall owner permitted other nonunion solicitation on its property.[5] Noting its disagreement with a more narrow definition of discrimination articulated by the Sixth Circuit in *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996), the Board stated that the mall owner's policy of permitting some solicitation, but not the union's, still amounted to discrimination under the Act. Although the Board did not specifically address the boycott message of the handbills, it implicitly affirmed that that message did not render the handbilling unprotected or the discrimination any less significant by finding a violation in those circumstances. In addition, it disagreed with the Court's approach in *Cleveland Real Estate Partners*, which also involved a boycott message. The Board rejected the mall owner's attempted distinction of the two types of solicitation as "little more than an employer permitting on its property solicitation that it likes and forbidding solicitation that it dislikes [citation omitted]." Accordingly, in *Sandusky Mall*, the Board majority found that the mall owner violated the Act by "discriminatorily prohibiting the Union's representatives from distributing area standards handbills on the mall property and by summoning the police to have the representatives arrested."

Members Hurtgen and Brame wrote separate dissents in *Sandusky Mall.* Both took the position that urging a boycott of one of the mall tenants was not the same as the type of charitable and other solicitation permitted on the mall property. Member Hurtgen's dissent makes clear that he viewed messages in support of a boycott as qualitatively different from other solicitation that does not have a boycott message. He therefore found no discrimination. He concluded that the mall owner would have forbidden "boycott activity" on its property by anyone, whether it was a union or not, because such activity would be detrimental to the business of the mall tenants, "irrespective of the identity of the boycotter."

Here, as in *Sandusky Mall*, the handbillers were on private property and they urged a boycott of a mall tenant because it employed a nonunion contractor who was not paying area standards. In *Sandusky Mall*, the Board found that the handbilling was protected activity, notwithstanding the boycott message. The Respondent attempts to distinguish *Sandusky Mall* by suggesting that the handbilling in this case was unprotected because it had no control over the selection of the contractor who built or remodeled its stores, raising a sort of secondary boycott or "no right of control" argument. The Board's decision in *Sandusky Mall* is silent as to whether the mall tenant had any control over the selection of the contractor who was remodeling its store. I doubt that Respondent's suggested distinction makes a difference, but the evidence in this case shows that, both in practice and in the lease agreements, Respondent had sufficient authority to select or suggest contractors, although, in most instances, it chose to go with the low bidder because the construction costs were ultimately paid by it. Contrary to Respondent's further suggestion that the Council's only dispute was with the nonunion contractors, the Council's dispute in this case was with the Respondent; it wanted Respondent to use whatever influence it had to employ union contractors to construct and remodel its stores. Thus, contrary to Respondent's view, it is inconsequential that a contractor was not actually present at Respondent's stores while the handbilling was in progress. In any event, this entire argument is of no moment because the Supreme Court's decision in *Edward J. Debartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 583–587 (1988), makes it clear that handbilling is not prohibited under the secondary boycott sections of the Act.

In addition, here, as in *Sandusky Mall*, the discrimination is shown by the employer's tolerance of other nonunion solicitation on its property. In neither case was such nonunion solicitation the type of isolated conduct that would negate a finding of discrimination. See *Hammary Mfg. Corp.*, 265 NLRB 57 (1982). And, as indicated above, in both cases, the handbillers urged a boycott of the alleged offending entity, while the nonunion solicitors did not. But, as indicated above, the Board majority in *Sandusky Mall* did not view the boycott message as significant in its disparate treatment analysis. In some ways, this would seem to be a stronger case than *Sandusky Mall* because, in that case, the mall owner had a policy against permitting controversial or politically divisive solicitation on its property and it consistently applied that policy. Here, the Respondent permitted nonunion political solicitation on its property, a clearly controversial topic. Moreover, solicitation by an environmental group, which Respondent also permitted here, might well have offended some of Respondent's customers who were not favorably disposed to the "Green" movement. Tolerance of

[5] In *Babcock & Wilcox*, the Supreme Court stated that "an employer may validly post his property . . . [if he] does not discriminate against the union by allowing other distribution." As the Board observed, that discrimination exception has survived in subsequent Supreme Court, courts of appeals and Board decisions, although the definition of discrimination has been applied somewhat more narrowly by some courts of appeals than by the Board.

such arguably controversial solicitation in this case offers more support for a finding of disparate treatment here than existed in *Sandusky Mall*.

In the last analysis, however, the determining factor in both *Sandusky Mall* and this case is whether the *Babcock & Wilcox* discrimination exception to an employer's unfettered right to use his private property applies where the otherwise protected union handbilling urges a business boycott of the employer and the allegedly comparable nonunion solicitation does not. The dissenters in *Sandusky Mall* said "no"; and the majority, without directly addressing the views of the dissenters on this point, said "yes." The Board's composition has changed significantly since *Sandusky Mall* was decided by closely divided members over 6 years ago. And, during that time, more circuit courts have weighed in with their own definitions of what kind of comparability is necessary to establish discrimination in the context of union activity. It is thus likely that the present Board would want to take a fresh look at the issue. But I am bound by extant Board law, which is set forth in the majority's *Sandusky Mall* opinion.[6] I do not believe that case can rationally be distinguished from the instant case in any meaningful way. I therefore find, based on the Board's decision in *Sandusky Mall*, that Respondent violated Section 8(a)(1) of the Act by prohibiting the Council's handbilling on its property while permitting nonunion solicitation on that property, and by having two of the handbillers issued citations.

CONCLUSIONS OF LAW

1. By discriminatorily prohibiting Council representatives from handbilling on its property outside its stores, while permitting other solicitation and distributions on that property, and, by having handbillers issued citations, Respondent violated Section 8(a)(1) of the Act.

