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Glendale Associates, Ltd., Glendale II Associates Limited Partnership, Glendale Orbach's Associates, and Donahue Schriber *and* National Association of Broadcast Employees and Technicians, the Broadcasting and Cable Television Workers Sector of the Communication Workers of America, AFL–CIO. Case 31–CA–22759

August 23, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On March 4, 1999, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel and the Respondents filed exceptions and supporting briefs, the General Counsel filed a brief in support of portions of the judge's decision, the Respondent filed a brief in opposition to the General Counsel's exceptions, and the General Counsel filed a reply 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, and conclusions and to adopt the judge's recommended Order as modified below.[1]

For the reasons set forth below, we adopt the judge's finding that the Respondents violated Section 8(a)(1) by maintaining and enforcing a rule that prohibited union handbillers from identifying by name any tenant at the Respondents' facility. We also adopt the judge's finding that the Respondents did not violate the Act by maintaining another rule requiring the Union to furnish in advance the names of all prospective handbillers.

I. THE RELEVANT FACTS

The Respondents own and operate a large retail shopping center in Glendale, California, known as the Glendale Galleria (Galleria). As set forth more fully by the judge, the Respondents promulgated comprehensive rules and guidelines applicable to all groups seeking to engage in political or other noncommercial activity at the Galleria. The Respondents did so in response to the decision of the Supreme Court of California in *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), holding that the free speech and petition provisions of the California state constitution protected the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner regulations by the property owner.[2]

In spring of 1997,[3] union officials, including employees of ABC, Inc., handbilled at the Galleria in front of or near the Disney Store, Inc. (Disney Store), a retail tenant of the Galleria. The Union was then engaged in a labor dispute with ABC, Inc., which is a wholly owned subsidiary of Disney Enterprises, Inc.[4] The purpose of the handbilling was to apply pressure to ABC, Inc., and to its parent company, in order to facilitate the successful resolution of collective-bargaining negotiations with ABC, Inc.[5] After commencing handbilling, union officials were informed that the Respondents maintained rules regulating handbilling at the Galleria and received an application and a packet of materials explaining what was necessary for compliance.

On June 2, the Union submitted the application to the Respondents and was subsequently given permission to handbill on June 7, subject to curing certain deficiencies in the application. These deficiencies included the failure to furnish to the Respondents the names of those expected to participate in the handbilling and the failure to remove reference to the "Disney Store" on the handbills. Thereafter, the Union complied with the request to identify by name likely handbillers, but declined to remove from the handbills' reference to the "Disney Store." In light of the failure to comply with the rules, the Respondents asked the union handbillers to leave the Galleria or be subject to arrest for illegal trespass on private property. Union handbilling continued on that date, however, and the Respondents did not, in fact, contact police officials.

[1] No exceptions were filed to the judge's dismissal of Respondent Glendale Orbach's Associates from the proceeding on jurisdictional grounds.

[2] In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the United States Supreme Court upheld California's right under its state constitution to restrict the property rights of shopping centers.

[3] All dates are 1997 unless noted otherwise.

[4] The Disney Store is also a separately incorporated wholly owned subsidiary of Disney Enterprises, Inc.

[5] The handbill at issue refers both to the "Walt Disney Company" and the "Disney Store," and states, inter alia, that "Disney is demanding take-backs from workers" in negotiations with ABC and urges that customers of Disney "should buy their toys elsewhere next time." Whether the handbill is considered a form of consumer information handbilling as to the Union's dispute with ABC, Inc., consumer boycott handbilling, or even a "less-favored" form of secondary handbilling, it is clearly protected under Sec. 7 of the Act. *Oakland Mall*, 316 NLRB 1160, 1163 at fn. 14 (1995), enfd. 74 F.3d 292 (D.C. Cir. 1996). See also *Edward J. DeBartolo Corp. v. Florida Building and Construction Trades Council*, 485 U.S. 568 (1988)(Act does not proscribe peaceful handbilling urging even a total consumer boycott of neutral employers).

II. ANALYSIS

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 violates 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. 187 F.3d 1080 (9th Cir. 1999).[6]

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 638; *Johnson & Hardin Co.*, 305 NLRB 690 (1991).

As discussed, California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner regulations by the property owner. As the judge found here, removal of the reference to the "Disney Store" on the union's handbills appears to be essentially a content-based restriction and not a "time, place, and manner" restriction permitted under State law.[7] Indeed, there is no evidence in this record explaining how application of the Respondents' rule to the handbilling at issue serves to promote the kind of time, place, and manner restrictions that would pass muster under California law.[8] As a practical matter, it appears that the purpose and effect of the rule, as applied here, was simply to shield the Respondents' tenants, such as the Disney Store, from being the subject of otherwise lawful handbilling.[9] Accordingly, we find, in agreement with the judge, that the Respondent violated Section 8(a)(1) by maintaining and enforcing a rule prohibiting activities which identify by name the center owner, manager, or any tenant of the center and by threatening to call the police to enforce that rule.[10]

