

# Oakland Mall, Ltd.: A Further Limitation on Union Access to Private Property

Stephanie Goss John

---

### Repository Citation

Stephanie Goss John, *Oakland Mall, Ltd.: A Further Limitation on Union Access to Private Property*, 57 La. L. Rev. (1996)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol57/iss1/18>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

## **Oakland Mall, Ltd.: A Further Limitation on Union Access to Private Property**

*Oakland Mall, Ltd.*<sup>1</sup> presented the National Labor Relations Board (the Board) with its first opportunity to determine how the Supreme Court's decision in *Lechmere v. NLRB*<sup>2</sup> affects the issue of non-employee union access to private property for purposes of secondary consumer boycott handbilling.<sup>3</sup> The Board followed the *Lechmere* Court's lead in reaching a pro-employer/property owner result. The Board decided that the employer's prohibition of handbilling under the facts of *Oakland Mall, Ltd.* was not a violation of Section 8(a)(1) of the National Labor Relations Act (the Act)<sup>4</sup> and dismissed the union's complaints.

This opinion is important for two reasons. First, it extends the holding of *Lechmere* to allow the prohibition of non-employee access to private property for secondary consumer boycott handbilling, unless there is no reasonably effective alternative means of communication. Second, it mandates that mass media be considered as a reasonably effective alternative means of communication, contrary to previous Board opinions. This opinion serves to limit union members' ability to effectively communicate with consumers and could result in dramatically decreased ability to communicate with prospective union members.

### I. FACTS

*Oakland Mall Ltd.* was the result of a dispute between members of Local 243 of the International Brotherhood of Teamsters, AFL-CIO and Ryder DPD (a trucking company).<sup>5</sup> Sears, Roebuck and Co. had a contract with Ryder for home delivery services that Sears canceled in July of 1988. As a result, Ryder laid off many of its employees who were members of the union. In August 1988, the union responded to the layoff by distributing handbills at Sears stores at the Oakland Mall in Troy, Michigan and the Macomb Mall in Roseville,

---

Copyright 1996, by LOUISIANA LAW REVIEW.

1. 316 N.L.R.B. 1160 (1995), *rev. denied sub nom* United Food & Commercial Workers, AFL-CIO, Local No. 880 v. NLRB, 74 F.3d 292 (D.C. Cir. 1996).

2. 502 U.S. 527, 112 S. Ct. 841 (1992).

3. A union passes out handbills or leaflets urging a consumer boycott of a company. It is considered "secondary" because the union urges a boycott of a company that does business with the company with whom the union has a dispute. Such handbilling is often desirable because it affords a more effective form of communication than picket signs.

4. 29 U.S.C. §§ 151-169 (1988). National Labor Relations Act § 8(a)(1) reads: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7."

Section 7 of the Act, titled Rights of Employees, reads in pertinent part: "Employees shall have 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."

5. 316 N.L.R.B. at 1160.

Michigan.<sup>6</sup> Sears customers were the sole targets of the handbilling. The handbills urged a boycott of Sears, and union members asked the customers to speak to Sears' management on their behalf.<sup>7</sup>

Sears has a strictly and uniformly enforced no-solicitation policy at its stores. There are signs giving notice of the policy at the entrances to the stores. In addition to the Sears policy, Macomb Mall also has a policy regarding solicitation/distribution by non-tenants. It requires an application procedure in which, among other things, the non-tenant must provide the mall with a certificate of insurance establishing that the mall is named as an additional insured.<sup>8</sup>

The handbillers at both malls stationed themselves at interior and exterior entrances to the Sears stores. At both locations, the Sears or Mall management demanded that they leave. When the handbillers refused, the management called the police. The police told the handbillers they could relocate to the easements surrounding the malls' parking lots (at a distance of several hundred feet from the stores). The police told them if they obstructed traffic, they would be arrested.<sup>9</sup>

The union filed unfair labor practice charges against Sears, Oakland Mall, and Macomb Mall, claiming that Sears and the malls had interfered with its members' rights "to engage in other concerted activities for the purpose of . . . mutual aid and protection"<sup>10</sup> under Section 7 of the Act. The Board affirmed the Administrative Law Judge's finding that under the Board's *Jean Country*<sup>11</sup> analysis for access issues, there had been a violation of the Act.<sup>12</sup> Sears and Macomb Mall petitioned the D.C. Circuit Court of Appeals for review.<sup>13</sup> While the appeal was pending, the Supreme Court overruled the *Jean Country* analysis for non-employee access in its decision in *Lechmere, Inc. v. NLRB*.<sup>14</sup> The appellate court remanded *Oakland Mall, Ltd.* to the Board for consideration in light of *Lechmere*.<sup>15</sup>

*Held:* Balancing of an employer's private property interests and a union's Section 7 interests in secondary consumer boycott handbilling is not appropriate

---

6. *Id.*

7. *Id.* at 1161.

8. *Id.*

9. *Id.* at 1161-62.

10. Section 7 of the Act establishes the employees' right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Such activities may include economic picketing, boycott handbilling, and area standards protests (protesting an employer's failure to pay the area's prevailing wages and benefits). *See, e.g.,* *Hudgens v. NLRB*, 424 U.S. 507, 96 S. Ct. 1029 (1976), *Oakland Mall, Ltd.*, 316 N.L.R.B. 1160 (1995), *Leslie Homes, Inc.*, 316 N.L.R.B. 123 (1995), *rev. denied sub nom. Metropolitan Dist. Council of Philadelphia and Vicinity United Broth. of Carpenters and Joiners of America, AFL-CIO v. NLRB*, 68 F.3d 71 (3d Cir. 1995).

11. 291 N.L.R.B. 11 (1988).

12. *Oakland Mall, Ltd.*, 304 N.L.R.B. 832 (1991).

13. *Macomb Mall Assoc. v. NLRB*, 957 F.2d 912 (D.C. Cir. 1992). *Oakland Mall* did not appeal the Board's order.

