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Balancing the Management and Property Rights of the Employer against Employee's Section 7 Rights

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by

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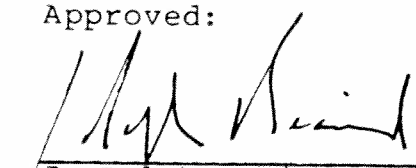

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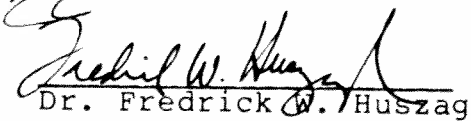

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I. INTRODUCTION

Until 1935 management had complete freedom to control the workplace. Prior to the passage of the National Labor Relations Act,[1] commonly known as the Wagner Act, employers had almost unlimited prerogatives to operate their enterprises. Statutory law generally did not reflect these prerogatives, which grew out of a long history of property rights, the right to contract, and master-servant concepts. The passage of the Wagner Act was properly viewed to be as much a termination of some of these employer prerogatives as a creation of statutorily protected employee rights. Thus, one group of rights contracted as the other group expanded. The court's decisions discussed hereinafter, whether or not one agrees with them, are nothing more than a drawing of the line at which employees' rights begin and employer prerogatives end.

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[1]National Labor Relations (Wagner) Act, ct. 372, 49 Stat. 449 (1935). The most important subsequent amendments to the Wagner Act were the Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947), and the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959). The current version of the National Labor Relations Act appears at 29 U.S.C. §§ 151-169 (1976).

Congress sought to create mechanisms that would allow the development of countervailing employee power through concerted activity. The Wagner Act was a direct congressional response to the inability of individual workers to contend with management's complete freedom to control the workplace. To accomplish this countervailing employee power Section 7[2] was drafted. It sets forth the basic employee rights of self-organization: to form, join, and assist unions, to bargain collectively, and to engage in concerted activity in support of collective bargaining or other issues of mutual aid and protection. Congress further provided express statutory sanctions known as unfair labor practices against violations of these employee rights by employers.[3] Congress also provided an election process for determining whether a majority of the affected employees desire collective bargaining through a particular bargaining representative.[4]

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[2]NLRA § 7, 29 U.S.C. § 157 (1976).

[3]NLRA § 8(a), 29 U.S.C. § 158(a) (1976). It provides, that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in their exercise of the rights guaranteed [them] in Section 7."

The Taft-Hartley amendments added union unfair labor practices to the statutory scheme which resulted in employer unfair labor practices becoming subsection (a) of § 8, and union unfair labor practices appear in subsection (b).

[4]NLRA § 9, 29 U.S.C. § 159 (1976).

From the beginning of the Wagner Act the National Labor Relations Board and courts have struggled with the bothersome task of reconciling under modern labor law the status of employer property and management rights when asserted in the context of alleged Section 7 protected activities of the employee.

An attempt will be made here to demonstrate the process and analysis through which the Board and the courts proceed in their attempts to balance these rights.

II. STATUTORY STRUCTURE

Section 7 of the Wagner Act[5] established the basic rights of employees in private industry. They were guaranteed the right to establish labor organizations, to bargain collectively through their own representatives, to engage in other concerted activities for the purpose of

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[5] § 7 (29 U.S.C. § 157), as amended by the Taft-Hartley Act, provides:

> "Employees shall have the right to self-organize, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activites for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

collective bargaining or other mutual aid or protection in furtherance of those rights.

Section 7 is intended

> to secure and preserve for employees the right to bargain collectively without intimidation, coercion or other improper influence on the part of employers or unions.[6]

The Supreme Court recognized early on that the rights of employees and employers are co-extensive. The Court noted the congressional intent in enacting Section 7 was to provide rights for the employees to form unions for the purpose of collective bargaining or other mutual aid and protection which are as basic to the employee as the rights of employers to form and run a business.[7]

This is not to say that the Section 7 rights of employees are not unlimited. They may not be exercised in a manner which unduly interferes with the right of employers to operate their businesses. The Supreme Court in Republic Aviation Corp. v. NLRB[8] stated:

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[6]Valley Mould & Iron Corps. v. NLRB, 116 F.2d 760, 764 (7th Cir. 1940), cert. denied 313 U.S. 590 (1941).