In agreement with the judge, however, we find that the Respondents' rule requiring advance identification of handbillers by name does not violate Section 8(a)(1). In contrast to the content-based rule prohibiting identification of a tenant on the handbill, the rule requiring advance notice of prospective handbillers is consistent with legitimate time, place, and manner purposes under State law. Thus, the rule allows indentification of persons who may previously have caused injury or damage to the shopping center and facilitates verification, for liability purposes, of the identity of those authorized by the applicant to handbill.[11] Indeed, the identical rule at issue here was upheld as a reasonable time, place, and manner regulation under California law. *Union of Needletrades, Industrial & Textile Employees [UNITE] v. the Superior Court of Los Angeles County*, 56 Cal. App.4th 996, 155 LRRM 3047 (1997)(finding it proper for the shopping centers to learn in advance the identity of the participants because this is information which case law had held can be taken into consideration in deciding whether to require insurance). In these circumstances, we agree with

[6] Accordingly, to the extent the judge's comments regarding the applicability of *Lechmere* suggest that *Lechmere* controls regardless of state law limitations on the employer's property rights, we do not adopt them.

[7] In *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d supra at 910, the Supreme Court of California endorsed the right to implement time, place, and manner rules to assure that the activities at issue "do not interfere with normal business operations [and] would not markedly dilute [the owner's] property rights." The United States Supreme Court has also endorsed time, place, and manner restrictions under the First Amendment "provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[8] In *Union of Needletrades, Industrial & Textile Employees [UNITE] v. the Superior Court of Los Angeles County*, 56 Cal. App. 4th 996, 155 LRRM 3047 (1997), the court of appeals indicated that it shared the trial court's concern as to the constitutionality of potential content-based regulations similar to the present case; however, the court declined to rule on the issue because it was not adequately raised before the trial court.

[9] The Respondent's rules expressly permit communicative "labor activities" at the Galleria when there is a dispute "with the Center owner, or with any tenant in the Center." Accordingly, it appears that, under its rules, the Respondents would permit consumer handbilling naming the "Disney Store" in furtherance of a primary labor dispute but not as to lawful secondary consumer handbilling. Drawing a distinction between forms of protected activities reinforces that the rule at issue is content based.

[10] In so finding, we do not rely on the judge's comments in section III,B,3,b, of his decision regarding "general theoretical" rights of the Respondents under State law to exclude persons from their property or his finding that the Respondents are "rebuttably presumed" to be within their rights to do so. As noted at fn. 6 above, we also do not rely on the judge's discussion regarding the Respondents' rights under *Lechmere*.

We find merit to the Respondent's contention that the judge's order is overly broad to the extent that it requires the Respondent to cease and desist from maintaining, and to affirmatively delete and expunge, rules and guidelines prohibiting activities that are not protected under the Act. Accordingly, we shall modify the judge's recommended Order and limit the remedy to the intrusion on Sec. 7 rights.

[11] We agree with the judge that the Respondents' willingness to accept last-minute additions for authorized handbillers does not render invalid the advance notice requirements.

the judge that the Respondents properly exercised its entitlement under State law to maintain and apply a reasonable time, place, and manner regulation. It follows that the Respondents did not violate the Act by requiring advance notice of the identity of prospective handbillers.[12]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Glendale Associates, Ltd., Glendale II Associates Limited Partnership, and Donahue Schriber, Glendale, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(a) Promulgating, maintaining, and enforcing by threats to call the police a rule at Glendale Galleria prohibiting handbilling or other expressive activities protected by Section 7 of the National Labor Relations Act which identify by name the center owner, manager or any tenant of the center."

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

"(a) Modify its Rules for Noncommercial use of Common Areas, its Internal Policies and Guidelines for Noncommercial Use of Common Areas of Glendale Galleria and any other document within the custody and control of Galleria where such rules may be contained, to permit handbilling and other such expressive activities protected under Section 7 of the Act, which identify by name the center owner, manager, or any tenant of the center."

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

Dated, Washington, D.C. August 23, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

WE WILL NOT promulgate, maintain, nor enforce by threats to call the police any rule prohibiting handbilling or other expressive activities protected by Section 7 of the National Labor Relations Act which identify by name, the center owner, manager, or any tenant of the 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 for Noncommercial Use of Common Areas, our Internal Policies & Guidelines for Noncommercial Use of Common Areas of Glendale Galleria, and any other document within our custody and control of Galleria where such rule may be contained to permit handbilling and other such expressive activities protected under Section 7 of the Act, which identify by name the center owner, manager, or any tenant of the center.

GLENDALE ASSOCIATES, LTD., GLENDALE II ASSOCIATES LIMITED PARTNERSHIP, AND DONAHUE SCHRIBER

[12] The General Counsel contends that the private property right asserted by the Respondents is, at best, an ancillary one and must "yield" to employees' Sec. 7 rights here. We decline to engage in a balancing test with regard to the Respondent's advance-notice rule. Once the Respondents establish a legitimate time, place and manner regulation pursuant to state law, then "the law that creates and defines the employer's property rights" allows them to exclude the non-complying individual or party. *Bristol Farms*, 311 NLRB at 438. And, under prevailing Board law, it is inappropriate to engage in the kind of balancing test that the General Counsel seeks in such circumstances. See *Oakland Mall*, supra; *Leslie Homes*, 316 NLRB 123 (1995). Member Truesdale dissented in the foregoing cases and Member Liebman did not participate. However, for institutional reasons, they shall apply that precedent as controlling here.