14. 502 U.S. 527, 112 S. Ct. 841 (1992).

15. *Macomb Mall Assoc.*, 957 F.2d at 912.

unless the union first demonstrates that there is no reasonable alternative means of communicating with the employer's customers, including use of mass media.<sup>16</sup>

## II. LAW PRIOR TO *OAKLAND MALL, LTD.*

### A. Access Issue

Over the last forty years, the Board and the courts have struggled over the rights of employers to deny access to their private property to non-employees who wish to engage in Section 7 activities. In 1956, the Supreme Court addressed the question in *NLRB v. Babcock and Wilcox*,<sup>17</sup> a case involving organizational activity.<sup>18</sup> In the years following, both the Court and the Board interpreted the standard for access from *Babcock*. In 1992, the Court revisited the issue in *Lechmere*, repudiating much of the interpretation of *Babcock*<sup>19</sup> and reaffirming a strict reading of *Babcock*.<sup>20</sup> The Board extended *Lechmere* to non-organizational activity in *Leslie Homes*,<sup>21</sup> which led to its application in *Oakland Mall*.<sup>22</sup> To fully understand this progression, it is necessary to examine it from its genesis: *NLRB v. Babcock and Wilcox*.

#### 1. The Seminal Case: Babcock

In 1956, the Supreme Court decided *NLRB v. Babcock and Wilcox*, the leading case on non-employee access to private property.<sup>23</sup> In *Babcock*, the employer enforced its nondiscriminatory, no-solicitation policy by refusing to allow non-employee union organizers to distribute union literature in the parking lot of its plant.<sup>24</sup> The Board had held that by interfering with the employees' Section 7 right to organize,<sup>25</sup> the employer violated the Act. The Supreme Court pointed out that the Board failed to distinguish between the law applicable to employees and the law applicable to non-employees, which was a "distinction of substance."<sup>26</sup> Although employees have a right to organize under Section 7, the Act gives no

---

16. *Oakland Mall, Ltd.*, 316 N.L.R.B. 1160 (1995).

17. 351 U.S. 105, 76 S. Ct. 679 (1956).

18. Organizational activity is § 7 activity which has as its purpose the recognition of a labor organization.

19. See *infra* text accompanying note 69.

20. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539, 112 S. Ct. 841, 849 (1992).

21. 316 N.L.R.B. 123 (1995).

22. Non-organizational activity is § 7 activity that does not have the recognition of a labor organization as its goal.

23. As used in this context, "non-employee" refers to one not employed by the employer against whom the § 7 rights were directed.

24. *NLRB v. Babcock and Wilcox*, 351 U.S. 105, 106, 76 S. Ct. 679, 681 (1956).

25. NLRA § 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations."

26. *Babcock*, 351 U.S. at 113, 76 S. Ct. at 684-85.

rights to non-employee union organizers. Thus, the organizers' only right of access to employees derived from the need of employees to have information about the advantages and methods of self-organization. The Court held that "an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message."<sup>27</sup> The Court also required that the no-solicitation policy be nondiscriminatory, so the policy could not deny unions the permission to solicit or distribute while giving permission to other parties.<sup>28</sup> The Court recognized that organizational rights and property rights come from the same source, the National Government, so some accommodation between the two should be made.<sup>29</sup>

The *Babcock* Court caused some confusion in later cases with the phrasing of its exception regarding alternative means of communication.<sup>30</sup> The Court required the employer's private property interests to yield when "the inaccessibility of employees [made] ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels."<sup>31</sup> Later in its opinion, the Court said that "if the location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them," then the property rights must yield.<sup>32</sup> These statements raised two questions. Was the first statement a broad exception and the second statement a mere example of its application? Or, did the second statement qualify the first statement, creating an extremely limited exception? Until the Court decided *Lechmere, Inc. v. NLRB*, the exception was interpreted broadly.<sup>33</sup>

## 2. Interpreting Babcock

Cases after *Babcock* differed in their interpretations of *Babcock's* holding. One case limited *Babcock* to organizational activity.<sup>34</sup> However, after the Court's opinion in *Hudgens v. NLRB*,<sup>35</sup> the courts and the Board extended *Babcock* to non-organizational activity.

In *Hudgens*, unionized employees of Butler Shoe Company's warehouse engaged in economic picketing in front of Butler Shoe's store inside a privately-owned shopping mall. The NLRB and the Fifth Circuit agreed that a threat of arrest by the agent of the mall owner violated Section 8(a)(1)<sup>36</sup> of the

27. *Id.* at 112, 76 S. Ct. at 684.

28. *Id.*

29. *Id.*

30. See *infra* discussion of *Lechmere, Inc. v. NLRB*, part II.A.4.

31. *Babcock*, 351 U.S. at 112, 76 S. Ct. at 684.

32. *Id.* at 113, 76 S. Ct. at 685.

33. See *infra* discussion of *Lechmere, Inc. v. NLRB*, part II.A.4.

34. *Central Hardware v. NLRB*, 407 U.S. 539, 544-45, 92 S. Ct. 2238, 2242 (1972) (involving organizational picketing at free-standing stores).

35. 424 U.S. 507, 96 S. Ct. 1029 (1976).