[7]In NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33, 57 S. Ct. 615, 8 L. Ed. 893 (1937), wherein the Supreme Court stated:

> "Employees have as clear a right to organize and select their representatives for lawful purposes as the [employer] has to organize its business and select its own officers and agents."

[8]324 U.S. 792, 65 S. Ct. 982, 89 L. Ed. 1372, rehearing denied 325 U.S. 894 (1945).

> [This case brings] here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society. 324 U.S. at 797-798.

Again the Supreme Court enforced the principal of accommodation between employer and employee rights when it wrote in the case of Babcock & Wilcox[9] that:

> [O]rganizaton rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.

The basic objective in reaching an accommodation and balancing between Section 7 rights and private property rights with as little destruction of one as is consistent with the maintenance of the other was explained in the Supreme Court decision of Hudgens v. NLRB.[10] There the Court explained that:

> the locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in

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[9]NLRB v. Babcock & Wilcox Co., 351 U.S. 105 at 112, 76 S. Ct. 679, 100 L. Ed. 975 (1956).

[10]Hudgens v. NLRB, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

> the first instance." [Footnotes and citations omitted.] 424 U.S. at 522.

The National Labor Relations Act does not expressly mandate the creation of protected employer rights. While it is true that the Act does recognize some employer rights in the area of unfair union labor practices in § 8(b), 29 U.S.C. § 158(b) and the free speech provision of § 8(c), 29 U.S.C. § 158(c); nevertheless, the Act no where states openly that certain employer activities are to have protection even though they technically violate § 8(a), 29 U.S.C. § 158(a).

The scope of § 7 rights is shaped by § 8(a) which proscribes certain unfair labor practices by employers. An unfair labor practice will be triggered when an employer interferes with an employee's activity protected by § 7. Conversely, to the extent that an employer is free under § 8(a) to respond as it wishes to employees' activity, that activity is not protected by § 7, and is not an unfair labor practice. Thus, it is up to the Board initially to determine whether or not the employee activity is protected by §7, and if so, whether the actions of the employer tends to interfere with, restrain or coerce the employees in the exercise of their § 7 guaranteed rights. If so, the employer is guilty of an unfair labor practice.

We shall now look at some of the activites of the employee and employer to determine how the Board and courts

have established accommodations of § 7 rights and private property rights.

As the Supreme Court stated in Republic Aviation Corp. v. NLRB, 324 U.S. 793, at 798,

> The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of applying the Act's general prohibitionary language in the light of the indefinite combinations of events which might be charged as violative of its terms. Thus a 'rigid scheme of remedies' is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation. Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 194. So far as we are here concerned, that purpose is the right of employees to organize for mutual aid without employer interference. This is the principal of labor relations which the Board is to foster.

III. ACTIVITIES

A. Access to Employer's Premises

The principles governing union rights of access to company property are among the most fundamental of labor law. Access can be an extremely organizational tool. At least one empirical study[11] has found that those

[11] Getman and Goldberg, The Behavioral Assumptions Underlying NLRB Regulations of Campaign Misrepresentations: An Empirical Evaluation, 28 Stan. L. Rev. 263, 281 (1976).

employees who switch from a pro-company to a pro-union position during an organizational drive are more likely to be familiar with the content of a union campaign than those employees who do not switch. Therefore, the success of a union organizational drive may be determined by the extent of its access to a company plant during the course of an election campaign. This union access by definition impacts directly on the private property rights of an employer. In NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 76 S. Ct. 679, 100 L. Ed. 975 (1956), the Supreme Court recognized these competing forces and established rule governing rights of access of non-employee union organizers to the private propertv of an employer.

At issue in Babcock was the legality of a rule promulgated by an employer that prohibited the distribution of literature by non-employee union organizers on company-owned parking lots. The plant in Babcock was located in a community of 21,000 people. Approximately 40 percent of the employees lived within the community, with the remainder located within a 30-mile radius. The only public area in the immediate vicinity of the plant was an area where the driveway to the plant met a public right-of-way; because of traffic conditions, however, union solicitation could not be conducted safely at that spot. The Board held that the company had violated the Act by

refusing an organizer limited access to company property.[12]

The Court noted that the company's no-access policy did not discriminate against unions and that "other means of communication, such as the mail and telephones, as well as" home visits were available to the union.[13]

In a unanimous decision, the Supreme Court said:

> [A]n 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 and if the employer's notice of order does not discriminate against the union by allowing other distribution. 351 U.S. at 112.