Alice Garfield, Atty., for the General Counsel.
Thomas J. Leanse and Jamie Rudman, Attys. (*Katten, Muchin & Zavis*), of Los Angeles, California, for the Respondent.
Gena M. Stinett, NABET, CWA, of Burbank, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge: This case was tried before me at Los Angeles, California, on November 2, 1998,[1] pursuant to a consolidated amended complaint issued by the Regional Director for the National Labor Relations Board for Region 31 on June 30, 1998, and which is based upon charges filed by National Association of Broadcast Employees and Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, AFL–CIO (the Union), on June 16 and September 19 (original and first-amended charge in 31–CA–22759). The complaint alleges that Glendale Associates, Ltd., Glendale II Associates Limited Partnership, Glendale Orbach's Associates, and Donahue Schriber (the Respondents) have engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended.

Issue

Whether Respondents violated Section 8(a)(1) of the Act by maintaining and enforcing certain rules for noncommercial use of common areas, purporting to regulate the solicitations and distribution of materials to members of the public present at an indoor shopping mall:

(1) Rule prohibiting the naming of any [mall] tenant in printed materials;

(2) Rule requiring the naming in advance of the noncommercialnoncommercial expressive activity in question, all persons who will or may engage in that activity.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel and Respondents.[2]

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS

For all times material to this case, Glendale Associates, Ltd., a California limited partnership; Glendale II Associates, a California partnership, and Glendale Orbach's Associates, a California general partnership, each owned a separate portion of a retail shopping center known by the fictitious business name, "Glendale Galleria," located in Glendale, California. In addition, the three entities named above employed Donahue Schriber, a management company with an office and place of business located in Newport Beach, California, to manage the operations of the Galleria.

During the 12-month period ending December 31, each Respondent, in conducting its respective business operations, purchased and received within the State of California, goods or services valued in excess of $50,000 from other enterprises located within the State of California, each of which other enterprises had received these goods in substantially the same form directly from points outside the State of California. During the same 12-month period, each Respondent, in conducting its respective business operations, annually derives gross revenues in excess of $500,000. Accordingly, with the exception of Glendale Orbach's Associates, all other Respondents admit and I find that for all times material to this case, all Respondents except for Glendale Orbach's Associates, have been employers engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondents admit, and I find that National Association of Broadcast Employees and Technicians, The Broadcasting and Cable Television Workers Sector of the Communication Workers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1.

This case involves the distribution of certain leaflets in an enclosed shopping center by representatives of the Union. General Counsel challenges certain of the rules which regulate this activity. Prior to hearing, a companion case, 31–CA–23189, involving the same parties and arising out of the same facts as the present case, was settled, and severed from the consolidated complaint. For the remaining case, the essential facts, if not all the facts, are undisputed.

The events in question, occurred at the Glendale Galleria (Galleria), a retail shopping center, located in Glendale, California. Consisting of 1.3 million square feet under roof, Galleria contains five major department stores and about 60 other stores on two levels (GC Exh. 2). It has 13 entrances with signs on each welcoming customers and announcing general bans on bicycles, radios, roller skates, and "soliciting." At various locations in Galleria, there are directories containing locations of the stores and the management and security offices. As of June, Galleria is open 10 a.m.–9 p.m. (Monday–Friday), 10 a.m.– 8 p.m. (Saturday), and 11 a.m.–7 p.m. (Sunday).

Different portions of Galleria are owned by Respondents, Glendale Associates, Ltd., Glendale II Associates Limited Partnership, and Glendale Orbach's Associates. Together they employ a management company, Respondent Donahue Schriber. General Manager of Galleria is Cynthia Chong who did not testify. In addition to employing a general manager, Galleria employed 40–45 security officers in June, with about 10–12 officers working on the property at any given time. The Galleria director of security in June was Greg Flosty, who testi-

[1] All dates herein refer to 1997 unless otherwise indicated.

[2] The transcript prepared for this case is of such poor quality, that it must be noted for the record. The garbled syntax, misspellings, and wrong speakers cited are an embarrassment to the NLRB and to all involved in this hearing.

fied as Respondents' witness. The current Galleria director of operations, since October 1996 and former Galleria director of security is Michael Cross, who also testified as Respondents' witness.

One of the tenants of Galleria is the Disney Store, Inc., a California corporation, which store is located on the lower level in a segment of Galleria owned by Glendale II Associates Limited Partnership (Tr. 17, R. Exh. 5). Two interior views of Galleria with a focus on the Disney Store location from different perspectives are contained in the record (R. Exhs. 6 and 7). The parties to the case stipulated and agreed that the Disney Store is a separately incorporated wholly owned subsidiary of Disney Enterprises, Inc., hereinafter called DEP, a California corporation. DEP, in turn, is a wholly owned subsidiary of the Walt Disney Company, hereinafter called Disney, a Delaware corporation.