36. See *supra* note 4.

Act.<sup>37</sup> The *Hudgens* Court held that this case did not fall under the First Amendment's protections of free expression as had been suggested in lower courts and by the Board.<sup>38</sup> After the Supreme Court decided that any protection to which the picketers were entitled came under the Act,<sup>39</sup> it remanded the case to the Board. In doing so, the Court directed the Board to "seek a proper accommodation"<sup>40</sup> of the Section 7 rights and the property rights. Justice Stewart stated that the proper accommodation would "largely depend upon the content and context of the § 7 rights being asserted."<sup>41</sup> Thus, the *Babcock* analysis was applicable to actions involving any Section 7 right. The Court then outlined the factual distinctions between *Hudgens* and *Babcock*<sup>42</sup> to show how the accommodation might change with the context, while leaving that accommodation to the Board.<sup>43</sup> The Court seemed to indicate a balancing test might be used in making the accommodation by stating "the locus of [the] accommodation, however, may fall at differing points along the spectrum depending on the nature of the respective § 7 rights and private property rights asserted in any given context."<sup>44</sup>

On remand,<sup>45</sup> the Board considered the factual distinctions between *Hudgens* and *Babcock* and determined that in the spectrum of Section 7 rights, economic activity and organizational activity were equally protected.<sup>46</sup> It determined the mall owner was not a disinterested party, and since the mall was open to the public, it was "simply subjecting the businesses on the Mall to the same risk of Section 7 activity as similar businesses fronting on public sidewalks now endure."<sup>47</sup> The Board concluded employees were entitled to at least as much protection by the Act as the non-employees in *Babcock*.<sup>48</sup> The Board then applied *Babcock* to the facts. When it analyzed the alternative means of communication, the Board found that it was not reasonable to force the union out of the mall.<sup>49</sup>

---

37. *Hudgens*, 424 U.S. at 510-11, 96 S. Ct. at 1032.

38. *Id.* at 511, 96 S. Ct. at 1032-33.

39. The Court reasoned that the First Amendment protects against state action but not private action. The Court refused to engage in analysis of when private property which is open to the public is public enough to be dedicated to public use. *Id.* at 519, 96 S. Ct. 1037.

40. *Id.* at 520, 96 S. Ct. at 1037.

41. *Id.* at 521, 96 S. Ct. at 1037.

42. *Id.* at 521-22, 96 S. Ct. at 1037. The Court outlined the following factual distinctions:

- 1) economic strike activity rather than organizational;
- 2) property rights impinged were not those of the employer against whom the § 7 activity was directed; and
- 3) picketers were employees of the employer against whom the § 7 activity was directed.

43. This showed a deference to the Board that the Court did not show in *Lechmere*. See *infra* note 76 and accompanying text.

44. *Hudgens*, 424 U.S. at 522, 96 S. Ct. at 1038.

45. *Scott Hudgens*, 230 N.L.R.B. 414 (1977).

46. *Id.* at 416.

47. *Id.* at 418.

48. *Id.* at 416.

49. *Id.* at 416-17. The Board's analysis included:

- 1) definition of the audience of the § 7 activity;

In 1978, the Court began to illuminate the "spectrum of § 7 rights" in *Sears v. San Diego District Council of Carpenters*.<sup>50</sup> In this case, the employer brought a trespass action under state law against a union engaging in area standards picketing on its private property. Given the context, the Court dealt mainly with preemption issues. However, in dicta, the Court discussed the application of *Babcock*. In questioning whether area standards picketing is entitled to the same deference in the *Babcock* accommodation as organizational activity, the Court noted that "the right to organize is at the very core of the purpose for which the NLRA was enacted."<sup>51</sup> Thus, the Court suggested that organizational rights are more important than the right to engage in area standards picketing.

### 3. Board Decisions on Access Issues

With the Court providing limited guidance on how to apply the standard announced in *Babcock*, the Board struggled with the access issue often. In making the prescribed accommodation, the Board formulated two tests. The first was the short-lived *Fairmont Hotel*<sup>52</sup> approach. The next, and more accepted approach, was the *Jean Country*<sup>53</sup> analysis.<sup>54</sup>

In *Fairmont Hotel*, non-employee union members attempted to engage in area standards/secondary consumer boycott handbilling<sup>55</sup> of guests at a hotel. The Board expressed doubts about the application of the *Babcock* analysis to all Section 7 activity. These doubts stemmed from cases in which the Section 7 activity targeted a not-easily-identifiable audience.<sup>56</sup> In such cases, the Board

2) concern over enmeshing neutral employers in the dispute unless pickets were allowed directly in front of Butler's;

3) consideration of the safety of relegating the picketers to public streets and sidewalks outside the shopping center; and

4) rejection of mass media as a reasonable means of publication of a labor dispute with a single store in a mall.

50. 436 U.S. 180, 98 S. Ct. 1745 (1978).

51. *Id.* at 206 n.42, 98 S. Ct. at 1762 n.42.

52. 282 N.L.R.B. 139 (1986).

53. 291 N.L.R.B. 11 (1988).

54. The Board's *Jean Country* test was accepted by the First, Sixth, Seventh, and D.C. Circuits. See *Lechmere, Inc. v. NLRB*, 914 F.2d 313, 320-21 (1st Cir. 1990); *Sentry Markets, Inc. v. NLRB*, 914 F.2d 113, 115-117 (7th Cir. 1990); *Laborer's Local 204 v. NLRB (Hardee's)*, 904 F.2d 715, 717-19 (D.C. Cir. 1990); *Emery Realty, Inc. v. NLRB*, 863 F.2d 1259, 1264 (6th Cir. 1988).

55. A supplier of the hotel was involved in an area standards dispute with the union (a type of dispute in which an employer's failure to pay area standard wages and benefits allegedly undercuts unionized employers' economic opportunities). The union urged guests of the hotel to boycott the hotel in an effort to exert economic pressure on the hotel that would result in economic pressure on the supplier. 282 N.L.R.B. at 139.