2. The above violations are unfair labor practices within the meaning of the Act.

REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act, I will order it to cease and desist from engaging in conduct found unlawful and to take certain affirmative action, including the posting of an appropriate notice, that will effectuate the policy of the Act. The remedy shall include a provision that Respondent take steps to have the appropriate law enforcement authorities remove any reference to the citations issued to handbillers Steven Schreiner and Gerald Rintamaki. In accordance with the General Counsel's concession (GC Br. 3 at fn. 3), there will be no provision providing reimbursement of legal fees since it appears that Schreiner and Rintamaki suffered no losses due to their legal representation in connection with the citations. The General Counsel also asks that I specifically order the notices to be posted on bulletin boards at the entrance to Respondent's stores because that is the point closest to where the handbilling took place. I am reluctant to do so because the General Counsel's request seems to go beyond what the Board ordered in *Sandusky Mall* and the Respondent has not had the opportunity to respond to the request. In these circumstances, I will follow *Sandusky Mall* and use the traditional notice-posting language of the order in that case.[7]

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended[8]

ORDER

The Respondent, Roundy's Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily prohibiting representatives of the Council from distributing handbills on its property, by demanding that they leave the property and by having them issued citations, or, in any other way, interfering with them.

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

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

(a) Within 14 days from the date of this order, notify the appropriate law enforcement authorities, in writing, with copies to the Council, that the Board has found that the citations issued to Steven Schreiber and Gerald Rintamaki were unlawful and ask them to expunge any citations and other records dealing with the events in this case.

(b) Within 14 days after service by the Region, post at all of its stores, at which Council representatives were prohibited from handbilling, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the stores involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent since May 9, 2005, the date the first charge was filed in this case.

[6] See *Iowa Beef Packers*, 144 NLRB 615, 616 (1963).

[7] Actually, the Board's notice in *Sandusky Mall*, which is addressed to the employer's employees, seems an odd remedy for the ouster and arrest of nonemployee handbillers whose area standards message had absolutely nothing to do with the employer's employees. Indeed, the boycott urged by the handbillers might well have adversely affected those employees by jeopardizing their jobs through the consequent loss of business due to the boycott of their employer.

[8] 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.

[9] 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."

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

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

WE WILL NOT discriminatorily prohibit representatives of Milwaukee Building and Construction Trades Council, AFL–CIO from distributing handbills on property owned or leased by Roundy's Inc., by demanding that they leave the property, having them issued citations, or, in any other way, interfering with them.

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

WE WILL, within 14 days of the Board's order, notify the applicable law enforcement authorities, in writing, that the citations issued to Steven Schreiber and Gerald Rintamaki were found to be unlawful by the Board and ask them to expunge any citations and other records dealing with the citations. Copies of such notification and request will be sent to the above individuals and the Council.

ROUNDY'S INC.

Andrew S. Gollin, Esq., for the General Counsel.
Scott A. Gore, Esq. and *Mark L. Stozenburg, Esq. (Laner, Muchin, Dombrow, Becker, Levin & Tominberg, Ltd.)*, of Chicago, IL, for the Respondent.
Ying Tao Ho, Esq. (Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C.), of Milwaukee, Wisconsin, for the Charging Party.

SUPPLEMENTAL DECISION ON REMAND

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. On February 8, 2006, I issued my original decision in this case, finding that the Respondent had violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discriminatorily preventing union agents from distributing handbills on the sidewalks in front of its stores while at the same time permitting other individuals to solicit customers from this same area. Although the General Counsel tried the case only on that discrimination theory, in his brief to me, he urged a different theory, namely, that the Respondent had not established that it had a property interest in the sidewalks in front of its stores sufficient to exclude the handbillers. Therefore, according to the General Counsel, the Respondent had violated the Act notwithstanding its discriminatory conduct. I rejected that theory on the ground that all parties had assumed that the Respondent had a sufficient property interest to exclude the handbillers under the discrimination theory advanced under the complaint and at trial, and to permit the General Counsel to raise this new theory would raise due process problems. See footnote 3 of my original decision. The new theory was neither specifically mentioned in the complaint nor raised by counsel for the General Counsel in his opening statement.

On September 11, 2006, the Board, acknowledging that the issue of the Respondent's property interest appeared to be uncontested during the hearing, nevertheless, remanded the case to me to take further evidence on the issue because, under *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000), a respondent in these types of cases has the burden of establishing that it had a sufficient property interest to exclude others from the property in question. The Board also noted that it need not pass on the issue whether the Respondent's exclusion of the handbillers was discriminatory because "[i]f it is found that the Respondent lacked an exclusionary property interest, that finding could be sufficient to find a violation even if the Respondent did not act discriminatorily." Slip decision p. 5 fn. 4. Compare *Food Lion, Inc.*, 304 NLRB 602 (1991), in which the Board affirmed the judge's finding of a violation where the respondent disparately enforced its rules and policies against the union by granting other individuals the right to solicit on property adjacent to its stores while denying such access to the union, but found it "unnecessary to pass on the judge's discussion and analysis of whether the [r]espondent had an exclusory property interest in the areas from which it excluded the union representatives." Ibid.

The Board's remand order effectively amends the complaint to add the theory—separate from the discrimination theory advanced in the General Counsel's original complaint—that Respondent violated the Act by excluding union representatives engaging in protected concerted activity from property in which it had no exclusionary interest. On December 14, 2006, I heard evidence on the remand in Milwaukee, Wisconsin. At the end of the hearing, the parties all expressed satisfaction that the record was now complete (Tr. 343). Thereafter, I received briefs and reply briefs from the parties. Based on evidence submitted both on remand and in the original proceeding, the stipulations and briefs of the parties and on the entire record, I make the following additional findings of fact and conclusions of law.

The Facts

The union handbilling discussed in my original decision took place in front of Respondent's stores at 26 specific locations, according to a stipulation of the parties (Jt. Exh. 1). The parties

also entered into a stipulation setting forth lease agreements and property interests at each of those locations (Jt. Exh. 4). At some of the locations, Respondent's store was in a shopping mall and in others the store was free standing. The parties stipulated that the handbilling was peaceful. And the record does not contain any evidence that the handbillers obstructed or interfered with customer access to or egress from the Respondent's stores. The record also contains testimonial evidence as to some of the handbilling. Two of the lead handbillers testified that they instructed their associates not to interfere with customers (Tr. 77, 321).

