Equitable Life Assurance Society of the United States and ITC Fashion Valley Corporation d/b/a Fashion Valley Shopping Center *and* Graphic Communications International Union, Local 432M, AFL–CIO. Case 21–CA–33004

October 29, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 26, 2001, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

Introduction

The complaint alleges, in pertinent part, that the Respondent violated Section 8(a)(1) by: (1) maintaining a rule prohibiting consumer boycott handbilling, rule 5.6.2; and (2) enforcing this rule and unlawfully excluding union handbillers at the entrances to the Robinsons-May department store at the Fashion Valley Shopping Center on October 4, 1998. The judge found that the exclusion of the handbillers violated Section 8(a)(1). For the reasons that follow, we agree with this finding.

The judge declined to rule on the separate complaint allegation that the maintenance of the rule prohibiting consumer boycott handbilling also was unlawful. The General Counsel has excepted to the judge's failure to find this additional violation of Section 8(a)(1). For the reasons that follow, we find merit to this exception.

Facts

The judge has fully set out the facts. In brief, the Respondent owns and operates a retail shopping mall in San Diego, California, known as the Fashion Valley Shopping Center (the Mall). The Respondent leases space at the Mall to tenants who are engaged in retail sales to the public. The Robinsons-May department store is one of the larger tenants at the Mall and occupies space in a freestanding building at the east end of the Mall. The store is surrounded on three sides by parking areas and on the west side by a separate building housing a Saks Fifth Avenue store and another building housing a number of small retailers. The Respondent retains Jones, Lang, LaSalle Americas, Inc. (La Salle) to manage and operate the Mall on its behalf.

The Respondent has adopted rules and regulations applicable to all individuals and organizations seeking to engage in expressive activities at the Mall. The Respondent's rule 5.6.2 expressly prohibits applicants and participants from "impeding, competing, or interfering with the business of one or more of the stores or merchants in the shopping center by . . . urging, or encouraging in any manner, customers not to purchase the merchandise or services offered by one or more of the stores or merchants in the shopping center." The Respondent's rules and Regulations also include an application-permit process for all individuals and organizations seeking to engage in expressive activities at the Mall, which, among other things, requires each applicant to agree to abide by all of the Mall's rules and regulations, including rule 5.6.2. Since the rules were established, the Respondent has required all individuals and organizations that seek to engage in expressive activity to apply for and receive a permit prior to engaging in the activity.

On October 4, 1998,[3] union members and supporters distributed handbills[4] on the sidewalk outside the entrances to the Robinsons-May department store to persons entering and leaving the store, and to other persons on their way to other Mall stores or parking areas. Shortly after the handbilling began, officials from La Salle stopped the handbilling, and told the handbillers

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's finding that under California law time, place, and manner rules can be applied to labor activity conducted at private shopping malls or large stand-alone shopping facilities in California; and that among the time, place, and manner rules allowed under California law are rules requiring the disclosure of the names of the persons who seek to engage in expressive activity.

[2] We have modified the Order and notice to more accurately reflect the violations found.

[3] All dates hereinafter refer to 1998 unless otherwise indicated.

[4] The Union was involved in a primary labor dispute with the San Diego Union-Tribune newspaper. The handbill highlighted particular aspects of the Union's dispute with the Union-Tribune newspaper, urged Robinsons-May Department Store employees to remain on the job, asked consumers to call the Union-Tribune CEO on behalf of the Union, and concluded: "Robinsons-May advertises with the Union-Tribune."

that they were on private property and should have submitted an application for a permit to engage in expressive activity at the Mall. The handbillers were handed the Respondent's standard trespass notice, offered an expressive activity application, and warned that they would be subject to civil litigation and/or arrest if they did not leave. The handbillers promptly ceased their activity, left the Mall's premises, and relocated to public property where they continued to handbill for an additional 15 minutes. On October 22, by letter directed to the Union's counsel, counsel for the Mall sought to compel the Union to complete the Mall's application as a prerequisite to engaging in expressive activity at the Mall.

Analysis

The pertinent principles are set forth in *Glendale Associates*, 335 NLRB 27, 28 (2001), enfd. 347 F.3d 1145 (9th Cir. 2003):

> In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Supreme Court held that an employer may lawfully bar nonemployee union organizers from private property (unless the employees are inaccessible through usual channels). In the absence of a private property interest, however, the Court's holding in *Lechmere* is not controlling. See *Bristol Farms*, 311 NLRB 437, 438 fn. 6 (1993) ("employer's exclusion of union representatives from private property to which the employer lacks a property right entitling it to exclude individuals likewise violated Section 8(a)(1) assuming the union representatives are engaged in Section 7 activities"). See also *Indio Grocery Outlet*, 323 NLRB 1138, 1142 (1997), enfd. sub nom. *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999).
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> The Board looks to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives. *Bristol Farms*, 311 NLRB at 438. The Board does so because it is State law, not the Act, that creates and defines the employer's property interest. Thus, an employer cannot exclude individuals exercising Section 7 rights if the State law would not allow the employer to exclude the individuals. Id. at 438; *Johnson & Hardin Co.*, 305 NLRB 690 (1991).

California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979), affd. 447 U.S. 74 (1980); *Glendale*, supra, 335 NLRB at 28. Rule 5.6.2, however, is essentially a content-based restriction and not a time, place, and manner restriction permitted under California law. That is, the rule prohibits speech "urging or encouraging in any manner" customers to boycott one of the shopping center stores. By contrast, there is no evidence in the record explaining how rule 5.6.2 regulates the time, place, or manner of speech at the Mall. Rather, it appears that the purpose and effect of this rule was to shield the Respondent's tenants, such as the Robinsons-May department store, from otherwise lawful consumer boycott handbilling. Accordingly, we find that the Respondent violated Section 8(a)(1) by maintaining rule 5.6.2.[5] See *Glendale*, supra.

We find, for similar reasons, that the Respondent also violated Section 8(a)(1) by excluding the handbillers on October 4. The Respondent contends that it was entitled to exclude the handbillers because they did not apply for a permit to engage in handbilling, as its rules require. As noted above, though, the Respondent's application-permit process requires each applicant to agree to abide by all its rules and regulations, including rule 5.6.2, which we have already found to be unlawful. Thus, inasmuch as the application process requires adherence to an unlawful rule, the Respondent may not enforce it. Accordingly, we find that the Respondent violated Section 8(a)(1) by enforcing rule 5.6.2, i.e., by requiring the instant application for a permit.