56. See, e.g., *Giant Food Markets, Inc.*, 241 N.L.R.B. 727 (1979) (holding it was an unfair labor practice to prohibit area standards picketing and handbilling in parking lot of retail store, because there was no other reasonable means of communicating with possible consumers).

inevitably found a lack of reasonably effective alternative means of communication. Gaining access in such cases became easier than gaining access in cases involving more important Section 7 rights, such as organizational rights, because the intended audience in organization cases was the readily identifiable group of employees. To remedy this problem, the Board in *Fairmont Hotel* stated it would only analyze the alternative means of communication if the relative weights of the Section 7 right and private property right asserted were equal.<sup>57</sup>

However, the Sixth Circuit in *Emery Realty, Inc. v. NLRB*<sup>58</sup> held that the Board's *Fairmont Hotel* analysis had "erroneously subordinate[d] the issue of reasonable alternative means of access . . . to other factors."<sup>59</sup> *Fairmont Hotel* would almost always require access for the exercise of a strong Section 7 right. Less important Section 7 activity, such as area standards or consumer boycott handbilling, would be defeated by a strong property interest. This approach would negate the general rule of *Babcock*, which allowed access only if there were no alternative means of communication. The Board had applied a *Fairmont* analysis in *Emery*,<sup>60</sup> but the appellate court repudiated this application. The *Emery* court also noted that the Board had already addressed *Fairmont Hotel*'s defects in *Jean Country*<sup>61</sup> while the *Emery* appeal was pending.

*Jean Country* involved organizational picketing of one retail store at an open-air shopping center. The Board recognized the varying strengths of both Section 7 rights<sup>62</sup> and property rights.<sup>63</sup> It also recognized that *Babcock* required an analysis, which the *Fairmont Hotel* analysis had omitted, of the alternative means of communication.<sup>64</sup> Thus, a new test was born:

[I]n all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as *especially significant* in this balancing process.<sup>65</sup>

---

57. 282 N.L.R.B. at 142.

58. 863 F.2d 1259 (6th Cir. 1988).

59. *Id.* at 1263.

60. *Id.* at 1262.

61. *Id.* at 1264.

62. In assessing the strength of the § 7 right asserted, the Board considered the nature of the right, the identity of the employer to which the right was directly related, the relationship of the employer or other target to the property to which access was sought, the identity of the target audience, and the manner of exercise of the right. *Jean Country*, 291 N.L.R.B. 11, 13 (1988).

63. In assessing the strength of the private property rights, the Board considered the use to which the property was put, any restrictions imposed upon public access to the property, and the property's size and openness. *Id.*

64. *Id.*

65. *Id.* at 14 (emphasis added).

The Board utilized this balancing test in many subsequent access cases, including its first decision in *Oakland Mall Ltd.*<sup>66</sup> and *Lechmere, Inc.*<sup>67</sup>

#### 4. *Lechmere, Inc. v. NLRB*

The Supreme Court rejected the *Jean Country* analysis in *Lechmere, Inc. v. NLRB*.<sup>68</sup> Justice Thomas, for the majority, reasoned that *Jean Country* significantly eroded the general rule of *Babcock* and impermissibly "recast it as a multifactor balancing test."<sup>69</sup> The Court held that *Babcock* demanded an evaluation of the availability of reasonably effective alternative means of communication as a threshold matter and not just as an "especially significant" factor in a balancing test. If there were an available alternative, the property owner could deny access to the property.

Justice Thomas wrote that the *Babcock* exception "was crafted precisely to protect the § 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society."<sup>70</sup> As examples of such employees, the Court listed employees of logging camps, mining camps, and mountain resort hotels.<sup>71</sup> These examples indicate the Court's opinion of the narrowness of the *Babcock* exception. Quoting *Sears* on the heavy weight of the union's burden to prove a lack of reasonably effective alternative means of communication, the Court warned that "mere conjecture or the expression of doubts"<sup>72</sup> would not suffice to meet the burden.

*Lechmere* sparked controversy for several reasons. Justice White, writing for the dissent in *Lechmere*, pointed out that *Babcock* did not say that inaccessibility was the only reason to grant access.<sup>73</sup> Thus, the dissent believed that *Babcock* called for a more flexible analysis than that espoused by the *Lechmere* majority. The dissent indicated that the Board should be able to consider, in the *Babcock* analysis, the openness of the property to which access is sought and the fact that the intended audience of the Section 7 activity was spread throughout a major metropolitan area. Also, the dissent maintained that the Court's opinion was inconsistent with *Central Hardware* and *Hudgens*, past interpretations of

---

66. 304 N.L.R.B. 832 (1991) (original opinion).

67. 295 N.L.R.B. 92 (1989); see also *Hardee's Food Systems*, 294 N.L.R.B. 642 (1989) (applying *Jean Country* analysis to dismiss Union's unfair labor practices charge against chain food store in area standards handbilling case); *Sentry Markets*, 296 N.L.R.B. 40 (1989) (applying *Jean Country* analysis to hold employer violated the Act when it prevented product boycott handbilling on sidewalk in front of retail store).

68. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 112 S. Ct. 841 (1992) (involving organizational handbilling).

69. *Id.* at 538, 112 S. Ct. at 848.

70. *Id.* at 540, 112 S. Ct. at 849.

71. *Id.*

72. *Id.*

73. *Id.* at 543, 112 S. Ct. at 851 (White, J., dissenting).

*Babcock* that required a "neutral and flexible rule of accommodation."<sup>74</sup> The dissent reasoned that since *Hudgens* was the later Court pronouncement on the access issue and "issued as a directive to the Board,"<sup>75</sup> it should control over *Babcock*. Finally, the dissent objected to the Court's lack of deference to the Board, the administrative agency charged with interpretation of the Act.<sup>76</sup>

Although some hailed *Lechmere* as representing "the high Court's positive protection of private property rights and the sensitivity of the Court's newest member to such rights,"<sup>77</sup> most commentators repeated the objections of the *Lechmere* dissent and suggested limiting the decision to its facts. Robert A. Gorman, a noted labor law scholar, characterized the opinion as mechanical, untenable and cavalier.<sup>78</sup> In the *Harvard Law Review* survey of the 1991 Supreme Court term, the opinion was criticized as misapprehending the issue and misapplying Court precedent regarding deference to Board interpretations.<sup>79</sup> Professor Cynthia Estlund suggested limiting *Lechmere* to its facts, since it only addressed organizational rights.<sup>80</sup> She opined that extending it to other Section 7 rights, such as primary picketing, area standards protests, and product boycotts would compound the errors of *Lechmere*. Professor Roger Hartley wrote "[t]he result obtained in *Lechmere*, however, does not necessarily follow with respect to consumer picketing and handbilling."<sup>81</sup> Because the potential patrons of a particular store in a shopping mall are not easily identifiable, the "communication dynamics"<sup>82</sup> are markedly different from those in *Lechmere*. Notwithstanding these suggestions and criticisms, the Board extended *Lechmere* to other Section 7 activity in ensuing cases.