ABC, Inc., hereinafter called ABC, and formally known as Capitol Cities/ABC, Inc. is a New York corporation and a wholly owned subsidiary of DEP. DEP acquired ABC on or about February 9, 1999. Neither ABC nor the Disney Store is a parent or subsidiary of the other (Tr. 17).

2.

Sometime in 1991, after experiencing problems with certain groups wishing to use Galleria property for political or other noncommercial purposes, officials of Galleria formulated "Rules For Noncommercial use of Common Areas" hereafter Rules (R. Exh. 1). These rules are interpreted with the guidance of a second document called "Internal Policies & Guidelines for Noncommercial Use of Common Areas of Glendale Galleria" (R. Exh. 2) (The second document is sometimes referred to as "in-house rules.")

General Counsel's sole witness was Gena Stinett, president of Local 57 of the Union since July 1994, and currently on a leave of absence from her job as a video tape editor for ABC. The Union and ABC have a collective-bargaining relationship for a bargaining unit which includes video tape editors. The last labor agreement expired on March 31 and as of the date of hearing, a new agreement had not been reached.[3] According to Stinett, on May 10, she and other members of Local 57 were handbilling inside Galleria in front of or near the Disney store. The purpose of the handbilling was to apply pressure to the Disney store's parent company and to ABC so the Union could obtain a new labor agreement to their liking. Sometime after Stinett and the others began their activity, they encountered Cross, who informed them of the Rules which regulated handbilling and other types of noncommercial activity. Stinett requested and received a packet of materials necessary for compliance. The materials included,

(1) Free Speech Rights in California Shopping Centers. This single page document purported to state briefly the free speech rights with citations to U.S. Supreme Court and certain California state court cases (GC Exh. 4(a)).

(2) Rules for Noncommercial Use of Common Areas (GC Exh. 4(b)) with attached maps of Galleria (GC Exh. 2).

(3) Application for Access to Glendale Galleria For Noncommercial Expressive Activity.

This document informs the user, "The information contained in this application will be kept confidential and will only be used by center management in furtherance of its business activities" (GC Exh. 4(c)).

(4) Notification Form—This document tells the applicant of Galleria's response to the application (GC Exh. 4(d)).

(5) Indemnity Agreement—This document asks for information on a specific person who will be responsible for the activity in question (GC Exh. 4(e)).

The Union's completed application dated 6-2–97 and Indemnity Agreement are contained in the record (GC Exh. 5). Also part of the same exhibit is the notification form indicating that the Union was given permission to handbill on the date sought, Saturday, June 7, subject to the curing of certain claimed deficiencies in the application:

(1) Names of participants must be explicitly identified. Stinett had provided her own name, several other names and then wrote "others." On June 7, Flosty asked her to line out "others" and supply additional names of those persons expected to participate. Stinett complied and added three additional names.

(2) Indemnity Agreement must identify an individual. The original agreement dated 6–2–97 had "NABET-CWA Local 57" listed as name of individual applicant, and was signed by Daniel Mahoney, Local 57's Secretary-Treasurer (GC Exh. 8). Because this was felt to be out of compliance, Stinett executed a second Indemnity Agreement, dated June 6, wherein she supplied her own name as the Applicant and signed the document as President of NABET-CWA, Local 57 (GC Exh. 5).

Finally (3) Reference to the "Disney Store" on the Flyer must be removed. This was not done and the flyer distributed by Stinett and others on June 7 is contained in the record:

[3] According to recent news reports, the Union and ABC have resolved a side issue which had resulted in a nationwide lock-out of bargaining unit employees.

Owes You $5

FEDERAL RESERVE NOTE
THE UNITED STATES OF AMERICA
THIS NOTE IS
DISNEY CORPORATE WELFARE
E 74351609 B
WASHINGTON, D.C.
abc
abc
E 74351609 B
Goofy
Mickey Mouse
FIVE DOLLARS

With the flyer, the handbiller also distributed a postcard to be filled out by sympathetic recipients with the person's name and address and then mailed to the Union, with a preprinted message to certain legislators in Washington, D.C. (GC Exh. 6(b).) This final issue could not be resolved by the parties. On June 6, Flosty spoke to Stinett by phone and offered her the option of lining out the name of the Disney Store on the flyer but she refused.

As part of the service provided to applicants, Galleria employees set up a table and chair in front of or very nearby the Disney Store. This location desired by Stinett happened to be one of several, so-called "designated areas" located at various points in Galleria and used for noncommercial activity. The policy is to allow an applicant to select any designated area to perform activities under the Rules, so long as no other group has selected it first and so long as it is otherwise available. Under the Rules, at any given time, only three participants are permitted to handbill, and they may stand or sit at the table as they choose. On June 7, about 10 a.m., Stinett found the table and chairs set up in the designated area requested. A few minutes later, Flosty arrived and he and Stinett agreed on the corrections of "others" and of the indemnity agreement. However, when Flosty noted that the Disney name had not been deleted or lined out in the flyer, he stated Stinett and Neal Noorlag, General Counsel's rebuttal witness and fellow union handbiller, were not in compliance with the Rules. Accordingly, Flosty ordered them to leave Galleria immediately, or be subject to arrest for illegal trespass. Stinett refused to leave and continued to leaflet until about 2p.m. During the handbilling, various other union members assisted in the handbilling arriving and leaving at various times during the day and continuing the activity until about 4p.m. For unknown reasons, these other individuals failed to sign-in on a sheet (GC Exh. 3) brought to the table for that purpose, shortly after Stinett began handbilling. As to Flosty's threat to call the policy, he never did so. Instead he left Galleria shortly after speaking to Stinett.

