

Nos. 10-3921, 11-1292

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

ROUNDY'S INCORPORATED

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**MILWAUKEE BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO**

Intervening Respondent

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

The jurisdictional statement of Roundy's Incorporated ("the Company") is not complete and correct. This case is before the Court on the petition of the

Company to review, and the application of the National Labor Relations Board (“the Board”) to enforce, a final Board Order issued against the Company on November 12, 2010, and reported at 356 NLRB No. 27. (A. 1-15.)¹ The Board found that the Company unlawfully prohibited representatives of the Milwaukee Building and Construction Trades Council, AFL-CIO (“the Union”), from peacefully handbilling in front of its stores.

The Board had jurisdiction over the proceeding under Section 10(a) (29 U.S.C. §§ 151, 160(a)) of the National Labor Relations Act (“the Act”), as amended. The Board’s Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction over the proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practices at issue occurred in Wisconsin. The Company’s petition for review and the Board’s application for enforcement were timely filed, as the Act imposes no time limit on such filings. The Union intervened on the Board’s behalf.

¹ “A.” refers to the appendix filed by the Company. “Tr.” refers to the transcript of the hearing in the unfair-labor-practice proceeding. “GCX” refers to exhibits introduced at the hearing by the General Counsel and “RX” refers to exhibits introduced by the Company, the Respondent before the Board; “JX” refers to joint exhibits introduced by the parties. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Court is jurisdictionally barred by Section 10(e) of the Act from considering the Company's untimely and procedurally improper challenge to the Board's earlier remand order; or, in any event, whether the Board acted within its broad discretion over its own proceedings in remanding the matter.

2. Whether substantial evidence supports the Board's finding that the Company failed to establish an exclusionary property interest in the sidewalks and other common areas in front of 23 of its stores, and, therefore, violated Section 8(a)(1) of the Act by prohibiting union representatives from handbilling in those areas.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act by prohibiting nonemployee union agents from handbilling on property owned or leased by the Company, while permitting nonunion solicitations or distributions on such property. (A. 3; GCX 1(e).) The complaint also alleged that the Company violated Section 8(a)(1) by calling the police to remove the handbillers, and causing the police to issue trespassing citations to two of the handbillers. An administrative law judge conducted a hearing on these allegations and the parties filed briefs. On February 8, 2006, the judge issued his initial

decision finding that the Company violated Section 8(a)(1) by discriminatorily preventing union agents from distributing handbills at 26 of its stores. (A. 3-6.) The Company and General Counsel filed exceptions to the judge's decision. On September 11, 2006, the Board issued an order remanding the case to the judge to give the Company 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. (A. 1; GCX 49(a).)

The judge conducted an additional hearing on the property-interest issue, at the end of which all parties expressed satisfaction that the record was now complete. (A. 8; Tr. 343.) Thereafter, the parties filed additional briefs. On March 28, 2007, the judge issued a supplemental decision finding that the Company failed to establish an exclusionary property interest in the sidewalks and other common areas in front of 23 of its stores, and, therefore, violated Section 8(a)(1) by prohibiting union representatives from handbilling in those areas. (A. 13-15.) With respect to two other stores—Stores No. 1 (127/Capitol) and No. 8 (Bluemound)²—the judge found that the Company had demonstrated an

² The parties' stipulation (JX 1) summarizes the facts regarding the handbillers' conduct and the Company's response thereto at each location. In his discussion of these facts (A. 8-11), the judge assigned each store a number according to the order in which it was listed in JX 1. For ease of reference, this brief refers to each store by the number assigned to it by the judge (and where appropriate, the store name), *e.g.*, Store No. 7 (Mequon).

exclusionary property interest, but reaffirmed his prior finding that the Company had unlawfully discriminated against union agents at those locations. (A. 8 n.4, 11.) Finally, because the evidence did not support a finding of a violation at one other store—Store No. 13 (East Pointe)—under either the property-interest theory or the discrimination theory, the judge dismissed the complaint allegations as to that location. (A. 9 n.7.) The Company filed exceptions to the judge’s supplemental decision.

On November 12, 2010, the Board issued a Supplemental Decision and Order, which adopted the judge’s findings that the Company failed to establish an exclusionary property interest at 23 of its stores, and, therefore, violated Section 8(a)(1) by prohibiting union representatives from handbilling in front of those stores. (A. 1.) In the absence of exceptions, the Board also affirmed the judge’s dismissal of the allegations regarding Store No. 13 (East Pointe). (A. 1 n.6.) Finally, in an aspect of this case that is not before the Court, the Board severed the allegations of discrimination at two other locations (Stores No. 1 (127/Capitol) and No. 8 (Bluemound)), retained them for further consideration, and invited interested parties to file briefs on the discrimination issue. (A. 1-2.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company's Operations

The Company operates numerous grocery stores in the Milwaukee, Wisconsin area under the name Pick 'n Save. The Company leases the stores in question, but not the sidewalks and other common areas adjacent to the stores. Rather, as detailed below, the leases include non-exclusive easements generally allowing the Company, its customers, its co-tenants, and their customers, and the landlord, to use such areas. (A. 11; A. 16-29.)

B. The Union's Concerns with the Company's Use of Nonunion Contractors Who Pay Less than Area-Standard Wages and Benefits

The Union is a central body comprised of construction industry local unions in the Milwaukee area, which coordinates the activities of its member unions. (A. 3; Tr. 37.)³ In 2004, the Union became concerned that the Company was constructing or remodeling stores by using nonunion contractors who pay their employees less than area-standard wage rates and benefits. (A. 3; Tr. 40-41.) Such rates and benefits, which apply to public construction projects, are set annually by the State of Wisconsin after surveying and analyzing wage rates and benefits paid by representative contractors in the particular crafts. (A. 3 n.2; Tr.

51-52, 64-66, 98-101, GCX 3-15.) Moreover, the collective-bargaining agreements of the Union's member unions incorporate the area-standard wages and benefits set for the construction work in the Milwaukee area. (A. 3; Tr. 41, 51.) Accordingly, the Union believed that the Company's use of contractors who pay less would undercut its members' collectively bargained wages and benefits. (*Id.*)

C. After the Union's Attempts to Resolve Its Area-Standard Wage Concerns Directly With the Company Fail, It Engages in Peaceful Handbilling on Sidewalks and Other Common Areas in Front of the Company's Stores To Publicize Those Concerns

The Union tried to work with the Company to resolve its area-standard wage concerns. Thus, it met with company representatives multiple times in early 2005 to convince it to give union contractors, whom the Union believed would provide better quality services than nonunion contractors, an opportunity to bid on the Company's construction work. The Company rebuffed that effort, claiming that its landlords selected the contractors and it prefers to use only the lowest bidders, which tended to exclude union contractors who pay higher wages and benefits. (A. 3-4; Tr. 41-43, 150-52.) In fact, the Company had some control over the selection of contractors. It retained the authority to approve the contractors selected by the landlord (A. 3; Tr. 43, 177), and it may agree with the landlord to select a

³ The Company's employees are represented by local unions of the United Food and Commercial Workers Union. (A. 3; Tr. 53, 114.)

contractor other than the lowest bidder. (A. 3; Tr. 177-78, 203, 215, 220-21, 225-26, 235.)