AMENDED CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by maintaining and enforcing a rule prohibiting handbilling or other expressive activity which urges, or encourages in any manner, customers not to purchase the merchandise or ser-

[5] In light of our finding above, we find it unnecessary to rely on the judge's finding that rule 5.6.2 was impermissible under the California law set forth in *Sears, Roebuck & Co. v. San Diego County Dist. Counsel of Carpenters*, 25 Cal. 3d 317 (1979), *In re Lane*, 71 Cal. 2d 872 (1969), and *Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers' Union*, 61 Cal. 2d 766 (1964), and we do not pass on the judge's discussion of those cases. Accordingly, there is no need for us to address the D.C. Circuit's recent decision in *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004), questioning whether *Sears*, *Lane*, and *Schwartz-Torrance* remain good law.

We find it unnecessary to pass on the judge's finding that the Respondent unlawfully maintained a rule limiting expressive activities to six "pre-approved" locations in the common areas of the mall. We rely on the following reason. There was no allegation in the complaint challenging this rule and the General Counsel's cross-exceptions make it clear that the General Counsel does not contend that the Respondent violated the Act by maintaining such a rule. In these circumstances, the question of whether such a rule would be unlawful is not before us.

vices offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

4. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated Section 8(a)(1) of the Act in any other manner except as specifically found herein.

ORDER

The National Labor Relations Board orders that the Respondent, Equitable Life Assurance Society of the United States and ITC Fashion Valley Corporation d/b/a Fashion Valley Shopping Center, San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a rule prohibiting handbilling or other expressive activity protected by Section 7 of the National Labor Relations Act which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

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

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

(a) Delete from its rules and regulations, and any other document within its custody and control where such rules may be contained, any rule which prohibits handbilling or other expressive activity protected by Section 7 of the National Labor Relations Act which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

(b) Within 14 days after service by the Region, post at the facilities it maintains in connection with the operation of the Fashion Valley Shopping Center in San Diego, California, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 4, 1998.

(c) Within 14 days after service by the Region, sign and return to the Regional Director sufficient copies of the notice for posting by the Union at its facility, if willing, at all places where notices to members and employees are customarily posted.

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

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a rule at the Fashion Valley Shopping Center prohibiting handbilling or other expressive activities protected by Section 7 of the National Labor Relations Act which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

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

WE WILL modify our rules and regulations for expressive activities at Fashion Valley Shopping Center, and any other document within our custody and control

[6] 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."

where such rules may be contained, to delete any rule which prohibits handbilling or other expressive activity protected by Section 7 of the National Labor Relations Act which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES AND ITC FASHION VALLEY CORPORATION D/B/A FASHION VALLEY SHOPPING CENTER

Robert MacKay and *David Mori, Attys.,* for the General Counsel.

Theodore R. Scott, Atty. (Luce, Forward, Hamilton & Scripps, LLP), of San Diego, California, and *W. McLin Lines, Atty. (Law Office of W. McLin Lines),* of Torrance, California, for the Respondent.

Richard D. Prochazka, Atty. (Richard D. Prochazka & Associates), of San Diego, California, for the Charging Party's brief.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. The outcome here turns on whether the Equitable Life Assurance Society of the United States and ITC Fashion Valley Corporation d/b/a Fashion Valley Shopping Center (Respondent, Company, or Equitable Life) met its threshold burden of establishing a sufficient property interest under California law that entitled it to bar agents, members, and sympathizers of Graphic Communications International Union, Local 432M, AFL–CIO (Local 432M, Union, Charging Party) from distributing leaflets to consumers at the Fashion Valley Shopping Center (Mall) in San Diego, California, on October 4, 1998. Below, I conclude Respondent failed to meet that burden and that it violated Section 8(a)(1) of the National Labor Relations Act (Act)[1] by barring the Union's leafleters that day under a threat of arrest.

This proceeding commenced with the unfair labor practice charge filed by Local 432M on October 15, 1998.[2] Thereafter, the Regional Director for Region 21 issued a complaint and notice of hearing on September 30, 1999, alleging that Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) by threatening the Union's leafleters with arrest for engaging in handbilling on Respondent's property without a permit. Respondent filed a timely answer denying the alleged unfair labor practices.

I heard this matter on October 10, 2000, at San Diego, California. On the entire record, including my observation of the demeanor of the witnesses, and after considering the helpful briefs filed with me by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation, is engaged in the management and operation of a shopping center in San Diego, California. During the 1998 calendar year, Respondent derived gross revenues in excess of $1 million, of which $25,000 was derived from retail tenants, including Robinsons-May Department Stores, each of which tenants, during the same period of time, derived gross revenues in excess of $500,000 and purchased and received at the Fashion Valley Mall location goods valued in excess of $50,000 directly from points outside the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

Respondent leases space at the Mall to tenants engaged in retail sales to the public. During regular business hours, Respondent provides the public at large with access to the Mall for the purpose of shopping at the retail stores located therein. The Mall is situated on land bounded on the north by Friars Road, to the east by Highway 163, to the south by Hazard Center Drive, and to the west by Fashion Valley Road. Equitable Life retains Jones, Lang, LaSalle, Americas, Inc. (LaSalle), to manage and operate the Mall on its behalf. The Robinsons-May Department Store is one of the larger tenants at the Mall. That retailer occupies space in a freestanding building at the east end of the Mall. It is surrounded on three sides by parking areas and on the west side by a separate building housing a Saks Fifth Avenue store and another building housing a number of smaller retailers. (R. Exh. 5.)

The Charging Party, Local 432M, represents a unit of the pressroom employees at the San Diego Union-Tribune (Union-Tribune), a major general circulation newspaper in San Diego. The Union's pressroom collective-bargaining agreement with the Union-Tribune expired on October 16, 1992. Local 432M and the Union-Tribune have bargained since that time, and before, in an unsuccessful effort to reach a new agreement. A primary labor dispute existed between Local 432M and the Union-Tribune during August, September, and October of 1998.

2. Respondent's time-place-manner rules

On December 1, 1995, Respondent adopted rules applicable to persons seeking to engage in expressive activities at the Mall. (Jt. Exh. 1.) The preamble to the rules purports to explain the law concerning the exercise of expressive activity at pri-

[1] Sec. 8(a)(1) provides that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their rights under Sec. 7 of the Act. The pertinent portion of Sec. 7 guarantees to employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . [or] to refrain from any or all such activities."

[2] All further dates refer to 1998 unless shown otherwise.

vately owned shopping centers such as Fashion Valley. Among other things the preamble states:

> The California appellate courts have recognized that the California Constitution allows a privately owned shopping center to prohibit expressive activities which impede, disrupt, or compete with the owner or merchants' businesses or which interfere with customer convenience,[4] and have decided that a privately owned shopping center may so prohibit political, religious, and any other type of expressive activity protected by the California Constitution.[5]
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> The United States Supreme Court has decided that a privately owned shopping center can prohibit nonemployees from engaging in union organizing activities on a shopping center unless the union can demonstrate the employees it is attempting to organize are beyond the union's reasonable efforts to contact them. Since none of the employees of Fashion Valley, the mall stores, or the department store live on the shopping center, the law presumes that the union has reasonable access to these employees outside the shopping center.[6]

[4] *H-CHH Associates v. Citizens for Representative Government* (1987) 193 Cal.App.3 superrd 1193.