B. Analysis and Conclusions

1. Jurisdictional Issue Regarding Glendale Orbach's Associates

During the hearing, Respondents argued that the Board lacked jurisdiction over one of the four Respondents, Glendale Orbach's Associates, on the grounds that it has no employees. Without objection, I admitted in support of that contention, an "Offer of Proof of Patrick S. Donahue" (R. Exh. 12). That document reflects that Donahue is a General Partner of Respondent's Glendale Orbach's Associates and that he would testify, if called as a witness, that Respondent Glendale Orbach's Associates does not have, and has never had, any employees.

Not only was there no objection to Respondent Exhibit 12 (Tr. 89), but in fact, General Counsel stipulated to the document (Tr. 106), meaning that she agreed that if Donahue had been called as a witness, he would have testified as indicated in Respondent exhibit 12. Further, General Counsel candidly represented at hearing that she had no rebuttal to that evidence (Tr. 106). Accordingly, I find that Respondent Glendale Orbach's Associates does not have, and has never had, any employees.

General Counsel refused at hearing to dismiss Respondent Glendale Orbach's Associates from the hearing on the grounds that

> simply because I have no evidence to the contrary that they have no employees that doesn't release them from liability. Because it is a joint enterprise and they operate . . . and to the public they are one entity, Glendale Galleria and the reason that I wouldn't want to dismiss them from the complaint is that I would like to make the argument in brief that they are liable—even though they are not the employer, they are liable for the acts of the Mall—it is a joint enterprise. [Tr. 106]

In their brief, pages 15–16, Respondents renew their argument that Glendale Orbach's Associates should be dismissed. In support of their argument, they cite the case of *Operating Engineers Local 487 Health & Welfare Trust Fund*, 308 NLRB 805 (1992). There the Board stated at 807

> the "ordinary meaning" of "employer" does not include an entity that has no employees. Rather, the plain meaning of "employer" is one who employs employees to work for wages and salaries. Indeed, we believe it would be "far-fetched," and therefore contrary to congressional intent, to hold that an "employer" need not employ any employees.

At page 18, footnote 18 of her brief, General Counsel makes a rather brief argument, first again conceding the lack of evidence showing that Glendale Orbach's Associates has any employees. Then, it is alleged without citations to the record, that Respondents operate the shopping center as a single, integrated business enterprise. I have read the case of *G.M. Trimmings, Inc*., 279 NLRB 890 (1986), cited by General Counsel, but conclude it does not apply to the present case because the evidence does not support a single or joint employer theory and neither concept was litigated in this case. Therefore, I adopt the argument advanced by Respondents above.

In further support of Respondents' argument that jurisdiction over Glendale Orbach's Associates does not exist, I note that the parties apparently agreed to delete Glendale Orbach's Associates as a Respondent in the Settlement Agreement of Case 31–CA–23189 and signified their agreement by lining out the name of said Respondent and by the opposing attorneys apparently initialing the deletion. I find that this fact supports Respondents' contention advanced here because it appears General Counsel conceded the issue in the related case.[4] For the reasons stated above, I will dismiss Glendale Orbach's Associates from the case on the grounds that the Board lacks jurisdiction.

[4] At p. 85 of Tr., I inquired of the parties whether anyone thought the Settlement Agreement in Case 31–CA–23189 should be made a part of the record. No one did. Now because I think it should be, on my own motion, I reopen the record and admit the Settlement Agreement as ALJ Exh. 1 and reclose the record.

2. General Counsel's Motion to Strike Portions of Respondents' Brief to the Administrative Law Judge

General Counsel has moved to strike Exhibit E to Respondents' brief which is an Advice Memorandum pertaining to another case (31–CA–23189). In support thereof, General Counsel contends that said Advice Memorandum is not part of the record in this proceeding, that an Advice Memorandum does not constitute Board law and has never been accepted legal authority, and finally, the facts in the Advice Memorandum are distinguishable from the facts in the present case. Respondents opposes the Motion.

I agree with General Counsel's argument that Advice Memoranda do not constitute Board law. *Geske & Sons*, 317 NLRB 28, JD at 56 (1995), citing *Kysor Industrial Corp.* 307 NLRB 598, 602 fn. 4 (1992). Various State court decisions appended to Respondents' brief, also do not constitute Board law and also are outside the record, but General Counsel does not move to strike them. The State court cases are appended to the brief, as a courtesy to the undersigned who does not have ready access to State court reports. All such legal authorities will be carefully considered in due course. As a matter of discretion, I decline to strike Respondents' reference to the Advice Memorandum because said document may yield legal authorities or factual arguments which may relate to one or more issues in the present case. In addition, it may otherwise be helpful to me or to a reviewing body. Cf. *Southwestern Bell Telephone Co.*, 303 NLRB 87 fn. 2 (1991).