After these meetings failed to resolve its concerns, the Union authorized a handbilling campaign at the Company's stores. The parties stipulated that, in April through June 2005, nonemployee union agents distributed informational handbills on sidewalks and other common areas in front of 26 of the Company's stores, some of which are in a mall, others of which are free standing. (A. 4, 8-11; JX 1.)⁴ The handbills accurately identified the Company or Pick 'n Save as using nonunion contractors who did not pay their employees prevailing area-standard wages and benefits. (A. 4 & n.4; JX 2.) The handbills also asked customers not to patronize the Company's stores; asserted the Company was saving money by using cheap labor to build and remodel its stores without passing those savings on to its customers; and suggested that customers could achieve savings by shopping at other stores, while providing examples of competitors' cheaper prices. Finally, the handbills asked customers to contact the Company in support of the Union's efforts to protect the area-standard wages and benefits of its member unions. (A. 4; JX 2.)

⁴ The parties stipulated that the phrase "in front of [the] store," as used in their stipulations (JX 1) means somewhere in the "common areas" described in the applicable leases, including private sidewalks in front of a particular store. (A. 8 n.3; Tr. 281-82, 314-16, A. 16-29.)

The parties stipulated that the handbilling was peaceful. (A. 8; JX 1.) The lead handbillers specifically directed all handbillers not to interfere with customers, and the handbillers complied. (A. 8; Tr. 77, 321, 333, JX 1.) Accordingly, the handbillers did not obstruct or interfere with customer ingress to or egress from the Company's stores. (A. 8; Tr. 333-34, JX 1.)

D. The Company Attempts To Expel the Handbillers, Threatens To Call the Police To Have Them Removed, and Causes the Police To Issue Citations to Two Handbillers

The parties' stipulation summarizes the Company's response to the handbilling at each location. (A. 8-11; JX 1.) The Company attempted to expel the handbillers from the common areas in front of its stores. Thus, a company agent, who was sometimes accompanied by company security, approached the handbillers at various locations and demanded that they stop distributing handbills or else he would call the police to have them removed. (A. 8-11, JX 1 (Store Nos. 1-7, 9, 11-12, 14-15, 20-21, 23, 25-26).) In some instances, the handbillers left before the Company called the police. (A. 8-11; JX 1 (Store Nos. 2-3, 4, 6, 9, 11-12, 14-15, 20-21, 23, 25).) In others, the Company called the police to have them removed. (A. 8-11, JX 1 (Store Nos. 4-5, 7, 10, 18-19, 22, 24, 26).) The police issued citations to two handbillers, Steven Schreiner and Gerald Rintamaki, who were required to appear in court to contest the citations. (A. 4, 8-11; JX 1 (Store No. 7).)

E. The Company's Leases Provide It with Only a Non-Exclusive Easement to Use the Common Areas in Front of Its Stores

As noted, the Company leased the stores at issue here, not the common areas in front of the stores, such as sidewalks, on which the handbilling occurred. The parties agreed that the Company's leases at the relevant locations granted it only a "non-exclusive easement" over those areas. (A. 11; A. 16-29 (stipulation summarizing relevant lease provisions).) The easements permit use of the common areas by the Company and its customers, employees and invitees, as well as the landlord and other tenants of the shopping centers, and their customers, employees and invitees. (A. 11; A. 16-29.) The leases make no reference to any authority to eject trespassers or other unwanted parties. (*Id.*)

II. THE BOARD'S CONCLUSIONS AND ORDER

On November 12, 2010, the Board (Chairman Liebman and Members Becker, Pearce, and Hayes) found, in agreement with the administrative law judge, that the Company failed to establish that it had an exclusionary property interest in the sidewalks and other common areas in front of 23 of its stores. It therefore found the Company violated Section 8(a)(1) of the Act by prohibiting union representatives from handbilling in those areas and by having handbillers issued citations. (A. 1-2, 14.) The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with the rights guaranteed by Section 7 of the Act (29 U.S.C.

§ 157). Affirmatively, the Order requires the Company to notify the appropriate law enforcement authorities in writing, with copies to the Union, that the citations issued to handbillers Steven Schreiner and Gerald Rintamaki based on the events in this case were unlawful, and to ask the authorities to expunge those citations and any related records. The Order also requires the Company to post a remedial notice at all of its stores at which it unlawfully prohibited union representatives from handbilling. In addition to physical posting, the Order requires the Company to distribute such notices electronically, such as by email or on an intranet or internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. (A. 2.)

SUMMARY OF ARGUMENT

The Company does not seriously dispute that the Union's peaceful area-standards handbilling was protected activity under Section 7 of the Act. Thus, this case turns on the Board's finding that the Company failed to establish that it had an exclusionary property interest in the common areas where the handbilling occurred, and, therefore, that it violated Section 8(a)(1) of the Act by prohibiting union representatives from handbilling in those areas. The Board's determination is supported by substantial evidence and settled law, and should, therefore, be affirmed. The Company's various attacks on this finding are unfounded.

I. The Company's challenge to the Board's decision to remand the case

for further evidence on the Company's property interest is untimely and meritless. As the Company failed to challenge that decision within the time prescribed by the Board's regulations, the Court is jurisdictionally barred by Section 10(e) of the Act from considering that claim. In any event, the Board acted within its discretion when it remanded the case to afford the Company a "full and fair" opportunity to prove that it had a property interest entitling it to exclude the handbillers. The Company's claim that it was deprived of a fair hearing is negated by its admission, at the close of the hearing on remand, that it was satisfied with the record on the property-interest issue. Likewise, its claim that it was unfairly surprised by the need to address that issue is belied by its having noted the relevance of that very issue in its pre-remand briefs to the Board. Indeed, it even conditionally requested that the Board remand the case for a hearing on the property-interest issue.

II. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) by prohibiting protected union handbilling in common areas over which it had only a non-exclusive easement. The Company had the burden to prove that, under Wisconsin law, its easement entitled it to exclude the handbillers. The Board found that the Company failed to do so for three reasons. First, the leases that defined the easement did not grant any such right. Second, an easement is a non-possessory interest in land, which provides no right under Wisconsin law to bring a trespass action to eject the handbillers. While an

easement holder under Wisconsin law may do what is reasonably necessary to use the easement in accordance with the purpose for which it was granted, there was no evidence that the handbillers in any way interfered with the Company's or its customers' use of the common areas. Lastly, cases applying similar law from other states find no exclusionary property interest from an easement.

The Company provides no grounds for disturbing these reasonable findings. It fails to cite a single Wisconsin case establishing that peacefully distributing handbills, an activity protected by Section 7 of the Act, amounts to actionable interference with an easement. Its claim that the Board should have addressed other uses of the easement—such as loading, unloading and display of its products—is a red herring because it has shown no interference with any such use. The Company also errs in relying on the Fourth Circuit's decision in *Weis Markets, Inc. v. NLRB*, 265 F.3d 239, 246-48 (4th Cir. 2001), involving distinguishable facts and state law.

The Board did not abuse its discretion when it refused to allow the Company's expert witness to testify about his legal conclusions regarding Wisconsin statutes and cases, which the judge was capable of interpreting on his own. The Company points to no law requiring the Board to allow such testimony. Indeed, this Court has held that it may be properly excluded. Moreover, the Company could (and presumably did) include the witness's legal conclusions in its

post-hearing brief to the judge. As such, the judge reasonably excluded the testimony as cumulative, and its exclusion did not prejudice the Company.

Finally, the Company errs in claiming that the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), bars the Board from requiring it to meet an initial burden of proving that it had an exclusionary property interest. The Board and the courts consistently hold that the cited analysis from *Lechmere* does not apply where, as here, the employer neither owns nor possesses the property in question. Further, settled law requires the employer to prove that it had a property interest entitling it to exclude union organizers.