##### 5. Board Reaction to *Lechmere*: Leslie Homes

The Board's first opportunity to consider the application of *Lechmere* to non-organizational activity came in early 1995 with *Leslie Homes, Inc.*<sup>83</sup> *Leslie Homes* involved area standards handbilling of a condominium development.<sup>84</sup>

74. *Id.*

75. *Id.* at 544, 112 S. Ct. at 851.

76. *Id.* at 545, 112 S. Ct. at 852. Not only did the Court overrule the Board test, it did not remand the matter for the Board's consideration under the "correct" test. The dissent argued that the case should have been remanded for the Board to apply the test to the facts.

77. Leonard Bierman, *Justice Thomas and Lechmere, Inc. v. NLRB: A Reply to Professor Robert A. Gorman*, 10 Hofstra Lab. L. J. 299 (1992) (quoting a former NLRB General Counsel).

78. Robert A. Gorman, *Union Access To Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 Hofstra Lab. L. J. 1, 10-11 (1991).

79. *The Supreme Court, 1991 Term*, 106 Harv. L. Rev. 19, 364-66 (1992).

80. Cynthia Estlund, *Property and Sovereignty after Lechmere*, 46 Stan. L. Rev. 305, 355 (1994).

81. Roger C. Hartley, *The Supreme Court's 1991-1992 Labor and Employment Law Term*, 8 Lab. Law. 739, 742 (1992).

82. *Id.*

83. 316 N.L.R.B. 123 (1995).

84. For construction work on part of the project, *Leslie Homes* employed non-union carpenters directly, but did not pay them prevailing union wages or benefits (the area standard). The union

The full Board decided this case.<sup>85</sup> The union and the dissent argued that *Lechmere* should not apply to area standards activity, since the non-employee union representatives in *Leslie Homes* were exercising their own (non-derivative) Section 7 rights "to engage in other concerted activities"<sup>86</sup> as opposed to the union organizers in *Lechmere* whose rights were only derivative of the employees' Section 7 rights. The majority of the Board did not agree with that argument.

The Board gave several reasons for extending *Lechmere* to non-organizational settings. The *Lechmere* Court's concern with protecting employers' private property rights was manifested clearly by its narrow construction of the *Babcock* exception. Given that concern, the majority in *Leslie Homes* could find no reason to assume the Supreme Court would limit its reasoning to organizing cases. Also, the Court's previous application of *Babcock* to non-organizing cases<sup>87</sup> convinced the majority that the Board should not limit the *Lechmere* interpretation of *Babcock* "without some overt signal" from the Court that it intended to so limit the decision.<sup>88</sup> The majority questioned "why the *Babcock* analysis, as explicated in *Lechmere*, should favor access *more* for non-employees engaged in non-organizational 'other concerted activities'"<sup>89</sup> when such activities are less favored under the *Babcock* analysis than organizational activity.<sup>90</sup> This *a fortiori* argument won the day and signaled the future of non-employee access cases: only in very rare cases would non-employees have a right of access to private property for the exercise of any Section 7 right.

### B. Alternative Means of Communication

Although *Babcock* allows unions access to private property in some circumstances, the right of an employer to bar access remains the general rule. The union has the burden to prove a lack of reasonably effective alternative means of communication before access might be granted. Supreme Court decisions affirm that "the burden imposed on the Union is a heavy one."<sup>91</sup>

The *Jean Country* decision listed some factors that had been considered by the Board in analyzing alternative means of communication: 1) desirability of

---

protested this by handbilling at the entrance to the development's model condominium. The handbills urged a boycott of the development. 316 N.L.R.B. at 123-24.

85. In a routine case, a panel of three of the five members of the Board decides a case. However, a draft opinion is circulated to all five members. Any member may ask to have the case referred to the full Board if the case is important enough to warrant consideration by all five members. Archibald Cox, et al., *Cases and Materials on Labor Law* 110 (11th ed. 1991).

86. NLRA § 7.

87. See *supra* text accompanying notes 34-44.

88. 316 N.L.R.B. at 128.

89. *Id.* at 128-29 (emphasis in original).

90. *Id.* (citing *Sears v. San Diego District Council of Carpenters*, 436 U.S. 180, 206, 98 S. Ct. 1745, 1762 (1978)).

91. *Sears*, 436 U.S. at 205, 98 S. Ct. at 1762.

avoiding enmeshment of those neutral to the dispute; 2) safety of attempting communications at alternate public sites; 3) burden and expense of nontrespassory communication alternatives; 4) extent to which nontrespassory methods would dilute the effectiveness of the message; and 5) identification of intended audience.<sup>92</sup> The Board continued to consider these factors after *Lechmere*.<sup>93</sup>

When analyzing reasonable alternative means of communication, the Board and the courts have never indicated that the use of mass media would be considered a reasonable alternative. The Second Circuit, in dicta, stated that mass media suffered from "the flaws of greater expense and effort and a lower degree of effectiveness."<sup>94</sup> It continued, saying that newspaper, television, and radio, "where not precluded entirely by cost . . . would not compare with personal solicitation."<sup>95</sup> In *Hudgens*, the Administrative Law Judge wrote that a union should not be required to "squander its assets" on mass media in a dispute with one store in a mall.<sup>96</sup> The Sixth Circuit stated its view on the use of mass media when Section 7 activity is aimed at consumers in *Giant Food Markets, Inc. v. NLRB*.<sup>97</sup>