[5] *Savage v. Trammell Crow* (1990) 223 Cal.App.3 superrd 1562; and *Westside Sane/Freeze v. Ernest W. Hahn* (1990) 224 Cal.App.3 superrd 546.

[6] *Lechmere, Inc. v. National Labor Relations Board* (1992) 112 S.Ct. 841.

Respondent's rules provided for an extensive application-permit process that requires considerable information from the permit applicant and each person who will participate in the planned expressive activity. Rule 2.1 provides that an applicant "must submit a completed application for a permit at least five (5) business days . . . in advance of the expressive activity, and must obtain a permit, before engaging in an expressive activity at Fashion Valley." The 10-page permit application seeks these disclosures:

1. The name and address of "the person or group requesting a permit to engage in expressive activity at the Mall.
2. The name, and the day and evening phone numbers for "the person in charge of, or responsible for" the applicant's conduct.
3. Other public or private locations where the applicant engaged in expressive activity in the past 12 months.
4. Injuries sustained by persons or property "while . . . engaged in a similar expressive activity" elsewhere.
5. The name and address of the applicant's liability insurer as well as the policy number and liability limits.
6. Any economic consideration the applicant or participants would receive from the activity.
7. The manner in which the applicant plans to educate the "participants" concerning the activity permitted by the rules.
8. The purpose of the expressive activity and the times the applicant wants to engage in expressive activity.
9. The location desired for the activity, including an explanation as to why the "preapproved" locations would not be acceptable.
10. The number of participants anticipated and what the participants will be doing during the activity.
11. How far the participants will range from the approved location where the activity will take place.
12. The "general content of the [planned] verbal communications [with the patrons] . . . including songs."
13. Whether the participants would be soliciting funds.
14. Whether the participants would be promoting or discouraging the sale of merchandise carried by any Mall business.
15. The applicant's agreement or representation that he/she would abide by all of the Mall's rules and regulations.
16. The applicant's agreement that the participants had been educated about the Mall's rules.

The applicant must also submit a copy of any written material that would be "displayed, distributed or otherwise used." If a copy of the written material to be used cannot be attached to a separate "Written Material Attachment," then the applicant must complete a form that describes the number, size, and content of the written materials and the manner in which the applicant plans to display or distribute the written material. Its rules bar, among other materials, "fighting words, obscenities, grisly or gruesome displays, and highly inflammatory slogans." See Joint Exhibit 1, Exhibit 2, rule 5.11.2. When the disputed activity occurred, the rules prohibited applicants and participants from:

> Impeding, competing or interfering with the business of one or more of the stores or merchants in the shopping center by . . . urging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center.

See Joint Exhibit 1, Exhibit 2, rule 5.6.2. On September 1, 1999, around the time the complaint in this case issued, Respondent amended its rules. The amendments provide that rule 5.6.2 "has been deleted subject to appropriate revision and restatement."

The applicant must also submit a 5-page "Participant Attachment" for each participant. The participant attachment calls for the name, address, workday telephone number of the "participant," and the "relationship" of the participant to the applicant. As in the case of the applicant, the participant must also disclose the date, location, sponsor, and purpose of any "similar expressive activity within the last 12 months." Similarly, the participant must provide information about "previous injury(ies) to persons or property" while engaged in similar expressive activity. If the participant declares that injury occurred then he/she must declare the location and the injury that occurred. Each participant is also required to disclose the same insurance information as is required of the applicant as well as the same information concerning consideration the participant would receive for engaging in the planned expressive activity and whether the participant plans to promote the sale or boycott of any product.

The application forms contemplate prior approval or disapproval by the Mall of the applicant, each participant and the written materials before any expressive activity commences. The forms also suggest that the Mall might demand the submission of a "certificate of insurance" if the activity involves a

"risk" warranting insurance. In that event, the language on the Mall's permit indicates that it might require insurance up to $1 million per occurrence covering the applicant, each participant and others specified by the Mall including "[a]ny and all person or entities, as well as their respective agents and employees, holding any ownership, security, or leasehold interest in, or managing the common areas of, Fashion Valley."

Permits to engage in expressive activity are issued for periods limited to "either: a single day, or any portion of a day; three consecutive days for a weekend preceded or followed by a legal holiday; or five consecutive days for a Monday through Friday." Under the amendments adopted in 1999, permits can be renewed but no applicant can have more than one application or permit pending at any given time.

The Mall only allows expressive activities in the common areas. Respondent has six predesignated locations for that purpose. The Robinsons-May store appears to have one or more entrances on all sides of the building it occupies. The nearest designated expressive activity area is located across a walkway from the store's west entrance. No designated expressive activity areas exist on the other three sides of the store that are adjacent to parking areas and that have public entrances. The Mall prohibits expressive activities on property "leased to, or owned by, the mall stores or the department stores, or on property not open to the general public." No evidence explains the geographic scope of Robinsons-May's lease, e.g., whether it includes the surrounding walkways or any portion thereof.

3. The Union's October 4 leafleting

Local 432M began planning to leaflet consumers at the Robinsons-May store in the Mall sometime between the end of August and the mid-September. Its president, John Finneran, with assistance from members of the Union's executive board, prepared the leaflets. Agents from Local 404, a sister local in Los Angeles, also provided assistance. On October 3, Finneran spoke by telephone with the Mall's security shift supervisor to advise that about 30 union supporters would engage in a peaceful protest outside the Robinsons-May store the following day around 1 p.m.[3] Local 432M made no effort to obtain a permit under the Mall's rules to engage in expressive activities.[4]

Around 1 p.m. on October 4, Finneran and Marty Keegan, director of organizing for Local 404, a sister local in Los Angeles, along with 30 to 40 union members and a few of their family members went to the Mall to distribute leaflets to the Mall patrons, particularly those entering and leaving the Mall's Robinsons-May store.[5] The leaflets highlight particular aspects of the Union's dispute with the Union-Tribune, urge Robinsons-May employees to remain on the job, ask consumers to call the Union-Tribune C.E.O. on behalf of the Union, and conclude: "Robinsons-May advertises with the Union-Tribune." (GC Exh. 3.)