STANDARD OF REVIEW

In reviewing the Board's decisions, the Court gives substantial deference to the Board's findings of fact and its interpretation of the Act. The Board's factual determinations must be upheld if they are supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1024 (7th Cir. 2005). "Substantial evidence in this context means such relevant evidence that a reasonable mind might accept as adequate to support the conclusions of the Board. The presence of contradicting evidence is not of consequence as long as substantial evidence supports the Board's decision." *L.S.F. Transp., Inc. v. NLRB*, 282 F.3d 972, 980 (7th Cir.

2002). *Accord Ryder Truck Rental v. NLRB*, 401 F.3d 815, 825 (7th Cir. 2005). In sum, the Court will not “interfere with the Board’s choice between two permissible views of the evidence, even though [it] may have decided the matter differently had the case been before [it] *de novo*.” *L.S.F. Transp.*, 282 F.3d at 980. *See generally Universal Camera*, 340 U.S. at 477, 488. Moreover, the Board “has the primary responsibility for developing and applying national labor policy,” and its rules are accorded “considerable deference.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (citations omitted). Accordingly, the courts defer to the Board’s interpretation of the Act if it is “reasonably defensible.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496-97 (1979); *accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996); *L.S.F. Transp., Inc.*, 282 F.3d at 980.

ARGUMENT

I. THE COURT IS JURISDICTIONALLY BARRED FROM CONSIDERING THE COMPANY’S UNTIMELY AND PROCEDURALLY IMPROPER CHALLENGE TO THE BOARD’S EARLIER REMAND ORDER; IN ANY EVENT, THE BOARD ACTED WITHIN ITS BROAD DISCRETION OVER ITS OWN PROCEEDINGS IN REMANDING THE MATTER

The Company argues (Br. 18-21) that the Board erred in remanding the case on September 11, 2006 (the “Remand Order”) for further evidence about the Company’s property interest in the areas in which the handbilling occurred. The first hearing before the administrative law judge focused on the disparate treatment aspect of the complaint—namely, the allegation that the Company expelled union

handbillers while allowing similar activity by other groups. The judge noted that the parties “assumed” that the Company had a sufficient property interest to oust the handbillers. (A. 4 n.3.) In considering the parties’ exceptions to the judge’s decision that issued after the first hearing, the Board observed that the employer has the threshold burden of demonstrating a sufficient property interest entitling it to exclude handbillers from the locations at issue. Because the record was unclear on that requisite issue, the Board remanded the case to afford the Company a full and fair opportunity to meet that burden. The Company did not challenge the Remand Order and proceeded to the second hearing. Because it failed to challenge the Remand Order in the time prescribed by the Board’s regulations, the Court is jurisdictionally barred from considering that claim. In any event, the Board acted within its broad discretion to process its own docket and to determine that a remand to take further evidence was necessary.

A. Section 10(e) Bars Consideration of the Company’s Untimely and Procedurally Improper Challenge to the Board’s Remand Order

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that “no objection that has not been urged before the Board . . . shall be considered by the Court,” absent extraordinary circumstances, which are not presented here. The Board’s regulations fortify this statutory mandate by providing that “[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.” 29 C.F.R. § 102.46(b)(2).

The mandate of Section 10(e) and its accompanying regulations is clear: If a particular objection has not been raised before the Board, a reviewing court is without jurisdiction to consider the issue. *See, e.g., Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (holding that the court of appeals lacked jurisdiction to consider an issue that the parties have not raised before the Board); *accord NLRB v. Howard Immel, Inc.*, 102 F.3d 948, 951 (7th Cir. 1996). This rule creates “a win-win situation” because “adhering to it simultaneously enhances the efficiency of the agency, fosters judicial efficiency, and safeguards the integrity of the inter-branch review relationship.” *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 104 (1st Cir. 1997). Moreover, Section 10(e) embodies the bedrock principle that “courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

The Company’s challenge to the Board’s Remand Order was not, however, “made at the time appropriate under [the Board’s] practice.” *Id.* If the Company wished to challenge the Remand Order, then the Board’s rules required it to file a motion for reconsideration with the Board within 28 days of the Order’s issuance on September 11, 2006. *See* Board Rules & Regulations Section 102.48(d)(1)-(2) (29 C.F.R. § 102.48(d)(1)-(2)). The Company, however, declined to do so.

Instead, it litigated the issue on remand and waited for the administrative law judge to issue a supplemental decision on March 28, 2007. When it primarily lost that decision, it belatedly attacked the Board's Remand Order in its exceptions to the judge's supplemental decision, months after the deadline for challenging the Remand Order had passed. Moreover, Board rules provide that a party may only file exceptions to the decision of an administrative law judge. *See* Board Rules Section 102.46(a) (29 C.F.R. § 102.46(a)). Thus, as the Board noted (A. 1 n.2), the Company's challenge to the *Board's* Remand Order via exceptions to the *judge's* decision was procedurally invalid. In the Supplemental Decision and Order now before the Court, the Board explained that it did not consider the Company's challenge to the Remand Order because the Company failed to file a timely motion for reconsideration. (A. 1 n.2.)

At the time of the remand, the Board was aware of the Company's (and the judge's) view that the General Counsel had stated during the hearing that the Company owned the property in question. However, that is certainly not the gravamen of Company's current disagreement with the Remand Order; after all, the Board acknowledged, in that Order, that the General Counsel had made that statement. Instead, the Company now appears to dispute the Board's view (described in detail below, pp. 20-21, 29) that the property-interest issue was its "threshold" burden that must be litigated. The Company, however, failed to

apprise the Board of its disagreement regarding its threshold burden when the Board had the opportunity for correction. *See L.A. Tucker Truck Lines*, 344 U.S. at 37 (explaining that “orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has the opportunity for correction”).

Accordingly, Section 10(e) bars the Court from considering the Company’s untimely and procedurally invalid challenge to the Remand Order. However, assuming the Court has jurisdiction over that claim, it clearly lacks merit for the reasons discussed below.

B. In Any Event, the Board Acted Within Its Broad Discretion In Remanding the Case So that the Threshold Issue of the Company’s Property Interest Could be Fully and Fairly Litigated

It is axiomatic that the Board has broad discretion to decide how to process its own cases according to its own procedural rules. *See generally Vermont Yankee Nuclear Corp. v. NRDC*, 435 U.S. 519, 543-44, 549 (1978) (agency’s procedural rules for carrying out its statutory responsibilities are presumptively valid and may not be overturned unless shown to be unreasonable). Accordingly, its decision to reopen the record and/or remand a case for further fact finding is reviewed only for an abuse of discretion. *See generally Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 139-40 (1971) (Board has discretion whether to reopen issue where new evidence is available); *Wisconsin v. Federal Power Commission*, 373 U.S. 294,

311 (1962) (adjudicatory agency has discretion whether to remand for additional evidence); accord *May Dep't Stores v. NLRB*, 897 F.2d 221, 230, 231 (7th Cir. 1990) (“Board did not abuse its discretion when it refused to reopen the record”); *NLRB v. Mosey Mfg., Co.*, 595 F.2d 375, 379 (7th Cir. 1979) (Board has discretion to remand case for further investigation or hearing). For several reasons, the Company fails to prove (Br. 18-21) that the Board abused its discretion in remanding this case.

The Board properly remanded the case to ensure that the Company had a full and fair opportunity to litigate the necessary legal issues raised in the complaint. As the Board noted, the substantive issue before it, on exceptions from the administrative law judge’s initial decision, was whether the Company had violated Section 8(a)(1) of the Act by prohibiting handbilling by nonemployee union agents on property owned or leased by the Company while permitting nonunion solicitations and distributions on such property. (Remand Order 1.) However, the Board found that it must first address the procedural issue of whether the Company “was given a full and fair opportunity [during the first hearing] to establish that it owned or leased the property in question.” (Remand Order 1.) The Board properly followed the settled law that “the existence of a sufficient property interest is a threshold burden that the employer must carry in order to show that it is entitled to exclude others from the property in question.” (Remand Order 3-4)

(citing *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), *enforced*, 187 F.3d 1080 (9th Cir. 1999)). As shown below (*see* Argument Section II.A. and cases cited therein), this is a correct statement of law.