3. The Challenged Rules

a.

A long history of cases manifests a hierarchy among Section 7 rights, with organizational rights asserted by a particular employer's own employees being the strongest, the interests of nonemployees in organizing an employer's employees being somewhat weaker, and the interests of uninvited visitors in undertaking area standards activity, or otherwise attempting to communicate with an employer's customers, being weaker still. Thus under the Section 7 hierarchy of protected activity imposed by the Supreme Court, nonemployee activity in which the targeted audience was not (an employer's) employees but its customers "warrants even less protection then non-employee organizational activity." *United Food & Commercial Workers Local 880 v. NLRB*, 74 F.3d 292, 297–298 (D.C. Cir. 1996), cert. denied 117 S. Ct. 52 (1996), citing *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994).[5]

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992), the Supreme Court has created a bright line rule: "An employer cannot be compelled to allow distribution of union literature by non-employee organizers on his property, absent evidence that satisfies one narrow exception to accommodate workers who are truly inaccessible." *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992). This rule applies with special force where the handbills are aimed at the general public. Id. 997–998.

In *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1212 (6th Cir. 1997), the court discussed and distinguished an earlier case which it had decided, *Cleveland Real Estate Partners (CREP) v. NLRB*, 95 F.3d 457 (6th Cir. 1996). In *CREP*, the Court held that it was permissible for the owner of a private retail shopping mall to preclude union representatives from distributing handbills directed at shoppers in order to discourage them from patronizing nonunion retailers, even though the owner permitted handbilling and solicitation by nonunion permittees in the mall. While there is no issue in the instant case of disparate application of the Rules, [6] the court's explication of CREP in the later case is instructive. At page 1213 of *Meijer, Inc.*, the court explained:

> First, as a general rule an "owner of private property . . . need not . . . permit the distribution of union literature on its property." Second, "there is a substantial difference between the rights of employees and [that] of non-employees with respect to the distribution of union literature on privately owned property." Third, the non-employee union representatives were engaged in non-organizational informational picketing directed at the general public."

The court in *Meijer, Inc.* went on to conclude that because the three considerations discussed above were not present in the case under review, the holding in *CREP* did not apply and the Board's decision was enforced.

By contrast, the three considerations recited above and much more are present here. Thus, Respondents did not seek to ban the distribution of union literature, as it may have a right to do, but merely to regulate it with reasonable time, place, and manner rules. The issue presented here involves the rights of nonemployees of the Disney Store. All such participants who sought access to Galleria pursuant to the Rules in question were employees of ABC. The relationship between the Disney Store and ABC, such as it is, has been described above and need not be repeated. It suffices to say that I find that Stinett, Norlag, and all other participants in the handbilling were nonemployees of the Disney Store. Finally, the nonorganizational activities here were directed at the general public.

General Counsel does not challenge the overall regulatory scheme, or the avowed purpose underlying the Rules as being pretextual. Among the provisions of the Rules not challenged are the requirements of applicants to use designated areas, to sign in/sign out and to refrain from any noncommercial activity during a limited number of so-called "peak shopping days," e.g., Christmas season.

The Rules specifically provide that they do no apply to a "labor dispute," as defined under California law (R. Exh. 2, pp. 1–2, fn. 4).[7] During the hearing no party contended that the ac-

[5] Secondary consumer boycott handbilling is included among the less favored Sec. 7 activities. *Oakland Mall Ltd.*, 316 NLRB 1160, 1163 (1995), enfd. 74 F.3d 292 (D.C. Cir. 1996), cert. denied 117 S. Ct. 153 (1996).

[6] Compare *Price Chopper*, 325 NLRB 186 (1997).

[7] The applicable definition of "labor dispute"

> . . . involves persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers of employees. A "labor dispute" further includes any controversy concerning terms

tivities in question constituted a "labor dispute" as defined in the Internal Policies & Guidelines (R. Exh. 2). This "safe harbor" for a labor dispute tends to undermine General Counsel's case. See *Riesbeck Food Markets v. NLRB*, 91 F.3d 132 (4th Cir. 1996).

The discussion above includes citations to several decisions of courts of appeals which failed to enforce Board orders. I acknowledge that where conflict between a Board holding and a court of appeals exists, I am bound by the Board's holding. However, I am entitled to interpret the Supreme Court's *Lechmere* decision which is binding on both the Board and courts of appeals. Moreover, the material collected from the cited cases above is not generally at odds with Board law. For example, in *Oakland Mall Ltd*., supra, 316 NLRB at 1162–1163, the Board held that, based on *Lechmere*, an employer may prohibit nonemployees from gaining access to its private property to engage in area standards or consumer boycott activities. The Board went on to state that no balancing of employee and employer rights is appropriate unless the union can first demonstrate that it lacks reasonable access to the employer's customers outside the employer's property. See also *Leslie Homes*, 316 NLRB 123 (1995), and *Galleria Joint Venture*, 317 NLRB 1147 (1995). I find that no such showing was made here.

b.