Below, I set forth, for each of the locations, what activity took place and where, and the circumstances of the Respondent's interference with the handbilling. I also discuss the Respondent's relevant property interests in the areas in which the handbilling took place. The Respondent owned the store and the property at the first location listed below. The stores at the other 25 locations were leased by the Respondent and the terms of the leases were somewhat different at each location.[1]

The Activity, Where it Took Place, and Respondent's Reaction to it

1. Pick'n Save—127/Capitol, Brookfield, Wisconsin (Mall). On or about April 20,[2] union handbillers peacefully distributed handbills "in front of this store."[3] An agent of the Respondent approached the handbillers and demanded that they stop distributing their handbills at that location or else he would call the police to have the handbillers removed. The handbillers then left. The Respondent owned the property involved at this location, including the area in which the handbilling took place.[4]

2. Pick'n Save—Rawson, Franklin, Wisconsin (Mall). On or about April 6, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing their handbills at that location or else he would call the police to have the handbillers removed. The handbillers then left.

3. Pick'n Save—Greenfield, Greenfield, Wisconsin (Free Standing). On or about April 6, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing their handbills at that location or else he would call the police to have the handbillers removed. The handbillers then left.

4. Pick'n Save—Hales Corners, Hales Corners, Wisconsin (Mall). On or about April 6 and May 5, union handbillers peacefully distributed handbills "in front of this store," and, on or about June 8, distributed handbills "on a sidewalk near the store." An agent of the Respondent approached the handbillers and demanded that they stop distributing the handbills at that location or else he would call the police to have the handbillers removed. On June 8, two of the Respondent's security guards accompanied the manager. On April 6, the handbillers left without the police being called or present. On May 5 and June 8, the handbillers left only after the police were called, arrived and talked to the handbillers. One of the handbillers, Charlie Falkner, testified that he personally handbilled at this location two times, presumably May 5 and June 8, because the police confronted the handbillers (Tr. 322–323). On one occasion, when the handbillers were handbilling on "a crosswalk from . . . a Blockbuster there going into the parking lot," he testified that the police told the handbillers that they would be arrested if they did not leave. (Tr. 323.) On the second occasion, when the handbillers were "directly in front of the store, somewhat in front of the doors of the store itself," the police "showed up" and, after some discussion, permitted the handbillers to remain and continue their handbilling. (Tr. 323–324.) Falkner also testified that someone who said he was the Respondent's store manager approached the handbillers while he was there. (Tr. 335–336.)[5]

5. Pick'n Save—Menomonee Falls East, Menomonee Falls, Wisconsin (Mall). On or about April 6, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent demanded that the handbillers stop distributing the handbills at that location or else he would call the police to have the handbillers removed. The handbillers did not leave until after the police were called, arrived and spoke to the handbillers.[6]

6. Pick'n Save—Menomonee Falls, Menomonee Falls, Wisconsin (Mall). On or about April 6, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent demanded that the handbillers stop distributing the handbills at that location or else he would call the police to have the handbillers removed. The handbillers left.

7. Pick'n Save—Mequon, Mequon, Wisconsin (Free Standing). On or about April 6, Union Agents Steve Schreiner and

[1] The numbering system that I use in describing the store locations from 1 through 26 is based on the listings set forth in Jt. Exh. 1. Those locations are the only ones at which the handbilling took place. The Respondent apparently has a different numbering system that covers all of its stores, not just the ones involved in the handbilling. Jt. Exh. 1 also identifies whether the store is free standing or in a shopping mall.

[2] All dates refer to 2005, unless otherwise stated.

[3] The parties stipulated that the term "in front of [the] store" means somewhere in the "common areas" described in the applicable lease agreements, including private sidewalks in front of a particular store (Tr. 281–282, 314–316).

[4] In his opening brief on remand, the General Counsel concedes that the Respondent owned this property, including the location on which the handbilling took place, at the time it took place. The General Counsel also concedes that the Respondent therefore had a sufficient property interest to exclude the handbillers. The evidence submitted in the remand proceeding supports this view (R. Exh. 3–4, Tr. 347–350). Accordingly, the General Counsel concedes that the Respondent did not violate the Act under the new remand theory of the case. But my findings that the Respondent discriminated against the union handbillers by ousting them from this location, set forth in my original decision, stands.

[5] The parties also stipulated that, where the police were called, "Respondent's agents were responsible for contacting the police or having the property owner contact the police." Jt. Exh. 1 p. 1.

[6] In its opening brief on remand (Br. 6, 30), the Respondent mistakenly states that this aspect of the stipulation refers to an unidentified manager, not a Roundy's manager. The relevant part of the stipulation covering this incident, however, clearly refers to an "unidentified Roundy's manager."

Gerald Rintamaki distributed handbills "in front of this store." An "unidentified manager" approached them and demanded they stop distributing handbills at that location or else he would call the police and have the handbillers removed. The police were called, arrived and talked to the handbillers. The police told the handbillers that the Mequon Police Department was going to issue them citations. The handbillers then left. The citations were later mailed to Schreiner and Rintamaki. Although Schreiner testified at the first hearing about this particular incident, his testimony does not amplify the circumstances of the handbilling beyond what is already in the stipulation.

8. Pick'n Save—Bluemound East, Milwaukee, Wisconsin (Mall). On or about April 21 and 29, May 4, and June 29, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing handbills at that location or else he would call the police and have the handbillers removed. On each occasion, the police were called, arrived and talked to the handbillers. On April 21, the handbillers moved to the public sidewalk only after the police arrived. On the last three occasions, however, the handbillers had moved to the public sidewalk before the police appeared. On all occasions, the handbilling continued on the public sidewalk.

9. Pick'n Save—Bayview, Milwaukee, Wisconsin (Free Standing). On an unspecified date in June, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing handbills at that location or else he would call the police and have the handbillers removed. The handbillers then left. Union handbiller Charlie Falkner testified to the same effect. (Tr. 325.)