The Board, moreover, was justifiably concerned that the Company had not received a reasonable opportunity in the first hearing to introduce leases and other evidence to meet its burden. The Board noted, for example, that the complaint primarily (though not exclusively) alleged disparate-treatment allegations, and that the General Counsel had, during the hearing, answered affirmatively when the administrative law judge asked him whether the events in question had occurred on property owned by the Company. (Remand Order 4-5; Tr. 80.) The Board also noted the lack of clarity as to whether the Company's property interest was being contested, which the Board attributed in part to the Company's belated production of subpoenaed leases. (Remand Order 5 & n.3.) Indeed, the Company had not produced those leases when the General Counsel responded affirmatively to the judge's question about company property, and did not do so until after the General Counsel completed the presentation of his case-in-chief. (Remand Order 5 & n.3; Tr. 174-75, 192-93.) Based on these circumstances, the Board found that the Company "reasonably believed that it did not have to prove its property interest because that point appeared to be uncontested up to and through the time of the hearing." (Remand Order 4.)

The Board was thus left with the following dilemma. On the one hand, if the Company lacked a property interest in the relevant areas sufficient to exclude the union handbillers, that could support finding a violation. On the other hand, the Company was entitled to “an opportunity to fully and fairly litigate [its] claims and defenses.” (Remand Order 5) (citing *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enforced*, 920 F.2d 130 (2d Cir. 1990).) The record from the first hearing did not provide a clear answer on the property-interest issue—for which the Company bore the burden. Thus, because the Company “has not yet had that opportunity with respect to the property-interest issue,” the Board remanded the case to the judge so that the Company could introduce evidence on this issue. (Remand Order 5.) By remanding, the Board prevented the Company from being prejudiced by the confusion during the first hearing as to whether its property interests were being contested. Such is hardly an abuse of discretion.

In response, the Company fails to show otherwise. Its claim (Br. 19) that it was thereby “deprived . . . of a fair hearing” is a non-starter. This claim is belied by its concession, at the close of the hearing on remand, that the record was now complete on the property-interest issue. (A. 8; Tr. 343.) Accordingly, the Company cannot rely (Br. 19-20) on distinguishable cases where the Board declined to find a violation because the “Respondent had no notice or opportunity to prepare and present a defense to it.” *Bouley*, 306 NLRB 385, 386-87 (1992).

Here, of course, the Company received formal notice in the remand order and a full and fair opportunity to litigate its property-interest claims at a hearing dedicated to that issue.

Nor is this case like *Paul Mueller Co.*, 332 NLRB 1350, 1350-51 (2000), where the Board declined to remand the case for consideration of an alternate theory that the General Counsel had explicitly disavowed. Here, the Board reasonably found that the property-interest issue was a “threshold” matter that could not be separated from the General Counsel’s case and needed resolution to complete the analysis. The opposite was true in *Mueller*, where the theory the General Counsel disavowed (the delayed reinstatement of strikers) was distinct from the one it chose to pursue (the failure to reinstate strikers to their former positions). *Id.*⁵

In other words, the Board did not “amend” the complaint to add an additional allegation or new theory, as the Company suggests (Br. 19-20). Rather, it interpreted the existing allegations and found that they required litigation of the “threshold issue” of the Company’s burden to prove that it had an exclusionary

⁵ Moreover, unlike in *Mueller*, where the status of the alternate theory was resolved by the General Counsel’s clear disavowal of it, the Board noted the “lack [of] clarity” over whether the Company’s property interest was being disputed, which was due in part to the Company’s delay in producing the leases that would have defined that interest. (Remand Order 5 & n.3.)

property interest. It then remanded the case to ensure that the Company had the opportunity to fully and fairly litigate that issue.

Similarly, the Company overstates its case, and cites the record out of context, when it claims (Br. 20; Tr. 80) that the General Counsel “stipulated” that the Company “had a sufficient property interest to oust the [Union’s] handbillers.” As the Board noted (Remand Order 3), none of the parties’ stipulations during the first hearing (JX 1) touched on the Company’s property interest in its leased locations. The Company relies (Br. 20) mainly on the General Counsel’s affirmative response (Tr. 80) when the administrative law judge asked whether the handbilling occurred on property owned by the Company. Viewed in context, that exchange falls short of a clear stipulation as broad as the Company asserts. It is unclear whether the question referred only to the locations discussed in the corresponding testimony. (Tr. 78-79 (describing handbilling at New Berlin (Store No. 17) and Muskego (Store No. 16).) The Company later admitted (RX 2; A 17, 23), contrary to the purported stipulation, that it leased rather than owned these stores. Also, the General Counsel responded before the Company produced the subpoenaed leases that demonstrated the Company’s property interest. That context supports the Board’s conclusion that there was a lack of clarity regarding whether the parties contested the Company’s property interest. (Remand Order 5 n.3.)

Moreover, the Company's suggestion (Br. 19) that it was blindsided by having to prove, post-remand, that it had an exclusionary property interest is belied by its having already argued that very issue, pre-remand, in its brief to the judge after the first hearing. Thus, Section III.C. of that brief (pp. 17-19) asserts that the Company "Has a Sufficient Property Right to Move the Handbillers from Its Stores, and Wisconsin Trespass Law Permitted [the Company] To Do So." Also, in its pre-remand brief in support of exceptions filed with the Board (p. 11 n.7), the Company stated that if the Board decides that the property-interest issue is relevant to this case, "Roundy's respectfully requests that the case be remanded to the Administrative Law Judge for an evidentiary hearing as to whether Roundy's had a sufficient property interest to prohibit the handbillers from its property." It twice repeated that request in its answering brief to the General Counsel's exceptions (p. 4 n.3, p. 6 n.4). Thus, the Company could hardly have been surprised by the Remand Order.

Finally, the Company's claim (Br. 21) that it had to expend additional resources because of the remand is disingenuous given that it chose to litigate the remanded issue without first filing a timely challenge to the Board's remand order and had conditionally requested remand. Indeed, it made no attempt to challenge the remand until after the second hearing resulted in a supplemental decision that it primarily lost.

In sum, the Board properly remanded the case to afford the Company a “full and fair” opportunity to meet its threshold burden that it had the right to exclude the handbillers from the property in question. The Company, however, offers nothing showing that the Board’s decision, rooted in its authority to process its own docket, was an abuse of discretion.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY FAILED TO ESTABLISH AN EXCLUSIONARY PROPERTY INTEREST IN THE SIDEWALKS AND OTHER COMMON AREAS IN FRONT OF ITS STORES, AND, THEREFORE, VIOLATED SECTION 8(a)(1) OF THE ACT BY PROHIBITING UNION REPRESENTATIVES FROM ENGAGING IN PROTECTED HANDBILLING IN THOSE AREAS

A. Applicable Principles: Protection of Nonemployee Handbilling and Employer’s Burden to Demonstrate Its Property Interest

Section 7 of the Act (29 U.S.C. § 157) guarantees employees “the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that guarantee by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7.”