In attempting to reconcile employers' property rights with employees' organizational rights, the Court stated,

> Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization: the union may not always insist that the employer aid organization.[14]

The Court further noted that the rules of law applicable to employees and those applicable to non-employees [as was the instant case] is a substantive one. Absent unusal circumstances, no restrictions may be placed on the rights of employees to discuss self-organization among themselves during non-working time.

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[12]Babcock & Wilcox Co., 109 N.L.R.B. 485, 34 L.R.R.M. 1373 (1954).

[13]351 U.S. at 107.

[14]355 U.S. at 112.

The Court remarked, however, that no such obligation is owed non-employees since their rights are governed by different considerations and then stated:

> The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable Union efforts to communicate with them, the employer must allow the Union to approach his employees on his property.[15]

In denying access to the Babcock plant, the Court found particularly important the various outside instruments of communication and publicity that were at hand, such as mailings, home and street visits, telephone contact and mass media. The Court seemed to establish the maxim that access will be the exception, not the rule.

Babcock was first applied to give organizers access to live-in facilities such as resort hotels and vessels wherein the facts demonstrated that all tentative communication was not available because the employees resided on the employer's premises.[16]

However, later the Board's analysis began to shift from the emphasis upon alternative means of communications,

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[15]351 U.S. at 113.

[16]See, Sabain Towing & Transport Co., 205 N.L.R.B. No. 45, 84 L.R.R.M. 1275 (1973); New Pines, Inc., 191 N.L.R.B. No. 144, 77 L.R.R.M. 1543 (1971), enforcement denied 468 F.2d 428, 81 L.R.R.M. 2423 (2d Cir. 1972); Tamiment, Inc., 180 N.L.R.B. No. 121, 73 L.R.R.M. 1280 (1970), enforcement denied 451 F.2d 794, 78 L.R.R.M. 2726 (3d Cir. 1971).

as called for by Babcock, to examination of the quasi-public nature of the property. Such an analysis can be seen in the case of Central Hardware Co. v. National Labor Relations Board.[17]

Here the company had a rule against solicitation activities in its store and parking lot. The parking lot surrounded petitioner's free standing store and did not serve any other retail establishments. Union organizers attempted to use the petitioner's parking lot to solicit petitioner's employees to join the union, and the petitioner ordered the organizers off its property. The Board distinguished this case from Babcock & Wilcox because of the characteristics and use of the lots surrounding the petitioner's store. Instead, the Board held applicable the case of Food Employees v. Logan Valley Plaza, 391 U.S. 308, wherein peaceful picketing by union agents on a parking lot within a shopping center was held, under the circumstances existing, to be within the protection of the First Amendment.[18]

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[17]407 U.S. 539 (1972).

[18]Justice Marshall stated in Valley the following:

> [P]eaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment. 391 U.S. at 313.

The court remarked that if the shopping premises were part of a business area of a municipality, the union could not be barred from exercising its First Amendment right of free speech. The Court

However, the Supreme Court disagreed with the Board and the Court of Appeals, holding that Logan Valley rested on Constitutional grounds and was not a § 7 case. The decision was vacated and remanded to the Court of Appeals to consider the facts in light of the Babcock doctrine. The Court pointed out that the Board had erred when it asserted that the distinguishing feature between Logan Valley and Babcock was the fact that the owner in the former case had "diluted his property interests by opening his property to the general public for his own economic advantage."[19] The Court concluded that the case should be remanded and ordered that the Court of Appeals could consider whether there were no other reasonable means of communication with employees available to the non-employee union organizers other than solicitation in Central's parking lots.

Again in 1973 the Board attempted to root its decision in the quasi-public nature of the property reasoning by allowing otherwise lawful union picketing on the private property of an industrial park. In Peddie Buildings[20] employees were engaged in a strike related picketing at

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stated that the modern day shopping center is the "functional equivalent" of the business district of the company-owned town referring to the courts landmark decision in Marsh v. Alabama, 326 U.S. 501 (1946).