10. Pick'n Save—Clark Square, Milwaukee, Wisconsin (Mall). On or about April 21, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing handbills at that location or else he would call the police and have the handbillers removed. The police were called, arrived and spoke to the handbillers. The handbillers then moved to the public sidewalk.

11. Pick'n Save—Good Hope, Milwaukee, Wisconsin (Free Standing). On or about April 20, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing handbills at that location or else he would call the police and have the handbillers removed. The handbillers then left.

12. Pick'n Save—Metro Market, Milwaukee, Wisconsin (Mall). According to the stipulation of the parties, on an unspecified date in June, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing the handbills at that location or else he would call the police and have the handbillers removed. The handbillers then left. Union handbiller Charlie Falkner testified about being present at this location, but was unable to identify the date; he recalled handbilling on a public sidewalk "going into the parking lot (Tr. 332–333)." His testimony is not specific enough to make definitive findings, but it does not detract from the incident set forth in the stipulation.

13. Pick'n Save—East Pointe, Milwaukee, Wisconsin (Mall). On or about June 29, a union handbiller peacefully distributed handbills "on the public sidewalk outside this store." An unidentified person claiming to own the property approached the handbiller and demanded that he stop distributing handbills at that location. The handbiller refused. The police were called, arrived and spoke with "the parties." The police allowed the handbiller to remain. This part of the stipulation does not state the person who approached the handbiller was an agent of the Respondent, although the stipulation generally provides that "Respondent's agents were responsible for contacting the police or having the property owner contact the police."[7]

14. Pick'n Save—Midtown, Milwaukee, Wisconsin (Mall). On an unspecified date in June, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing the handbills at that location or else he would call the police and have the handbillers removed. The handbillers then left. Union handbiller Falkner testified that, on a different date, he handbilled in certain parking areas of the mall, but no action was taken against the handbillers. (Tr. 325–326.)

15. Pick'n Save—Silver Spring, Milwaukee, Wisconsin (Mall). On or about April 20, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing the handbills at that location or else he would call the police and have the handbillers removed. The handbillers then left.

16. Pick'n Save—Muskego, Muskego, Wisconsin (Mall). On or about April 6, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing the handbills at that location or else he would call the police and have the handbillers removed. The police were called, arrived and spoke with the handbillers. The handbillers then left. There was testimony concerning this incident that supported this aspect of the stipulation (Tr. 79–80).

17. Pick'n Save—New Berlin, New Berlin, Wisconsin (Mall). On or about April 6, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing the handbills at that location or else he would call the police and have the handbillers removed. The police were called, arrived and spoke to the handbillers. The handbillers then left. Testimonial evidence also supported this aspect of the stipulation (Tr. 78–79).

18. Pick'n Save—Tri City, Oak Creek, Wisconsin (Mall). On or about April 20, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent

[7] Because of the apparent ambiguity in the stipulation, the General Counsel, in his opening brief on remand (Br. 16), concedes that the stipulation does not support a violation of the Act as to this incident, under either the remand theory or the discrimination theory of the case.

approached the handbillers and demanded that they stop distributing the handbills at that location or else he would call the police and have the handbillers removed. Thereafter, according to the relevant part of the stipulation, "[t]he handbillers moved to the sidewalk." The police were called, arrived and spoke to the handbillers. After this, again according to the stipulation, "[t]he handbillers remained on the public sidewalk." The handbillers returned on or about April 21, May 10 and 25 and distributed handbills on "the public sidewalk." Thereafter, the police were called, arrived and spoke to the handbillers, but the handbillers continued their handbilling on the public sidewalk.[8] Falkner also testified that he handbilled twice at this location, but no action was taken against the handbillers. (Tr. 327.)[9]

19. Pick'n Save—Oconomowoc, Oconomowoc, Wisconsin (Mall). On or about May 17, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing handbills at that location or else he would call the police and have the handbillers removed. The police were called, arrived and spoke to the handbillers. The handbillers thereafter moved their handbilling to the public sidewalk. Falkner testified that he handbilled at this location, but at the "entrances of the parking lot itself." According to Falkner, a store manager told the handbillers to leave, then the police came and permitted the handbillers to continue. (Tr. 327–328.) The latter incident appears to be a different incident than the incident described in the stipulation.

20. Pick'n Save—Whitnall, St. Francis, Wisconsin (Mall). On or about April 21, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing handbills at that location or else he would call the police and have the handbillers removed. The handbillers left.

21. Pick'n Save—Wales, Wales, Wisconsin (Free Standing). On an unspecified date in April, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing handbills at that location or else he would call the police and have the handbillers removed. The handbillers left.

22. Pick'n Save—Sunset, Waukesha, Wisconsin (Free Standing). On or about June 29, union handbillers peacefully distributed handbills "in front of the store." An agent of the Respondent approached the handbillers and demanded that they stop distributing handbills at that location or else he would call the police and have the handbillers removed. The police were called, arrived and spoke to the handbillers. The handbillers then moved to the public sidewalk or right-of-way.

23. Pick'n Save—Waukesha East, Waukesha, Wisconsin (Mall). On or about June 29, union handbillers peacefully distributed handbills "in front of the store." An agent of the Respondent approached the handbillers and demanded that they stop distributing handbills at that location or else he would call the police and have the handbillers removed. The handbillers left.

24. Pick'n Save—State Street, Wauwatosa, Wisconsin (Mall). On or about April 6, and again on an unspecified date in May, union handbillers peacefully distributed handbills "in front of the store." An agent of the Respondent approached the handbillers and demanded that they stop distributing handbills at that location or else he would call the police and have the handbillers removed. The police were called, arrived and talked to the handbillers. The handbillers then moved to the public sidewalk. On an unspecified date in June, handbillers again appeared at this location, this time "at the entrance of the parking lot from the street." On this occasion, an agent of the Respondent approached the handbillers and demanded that they stop distributing handbills at that location or else he would call the police to have the handbillers removed. The police were called, arrived and spoke to the handbillers. The handbillers thereafter moved to the public sidewalk.