The Board, with court approval, has long held that Section 7 of the Act encompasses the activity of nonemployee union agents peacefully handbilling or picketing for the purpose of protecting the area wage and benefit standards that the

union has negotiated for its members. *See O’Neil’s Mkts. v. NLRB*, 95 F.3d 733, 737 (8th Cir. 1996) (nonemployee union organizers’ area-standards handbilling of customers was protected by Section 7) (citing *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 205-06 & n.42 (1978)); accord *NLRB v. Calkins*, 187 F.3d 1080, 1086-87, 1089 (9th Cir. 1999) (same); see also *Giant Food Mkts., Inc. v. NLRB*, 633 F.2d 18, 23 n.11 (6th Cir. 1980) (noting that it is “beyond dispute that area standards picketing is lawful and protected under [S]ection 7 of the [Act]”). As the Board has explained, a union’s protection of employment standards it has negotiated in a particular geographic area from unfair competition from employers with lower labor costs serves not only the union’s own interest, but also “the interests of employees of employers with whom it has negotiated more beneficial employment standards.” *Giant Food Mkts., Inc.*, 633 F.2d at 23 n.11 (internal quotation and citation omitted); accord *O’Neil’s Mkts.*, 95 F.3d at 736 n.1, 737; *Calkins*, 187 F.3d at 1089.

The existence of a right to engage in protected handbilling, however, does not establish that union representatives may do so on property owned by the employer. Rather, the Supreme Court has held that an “accommodation” between Section 7 rights and private property rights “must be obtained with as little destruction of one as is consistent with the other.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

However, where the nonemployee union agents engaged in protected activity on property that is not owned by the employer, there is no possessory property right of the employer to be accommodated, and, thus, the employer may not interfere with the protected activity. *See O’Neil’s Mkts.*, 95 F.3d at 738-39; *Calkins*, 187 F.3d at 1088. Accordingly, if the employer lacks a property right entitling it to exclude individuals from the property in question, it violates Section 8(a)(1) by interfering with nonemployee union representatives engaged in protected handbilling on that property, including by calling, or threatening to call, law enforcement authorities if they do not cease their activity. *See O’Neil’s Mkts.*, 95 F.3d at 738-39; *United Food & Commercial Workers Union Local 400 v. NLRB* (“*UFCW*”), 222 F.3d 1030, 1034-35 (D.C. Cir. 2000); *Calkins*, 187 F.3d at 1088, 1095; *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 240-42 (6th Cir. 1995).

Thus, where, as here, the employer has interfered with protected handbilling activity, the threshold question is whether, at the time the employer sought to exclude the organizers, it possessed a property right entitling it do so. *UFCW*, 222 F.3d at 1034-35; *O’Neil’s Mkts.*, 95 F.3d at 738-39; *Johnson & Hardin*, 49 F.3d at 241-42. Whether the employer possesses an adequate property interest is a question of state law, for it is state law that creates and defines the employer’s property interests. *O’Neil’s Mkts.*, 95 F.3d at 738-39; *Calkins*, 187 F.3d at 1088. *See also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n.21 (1994) (“The

right of employers to exclude union organizers from their private property emanates from state common law.”). The Board, with court approval, requires that the employer “bears a threshold burden to establish that it had, at the time it expelled the union representatives, an interest which entitled it to exclude individuals from the property.” *Calkins*, 187 F.3d at 1095. *Accord O’Neil’s Mkts.*, 95 F.3d at 739; *Johnson & Hardin Co*, 305 NLRB 690, 691, 695 (1991), *enforced in relevant part*, 49 F.3d 237 (6th Cir. 1995); *UFCW*, 222 F.3d at 1034-35 n.5 (collecting cases).

B. The Company Failed to Meet Its Burden of Proving that It Had an Exclusionary Property Interest in the Common Areas in Front of Its Stores and, Therefore, Violated Section 8(a)(1) of the Act by Prohibiting Nonemployee Union Agents from Protected Handbilling in Those Areas

Applying the foregoing principles, the Board found (A. 11) that the Union’s peaceful, area-standards handbilling was protected activity under Section 7 of the Act. The Company does not seriously dispute this finding,⁶ which is well

⁶ At the end of its brief (Br. 37), the Company makes the conclusory assertion that the Board’s “General Counsel did not carry its initial burden of showing that the [Union’s] handbillers were engaged in activity protected by Section 7.” The Company, however, does not cite anything to support its one-sentence argument. It is settled that such a perfunctory reference to an issue cannot preserve it for judicial review. *See, e.g., Dunkin’ Donuts Mid-Atlantic Dist. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (Fed. R. App. P. 28(a)(9) requires opening brief to contain party’s contentions and the reasons for them, with citations to authorities and record); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1180-81 (D.C. Cir. 2000) (declining to consider argument that employer had referred to, but had not “actually argue[d],” in its opening brief).

supported by settled law. *See* cases cited at p. 27. Instead, the Company primarily disputes (Br. 21-35) the Board’s finding (A. 1, 12-14) that the Company failed to establish that it had an exclusionary property interest in the sidewalks and other common areas, and, therefore, violated Section 8(a)(1) of the Act by prohibiting union representatives from protected handbilling in those areas. As shown below, the Board’s findings are supported by the applicable lease language—granting the Company only a non-exclusive easement for common areas—and Wisconsin law, and should therefore be affirmed.

1. Applicable Wisconsin Law on Easements

Wisconsin law provides that an easement is a non-possessory interest in using another’s land for certain purposes. Specifically, 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 Elec. Coop.*, 637 N.W.2d 80, 85 (Wis. Ct. App. 2001) (collecting cases). *See also* Restatement (Third) of Property: Servitudes § 1.2 (2010) (“An easement creates a nonpossessory right to enter and use land in the possession of another.”)

Easements are narrowly construed under Wisconsin law. Thus, Wisconsin courts begin by looking to the document that granted the easement, and typically

confine an easement to its express scope and purpose. *See, e.g., Hunter v. McDonald*, 254 N.W.2d 282, 285-86 (Wis. 1977) (“The use of an easement must be in accordance with and confined to the terms and purposes of the grant.”); *accord Grygiel v. Monches Fish & Game Club, Inc.*, 787 N.W.2d 6, 14 (Wis. 2010). Accordingly, an easement holder has only those rights necessary to utilize the easement for its intended purpose. *See Gallagher*, 637 N.W.2d at 86-88, 92 (an easement holder may take only those steps which are “reasonably necessary for the full enjoyment of the easement in light of the purpose for which it was granted”); *accord Hunter*, 254 N.W.2d at 285.

Moreover, Wisconsin law provides that an easement holder may bring an action to enjoin conduct that “unreasonably and materially” interferes with the intended use of the easement; the burden of proving such interference lies with the easement holder. *See, e.g., Hunter*, 254 N.W.2d at 285-86 (holding that placement of rocks and fence along right-of-way easement “unreasonably obstruct[ed]” the ingress and egress for which easement was granted); *Lintner v. Augustine Furniture Co.*, 225 N.W. 193, 194 (Wis. 1929) (holding that it is “undoubtedly” the law that the “owner of a mere easement” can only enjoin conduct which he proves “unreasonably and materially interferes with his use and enjoyment thereof,” and finding that standard met where physical obstruction “completely blocked” a right-of-way). *Accord Figliuzzi v. Carcajou Shooting Club of Lake*

Koshkongong, 516 N.W. 2d 410, 412, 417 (Wis. 1994) (easement holder proved “unreasonable interference” with easement where construction of condominiums on easement property would “virtually destroy” its intended use for hunting and fishing).