In her brief, General Counsel claims that *Lechmere* does not apply; rather, I must look to State law to determine the rights of the parties to this case. To a certain extent, Respondents seem to agree with General Counsel's analytical framework (brief, pp. 19, 27 et. seq.). I do not agree and find that *Lechmere* is the primary authority to determine the rights of the parties here. To be sure, in *Farm Fresh, Inc*., 326 NLRB 997 at 1001 (1998), the Board cited *Indio Grocery Outlet*, 323 NLRB 1138 (1997), for the proposition that, in cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representatives, an interest which entitled it to exclude individuals from the property. To determine the property interest,(the Board) looks to the law that created and defined the Respondent's property interest which is State, rather than Federal law. In *Farm Fresh, Inc*., the Board looked to the law of the State of Virginia and concluded that respondent had acted properly by removing union agents from sidewalks in front of four stores, and improperly with respect to three other stores.

I note that the union organizers in *Farm Fresh, Inc*. were attempting to organize the Respondent's employees, unlike the instant case, where union representatives were attempting to reach the public. In addition, there was no time, place, and manner rules in issue. Notwithstanding all of this, I assume arguendo, that a discussion of California State law is required under the facts and circumstances of the present case. General Counsel directs my attention to two cases, *Bristol Farms, Inc*., 311 NLRB 437 (1993), and *Payless Drug Stores Northwest, Inc*., 311 NLRB 678 (1993).

In *Payless Drug Stores*, 311 NLRB at 679, the Board explained that in *Bristol Farms*, the Board looked to the law of the State of California, to establish the extent of the respondent's property rights and thus whether respondent had the requisite property interest to support a property-rights defense. The Board went on to note that a California Supreme Court decision had held that a shopping center's property right was limited by the free speech and petition provisions of the California Constitution. The Board then noted the U.S. Supreme Court's affirmance of that California Supreme Court decision in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). Finally, the Board noted that after *Pruneyard Shopping Center*, another California appellate court case extended Pruneyard to permit the distribution of union handbills at a shopping center. *Northern California Newspaper Organizing Committee v. Solano Associates*, 239 Cal. Rptr. 227 (Cal. App. 1 Dist., 1987).

Applying the *Payless Drug Stores* case to the present case, I first note fn. 3 (p. 679) of the Board's decision where the Board acknowledged that under *Pruneyard*, a shopping center could adopt reasonable time, place, and manner rules concerning the exercise of free speech at the shopping center. I find generally that the rules in question here are reasonable time, place, and manner rules. Based on *Lechmere*, *Oakland Mall*, and other authorities, there is at least a strong presumption of validity which General counsel must overcome to prevail.

In addition, I adopt Respondents' argument, brief, page 26, that as owners of Galleria, Respondents herein have a general theoretical right under California law to exclude persons from their property. *Allred v. Harris*, 14 Cal. App. 4th 1386 (1993). The right of owners to exclude persons under California law may be greater than that of lessees, but this question need not be addressed. I find only that Respondents here exercised their private property rights in light of the reasonable time, place, and manner rules referred to above and they are rebuttably presumed to be within their rights to do so.

c.

I turn finally to the two rules under challenge and begin with Galleria's Rule H requiring applicants to provide in advance the names of all persons who are expected to participate in the noncommercial activity. The rationale for providing the names of participants relates to potential liability problems for injuries which may occur during the activity and, so that participants with a history or record of misconduct can be monitored closely or excluded altogether. However, Cross testified that Galleria will accept last-minute additions to the list of participants even though this practice undercuts a portion of the purported rationale, since the last minute furnishing of names does not generally permit a record check of the names for past trouble. However, these last-minute names must be verified by the responsible person who submitted the application. I am unwilling to find that the relaxed enforcement of this rule somehow uncuts its strong presumption of validity under *Pruneyard*. I note the recent case of *Buckley v. American Constitutional Law Founda-*

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and conditions of employment, or concerning the association or representation of persons in negotiating, filing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the relationship of employer and employee. [Alleged source of definition in California law not stated.]

tion, Inc., 525 U.S.182, (1999), where the court held that under the First Amendment to the US Constitution, initiative petition circulators need not be registered voters, wear identification badges with their names nor comply with certain other rules relating to reporting requirements. In its decision, the Court recognized the State's "strong interest in policing lawbreakers among petition circulators." The interest in reaching law violators, however, the Court stated, "is served by the requirement, upheld below, that each circulator submit an affidavit" to authorities setting out, among several particulars, the [circulator's name] and address at which he or she resides. . . ." The affidavit sufficed and rendered other requirements overly burdensome. I find this decision supports Respondents' defense here.

More to the point is the case of *Union of Needletrades, Industrial & Textile Employees [UNITE] v. the Superior Court of Los Angeles County*, 56 Cal. App. 4th 996 (1997). In that case, the court affirmed a trial court's ruling refusing to issue a preliminary injunction sought by a labor union to bar enforcement of certain time, place and manner rules maintained by six shopping malls. The labor union sought access in order to publicize its labor dispute with a specific retailer.