25. Pick'n Save—Cleveland, West Allis, Wisconsin (Mall). On or about April 6, union handbillers peacefully distributed handbills "in front of this store." An agent of the Respondent approached the handbillers and demanded that they stop distributing handbills at that location or else he would call the police and have the handbillers removed. The handbillers then left.

26. Pick'n Save—Market Square, West Allis, Wisconsin (Mall). On or about May 18, union handbillers peacefully distributed handbills "outside this store." Two of the Respondent's security guards approached the handbillers and asked them to leave or else they would call the police and have the handbillers removed. The police were called, arrived and talked to the handbillers. The handbillers thereafter moved to the public sidewalk.

In its opening brief on remand (Br. 30–32), the Respondent contends that, in several of the incidents described above, its agents were not responsible for ousting the handbillers or for calling the police. In one incident, at Menomonee Falls, No. 5, above, the Respondent was wrong on the facts. In another, at East Pointe, No. 13, above, the General Counsel has disavowed any reliance on that incident in alleging violations of the Act. At Tri-City, No. 18 above, the General Counsel has disavowed any reliance on those incidents, except for that occurring on April 20, an incident that Respondent does not contest in its brief.

The Respondent also contends that the stipulation and the testimony about the Mequon incident, No. 7, above, does not show that the Respondent itself took action against the handbillers. The stipulation covering this incident does indeed, as Respondent contends, refer only to an "unidentified manager" approaching the handbillers and asking them to stop their activity. However, the stipulation states generally that "Respondent's agents were responsible for contacting the police or having the property owner contact the police." See footnote 5 above. Moreover, a separate part of the stipulation, number 3 at page 1 of Joint. Exhibit 1, states that "one of Respondent's

[8] I assume, in accordance with the stipulation of the parties, that an agent of the Respondent called the police on the latter three occasions.

[9] In his opening brief on remand (Br. 20, fn. 7), the General Counsel stated that he does not pursue the alleged violations based on any incidents that took place at this location, except the one on April 20, because of the lack of specificity in the stipulation as to who called the police.

statutory supervisors or agents, Peter Schuette" called the police, who thereafter issued citations to two of the handbillers, Steven Schreiner and Gerald Rintamaki. In these circumstances, I reject the Respondent's contention.

The Respondent also relies (Opening Br. 32) on the testimony of one of the handbillers, Charlie Falkner, in contending that some of the Respondent's contacts with him not only show no interference with his handbilling, but also show more generally that the Respondent did not interfere with any handbilling that took place at the locations where Falkner handbilled. I also reject this contention. First of all, it is not clear that Falkner was testifying to the same incidents described in the relevant parts of the stipulation. For example, the Respondent contends that Falkner was not interfered with when he handbilled at the Tri City location. But, as indicated above, the General Counsel only relies on the April 20 handbilling for a violation at that location. And Falkner's testimony indicates that he handbilled at Tri City on two occasions, neither of which he identified by date (Tr. 327). Thus, Falkner's testimony does not impugn the stipulated facts concerning the Tri City incident. Likewise, Falkner's testimony about his handbilling at the Oconomowoc location does not specify the date he handbilled there, and his description of what happened does not appear to match the incident described in the stipulation (Tr. 327–328). I could not find any reference in Falkner's testimony to the Cleveland location, which Respondent also cited in this connection. Thus, I cannot find that Falkner's testimony refutes the stipulation insofar as it relates to the Cleveland location. Finally, the Respondent contends that the Respondent did not interfere with Falkner's handbilling at the Hales Corners location. Falkner testified he handbilled at that location on two occasions, but did not give the dates he handbilled (Tr. 323–324). The stipulation for this location, No. 4, above, sets forth three particular dates. It is not clear to me that Falkner's testimony deals with the same incidents mentioned in the stipulation, but even if it did, one incident remains unrebutted by Falkner's testimony and, in another, Falkner clearly testified that the police were called and told the handbillers if they did not leave they would be arrested (Tr. 323). At most, therefore, in only one of the incidents Falkner testified about was he told that his handbilling was permitted (Tr. 323–324). In short, the testimony is insufficient to rebut the clear terms of the stipulation concerning the Hales Corners location and I reject the Respondent's contention that it did not interfere with the handbilling at this location.

The Respondent's Property Interests in the Areas Where the Handbilling Took Place

As indicated, the Respondent owned the property at location No. 1 listed above (127/Capitol), including the area in which the handbilling took place, and the General Counsel no longer relies on that incident to support a violation on the remand theory of the case. The General Counsel adheres to his view that the Respondent violated the Act at this location under the discrimination theory of the case, consistent with my original decision.

The other 25 locations were subject to different lease agreements between different landlords and the Respondent, which leased the stores themselves, not the common areas in front of the stores, where the handbilling took place. The details of the relevant language of the lease agreements are set forth in a stipulation of the parties during the remand hearing (Jt. Exh. 4). Although the parties differ on whether the Respondent has an exclusionary interest in the common areas where the handbilling took place, there is essential agreement that the Respondent had a nonexclusive easement in those common areas. Most of the leases specifically provide that the lessee has a nonexclusive easement in the common areas, including the sidewalks immediately in front of the stores and the parking lots serving the leased premises, and the others implicitly provide as much. The Respondent concedes (Opening brief on remand, at p. 2 and 37–39) that the leases at all 25 leased locations granted it "non-exclusive easements to the common areas." The easements generally permit use of the common areas by the Respondent and its customers, employees and invitees, as well as the landlord and other tenants of the shopping centers, and their customers, employees and invitees.[10]

Several of the locations, however, call for further discussion because of unique circumstances or particular lease language. For example, the General Counsel essentially concedes (Opening brief on remand at p. 11) that the lease language at the Bluemound store (No. 8) is too ambiguous to support a violation under the remand theory of the case. That location is thus no longer part of the remand theory of the case.