2. The Company Failed To Prove that It Had Any Right Under Its Leases or Wisconsin Law To Exclude Individuals From the Common Areas Where the Handbilling Occurred

As shown (p. 10), the Company’s leases provided it with non-exclusive easements to use the sidewalks and other common areas in front of its stores. Thus, this case turns on whether the Company proved that, under Wisconsin law, such a property interest was sufficient to entitle it to exclude individuals from those areas. After carefully considering the Company’s leases and applicable Wisconsin law, the Board found that Company failed to do so for three basic reasons. First, the leases themselves do not specifically grant the Company any right to exclude individuals from the common areas. (A. 13.) Second, an easement is a non-possessory interest in land, and, therefore, the Company had no right under Wisconsin law to bring a trespass action to eject the handbillers. (A. 13-14.) While an easement holder under Wisconsin law may do what is reasonably necessary to use the easement in accordance with the purpose for which it was granted, there was no evidence that the Company needed to expel the handbillers in order to achieve the easement’s purpose. (A. 14.) Lastly, cases applying similar

law from other states find no exclusionary property interest from an easement. (A. 12-14.)

a. The record evidence fails to establish the requisite property interest

The Board found (and the Company agrees, Br. 23) that nothing in the leases specifically granted the Company any right to exclude individuals from the common areas. Rather, as shown (p. 10; A. 11, 13-14; 16-29), the leases granted the Company the non-exclusive right to use those areas. Nowhere do the leases state that the Company may eject third parties from common areas. Wisconsin courts narrowly interpret documents granting easements to determine the specific rights granted (*see* cases cited at p. 31). The omission of any explicit right to exclude in the leases therefore indicates that the Company lacks this right.⁷

As such, the leases are clear enough to bar resort to extrinsic evidence that purportedly shows that the landlord intended to confer such a right upon the Company. *See Grygiel v. Monches Fish & Game Club, Inc.* 787 N.W.2d 6, 14 (Wis. 2010) (holding that if the language within the four corners of the document granting an easement is unambiguous, a court will look no further.) Thus, the

⁷ *See also UFCW*, 222 F.3d at 1035 (employer’s “shared right of use strongly suggests that it lacks the power to exclude those it dislikes from the shopping center’s common sidewalks;” interpreting Virginia law); *O’Neil’s Mkts.*, 95 F.3d at 739 (interpreting Missouri law and finding that “clearly” such non-exclusive rights to use the easement property did not directly authorize the easement holder to exclude anyone from sidewalks and other easement properties).

Company cannot rely (Br. 33) on extrinsic evidence to the effect that it “has assumed operational control over some of the common areas at its leased facilities, and proved through [its Loss Prevention Manager] Brian Pikalek’s testimony that it regularly exerts control over its leased premises by frequently removing individuals.”

Moreover, even assuming that a Wisconsin court would consider it, the Board reasonably found that this other evidence would not establish an exclusionary right on the Company’s part. Thus, as the Board explained (A. 13), while Pikalek’s testimony showed that company agents had sometimes excluded undesirable people, such as vagrants, from common areas in front of its stores, there is no evidence that the landlord, who actually owned the property, authorized such action. Accordingly, the Company’s agent testified that he did not act pursuant to the lease provisions or the landlord’s authorization. (A. 13; Tr. 300-01.) The Company cites no authority to demonstrate that the employer’s (unauthorized) practice of exclusion can fulfill its burden of showing the requisite property interest.

b. The Company failed to show that Wisconsin law establishes that an easement holder has the right to exclude

Next, the Board found (A. 13-14) that the Company failed to point to any other basis for establishing that it had a right to exclude individuals from common areas over which it had only a non-exclusive easement. As the Board explained (A. 13), such an easement is a non-possessory interest in land (*see Gallagher*, 637 N.W.2d at 85) and, therefore, the Company could not bring a trespass action under Wisconsin law to eject the handbillers. Thus, Wisconsin's trespass statute makes it a violation for an individual to remain on land after having been notified by the owner or occupant not to enter the premises. *See Wis.Stat. Ann. § 943.13(1m)(b)* (West 2011). Clearly, the Company is not the "owner" of the common areas. And, while the statute does not define "occupant," the Company has cited no Wisconsin case holding that an easement holder is an "occupant" under the statute, or otherwise entitled to bring a trespass action to eject individuals from easements. The Company appears (Br. 24) to now concede this point.

Nor does the Company (Br. 13-15; A. 16-29) cite any Wisconsin authority demonstrating that the fact that, under certain leases, it had some obligation to maintain, or pay for the maintenance of, the common areas, somehow transforms it from a mere easement holder into an occupant of the common areas. Rather, as the Board and the courts have found in similar cases, an easement holder's obligation

to maintain or police common areas does not give it an exclusionary right in such areas. *See, e.g., UFCW*, 222 F.3d at 1036-37 (holding, in construing Virginia statute permitting “custodian” or “person lawfully in charge of” property to bring a trespass action, that holder of non-exclusive easement was not covered by the statute despite being obligated to maintain the property); *O’Neil’s Mkts.*, 95 F.3d at 739 (noting lack of any Missouri authority indicating that “an individual’s maintenance and control over property overrides unambiguous language in a lease granting that individual only a non-exclusive easement”).

Further, the Board acknowledged that an easement carries “by implication the right to do what is reasonably necessary to the full enjoyment of the easement in light of the purpose for which it was granted.” (A. 14 (quoting *Gallagher*, 637 N.W.2d at 86).) Here, that would require evidence that removing the handbillers was reasonably necessary for the Company, its employees, or invitees to use the sidewalks and other common areas. As the Board noted (A. 14), however, there is no record evidence that the handbillers actually interfered with the intended use of the common areas. It is undisputed that the handbillers stood on the sidewalks or entrances to the parking lots in front of stores and peacefully delivered flyers to customers as they entered and exited the stores. *See generally UFCW*, 222 F.3d at 1037 (“We are unable to see why the power to expel peaceful organizers from adjacent sidewalks is reasonably necessary to the use of the leased property.”);

Johnson & Hardin Co. v. NLRB, 49 F.3d 237, 242 (6th Cir. 1995) (agreeing with Board that union organizers' peaceful handbilling did not interfere with employer's right to use driveway for ingress and egress).

As the Board observed, the absence of any evidence of interference distinguishes this case from the Wisconsin cases the Company cited (A. 14; Br. 25), which addressed physical obstructions that unreasonably interfered with the use of the easements or rights-of-way. *See, e.g., Hunter v. McDonald*, 254 N.W.2d 282, 286 (Wis. 1977) (defendant's placement of rocks and fence along right-of-way unreasonably obstructed ingress and egress); *Lintner v. Augustine Furniture Co.*, 225 N.W. 193, 194 (Wis. 1929) (physical obstruction "completely blocked" right-of-way). As shown (pp. 31-32), these cases would require the Company to prove that the handbillers unreasonably and materially interfered with its use of the easement. Yet, the Company cites no Wisconsin case indicating that peacefully distributing a message about area-standard wages and urging a boycott, all protected conduct under the Act, constitutes such interference. Rather, as the Board noted (A. 14), the closest case may be *Jacobs v. Major*, 407 N.W.2d 832, 848 (Wis. 1987), which does not help the Company because it addressed the rights of the property *owner* to exclude antinuclear protesters and handbillers from its premises.

c. Cases applying similar law from other states find no exclusionary property interest from an easement

In addition to addressing Wisconsin law, the Board noted (A. 12-14) that its findings are supported by cases addressing similar state law and likewise finding that non-exclusive easements do not provide the right to exclude individuals from the easement property. For example, in *O'Neil's Markets v. NLRB*, 95 F.3d 733, 734, 737-39 (8th Cir. 1996), the court addressed handbilling that, as here, occurred outside the employer's leased store on sidewalks and parking lots that it did not own, but over which it had a non-exclusive easement. As here, the lease in *O'Neil's* defined the easement over the sidewalks and parking areas as being held in common with the lessor and the lessor's other tenants for ingress, egress, and parking for their customers, employees, and invitees, and further provided the lessee with the non-exclusive right "to use" the easement property. *Id.* at 734-35. After analyzing the employer's lease and applicable Missouri law, the court found that the employer failed to prove that it had an exclusionary property interest in the easement property. *Id.* at 737-39.