Finneran and Keegan supervised the leafleting. The handbillers broke into groups of three to five people, and stood on wide sidewalks near the various entrances to the Robinsons-May store. They distributed leaflets to persons entering and leaving Robinsons-May, and to other passersby on their way to other Mall stores or the parking areas. Some of the leafleters engaged some willing Mall patrons in discussions about the Union's concerns, including the claim that the Union-Tribune had not granted a pay increase in nearly 7 years. From all indications, the leafleters conducted their activity in a courteous and peaceful manner without a disruption of any kind and without hindrance to customers entering or leaving Robinsons-May or any other Mall store. No picketing occurred. No leafleter entered the targeted store.

Finneran articulated three reasons for leafleting at the Mall's Robinsons-May store. First, that company frequently placed large advertisements in the Union-Tribune; second, that particular Robinsons-May store, located only about half of a mile from the Union-Tribune's facility, provided a convenient location for many of the handbillers to congregate; and third, the Mall has "a lot of people coming in and out of it," so the Union's access to the public would be maximized at that location. Although Finneran eschewed any intent to encourage a consumer boycott of Robinsons-May, the Union's brief boldly asserts otherwise. It states that the Union "was attempting to engage in a lawful consumer boycott of Robinsons-May because Robinsons-May advertised in the Union-Tribune newspaper." (CP Br., p. 2.) I find that admission consistent with the circumstances here.

But even in the absence of the admission in the Union's brief, I would find that this record merits the inference, despite Finneran's contrary claim, that the Union's October 4 leafleting had, as its primary object, a consumer boycott of the Mall's Robinsons-May store. Such an inference is strongly supported by the distribution of handbills that: (1) portray an unflattering account of the protracted negotiations at the Union-Tribune; (2) appeal to the readers to complain about the negotiations to the newspaper's chief executive officer; and (3) advise Mall patrons that the Robinsons-May store they were about to enter, leave or pass by, advertises in the Union-Tribune. Hence, persons usually sympathetic to union causes would also likely avoid the Robinsons-May store when confronted with this information.

Within 15 or 20 minutes, the Respondent's management company officials arrived on the scene to stop the leafleting. Eugene Kemp, Fashion Valley's property manager, told Keegan that the handbillers were on private property and that he should have submitted an application for a permit. Kemp warned Keegan that the leafleters would be subject to civil litigation and/or arrest if they did not leave, handed him Respondent's standard trespassing notice (R. Exh. 3), and offered him an expressive activity application. In pertinent part, the trespass notice reads:

[3] Finneran vehemently denied that he provided advance notice to the Mall of the October 4 activity. Because the contemporaneous entry in the Mall's security log shows otherwise and supports the contrary testimony of the security officer on duty, I do not credit Finneran's denial. (See R. Exh. 7.) The same log sheet indicates a call from a police officer who reported that Finneran had reported plans to demonstrate at the Mall. Finneran admitted that he spoke to the San Diego Police about the Union's plans to leaflet at the Mall.

[4] The Union explicitly refused to submit an application later when Respondent invited it to do so. However, the Union never attempted to engage in handbilling at the Mall after October 4.

[5] Earlier that day, this group also distributed leaflets at a nearby auto dealership.

> Since you have not obtained a permit to engage in an expressive activity, Fashion Valley insists that you immediately refrain from engaging in any expressive activity at Fashion Valley. . . . If you continue to engage in an expressive activity without a permit, or if you impede traffic entering or leaving Fashion Valley, you will be subject to arrest and criminal prosecution, as well as a civil legal action to enjoin future trespasses and to recover compensatory and punitive damages resulting from your trespass(es).

Keegan promptly began directing the union members to cease leafleting and to leave the Mall's premises. They complied but, instead of ceasing their activity altogether, most relocated to public property near the Friars Road entrance to the Mall where they continued to leaflet for another 15 or 20 minutes. Before leaving Mall property, Finneran engaged a policeman who appeared on the scene in a brief argument. No arrests occurred. No citation issued. No subsequent criminal or civil action ensued. And finally, no evidence shows that Kemp made any objection about the number of leafleters.

B. Argument

The General Counsel argues that Respondent lacked a sufficient property interest under California law to exclude the Union's leafleters despite its failure to follow the application-permit scheme established by the Mall's time-place-manner rules. The General Counsel argues that the state's labor law applies here and that the California Supreme Court has never applied time-place-manner regulations to peaceful concerted activities conducted on private property.

Alternatively, General Counsel argues that if the Board recognizes the legitimacy of time-place-manner rules in California labor cases, Respondent should be "foreclosed from applying certain . . . rules because they are not reasonable." Specifically, General Counsel claims that rule 5.6.2 effectively bars consumer boycott activity and amounts to an invalid content-based regulation. Citing *Riesbeck Food Markets,* 315 NLRB 940 (1994), enf. denied 91 F.3d 132 (4th Cir. 1996), the General Counsel contends that rule 5.6.2 constitutes a "facially discriminatory no-solicitation policy."

In addition, the General Counsel asserts that the requirement that the union disclose the names of its handbillers (participants) serves no significant interest of Respondent and, hence, it should be found to be invalid. In this regard, the General Counsel believes that this requirement raises the risk for retaliation if the handbiller's identity is disclosed to the Mall and then passed along to the handbiller's employer. This risk, the General Counsel argues, will serve to chill the exercise of Section 7 rights especially where, as here, no assurance of confidentiality is provided. In General Counsel's view, anonymity is a "fundamental right recognized in law" that the Board has "vigilantly preserved by maintaining the secrecy of employees' ballots in [[NLRB] elections" and by deliberately omitting employee names in certain complaint allegations.

To the extent that contrary conclusions could be reached from arguments grounded on *Union of Needle Trades, Indus. & Textile Employees v. Superior Court (Taubman Co.),* 56 Cal.App.4th 996 (1997) *(UNITE)*, the General Counsel advances numerous criticisms of that case and the arguments derived from it. Where I find General Counsel's criticisms relevant, they will be addressed in greater detail below.

Respondent asserts that it is not only "unnecessary to distinguish between labor-related speech and non-labor related speech, but that in fact shopping centers are required to treat both types of speech in the identical fashion." Respondent maintains that California law permits the type of time-place-manner rules it maintains and, therefore, the Union had no right to leaflet on Mall property without first obtaining a permit under the Mall's application-permit process.

Respondent claims that its derived its time-place-manner regulations from the guidance provided by the California court of appeals in *H-CHH Associates v. Citizens for Representative Government*, 193 Cal.App.3d 1193 (1987) (*Pasadena Plaza*). Furthermore, Respondent contends that reviewers saw no reason to revise its rules following the *UNITE* decision. Pasadena Plaza, Respondent asserts, provides "a considerable amount of detail relating to permissible regulation of . . . expressive activities [to assure that they] would not interfere with normal business operations." And Respondent contends that the *UNITE* decision affirmed "the validity of the shopping center's rules" and confirmed that a labor organization must comply with a shopping center's existing application-permit process before engaging in expressive activities.