In addition, several of the locations are covered by lease language that sets forth the Respondent's maintenance obligations with respect to the common areas. See generally Joint Exhibit 4. Thus, a number of the leases (stores 2, 3, 4, 5, 6, 9, 10, 11, 13, 14, 15, 17, 18, 20, 22, 24, 25, and 26) contain language providing that the landlord shall operate and maintain the common areas, but some (stores 2, 3, 4, 6, 9, 10, 11, 13, 14, 17, 20, 24, and 26) have language providing that the tenant shall pay as additional rent its proportionate share of certain common area expenses, including cleaning, snow and ice removal, property and liability insurance, landscaping, rubbish removal, and other expenses. At the Cleveland, West Allis store (no. 25), the Respondent shares in the landlord's costs of maintaining and operating the common areas and it also has the right to take over the landlord's responsibilities in the common areas (Jt. Exh. 4 at p. 13). But there is no evidence in this record that the Respondent has agreed to take over those responsibilities. At the Oconomowoc store (no. 19), the Respondent is wholly responsible for paying all the costs and expenses for maintaining the common areas. (Jt. Exh. 4 at p. 5.) Both the Cleveland and Oconomowoc stores are in a shopping mall.

Other locations have different lease provisions governing maintenance or payment of costs for using the common areas. The lease agreement for the free standing Wales store (no. 21) provides that the tenant, the Respondent, shall operate and maintain the common areas and pay "as and when due" all

[10] The General Counsel seems to contend (Reply Br. on remand at p. 2, fn. 1) that language in some of the leases does not in fact amount to an easement, because it simply provides the lessee with the "nonexclusive right and privilege . . . to use the Common areas." Such language, however, amounts to at least an implicit nonexclusive easement. In any event, I will assume as much for the purposes of this case.

costs and expenses for the maintenance of the common areas. (Jt. Exh 4 at p. 11.) The lease agreement for the Mequon store (no. 7), which, contrary to the General Counsel (Opening Br. 9), is a free standing store (Jt. Exh. 1), provides that the Respondent shall pay, "as additional rent," its share of common area expenses. Under another lease provision, the Respondent's share of those expenses is listed at 100 percent (Jt. Exh. 4, p. 7). At the Metro Market store (no. 12), which is in a shopping mall, the lease agreement provides that the Respondent should reimburse the landlord for at least some of the costs of maintaining the common areas; other costs are shared (Jt. Exh. 4, pp. 7–8). At the Muskego store (no. 16), which is in a shopping mall, the lease agreement provides that, as a tenant, Respondent should maintain and operate the common areas "in accordance with good real estate practice." (Jt. Exh. 4, p. 9.) At the Tri-City store (no. 18), which is in a shopping mall, the lease agreement provides that, as a tenant, the Respondent shall pay, "as additional rent, 100% of" certain specified common area expenses, including the cost of maintaining and repairing sidewalks, landscaping, utility and insurance costs. (Jt. Exh. 4 at p. 10.) At the Waukesha Sunset store (no. 22), a free standing store, the lease agreement provides that the Respondent shall pay, "as additional rent, its pro-rata share of" certain specified common area expenses. (Jt. Exh. 4, p. 12.) At the Waukesha East store (no. 23), which is in a shopping mall, the lease agreement provides that the Respondent shall reimburse the landlord for its proportional share of the common area costs. (Jt. Exh. 4, pp. 12–13.)

Brian Pikalek, a loss prevention district manager for the Respondent, testified in the remand proceeding. He supervises security issues over part of the Respondent's operations. He testified that it is the Respondent's practice to exclude undesirable people, such as panhandlers, drunks, skateboarders, handbillers or vagrants, from the common areas in front of the Respondent's leased stores. They are asked to leave the property and, if they do not, the police are called to remove them. (Tr. 289–290, 292, 297, 298. 304–306.) According to Pikalek, neither he nor any other of the Respondent's agents call the landlord in advance of requesting people to leave or calling the police (Tr. 291, 297) and the landlord does not know, even after the fact, that he or other agents of the Respondent exclude undesirable people from the common areas (Tr. 298). Nothing in the lease agreements authorizes the Respondent's actions in this respect and Pikalek was not acting in accordance with any authority under the lease agreements (Tr. 301–302).

Applicable Principles

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537–538 (1992), the Supreme Court, citing its earlier decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), rejected the Board's balancing test in assessing whether a property owner could deny access to his property to nonemployee union representatives who sought to reach the property owner's employees. The Court held that Section 7 does not protect nonemployees in those circumstances, except where the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to reach them through the usual channels. Ibid. As the Eighth Circuit stated, however, in a case almost identical to this one, the *Babcock/Lechmere* construct does not neatly fit the circumstances where nonemployees seek to reach customers rather than employees and where the respondent does not own the premises on which the nonemployee union activities take place. *O'Neil's Markets v. Food & Commercial Workers Local 88*, 95 F.3d 733, 737 (8th Cir. 1996), affirming in part and remanding in part, *Food for Less*, 318 NLRB 646 (1995). In *O'Neil's*, the court endorsed the Board's analysis, which assessed both the Section 7 and the property rights involved in peaceful area standards handbilling. The handbilling in that case, like that in the instant case, urged a consumer boycott and took place outside a respondent's leased store. Respondent did not own the property on which the handbilling took place, but it held a nonexclusive easement over it. While conceding that the nonemployee union handbilling involved was not a "core" organizing activity, the Court ruled that it was nevertheless a protected activity that could not be thwarted by the respondent because the latter did not have a property interest in the area on which the activity took place sufficient to exclude the handbillers. 93 F.3d at 738–739.[11]

In the underlying Board decision approved by the Eighth Circuit in *O'Neil's, Food for Less*, supra, 318 NLRB at 649, the Board stated:

> In cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representatives, an interest which *entitled* it to exclude individuals from the property. . . . In the absence of such a showing there is in fact no conflict between competing rights requiring an analysis and an accommodation under [the Supreme Court's *Lechmere* decision discussed above]. . . . In determining whether an adequate property interest has been shown, it is appropriate to look not only to relevant documentary evidence and other evidence on record but to the relevant state law. [Citations omitted.]