When the consumers potentially come from a large metropolitan area and cannot be categorized as a specific group patronizing a specific type of store, expensive, extensive mass media or mailer campaigns should not be required. If reasonableness is a criterion for determining whether or not an alternative means of communication exists, the union should not be forced to incur exorbitant or even heavy expenses. A mass media campaign would also diffuse the effectiveness of the communication by being physically removed from the actual location of the store whose policies are at issue and would prevent any personal contact between the union and the intended audience.<sup>98</sup>

The Board's analysis of reasonable alternative means of communication has been similar. The Board in *Jean Country*, in its discussion of reasonably effective alternative means of communication, said that "it [would] be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact."<sup>99</sup> Many subsequent Board decisions cited this language with

---

92. *Jean Country*, 291 N.L.R.B. 11, 13-14 (1988).

93. This is shown by the use of these factors in a post-*Lechmere* case: *Loehmann's Plaza*, 316 N.L.R.B. 109, 112 (1995) ("The traditional factors to consider . . . are effectiveness, safety, and enmeshment of neutrals.").

94. *NLRB v. United Aircraft Corp.*, 324 F.2d 128, 130 (2d Cir. 1963).

95. *Id.*

96. *Scott Hudgens*, 205 N.L.R.B. 628, 631 (1973). This part of the opinion was never questioned in the opinions of the courts reviewing the Board's order.

97. 633 F.2d 18 (1980).

98. *Id.* at 24-25.

99. *Jean Country*, 291 N.L.R.B. 11, 13 (1988).

approval in holding that use of mass media was not a reasonable alternative.<sup>100</sup> In view of these Board and court precedents, it seemed settled that mass media was presumptively not a reasonably effective alternative means of communication. However, *Oakland Mall* changed that.

### III. THE OAKLAND MALL DECISION

*Oakland Mall, Ltd.* is significant for two reasons. It represents a further extension of the Supreme Court's *Lechmere* decision. Also, it represents an abrupt about-face on the issue of whether mass media is a reasonable alternative means of communication. For such a decision, it is perhaps startling that a three-member panel of the Board decided the case.<sup>101</sup>

#### A. Further Extension of *Lechmere*

Although the union and amicus AFL-CIO argued that *Babcock* and *Lechmere* should not apply to consumer boycott activity by laid-off employees, the Board disagreed. It referred to the *Leslie Homes* decision for its reasoning in extending *Lechmere* to a case involving non-organizational activity. The Board dealt with the question summarily and moved on.<sup>102</sup>

#### B. Analysis of Reasonable Alternative Means of Communication

The Board spent most of its discussion considering the alternative means of communication. Specifically, it considered whether the Union had sustained its heavy burden of proving a lack of alternative means of communication. The Board reasoned that the General Counsel<sup>103</sup> must demonstrate the infeasibility of every means of communication in order to satisfy its burden:

---

100. See, e.g., *Great Scot, Inc.* 309 N.L.R.B. 548 (1992) (ALJ's opinion stating Board had made clear that mass media would only be a reasonable alternative for a union in exceptional circumstances); *Pepsi Cola Co.*, 307 N.L.R.B. 1378 (1992) (using *Jean Country* language to justify not requiring union to use mass media in organizing campaign); *Sentry Markets Inc.*, 296 N.L.R.B. 40 (1989) (In this product boycott handbilling case, the Board did not require use of mass media, because, citing *Jean Country*, it was not an exceptional case. Also, mass media would move the message too far in time and place from point of purchase.); *Trident Seafoods Corp.*, 293 N.L.R.B. 1016 (1989) (using *Jean Country* language to justify not requiring union to use mass media in campaign to organize an isolated cannery).

101. Members Stephens and Cohen were in the majority. Member Truesdale dissented. See also *supra* note 85.

102. *Oakland Mall, Ltd.*, 316 N.L.R.B. 1160, 1162-63 (1995). The treatment of this issue may reflect a somewhat "gun-shy" attitude of the Board due to the lack of deference shown it by the Supreme Court in *Lechmere*.

103. The General Counsel investigates unfair labor practices charges, decides if complaints should be issued for those charges, and directs the prosecution of those complaints. The General Counsel also represents the Board before courts on petitions for enforcement or review of Board decisions. Cox, *supra* note 85, at 108.

We therefore do not undertake here the task of analyzing the feasibility of handbilling while standing on easements around the parking lots or on public property at the mall perimeter, because we find that the General Counsel has failed to show that various means of *mass communication* were not an available means of presenting the Union's message to potential customers of Sears.<sup>104</sup>

Because earlier Board decisions viewed mass media as a much-disfavored alternative means of communication, it was surprising for the Board to make such a statement in *Oakland Mall*.

The Board acknowledged the conflict between its statement and past Board decisions. To explain the conflict, the Board indicated it had chosen to read its statement on mass media use in *Jean Country*<sup>105</sup> in light of *Lechmere* also. *Lechmere* stressed the narrowness of the *Babcock* exception by applying it only to employees "isolated from the ordinary flow of information which characterizes our society."<sup>106</sup> Since "[n]ewspapers, radio, and television are certainly part of 'the ordinary flow of information,'"<sup>107</sup> the Board reconsidered its statement in *Jean Country*. In light of *Lechmere*, "where the Section 7 right is as attenuated as [secondary consumer boycott handbilling] . . . the General Counsel must show the use of mass media . . . would not be a reasonable alternative means for the Union to communicate its message."<sup>108</sup>

The union had not tried, or even considered, the use of mass media to disseminate its message. Therefore, the General Counsel could not meet its burden to show by more than "mere conjecture or the expression of doubts"<sup>109</sup> that mass media would not be a reasonably effective alternative means of communication. Because the union did not show a lack of alternative means of communication, the Board concluded that the denial of access did not constitute a violation of the Act.