First, just as the Board did here, the *O'Neil's* court began by noting that "clearly" such a non-exclusive right to use the easement property did not directly authorize the easement holder to exclude anyone from that property. *Id.* at 739. Next, in rejecting an argument similar to that presented by the Company (Br. 33), the court found there was no authority indicating that an individual's exercise of

maintenance and control over easement property overrides unambiguous language granting that individual only a non-exclusive easement. *Id.* The court also concluded that Missouri law provided that easements are non-possessory interests in land, and, as such, are insufficient to permit actions such as trespass to protect such interests. *Id.* The same is true of Wisconsin law. Finally, the court determined that, as is the case with Wisconsin law, other possible civil actions under Missouri law, such as for nuisance, would require proof that the handbillers had interfered with the right of the employer, its employees, or its customers to use the easement property. Thus, where, as here, the record did not show any such interference, the court agreed with the Board that the employer lacked a property interest entitling it to exclude the handbillers. *Id.*

In similar cases, other courts have found that an employer violated Section 8(a)(1) by excluding peaceful union handbillers from property over which it had only an easement. *See, e.g., Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 240-42 (6th Cir. 1995) (holding that employer with easement for ingress and egress across state land had no right under Ohio law to exclude union organizers where handbilling did not interfere with employer's right to use the property); *UFCW v. NLRB*, 222 F.3d 1030, 1035-36 (D.C. Cir. 2000) (finding that employer's shared right to use common areas with other tenants did not, under Virginia law, include the right to eject union organizers from those areas).

3. The Company's Claims Do Not Undermine the Board's Finding that It Failed To Prove that It Had the Requisite Property Interest

In its brief (Br. 21-35), the Company fails to point to anything that would warrant disturbing the Board's reasonable findings. At bottom, it claims (Br. 22-30) that the Board too narrowly construed both the scope of the easements defined in its leases and the type of third-party interference giving rise to an easement holder's cause of action under Wisconsin law. The Company is wrong on both accounts.

The Company errs in suggesting (Br. 24-27) that the Board only analyzed criminal actions for trespass or physical obstruction, and thereby failed to address other types of third-party interference giving rise to an easement holder's cause of action under Wisconsin civil law. Rather, as shown (pp. 36-37), the Board fully considered an easement holder's right "to do that which is reasonably necessary to the full enjoyment of the easement in light of the purpose for which it was granted." (A. 14.) It correctly observed (A. 14; *see also* cases cited at pp. 31-32), however, that Wisconsin courts require proof of "unreasonable interference" with the use of the easement. As the Board noted (A. 14), the Company had no basis for such a claim because "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 Company, the purpose for which the easement was granted."

It follows that the Company gains no ground by citing (Br. 25-28) general provisions of the Wisconsin civil code, which provide that an easement holder may bring a civil cause of action to protect its interest in the easement. *See* Wis.Stat. Ann. § 840.01 (West 2011) (an easement is “an interest in real property”); § 840.03 (any person having such an interest may bring an action for, among other things, “[r]estraint of interference” with its right in the relevant property). However, the mere existence of such an action is a far cry from having the proof necessary to support it. Once again, the Company forgets that such actions must be supported by the very proof that is lacking here, namely, that the handbillers had “unreasonably and materially” interfered with the easement’s intended use.⁸ *See* cases cited at pp. 31-32, above.

The Company fares no better in relying (Br. 27) on the Wisconsin civil code’s definition of “interference” with a property interest as “any activity other than physical injury, which lessens the possibility of use or enjoyment of the interest.” Wis.Stat. Ann. § 840.03. While that definition is admittedly broad, the Company cites no case showing that Wisconsin courts would thereby excuse its failure to prove any interference with its use of the easement. Indeed, Wisconsin

⁸ Because the record does not support the Company’s theoretical cause of action in Wisconsin, its distinction (Br. 33-35) of cases from other states, cited by the Board (A. 12-13, see pp. 37-39, above), is unavailing. The alleged differences in potential causes of action under Wisconsin law and that of other states are irrelevant where the factual predicate for a Wisconsin action is absent.

courts require specific proof of actual unreasonable interference, even while reciting the broad definition of “interference” that the Company invokes here. *See, e.g., Hunter*, 254 N.W.2d at 285-86 (broadly defining “a disturbance with an easement” as anything which “wrongly interferes with the privilege to which the owner . . . is entitled by making its use less convenient and beneficial than before,” but finding that standard was met by proof of “unreasonable obstruct[ion]”). There is no evidence that the handbilling here impaired the Company’s ability to use the common areas.

Next, the Company cannot support its claim (Br. 27-28) that the Board misconstrued the purpose of the easement as being limited to “ingress and egress,” and thereby “erroneously limited the types of activities viewed as sufficient interference with such easements to merit Roundy’s actions under Wisconsin law.” This is a red herring because, even assuming the easement’s purpose was broader than ingress and egress, the Company still has not shown any interference with *any* use of the common areas. At bottom, the Company claims only (Br. 28) that its leases gave it the right “to use” the common areas. Yet, it fails to specify what those “uses” are beyond its general reference (Br. 29) to “other operating functions” such as “display, loading and unloading, [and] cart storage.” However, the Company (Br. 28-30) fails to point to any record evidence showing that the Union’s peaceful handbilling interfered with any such use of the easement.

The Company relies also on an even broader but equally unsupported theory (Br. 29-30) that the easement areas “are actual extensions of [its] business” and asserts that the handbills advocating a consumer boycott interfered with its business. It offers no legal support for its view that its property interest can come not from the easement itself but from its commercial use of the easement. The Company’s reliance (Br. 32-33) on language in certain leases stating that the easements are for the purpose of operating “a first class shopping center” is similarly incorrect. Those leases for 14 stores state only that no use of the common areas should detract from the first-class nature of the shopping center or obstruct access to parking, thus setting a limit on the easement’s use rather than explaining its purpose. This language also does not show that the Company has the right to exclude anyone. Moreover, given that Wisconsin courts narrowly construe documents granting easements to determine the specific rights granted, the law does not support the Company’s view that the goal of running a first-class mall, without more, necessarily entails the right to exclude peaceful union handbillers.

Finally, the Company errs (Br. 31-33) in relying on *Weis Markets, Inc. v. NLRB*, 265 F.3d 239, 246-48 (4th Cir. 2001), which found, based on materially different facts and law, that an employer had the right to exclude union advocates from property over which it had a non-exclusive easement. Of particular

significance, the *Weis* court “especially note[d]” that the relevant leases were amended before the Board’s complaint issued to grant the easement holder the “right to prevent trespassing, including handbilling, on the sidewalks” and other easement properties. *Id.* at 246. Of course, the leases here contain no such language. Moreover, the analysis in *Weis* conflated the exclusionary rights of the easement holder and the property owner. Thus, *Weis* relied on a Pennsylvania Supreme Court decision to the effect that the landlord and tenant each had a right to deny the “use of their property” for purposes such as union handbilling. *Id.* at 247 (quoting, *Logan Valley Plaza, Inc. v. Amalgamated Food Employees Union Local 590*, 227 A.2d 874, 877 (Pa. 1967)). This case involves not property owned or even leased by the Company, but property over which it had only a non-exclusive easement. Conflating the two would be error under Wisconsin law, which makes a clear distinction between the rights of the property owner or occupant and those of the easement holder who merely has a right to use another’s property. Lastly, there is no Wisconsin case addressing handbilling on easement property and the greater weight of authority from other states (pp. 38-39) supports the Board’s decision.