After analyzing the respondent's lease and the law of Missouri, where the case originated, the Board found, with the Eighth Circuit's approval, that the respondent violated Section 8(a)(1) of the Act by excluding the handbillers from the parking lot in front of its store. According to the Board, the respondent did not have the right, under Missouri law, to exclude the handbillers from the parking lot in front of its store because it only had a nonexclusive easement over that area. The lease defined the easement as being held in common with the lessor and lessor's other lessees for ingress, egress and parking for customers, employees and invitees. And Missouri law provided that an easement was a nonpossessory interest in land, an insufficient interest to permit actions such as trespass to protect such interest. 318 NLRB at 649–650; and 95 F.3d at 738–739.[12]

[11] The court remanded the case to the Board because the General Counsel had not proved that the union possessed a valid area standards objective. 95 F.3d at 738. No such issue is presented in this case because here the union did possess a valid area standards objective.

[12] The Board declined to pass on whether the lease under consideration gave the respondent a sufficient property interest in the sidewalk in

The Board has undertaken a similar analysis in other cases finding that the respondents involved did not have a right to exclude union representatives from property in which they had no exclusionary interest and thus violated the Act. See *Indio Grocery Outlet*, supra (California law); *Johnson & Hardin Co.*, 305 NLRB 690, 694–695 (1991) (Ohio law); *Mr. Z's Food Mart*, 325 NLRB 871 fn. 2 and 878–884 (1998), enforcement denied *Weis Markets, Inc. v. NLRB*, 265 F.3d 239 (4th Cir. 2001) (Pennsylvania law); and *Nicks'*, 326 NLRB 997 (1998), reversed in pertinent part, *Food & Commercial Workers v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000) (Virginia law). See also *Indio Grocery Outlet*, supra, and *Nicks'*, supra, for the Board's statement of the burden of proof in such cases.[13]

Discussion and Analysis

Applying the above principles to the facts in the instant case, I find, as shown in my original decision, that the handbilling was protected concerted activity. I also find that the Respondent interfered with such protected activity by ejecting the handbillers from the areas in front of its leased stores, except for the East Pointe and the Bluemound locations, because it has not satisfied its burden of proving that it had an exclusionary interest in those areas.[14] Nothing in the lease agreements themselves specifically states that that the Respondent had a right to exclude the handbillers from the areas in which the handbilling took place. The Respondent had only a nonexclusive easement in those areas, which were not part of its leased premises and which were defined as "common areas." The easement, which was shared with other tenants and the landlord, gave the Respondent—for the benefit of customers, employees and invitees—the right to use those areas for ingress and egress, not to eject anyone from those areas.

Nothing in the other record evidence establishes an exclusionary right on the part of the Respondent. Although testimony at the remand hearing showed that an agent for the Respondent did actually exclude undesirable people from the common areas in front of its stores, there is no evidence that the landlord, who actually owned the property, authorized or ratified such action. Indeed, the Respondent's agent testified that he did not act under the lease agreements. Nor did the Respondent test the legality of its position by taking legal actions that would have definitively determined its right to eject individuals from the common areas, over which it had a nonexclusive easement.

Nor has the Respondent shown that, under Wisconsin law, it had a right to exclude individuals from the common areas over which it had a nonexclusive easement. "An easement is an interest in land, which is in the possession of another, creating two distinct property interests: the dominant estate, which enjoys the privileges granted by the easement, and the servient estate, which permits the exercise of those privileges." *Gallagher v. Grant-Lafayette Electric Cooperative*, 249 Wis.2d 115, 126, 637 N.W.2d 80, 85 (2001), citing prior case authority. Thus, although, as an easement holder, Respondent does have a property interest in the common areas in front of its stores, it does not have a possessory interest in those areas. The lack of such an interest precludes it from bringing a trespass action against individuals whom it wants to exclude from those areas. Section 943.13(1m)(b) of the Wisconsin statutes makes it a violation for an individual to enter or remain "on any land of another after having been notified by the owner or occupant not to enter or remain on the premises." The statute does not define "occupant," but the Respondent has cited no Wisconsin cases that construe an easement holder as an "occupant" under the statute. As the General Counsel points out (Opening Br. 34), Black's Law Dictionary (8th ed. 2004) defines "occupant" as "one who has possessory rights in, or control over, certain property or premises."

An easement holder does not, by definition, have a possessory right. Moreover, since the areas in front of its stores are common areas, the Respondent does not have control over those areas; it certainly does not have exclusive control. Nor does the fact that, under some of the leases, the Respondent has an obligation to repair and maintain the common areas transform its status of an easement holder into that of an occupant or one who controls the common areas. The Respondent neither occupies the sidewalks in the common areas nor has control over them. It simply has the right, which it has purchased, to use the sidewalks, in common with the landlord and other tenants, and to have its customers and invitees use those sidewalks, again, in common with the customers and invitees of others, for ingress and egress. In similar cases, the Board has not found that an easement holder's obligation to maintain or police the common areas in which protected activity takes place operates to give it an exclusionary right in such common areas. See *Mr. Z's Food Mart*, supra, 325 NLRB at 871 fn. 2 and 883–884; *Food for Less*, supra, 318 NLRB at 650; and *Johnson & Hardin Co.*, supra, 305 NLRB at 695.[15]

To be sure, an easement "carries with it by implication the right to do what is reasonably necessary to the full enjoyment

front of its store, from which the handbillers were also excluded, because the lease was unclear as to whether the respondent controlled the sidewalk and the violation was established by exclusion of the handbillers from the parking lot. 318 NLRB at 650 fn. 6.