Respondent argues that the "*Zerbe to Sears*" line of union activity cases "has no bearing on the applicability of Fashion Valley's Rules to access to engage in labor-related speech." These cases, Respondent asserts, arose in the context of situations where (1) the property owner claimed the right to "absolutely ban" access based solely on the owner's private property rights; and (2) there was a "unique need to use the particular private property as a forum because it [was] located adjacent to the targeted employer or subject jobsite. Neither element, Respondent argues, is present in this case. Instead, Respondent claims that it merely asserted its "constitutionally permissible . . . right to regulate" by asking the Union to "stop using the shopping center as a public forum" without complying with its rules. Consequently, Respondent asserts, when California law protects labor expressive activities from an absolute ban by the owner of private property, that activity nonetheless may be regulated in the same manner as constitutionally protected speech and petitioning activity.

Finally, Respondent contends that the specific provisions of the Mall's rules challenged by the General Counsel are permissible under *Pasadena Plaza* and *UNITE*. Those cases. Respondent contends, both approved rules requiring the prior identification of participants. Furthermore, Respondent, notwithstanding the 1999 amendment deleting the boycott ban contained in rule 5.6.2, contends that by upholding a rule banning the solicitation of funds, *Plaza Pasadena* supports its ban on boycotts. Thus Respondent's brief states at 32–33:

> If the shopping center can prevent a single person from asking for a single dollar which, if given to the solicitor, might have been used to purchase goods or services somewhere in the shopping center, then a shopping center can certainly prevent one or more persons from asking customers not to purchase

> any goods of (sic) services from a specific store in the shopping center. The potential adverse impact on the promotion of any single business in the shopping center due to the request for a single dollar which may never have been spent in that or any other store in the shopping center is far less than the potential impact on a targeted store of a request not to purchase *anything* from that store.

Respondent disputes General Counsel's claim about the inapplicability of time-place-manner rules to labor activity at shopping malls. In support, Respondent cites this language from *Diamond v. Bland*, 3 Cal.3d 653 (1970) *(Diamond I):*

> Each of the cases upon which we rely-*Marsh, Logan, Schwartz-Torrance, Lane, and Hoffman*-presumed that the property owners involved were free to impose "reasonable regulations" upon the exercise of First Amendment rights on their premises; and each of the cases emphasized that disruptive First Amendment activities may be prohibited by the owners of private property opened to the public.
>
> . . . .
>
> We impose no unrealistic burden on the operators of shopping centers in insisting that their control over First Amendment rights be exercised, if at all, through reasonable regulations calculated to protect their business interests rather than through absolute bans on all nonbusiness-related activities. Shopping centers, like railway stations, are not incapable of regulating permissible activities. If regulations could not be designed, the decisions in *Schwartz-Torrance* and *Logan* might have produced chaos, as labor unions and other groups would have been free to picket businesses in the shopping centers without reasonable limitation as to time, place, or manner. Moreover, the trial court findings in the instant action demonstrate the ability of Inland Center to regulate the various sales promotions and displays that are permitted in the common aisleways: "In every instance where a promotion is held, it is closely regulated as to time, date, location, number of people or exhibits involved, manner of presentation and security factors." Similar regulations, if not repressive in scope, can be devised to protect Inland Center from actual or potential danger of First Amendment activities being conducted on its premises in a manner calculated to disrupt normal business operations and to interfere with the convenience of customers. 3 Cal.3d at 665.

C. Further Findings and Conclusions

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the U.S. Supreme Court rejected the balancing test formulated by the Board in *Jean Country*, 291 NLRB 11 (1988), to determine a nonemployee union organizer's right of access to an employer's private property for the purpose of engaging in Section 7 activities. In doing so, the Court reaffirmed the general rule originally adopted in *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956). *Babcock & Wilcox* held that an employer may bar nonemployee union agents from distributing literature on its property except in the rare cases the employees are inaccessible. The *Lechmere* Court emphasized that, absent the discriminatory application of access rules, "[i]t is only where such access [to employees] is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employer's rights." *Lechmere* above at 538.

As the Union leafleted at the Mall's Robinsons—May store for the object of appealing to consumers to boycott that store because it advertised heavily in the local newspaper with which the Union had a lengthy labor dispute, I find the October 4 leafleting protected by Section 7. "Whether the handbill is considered a form of consumer information handbilling . . . consumer boycott handbilling, or even a 'less-favored' form of secondary handbilling, it is clearly protected under [Section 7] of the Act." *Glendale Associates, Ltd.,* 335 NLRB 27 fn. 5 (2001). Protected Section 7 conduct consists of more than traditional organizing campaigns; it also includes "the right to conduct area standards picketing and consumer boycott activity." *Sears Roebuck & Co. v. San Diego County Dist. Counsel of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978). And see *NLRB v. Calkins*, 187 F.3d 1080, 1086 (9th Cir. 1999); *Food & Commercial Workers Local 880 v. NLRB (Loehmann's Plaza)*, 74 F.3d 292 (D.C. Cir. 1996).

A property owner seeking to bar nonemployee union agents engaged in Section 7 activity must shoulder 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." *Indio Grocery*, 323 NLRB 1138, 1141 (1997), enfd. sub nom. *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999). Although *Lechmere* requires "appropriate respect" for an employer's property rights, the Board and the courts do not accord an employer "any greater property interest than it actually possesses." *O'Neil's Markets v. NLRB*, 95 F.3d 733, 738–739 (8th Cir. 1996); *Bristol Farms*, 311 NLRB 437, 438 (1993). State law determines the extent of a property owner's interest. *Thunder Basin Coal v. Reich*, 510 U.S. 200, 217 fn. 21 (1994); *Bristol Farms* at 439.

Lewis v. Telephone Employees Credit Union, 87 F. 3d 1537, 1545 (9th Cir. 1996), directs Federal forums to determine the law of a State in the following manner:

> When interpreting state law, federal courts are bound by decisions of the state's highest court. "In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Arizona Elec. Power Coop., Inc. v. Berkeley,* 59 F.3d 988, 991 (9th Cir. 1995) (quoting *In re Kirkland*, 915 F.2d 1236, 1239 (9th Cir.1990)). However, where there is no convincing evidence that the state supreme court would decide differently, "a federal court is obligated to follow the decisions of the state's intermediate appellate courts." *Kirkland*, 915 F.2d at 1239.

The principles articulated in *Lewis* are consistent with U.S. Supreme Court's views expressed in *West v. American Telephone & Telegraph Co*., 311 U.S. 223 (1940). That case likewise directs federal forums must recognize their "duty . . . in every case to ascertain from all the available data what the state law is." Decisions by intermediate appellate courts, the Su-

preme Court said, should figure in the equation used to determine "state law" unless the Federal forum "is convinced by other persuasive data that the highest court of the state would decide otherwise." Id at 237. [Emphasis added.]