[19]407 U.S. 546.

[20]NLRB v. Peddie Bldgs., 498 F.2d 43, 86 L.R.R.M. 2541 (3d Cir. 1974).

their employers facility, located in an industrial park. The Board held that the owner of the park violated Section 8(a)(1) when it threatened to arrest the employees. Here again, the Board's analysis turned on the quasi-public nature of the park, the protected nature of the activity, and the fact that the employees were allowed access to the property for work. The Board recognized that a possible alternative was picketing at the entrance to the park but that this would enmesh other businesses and thus was not a desirable accommodation. The Third Circuit declined to accept the Board's decision and to extend Babcock to picketing stating that even if Babcock were applicable, the record did not contain substantial evidence of no alternate reasonable means of communication.

Four years after Central Hardware was decided, the Court issued its landmark opinion in Hudgens v. NLRB,[21] which expressly overruled Logan Valley.

In Hudgens, the employer operated a shoe store located in a privately owned enclosed shopping mall. The mall contained approximately 60 retail stores and was surrounded by a parking lot. In January, 1971, warehouse employees of the shoe company went on strike seeking certain contract demands. Strikers decided to picket not only the warehouse but also the employer's retail stores, one of which was located in the mall owned by Hudgens. On January 22, four

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[21] 424 U.S. 507, 91 L.R.R.M. 2489 (1976).

strikers entered the mall and picketed in front of the store and on two separate occasions, were warned that if they did not leave, they would be arrested for trespass. The picketers departed but subsequently filed a Section 8(a)(1) charge with the Board.

The Board concluded that the employer violated Section 8(a)(1) because the pickets' activities were protected by the First Amendment. However, Logan Valley was decided in the interim; thus, the Fifth Circuit remanded to the Board for reconsideration under Logan Valley. The second time around, the Board determined that the pickets were within Hudgen's invitation to the public, and thus, it was immaterial whether or not there existed alternative means of communication as called for by Babcock. Enforcing the Board's order, but sidestepping its analysis, the Fifth Circuit found that the Board had met the burden of Lloyd v. Tanner.[22]

Subsequently, and importantly, on certiorari, the Supreme Court determined that Logan Valley had been overruled by Lloyd v. Tanner and that the union's conduct

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[22]407 U.S. 551 (1972). A case decided the same day as Central Hardware, wherein the Court further restricted its holdings in Marsh and Logan Valley. There, anti-war handbillers sought Constitutional protection relative to distribution of leaflets in the mall of a privately owned shopping center. The Court distinguished Marsh and Logan Valley, holding that the First and Fourteenth Amendments did not protect the subject handbilling. More specifically, the Court narrowed Logan Valley to apply only to instances where the speech was related to the intended purpose of the facility.

was instead controlled by Section 7 of the NLRA. The Court reasoned that the subject conduct should be analyzed under the balancing or accommodation test in accordance with Central Hardware, and Babcock & Wilcox, instructing that the accommodation of Section 7 rights and property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other" and that the protected nature of various union activities will fall at different points along the spectrum of legality.[23]

The Court also highlighted certain factors which were to be considered by the Board, on remand, in addition to the traditional Babcock analysis, i.e., first that Hudgens involved lawful economic strike activities rather than organizational activities; second that the Section 7 activity in Hudgens was carried on by employees, not outsiders; and thirdly that the property interests at issue were not those of the employer but of the shopping center owner.

The Board, on remand, determined that the trespassory activity should be allowed. It analyzed in a very glossary manner the arguments that reasonable alternative means of communication were available, and noted in passing that mass media, adjacent parking lots and/or public sidewalks did not lend themselves to meaningful picketing. Instead,

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[23]91 L.R.R.M. at 2495.

the Board seemed determined to guarantee that the picketing would be carried on at the most effective locus, stating:

> [The company's] suggested approach would undercut Board and Court precedent recognizing and protecting such picketing as the most effective way of reaching those who would enter a struck employer's premises, including situations in which the entrance to the employer's property is on land owned by another. 230 N.L.R.B. No. 73, 95 L.R.R.M. 1351 (1977). [Emphasis added.]