[13] Several former Board members have taken a different view of the respondent's burden of proof in such cases, characterizing it more of a burden of going forward or production. Thus, former Member Cohen would first require the General Counsel to establish that the handbillers whom the respondent ejected were engaged in protected Sec. 7 activity. Then, he would require the respondent to show that it had a colorable property right to the area from which the handbillers were ejected. The burden at that point would shift back to the General Counsel to show that the respondent did not have an exclusionary property right. See *Great American*, 322 NLRB 17, 20 fn. 13 and 23, fn. 21 (1996). The views of former Members Hurtgen and Gould are essentially the same. See *Nicks'*, supra, 326 NLRB at 1002 fn. 26 and 1003 fn. 1.

[14] The General Counsel concedes that there was no violation under the remand theory at the 127/Capitol store (no. 1), on property that the Respondent owned outright. Respondent no longer owns that property (Tr. 348).

[15] In construing a Virginia statute, which permitted a "custodian" or a "person lawfully in charge of" the property in question to bring a trespass action, the District of Columbia Circuit ruled that the holder of a nonexclusive easement in that case did not come within the statute, even though it had some obligation to maintain the property. See *Food & Commercial Workers v. NLRB*, supra, 222 F.3d at 1036–1037.

of the easement in light of the purpose for which it was granted." *Gallagher,* supra, 249 Wis.2d at 128, 637 N.W.2d at 86, citing authority. But there is no evidence in this case that the handbillers interfered with the ingress or egress of customers or anyone else having business with the Respondent, the purpose for which the easement was granted. That fact distinguishes a number of the cases cited by the Respondent, particularly *Lintner v. Augustine Furniture Co.,* 199 Wis. 71, 225 N.W. 193 (1929), and *Hunter v. McDonald,* 78 Wis.2d 338, 254 N.W.2d 282 (1977), upon which it apparently chiefly relies (Reply Br. 7). Those cases dealt with unreasonable interference with use of the easements because of physical obstructions or infringements either on or immediately adjoining the rights-of- ways involved in those cases. Here, there was no interference with use of the easement. Nor has the Respondent cited any Wisconsin cases that support its contention (Opening Br. 40, Reply Br. 15) that peacefully distributing a message urging a consumer boycott, a protected concerted activity under Federal law, amounts to a material interference with the enjoyment of a nonexclusive easement permitting the ingress and egress of customers into and from a retail facility.

In its reply brief on remand (Br. 15), the Respondent cites the Fourth Circuit's disagreement with the Board's finding of a violation in *Mr. Z's Food Mart,* supra, in support of its contention that it had an exclusionary interest here. That case, which applied the property laws of Pennsylvania, is clearly distinguishable. The Fourth Circuit cited a Pennsylvania Supreme Court decision that the Board had not mentioned or discussed in its underlying decision, which specifically held that a shopping center tenant could, in fact, exclude union picketers from common areas in front of its store. *Weis Markets v. NLRB,* supra, 265 F.3d at 246–248, citing *Logan Valley Plaza, Inc. v. Amalgamated Food Employees Local 590,* 425 Pa. 382, 227 A.2d 874 (1967), a case the Court stated was directly on point and remained valid, despite a reversal by the United States Supreme Court because that Supreme Court decision was itself later overruled. The Respondent has not cited a comparable Wisconsin case. The closest Wisconsin case on point does not help Respondent. In *Jacobs v. Major,* 139 Wis.2d 492, 407 N.W.2d 832 (1987), the Wisconsin Supreme Court upheld a shopping center owner's right to exclude antinuclear protesters from its premises and held that the free speech provisions of the Wisconsin Constitution did not protect the protesters' rights on private land. But the property rights enforced in that case were the rights of the owner of the property who brought the lawsuit. Respondent does not own the property from which the handbillers in this case were ejected. It only has a nonexclusive easement over that property. Accordingly, any reliance on *Jacobs v. Major* would be unavailing.[16]

Since the Respondent has failed to meet its burden of showing that it had an exclusionary interest in the common areas from which it ousted the handbillers in this case, its exclusion of the handbillers was violative of the Act. Thus, under the remand theory of this case, and independent of whether the Respondent discriminated against the handbillers by permitting similar activity by nonunion entities, it has violated Section 8(a)(1) of the Act by its conduct at all locations listed above, except for the East Pointe, Bluemound and 127/Capitol locations (nos. 1, 8 and 13). I reaffirm the findings in my original decision, except that no violation is found, even under the discrimination theory, as to the East Pointe location (no. 13).

CONCLUSIONS OF LAW

1. By prohibiting Council representatives from handbilling in front of its stores, and by having handbillers issued citations, Respondent violated Section 8(a)(1) of the Act.

2. By discriminatorily prohibiting Council representatives from handbilling in front of its stores, and by having handbillers issued citations, while permitting other solicitation and distributions in those areas, Respondent violated Section 8(a)(1) of the Act.[17]

3. The above violations are unfair labor practices within the meaning of the Act.

REMEDY

I reaffirm the remedy set forth in my original decision with appropriate alterations to reflect the new violation found based on the remand theory of the case, as well as the new facts developed at the remand hearing insofar as they may affect the original remedy and order with regard to the discrimination theory of the case. I remain skeptical about the necessity for a notice posting addressed to the Respondent's employees to remedy a violation that amounts to interference with consumer-based appeals involving the rights of employees not employed by the Respondent. But Board law apparently endorses such a remedy. See, in addition to *Sandusky Mall,* cited in my original decision, *Food for Less,* supra, 318 NLRB at 650–651, with respect to the remand theory.

[Recommended Order omitted from publication.]

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[16] In a companion case decided on the same day as *Jacobs v. Major,* the Wisconsin Supreme Court upheld, on essentially the same grounds, a trespass conviction against abortion protesters on private property. *State v. Horn,* 139 Wis.2d 473, 407 N.W.2d 854 (1987).

[17] I have altered the conclusion and the corresponding order in my original decision to reflect the facts as developed in the remand proceeding and have added a conclusion and language in the corresponding order to reflect the new finding under the remand theory of the case.