West and Lewis are applicable and particularly apt here. In my judgment, Respondent relies on a one-size-fits-all set of rules incompatible with the controlling California precedent concerning access to private property in labor cases. Likewise, the General Counsel's argument that relies on the Board's election and complaint practices in support of a finding that Respondent's participant identity disclosure rule is unreasonable illustrates the ease with which the search for controlling state law can end in favor of more familiar but irrelevant precedent.

Early post-*Lechmere* California access cases looked exclusively to the California Supreme Court's decision in *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979), affd. 447 U.S. 74 (1980), that recognized protection derived from California's constitution for citizens engaged in expressive activities at privately owned shopping malls. *Pruneyard* reversed a trial court's refusal to enjoin that shopping mall owner from barring access to a group of high school students seeking signatures on a petition protesting a United Nations resolution they perceived as anti-Semitic. Based primarily on that decision, the Board concluded in *Bristol Farms*, supra, and *Payless Drug Stores*, 311 NLRB 678 (1993), that California property law does not permit shopping center owners to exclude nonemployee union agents engaged in protected labor activities such as area standards picketing or consumer boycott leafleting. Subsequently, *Indio Grocery* looked first to *Pruneyard* in holding that the owner of a large stand-alone grocery lacked a sufficient property interest to exclude agents from its property. Indio Grocery recognized, however, the relevance of two other California Supreme Court cases: *In re Lan*e, 71 Cal.2d 872 (1969), and *Sears, Roebuck & Co. v. San Diego County Dist. Counsel of Carpenters*, 25 Cal.3d 317 (1979). *Lane*'s relevant facts exactly parallel those here. In that case, the California high court reversed the trespass conviction of a union agent for distributing leaflets on a private sidewalk adjacent to a large grocery urging consumers to boycott that business because it advertised extensively in a newspaper where the union was involved in a labor dispute.

Pruneyard expressly recognizes an affected property owner's right to establish reasonable time-place-manner rules regulating expressive activities. Because no time-place-manner rules existed in *Indio Grocery, Bristol Farms,* or *Payless Drugs*, the Board had no need in those cases to address issues posed by these regulatory schemes. However, the Board held in *Glendale Associates, Ltd*., supra, that a mall owner could maintain and enforce a rule requiring the advance disclosure of the names of persons who would actually engage in labor leafleting. In addition, the Board held that the mall owner could not lawfully exclude the leafleters because the union refused to comply with a rule barring any reference in its leaflets to a mall tenant. The Board viewed this latter requirement as an unconstitutional content—based regulation of speech. In reaching its conclusion concerning names-disclosure, the Board appears to rely solely on the *UNITE* case, a controversial California court of appeals decision. However, *UNITE* actually contains no holding regarding the prior restraint question because the court concluded that issue had not been properly preserved for review.

Obviously, *Glendale Galleria* requires that I reject two claims made by the General Counsel: first, his general assertion that time-place-manner regulation may not be applied at all to labor activity conducted at private shopping malls or large stand-alone shopping facilities in California; and second his claim that participant identity disclosure rules are unreasonable Although the Board again relies on *Pruneyard* in deciding *Glendale Galleria*, its action in this recent case appears designed to accord "appropriate respect" for an employer's property rights. *Pruneyard* aside, the Board's recognition that reasonable time-place-manner rules can be applied to labor activity conducted on private property is also consistent with the express statements of the California Supreme Court. Thus, that court's dicta in *Diamond* I. cited by Respondent and quoted above, plainly shows that California's highest court always contemplated as much.[6]

However, I find considerable merit in the General Counsel's contention that the rationale for the California Supreme Court decision in *Pruneyard's* differs markedly from the rationale used in its decisions dealing with a labor organization's right to engage in peaceful, concerted activities for purposes of collective bargaining and other mutual aid and protection on private property. As a result, the decisions of that court strongly suggest that the reach of the protection accorded concerted activities extends to facilities not encompassed by *Pruneyard* and would require regulations, if the property owner chooses to establish any at all, significantly different from those maintained by Respondent. In my judgment, any careful consideration of California law will lead to the conclusion that *Pruneyard's* relevance in access cases involving concerted labor activity is only incidental. Instead, the primary source of applicable California law in situations involving concerted labor activity is derived from a considerable body of State statutory law and the State's settled common law as determined its highest court. Plainly, the two are different and in one recent case the court itself discussed that difference.

As noted, the Union's October 4 handbilling is identical to that in *Lane*; in addition, it is virtually indistinguishable from the activity in *Sears*. In the latter case, the California Supreme Court found the picketing activity on private property protected under the state's "public policy." Although recognizing that the U.S. Supreme Court's decision in *Hudgens v. NLRB*, 424 U.S. 507 (1975), undermined a one of the legal theories supporting the earlier California decisions in *Lane*, supra, and *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union*, 61 Cal.2d 766 (1964), the *Sears* court effectively gave those two cases new life by reaffirming their specific holdings as continuing principles of State labor law.[7] Reading

[6] The holding in *Diamond I* was subsequently overruled. However, I find that does not diminish the import of the dictum cited by Respondent showing that California's highest court always intended to permit time-place-manner regulation of labor activity on private property.

[7] To differing degrees *Schwartz-Torrance* and *Lane* relied on extant Federal constitutional law at the time they were decided. As the *Sears* court noted, until 1972, decisions of this court and the United States

Sears, Lane, and *Schwartz-Torrance* together, I find California law unquestionably permits peaceful concerted activities conducted by a labor organization on a sidewalk adjacent to the targeted employer's entrances even where that sidewalk is privately owned. This conclusion is also consistent with the very trespass statute on which Respondent relied to threaten the Union's leafleters. Thus, the relevant part of California Penal Code Section 602.1 provides:

> Any person who intentionally interferes with any lawful business or occupation carried on by the owner or agent of a business establishment open to the public, by obstructing or intimidating those attempting to carry on business, or their customers, and who refuses to leave the premises of the business establishment after being requested to leave by the owner or the owner's agent, is guilty of a misdemeanor . . . . This section shall not apply to any of the following persons: (1) Any person engaged in lawful labor union activities that are permitted to be carried out on the property by state or federal law; (2) Any person on the premises who is engaging in activities protected by the California Constitution or the United States Constitution. [Emphasis added.]