The majority addressed the dissent's concerns in its opinion. The dissent urged that "mass media has abundant shortcomings—expense and remoteness—that justify the Board's presumption that it does not provide a reasonable alternative means for unions to communicate with customers or potential customers of an employer,"<sup>110</sup> citing *Giant Food Markets* as support. The majority pointed out that the General Counsel produced no evidence on cost.

---

104. 316 N.L.R.B. at 1163 (emphasis added).

105. See *supra* text accompanying note 99.

106. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540, 112 S. Ct. 841, 849 (1992).

107. 316 N.L.R.B. at 1163.

108. *Id.* The Board refers to secondary consumer boycott handbilling as "attenuated," because it is not aimed at the employer with whom the union has the primary dispute. Also, it may be referring to the non-organizational nature of the right to handbill for a secondary consumer boycott. See generally *supra* text accompanying note 51.

109. *Lechmere*, 502 U.S. at 540, 112 S. Ct. at 849.

110. 316 N.L.R.B. at 1164.

The majority also decided that *Lechmere* made clear that the "broad proscription on non-employee trespass will apply even if nontrespassory communication is 'less-than-ideally effective.'"<sup>111</sup>

The Board's stand regarding mass media was a departure from clear Board precedent.<sup>112</sup> It could have been avoided. After *Lechmere*, the exception to the general rule of *Babcock* was so narrowed that the Board could have dismissed the case with an analysis of the alternative means of communication that were actually briefed (feasibility of handbilling while standing on easements/public property around the perimeters of the malls). Instead, the Board overruled its prior presumption and increased the burden on the General Counsel to disprove the existence of reasonable alternative means of communication. At the same time, the Board increased the burden on unions, who must now at least consider the use of mass media in attempting to engage in Section 7 activity.

### C. *Since Oakland Mall*

Although *Oakland Mall* was controversial, it has been applied without reservation in subsequent cases. In June of 1995, the Division of Advice<sup>113</sup> used *Oakland Mall* to recommend the dismissal of unfair labor practice charges.<sup>114</sup> In that case, a strip mall owner ousted union members handbilling to urge a consumer boycott of a mall tenant being remodeled by a construction company that failed to pay area standard wages. The union did not consider spending funds on mass media as a reasonable alternative to Section 7 handbilling and presented no evidence on the expense or effectiveness of mass media. Under *Oakland Mall*, this failure was fatal to the union's case.

In July of 1995, the Board decided *Galleria Joint Venture*.<sup>115</sup> In *Galleria*, the Section 7 activity was non-employee distribution of handbills to consumers at a mall protesting alleged unfair labor practices occurring elsewhere and informing consumers of a strike at the location of the alleged violations. The General Counsel did not submit evidence that mass media was not reasonable. The Board relied on *Oakland Mall* as support for its finding that the General Counsel did not prove a lack of reasonable alternative means of communication. As recently as August of 1995, the Division of Advice again used a union's failure to submit evidence regarding the cost and effectiveness of mass media to recommend a dismissal of unfair labor practices charges.<sup>116</sup>

---

111. *Id.*

112. *See supra* text accompanying notes 99-100.

113. The Division of Advice is one of four main divisions of the Office of the General Counsel. It advises Regional Offices on legal matters. Jeffrey A. Norris & Michael J. Shershin, Jr., *How to Take a Case Before the NLRB* 37 (1992).

114. *Grossman Companies*, 1995 WL 563318 (N.L.R.B.G.C.) (Advice) (June 30, 1995).

115. 317 N.L.R.B. No. 170 (1995) (rehearing of case originally decided under *Jean Country*).

116. *Hilton Hotel San Diego Mission Bay Tennis Resort*, 1995 WL 563325 (N.L.R.B.G.C.) (Advice) (August 16, 1995).

## IV. ANALYSIS

*Oakland Mall* is indicative of a Board so wary of an increasingly conservative Supreme Court that it reached too far in protecting privately-owned property. The Board perpetuated the mistakes of *Lechmere* by extending its holding to a non-organizational case. The Board also made a startling revision of its former policy of regarding mass media as an unreasonable alternative means of communication.

A. Extension of *Lechmere*

First, although the extension of *Lechmere* in *Oakland Mall* was a foregone conclusion after *Leslie Homes*, the Board should not have extended *Lechmere* to non-organizational activity in the first place. In urging a limitation of *Lechmere*, the *Leslie Homes* dissent accurately pointed to the fact that those engaging in non-organizational activity, such as area standards protests, were exercising their own non-derivative rights under Section 7. This is an important distinction to make. If those who have rights under the Act are not allowed to exercise them effectively, the rights are rendered mere empty words. Even if *Lechmere* was correct in its interpretation of the *Babcock* exception for organizational activities, it did not require the result in *Leslie Homes*.

The *Lechmere* Court did not analyze the *Hudgens* accommodation principles with respect to non-organizational activity. Thus, there was no indication from the Court that *Lechmere* should control non-organizational activity. The Board in *Leslie Homes* relied on the Court's silence to justify the extension of *Lechmere*. This reliance seemed to be the Board's way of collectively saying, "We give!" Chairman William B. Gould IV, in his concurring opinion to *Leslie Homes*, manifested his sentiments:

Regrettably, however, the majority opinion of the Supreme Court in *Lechmere* resolves the issue definitively. I am, of course, bound by the Supreme Court's view of this matter . . . . If there is to be a different result, it must come from the President and the Congress and not the Board.<sup>117</sup>

The extension of *Lechmere* to *Leslie Homes* and to *Oakland Mall* decimated the ability to effectively exercise some Section 7 rights. It will be the rare case when non-employees have access to private property under the narrow reading given to the *Babcock* exception by the *Lechmere* Court.