4. The Board Acted Within Its Discretion in Refusing To Allow the Company's Expert Witness To Testify About His Legal Conclusions Regarding Wisconsin Statutes and Case Law

The Company challenges (Br. 37-39) the Board's refusal to allow its expert witness, a Wisconsin lawyer specializing in real-property law, to testify about his legal conclusions regarding whether the Company had an exclusionary property interest under Wisconsin law. (A. 1 n.4.) The Company faces an uphill battle because the Board's evidentiary rulings are reviewed only for an abuse of discretion and must be affirmed if reasonable. *See Kentucky River Cmty. Care, Inc. v. NLRB*, 193 F.3d 444, 452 (6th Cir. 1999) (the Board has broad authority over its hearings and its decision to exclude evidence is reviewed only for abuse of discretion), *aff'd in part, rev'd in part, on other grounds*, 532 U.S. 706 (2001); *see generally United States v. Sinclair*, 74 F.3d 753, 756 (7th Cir. 1996) (this Court reviews the trial judge's decision to exclude evidence under the "formidable" abuse of discretion test, which is met only if "no reasonable person could agree" with the ruling under review). The Company fails to show, however, that the Board abused its discretion in excluding this testimony.

As the Board explained, the witness sought to present his legal conclusions regarding Wisconsin statutes and case law, which the judge was capable of interpreting on his own. (A. 1 n.4; Tr. 307-12.) There is simply no requirement that a judge allow an expert witness to testify about his legal conclusions,

especially as to legal issues that “will determine the outcome of the case.”

Sinclair, 74 F.3d at 758 n.1 (noting that while the courts have not provided a uniform answer to the question whether an expert witness can offer legal opinions, this Court has generally “determined that Federal Rules of Evidence 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case”).

Moreover, the Company could (and presumably did) include the witness’s legal arguments in its posthearing brief to the judge. It follows, as the Board noted (A. 1 n.4), that the judge properly excluded this testimony pursuant to his “obligation to make a complete but nonvoluminous record,” and that its exclusion did not prejudice the Company. Thus, contrary to Company (Br. 38), it is not dispositive whether the expert’s testimony would have been “helpful,” for it would be just as helpful written in its brief, indeed, more so, as that would avoid burdening the record and elongating the hearing. Finally, the Company errs in citing (Br. 38) a decision by an administrative law judge (*Shaw’s Supermarkets*, 2005 WL 1536395 (NLRB Div. of Judges 2005)), to which no exceptions were filed, because such a decision lacks precedential value.⁹ At any rate, *Shaw’s*

⁹ See *Whirlpool Corp.*, 337 NLRB 726, 727 n.4 (2002) (“the Board’s adoption of a portion of a judge’s decision to which no exceptions are filed does not serve as precedent for any other case”). *Accord ESI, Inc.*, 296 NLRB 1319, 1319 n.3 (1989).

merely shows that one judge in one case gave weight to expert testimony regarding state property law, not that the judge in this case was required to do so.

5. Settled Law Placing the Burden of Establishing an Exclusionary Property Interest on the Company is Reasonable and Consistent with *Lechmere*

Unable to meet its burden of proving an exclusionary property interest, the Company next misconstrues (Br. 35-37) the Supreme Court’s decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), as barring the Board from placing this burden on the Company. The Board and the courts, however, consistently hold that the analysis from *Lechmere* relied on by the Company does not apply where, as here, the employer neither owns nor possesses the property in question. Similarly settled law requires the employer to prove that it had a property interest entitling it to exclude union organizers.

The Supreme Court’s discussion of the burden of proof in *Lechmere*, 502 U.S. at 529, 535-39, addressed the rights of nonemployee union agents to access property owned by the employer for the purpose of organizing its employees. It was in this context—employer-owned property—that *Lechmere* held that, in order to have a right to access the property, the union must meet a “heavy” burden of establishing that the targeted employees are so inaccessible that no other reasonable means of communication with them is available. *See id.* at 529, 535, 539 (noting that the employer co-owned the shopping-mall parking lot in question,

and explaining that where the employer bars nonunion organizers from “his property,” the union has “heavy” burden to show that it lacks other reasonable means of access to employees). Of course, unlike *Lechmere*, the Union’s intended audience here was customers, not employees.

The Company errs in presuming (Br. 36) that *Lechmere* requires the Board to place the same “heavy” burden on union organizers regardless of whether the property in question is owned by the employer. To the contrary, the Board and the courts have repeatedly held that the burden of proof analysis from *Lechmere* does not apply where, as here, the protected nonemployee union activity occurred on property that is neither owned by nor in the possession of the employer. *See Calkins*, 187 F.3d at 1088; *O’Neil’s Mkts.*, 95 F.3d at 738-39. In such circumstances, there is no possessory property right of the employer to be accommodated and, therefore, the employer may not interfere with the protected activity. Thus, as the Eight Circuit aptly summarized it:

Where, as here, an employer lacks the right to exclude others from the property involved . . . , the Board has consistently held that the principles announced in *Babcock* and *Lechmere* do not apply. We agree. Those principles apply only when a property right sufficient to permit the exclusion of others and Section 7 rights conflict.

O’Neil’s Mkts., 95 F.3d at 739 (citing *Johnson & Hardin*, 305 NLRB 690, 691, 695 (1991), *enforced in relevant part*, 49 F.3d 237, 240-42 (6th Cir. 1995)); *accord Calkins*, 187 F.3d at 1088. In other words, under *Lechmere*,

the Union here would bear the “heavy” burden only if the Company has shown an exclusionary property interest. The Company has not done so.

Accordingly, the courts have uniformly agreed with the Board that, after *Lechmere*, the employer bears “a threshold burden to establish an interest entitling it to exclude individuals from its property,” and that absent such proof, “*Lechmere*’s accommodation analysis is not triggered.” *Calkins*, 187 F.3d at 1088, 1095; accord *O’Neil’s Mkts.*, 95 F.3d at 738-39; *UFCW*, 222 F.3d at 1034 n.5, 1038 (collecting cases).¹⁰ Yet, the Company fails to address this settled law holding that the Board may, consistent with *Lechmere*, place the initial burden on the employer to establish an exclusionary property interest. It gains no ground by relying instead (Br. 36-37) on the contrary views expressed in the dissenting opinions of three former Board members. As shown, that view has been rejected by the Board and the courts.

¹⁰ Thus, contrary to the Company (Br. 36), it is immaterial that *Lechmere* did not require the employer in that case to prove an exclusionary interest in its *own* property. *Lechmere* did not determine the appropriate burdens for access cases, like this one, involving property not owned by the employer.

CONCLUSION

The Company interfered with protected area-standards handbilling by nonemployee union organizers on sidewalks and other common areas in front of its stores, by demanding that they stop their activities and/or calling the police to have them removed. As the Company failed to meet its burden of proving that it had a property interest entitling it to exclude the handbillers from those areas, its interference violated Section 8(a)(1) of the Act. Accordingly, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full and denying the Company's petition for review.

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May 2011

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROUNDY'S INCORPORATED	*
	*
Petitioner/Cross-Respondent	* Nos. 10-3921
	* 11-1292
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 30-CA-17185
	*
Respondent/Cross-Petitioner	*
	*
and	*
	*
MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO	* * *
	*
Intervening Respondent	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,896 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 31st day of May, 2011



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