Respondent's contention that California law does not distinguish between concerted labor activities and expressive activities protected by the California Constitution is just badly mistaken. As is clear, *Pruneyard* rests solely on article I, sections 2 and 3 of the State's constitution. By contrast, the California Supreme Court went out of its way to note that its holding in *Sears* rested not on the state constitution but solely on California's public policy protecting labor-related concerted activities. Thus, *Sears* states:

> The *Robins [v. Pruneyard*] decision rests on provisions of the California constitution. In the instant case, our decision rests on the terms of Code of Civil Procedure 527.3; accordingly we express no opinion on whether the California Constitution protects the picketing here at issue.

25 Cal.3d at 327 fn. 5. But aside from this distinguishing aspect of *Sears*, its importance lies in the fact that it carried forward a variation on a principle the California high court earlier applied in an agricultural setting. Thus, in *Agricultural Labor Relations Board v. Superior Court*, 16 Cal.3d 392 (1976), the court approved a rule of general application, i.e., qualified access, in place of the *Babcock & Wilcox* rule requiring a case-by-case determination with respect to the right of nonemployee organizers to access private property.

Sears unmistakably sets forth California's divergence from this hallowed Federal labor law principle. It declares: "[The *Babcock & Wilcox* doctrine], however, rests on language of the National Labor Relations Act . . . and, as we have seen, California courts have never followed the *Babcock & Wilcox* doctrine of requiring a case-by-case determination, but have established rules of more general applicability." To illustrate, the court referenced *Schwartz-Torrance*. Id at 329. Later, the *Sears* notes that it did not believe the state legislature, by enacting the Moscone Act (California's version of the Norris-LaGuardia Act) under consideration in that case, "intended the courts to abandon such principles in favor of federal rules, such as the *Babcock & Wilcox* doctrine, which rest upon a statutory and administrative basis not found in California law." Id. at 330. The *Sears'* rationale, therefore, represents the preeminent pronouncement from California's highest court concerning the right of a labor organization (or employees) to access private property to engage in concerted activity. It deserves to be respected as such by federal forums in search of the applicable state law.

This "source" distinction is not academic nitpicking; it will likely become critical in some future case. Even though *Pruneyard* extended constitutional protection for expressive activities at large shopping centers and the like because they constitute the modern-day functional equivalent of a town center, it reassured property owners that its holding did not apply to "modest retail establishments." *Sears* makes no mention of a modest establishment limitation. In fact, the distinctive rationale applied in deciding these two cases suggests that the California Supreme court intentionally alluded to this limitation in *Pruneyard* but not in *Sears. Sears* extends the right of a labor organization to peacefully picket or handbill on private sidewalks adjacent to the entrances of targeted employers because the State's labor law establishes that location as the traditional place for the conduct of such activity. In so doing, the *Sears* court expressly chose not to dilute by distance the impact of area standards picketing, consumer boycott handbilling, and other, lawful "Do Not Patronize messages," all important economic weapons in labor's arsenal, as has been done under federal law by *Babcock & Wilcox*. The size of the establishment has nothing to do with the policy advanced in *Sears*; it does in *Pruneyard*. By way of example, a California court of appeals found in *Trader Joe's Co. v. Progressive Campaigns, Inc*., 73 Cal. App. 4th 425 (1999), that *Pruneyard* did not protect the political petitioning activity there because of the modest establishment limitation. But if a union elects to conduct consumer boycott leafleting, area standards picketing, or 8(b)(7)(C) publicity proviso picketing at that same location, *Sears* may well warrant the opposite outcome.

Furthermore, the recent decision in *Golden Gateway Center v. Golden Gateway Tenants Association*, 111 Cal.Rptr.2d 336 (SO81900, slip op. pp. 7–10) (August 30, 2001), a four-to-three decision by the California Supreme Court declining to extend the *Pruneyard* holding to the hallways of a large apartment complex, illustrates the critical importance several members of the present court (those who would imply a state action limitation for constitutionally protected speech and petition rights) accord to the distinction between rights guaranteed by the state's constitution and rights arising from legislation or the state's common law.[8] Regardless, I find the principles enunci-

Supreme Court had moved steadily toward the protection of the exercise of free speech upon private business property open to the public. Hudgens withdrew from that course, but when it later considered *Pruneyard* on appeal from the state's high court, the U.S. Supreme Court permitted California to go its own way under its State constitution.

[8] In *Gateway*, the opinion by three members of the majority addresses the avalanche of criticism leveled at *Pruneyard* because it construes, without explanation, the free speech and petitioning rights found

ated in West and Lewis requires the conclusion that a Federal forum should look to California Supreme Court's Sears decision, rather than *Pruneyard*, as the source of the state law that applies in cases, such as this, involving the right to engage in concerted labor activities on private property.

The parties disagree as to whether Respondent's time-place-manner rules can serve to license the exclusion of the Union's agents and sympathizers on October 4, because they failed to seek and obtain a permit under Respondent's established process. Although I have earlier rejected the General Counsel's contention that California law generally does not sanction the regulation of concerted activities on private property, I find, for reasons detailed below, that it would have been utterly futile for the Union to have followed Respondent's enormously burdensome application-permit process[9] because its rules contained express provisions barring the very kind of lawful conduct the Union sought to undertake at the Mall.

Specifically, I find Respondent's limitations on the type of activity and the locations where it may be performed in conflict with applicable State law. With respect to the former, section 5.6.2 of Respondent's rules barred consumer boycott activity despite the clear, unmistakable and longstanding holdings in *Sears, Lane,* and *Schwartz-Torrance* permitting exactly this kind of activity. Moreover, the Board, based on a different rationale, has now held that a similar rule represents an impermissible content-based restriction. *Glendale Associates, Ltd.,* above at 28. In view of the *Sears, Lane,* and *Schwartz-Torrance* trilogy, I find Respondent's contention that it can bar labor boycott activity based on the anti-solicitation rule upheld in the *Pasadena Plaza* case without merit.

In addition, I find that the provision in Respondent's rules limiting expressive activities to particular pre-determined locations down the center of the Mall's common areas (only one of which appears to be even remotely near any entrance to the Robinsons-May store) contravenes the explicit holdings in *Sears, Lane,* and *Schwartz-Torrance*. In *Sears*, which followed 6 months after *Pruneyard* the California Supreme Court stated:

> In summary, the decisions of the United States Supreme Court and of this court recognize that the State of California, by statute or by judicial decision, may permit union activity on private premises. Our earlier decision in Schwartz-Torrance and Lane-rulings which have not been overruled or eroded in later cases-established the legality of union picketing on private sidewalks outside a store as a matter of state labor law. [Emphasis added]

The *Schwartz-Torrance* court specifically noted that, if it barred the picketing involved there (Do Not Patronize picketing permitted by 8(b)(7)(C)'s publicity proviso), it would "deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion: the place of the involved business." It declined to do so because the owner's countervailing right "lies in the shadow cast by a property right worn thin by public usage." 61 Cal.2d at 774–775. Moreover, Lane stated that "[I]f we were to hold the particular sidewalk area [adjacent to the picketed store] to be 'off limits' . . . we would be saying that by erecting a 'cordon sanitaire' around its store, [the store] has succeeded in immunizing itself from on-the-spot public criticism." 71 Cal.2d at 876. Contrary to its claim, I find Respondent's published limits on the location for expressive activities clearly establishes an impermissible "cordon sanitaire" with respect to protected, concerted labor activity at the Robinsons-May store and several other significant Mall tenants wholly incompatible with California's labor law as determined by its highest court.