General Counsel, reverses field at this point from her position earlier, brief at 6-7, where she contended that property rights are generally within the purview of State rather than Federal law and therefore, she says, I must look to the law of California. At page 12 of General Counsel's brief, I am told to ignore the *UNITE* case because the Board is not bound by decisions of state courts, because the California court did not consider the issues in the context of Section 7 rights and because although the California court "examined the identical rules of Respondents, the facts were different as was the nature of the proceeding."

General Counsel does not satisfactorily explain why this case does not explicate California State law on the issue of Galleria's property rights. Rather the argument advanced here seems inconsistent and even contradictory to that advanced earlier. I find that the *UNITE* case is a strong factor in support of Respondents' defense of its rules requiring the identification of participants. See also *Farm Fresh, Inc*., supra, 326 NLRB 997 at 1001. For the reasons cited above, I will recommend that this segment of the case be dismissed.[8]

Finally, I address the rules prohibiting the naming of any tenant in handbills distributed to Galleria's customers–unless there be a labor dispute in effect rendering these rules not applicable. Both sides agree that *UNITE* did not address the rule prohibiting identification of a tenant by name, because the issue had not been properly raised below. I have expressed the view that under *Lechmere*, Galleria may have the right to bar the nonemployee union organizer completely absent a showing of nonaccessibility. However, in its wisdom, Galleria has seen fit to formulate certain rules regulating union demonstrators and others. These rules must past muster on their face and as applied. To find them lacking, I too reverse field.

In the instant case, the union participants were permitted to use a designated area in front of or very near the Disney Store. This was pure coincidence and other union handbillers in other cases could be assigned a designated area much further from a targeted store. The handbill in this case reads in pertinent part, "Hey Mouseketeer, Before you shop in the Disney Store, you should know what Disney is doing with your money." (GC Exhs. 6(a), (b)). If the handbills were not allowed to name the Disney Store, many people, particularly immigrants, who did not grow up with the pervasive Disney influence, might be uncertain of what the handbill was referring to. Moreover, other Galleria tenants may not be as well-known. I find that the rule prohibiting the naming of a mall client is a content-based restriction prohibited both by the First Amendment and by Section 7 of the Act. If found valid, said rule could render any handbilling meaningless. I find the promulgation, maintenance and enforcement of said provision, by a threat to call the police violates Section 8(a)(1) of the Act. Whatever interests Respondents have generally in protecting their tenants' rights to conduct their business without undue interference is outweighed by the First Amendment and Section 7 of the Act.[9]

CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. National Association of Broadcast employees and Technicians, the Broadcasting and Cable Television Workers Sector of the Communication Workers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Repondents violated Section 8(a)(1) of the Act by promolgating, maintaining, and enforcing a rule prohibiting activities which identify by name the center owner, manager or any tenant of the center and by threatening to call the police to enforce said invalid rule.

4. Respondent Glendale Orbach's Associates is dismissed.

5. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found the Respondents engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the purposes and policies of the Act.

Based on the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended Order.[10]

[8] I have given no weight to the Advice Memorandum submitted as Exh. E to Respondent's brief.

[9] Nothing in this recommended decision to the NLRB is meant to restrict Galleria's ability to regulate or ban entirely handbills containing so-called "fighting words," obscenities, grisly, or gruesome displays or highly inflammatory slogans likely to provoke a disturbance. *UNITE*, p. 12 of Exh. B to Respondent's brief.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

ORDER

The Respondents, Glendale Associates, Ltd., Glendale II Associates Limited Partnership, and Donhue Schriber, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Promulgating, maintaining and enforcing by threats to call the police a rule at Glendale Galleria prohibiting activities which identify by name the center owner, manager or any tenant of the center.

(b) In any like or related manner violated the provisions of the National Labor Relations Act.

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

(a) Delete and expunge from its Rules for Noncommercial use of Common Areas, from its Internal Policies & Guidelines for Noncommercial use of Common Areas of Glendale Galleria and from any other document within the custody and control of Galleria where such rules may be contained, any rule prohibiting activities which identify by name the center owner, manager or any tenant of the center.

(b) Within 14 days after service by the Region, post at its Glendale Galleria, Glendale, California copies of the attached Notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director, in English and such other language as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondents' authorized representative, shall be posted by the Respondents 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 Respondents to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondents has gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time after June 7, 1997.

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

Issued at San Francisco, California, this 4th day of March, 1999.

[11] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

APPENDIX

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

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

WE WILL NOT promulgate, maintain nor enforce by threats to call the police any rule prohibiting activities which identify by name, the center owner, manager, or any tenant of the 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 delete and expunge from our rules for Noncommercial Use of Common Areas, from its Internal Policies & Guidelines for Noncommercial Use of Common Areas of Glendale Galleria, and from any other document within our custody and control of Galleria where such rule may be contained, any rule prohibiting activities which identify by name, the center owner, manager, or any tenant of the center.

GLENDALE ASSOCIATES, LTD., GLENDALE II ASSOCIATES LIMITED PARTNERSHIP, GLENDALE ORBACH'S ASSOCIATES, AND DONAHUE SCHRIBER