---

117. *Leslie Homes, Inc.*, 316 N.L.R.B. 123, 131 (1995). This statement shows Gould's reaction to the lack of deference shown to the Board by the *Lechmere* Court. See *supra* note 76 and accompanying text. Ironically, one of the most recent Supreme Court decisions in the area of labor law bases much of its reasoning on deference to the Board's decisions. See *NLRB v. Town & Country Elec. Inc.*, 116 S. Ct. 450 (1995).

*B. Mass Media as a Reasonably Effective Alternative Means of Communication*

Second, *Oakland Mall's* statement on mass media causes much uncertainty. The three post-*Oakland Mall* actions discussed above all have similar fact patterns to *Oakland Mall*. They represent a union's attempt to exercise an "attenuated" Section 7 right, so the Board, to be consistent, had no choice but to apply *Oakland Mall*. However, the Board has yet to apply the *Oakland Mall* standard to a case involving a stronger Section 7 right, such as organizational activity, or a case presenting any evidence on mass media.

The Board's qualification of the requirement for evidence on mass media raises a question. If *Lechmere* stands for the proposition that no balancing of respective rights should occur until the alternative means of communication are analyzed, how can the Board change its standard for evaluation of alternative means of communication based on the strength of the Section 7 right? In determining whether the Section 7 right is as attenuated as the right to engage in secondary consumer boycott handbilling, the Board will have to consider the nature of the right, the intended audience, and the relationship of the audience to the employer against whom the Section 7 activity is directed. However, to truly assess the strength of the Section 7 right, some consideration must be given to any conflicting property rights. The stronger the property right is, the more "attenuated" the Section 7 right might seem. This seems to be headed in the direction of another "impermissible" balancing test.

Regardless of when the requirement for evidence on use of mass media is to be applied, there remains the question of how it is to be satisfied. The opinion makes only slight mention of the kind of evidence the Board requires. This uncertainty is another reason to criticize the Board's decision.

First, what is the definition of "mass media"? It may only include the traditional vehicles of radio, newspaper, and television.<sup>118</sup> It might also include billboards and magazines. In this age of ever-increasing technology, it could also include the internet and online information services. Without a more definitive list of the eligible media, how can the union and the General Counsel adequately prepare to satisfy the burden of proof?

Second, what role does effectiveness play? The *Oakland Mall* majority cites *Lechmere's* statement that even if non-trespassory communication is less-than-ideally effective, non-employees may not trespass.<sup>119</sup> *Lechmere* says access to the audience, not success in winning the audience over, is the important thing.<sup>120</sup> However, when those statements are read with the many statements on the effectiveness of mass media,<sup>121</sup> it seems clear that mass media does not

---

118. The Board uses this in *Oakland Mall* as a nonexclusive list of examples. *Oakland Mall, Ltd.*, 316 N.L.R.B. 1160, 1163 (1995).

119. See text accompanying note 111.

120. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540, 112 S. Ct. 841, 850 (1992).

121. See *supra* text accompanying notes 94-100.

give any reasonable access at all. Perhaps the Court's mission is to allow only nominal access which will, in fact, be wholly ineffective.

Third, what sort of evidence will show that mass media is not a reasonably effective alternative means of communication? Will the General Counsel satisfy the burden of proof merely by showing that use of newspaper, radio, and television is expensive? Does the General Counsel have to show that the cost is beyond the union's means? Will the General Counsel fulfill the requirement by presenting evidence only on the cost, and not the effectiveness, of mass media? *Oakland Mall* does not answer these questions, and no subsequent Board decisions have either. In the two post-*Oakland Mall* cases mentioned earlier, the Division of Advice observes that no evidence had been presented on cost or effectiveness of the use of mass media.<sup>122</sup> That could imply evidence on one, but not the other, would be sufficient; however, the Board has made no such statement.

The uncertainty and complexity regarding means of proof will lead to inefficient use of the Board's time. Where at one time there was a bright-line rule that presumed mass media unreasonable, there will now be a requirement of evidence of unspecified quantity or quality. Every case will require a factual inquiry into whether mass media is reasonable in that particular situation. This will increase the time required to handle cases and increase the time other cases must wait to be heard.

## V. CONCLUSION

Although *Oakland Mall* overruled Board precedent, the decision's statement on mass media may only apply in limited circumstances. It may also be a very easy requirement to fulfill. On the other hand, considering the increasingly pro-employer stance the Board has taken since *Lechmere*, *Oakland Mall* will likely apply broadly and present a very difficult burden for unions and the General Counsel. The general counsel of the International Ladies' Garment Workers' Union, Max Zimny, agrees with the latter view, saying that *Oakland Mall* "will result in the 'strangulation' of union communication with employees."<sup>123</sup> Should *Oakland Mall's* statement on mass media apply in cases involving organizational activity, union attempts to expand membership in the private sector by organizing at more facilities and attracting new members could be seriously hindered.<sup>124</sup> Certainly many unions will be forced to use less

---

122. See *supra* notes 114 and 116.

123. Susan Kneller, *Labor Law: Union, Management Attorneys Debate Access to Private Property*, 1995 Daily Lab. Rep. No. 98 (BNA) (May 22, 1995).

124. See *supra* text accompanying notes 94-95. Despite this grim prediction, Unions are not completely without means of organizing employees "in person" by virtue of the Supreme Court's decision in *NLRB v. Town & Country Electric, Inc.*, 116 S.Ct. 450 (1995). In *Town & Country*, the Supreme Court held that a worker or job applicant is protected from antiunion discrimination by the Act as an "employee" even if that person is also a paid union organizer. *Id.* at 457.

effective and more expensive means of communication with consumers after *Oakland Mall*, which will curtail efforts to exercise certain Section 7 rights. Zimny is probably correct, but only time, and a few unfair labor practice charges, will tell.

*Stephanie Goss John*