Respondent contends at some length that, as it fashioned its rules based on the majority opinions in California courts of appeal cases, namely, *Pasadena Plaza* and *UNITE*, it had ample justification for expelling the permitless union leafleters on October 4. *Pasadena Plaza* notes this broad standard applies to the regulation of expressive activity: "In sum, like any other time, place and manner regulations, those of a shopping center are constitutionally reasonable only if they are narrowly drawn and limited to the end of promoting specifically identified substantial interests." 193 Cal.App.3d at 1208–1209. In my judgment, the rules adopted by Respondent elevate its own interests to such a degree as to completely negate well-established principles of the State's labor law.

The location limitations approved in both *Pasadena Plaza* and *UNITE* appear peculiar to those cases. Consequently, Respondent's general rule limiting the expressive activity to predesignated common areas provides it with substantial discretion to significantly isolate certain major tenants from consumer boycott, area standards and other protected labor activity. The Mall's location limitations, though perhaps passable for *Pruneyard* protected speech and petitioning activity, would tend to mute this Union's boycott message. Thus, to the extent that Respondent argues that *Pasadena Plaza* and *UNITE* sanction its location limitations for protected concerted labor activity, I reject that claim. Any portion of a state appellate court opinion that can be construed as permitting a rule banishing protected labor activity such as that involved here to a location at some distance from the public entrances maintained at the targeted employer's place of business would be directly at odds with specific holdings—not dicta, specific holdings—of California's highest court in *Sears, Lane*, and *Schwartz-Torrance*. The holdings by California's highest court in those three cases unquestionably trump the extreme interpretations Respondent gives to the ambiguous dicta in these two California courts of appeal cases. As the high court trilogy plainly implies, the identity of the targeted employer will typically determine the appropriate location for concerted labor activities.

Furthermore, *Pasadena Plaza* involved political speech and petitioning that would be of interest to members of the public in their role as citizens rather than as consumers. For that reason, the designation of a specific location in the vicinity of a particular enterprise is of no unusual importance. By contrast, the location of the activities similar to those in this case are of key

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in California's constitution so as to limit private action. Although they would not overturn *Pruneyard*, they would find a state action limitation implicit in the state's constitution. In a separate opinion, the chief justice agreed that *Pruneyard* did not extend to the apartment hallways involved but declined to join them in imposing the broader limitation.

[9] Burdensome may be an understatement. Based on the estimated number of leafleters and the length of the required applications forms, an application package for this event could have approached 170 pp.

importance as the Union's conduct specifically appeals to members of the public in their role as consumers. I perceive this to be a fundamental distinction and, clearly, the California Supreme Court decisions do likewise. Where, as here, California's highest court has specifically declined in *Sears* to follow the identical property access approach found in the Federal rule as expressed in *Babcock & Wilcox*, I find Respondent's application of *Lechmere* in the preamble of its rules misstates controlling California law and calls into question its entire regulatory scheme insofar as it applies to a labor organizations seeking to engage in concerted activity. Even though by property owners may establish reasonable time-place-manner regulations, that right does not amount to a license to neuter *Sears*.

Respondent's rules unquestionably contain traces of *Pasadena Plaza's* language. But it would be misleading to characterize its regulatory scheme as identical to that approved there. Thus, Respondent's rules contain draconian nuances other than those already found in conflict with precedent of the State's highest court that depart significantly from the regulatory scheme *Pasadena Plaza* viewed favorably. For example, it struck down a rule requiring in every case that an individual associated with the applicant accept liability for any damage resulting from the proposed expressive activity because it would tend to unconstitutionally chill the exercise of speech or petitioning rights. However, the court indicated that the mall owner could require an applicant to furnish insurance based on an objective determination that the expressive activity presented a risk. 193 Cal.App.3d at 1218–1219. Here, Respondent's application process puts the cart far ahead of the horse by requiring the disclosure of detailed liability insurance information that most would regard as highly confidential from the applicant as well as each potential participant in advance of any objective risk determination. In my judgment, that requirement would also have a strong tendency to chill the exercise of lawful, concerted activities.

Respondent argues that *Sears, Lane,* and *Schwartz-Torrance* are inapplicable here. Its claim that its elaborate time-place-manner rules are permitted under the *Pasadena Plaza* and *UNITE* decisions is almost an admission that its rules have been formulated without regard to the State's labor law. As noted, *Pasadena Plaza* was not a labor case and *UNITE* seems to eschew the existence of separate State labor law. I agree with the General Counsel's contention that *UNITE* is particularly problematic. Although it involved consumer boycott activity, the *UNITE* relied solely on *Pruneyard* (a political expressive activity case), failed to discuss *Sears* (a labor boycott case) at all, and characterizes *Schwartz-Torrance* (a labor publicity proviso case) as being of "dubious" value following *Pruneyard* despite the high court's later, contrary statement in *Sears*.[10] Because *Sears* establishes a bright-line rule concerning the type of labor activity and the places, whether public or private, where a labor organization may engage in the peaceful pursuit of its collective bargaining objectives, Respondent lacked the right to establish and maintain a conflicting regulatory scheme.

Having concluded that Respondent's rules barred activity expressly permitted by California law and that it would have been futile for the Union to seek admittance to the Mall for the purpose of engaging in its protected leafleting, I find Respondent failed to meet its burden of establishing that it had a right under California law to exclude the Union's leafleters from its property on October 4. I find, therefore, that Respondent violated Section 8(a)(1) by prohibiting access to the Union's leafleters under a threat of civil and criminal trespass action. In view of this finding, I deem it unnecessary to consider General Counsel's alternate contention that particular rules maintained by Respondent violate the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. By prohibiting access to the Union's leafleters in order to engage in peaceful consumer boycott handbilling on the sidewalk in the vicinity of the entrances to the Robinsons-May department store at the Fashion Valley Shopping Center in San Diego, California, on October 4, 1998, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

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

[Recommended Order omitted from publication.]

[10] In *Indio Grocery*, the Board referred to *Sears'* statement that Lane had not been overruled. Actually, the statement in *Sears* refers to *Schwartz-Torrance* as well as *Lane*.