Approximately a year later the Supreme Court by way of dicta in the case of Sears Roebuck & Co. v. Carpenters[24] took the opportunity to apparently caution the Board relative to its demonstrated applicaton of Hudgens on remand. The cautions were contained in the following quotations:

> For while there are unquestionably examples of tresspassary union activity in which the question of whether it is protected is fairly debatable, experience under the Act teaches that such situations are rare and that a tresspass is far more likely to be unprotected than protected. . . .
>
> While Babcock indicates that an employer may not always bar non-employee union organizations from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the Courts under the Babcock accommodation principle has rarely been in favor of trespassory organizational activity.[25]

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[24] 436 U.S. 180, 98 L.R.R.M. 2282 (1978).

[25] 98 L.R.R.M. at 2292.

The Court also indicated, but did not decide, that area standards picketing generally would be considered illegal.

Notwithstanding the Court's warnings in Sears, the Board has since seen fit to ignore the Hudgens analysis and proceed in analyzing cases considering the "effectiveness" of the union's activity, as opposed to analyzing all factors, with particular emphasis upon alternate communication.

In Giant Foods, Inc.,[26] the Board decided that "area standards picketing" by non-employees should be allowed on private proprety, notwithstanding the Supreme Court's earlier statements in Sears. In that case, Giant occupied store space which was part of a two-store building. That building was surrounded by a parking lot. Shortly after Giant opened for business, non-employee union representatives engaged in area standards picketing at the immediate entrance to Giant. These individuals were told that they would be arrested if they did not leave the property, and the union resultingly filed a charge with the Board. The Administrative Law Judge determined that the company did not violate the Act by its conduct. However, the Board on review found the company did violate Section 8(a)(1), based upon the protected nature of area standards

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[26] 241 N.L.R.B. No. 105, 100 L.R.R.M. 1598 (1979).

picketing, the primary status of the employer, and the "quasi-public" nature of the facility.

The Board in its decision regarded the Supreme Court's comment in Sears concerning area standard picketing as only a suggestion and related that "we respectfully consider that the Court did not fully examine" the question.[27]

Again, the Board apparently rested a portion of its holding on a quasi-public property finding when it reasoned as follows:

> Surely, in the absence of picket signs and handbills, these same individuals would be welcome on the site during business hours as potential customers. . . .
>
> Aside from respondents' annoyance with the possibility that the pickets' activities might have an adverse affect on business . . . there are no grounds for finding the picketing a nuisance.[28]

As one can plainly see, the Board's analysis in Giant focused on the effectiveness of the locus of the picketing. The Board engaged in no meaningful discussion of alternate communication, and to the fact that the pickets were non-employees picketing for their own benefit. The Board seemed to rely primarily on the "quasi-public" nature of the property, and raised area standards picketing to the level of organizational rights or strike-related activities, all in contravention of earlier direction by the Supreme Court.

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[27] 100 L.R.R.M. 1600 n. 11.

[28] 100 L.R.R.M. 1600.

The Board's conduct and analysis did not go unnoticed however, because the Sixth Circuit set it aside and remanded the case for further evidence and findings.[29] The Circuit Court recognized that the Board had failed to engage in sufficient analysis of the protected or unprotected nature of the picketing in question and had failed to set forth substantial evidence that alternate communication was not reasonable.

Another recent case in which the Board seems to have ignored the Supreme Court's analysis in Hudgens is the case of Hutzler Brothers Co.[30] Therein, the Board held that union organizers should be allowed to trespass upon the parking lot of a retail store. The union organizers distributed handbills soliciting union membership to employees at various entrances to Hutzler Brothers' free-standing retail store. Security guards of the employer confronted the organizers and told them that they would be arrested if they did not leave the employers' property. As a result the union filed a Section 8(a)(1) charge.

The Administrative Law Judge determined that the employer had violated the Act. In his analysis the Law Judge erroneously did not engage in a discussion of the relative importance of organizing activities under the Act,

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[29]Giant Foods, Inc. v. NLRB, 210 D.L.R. D-1 (6th Cir. 1980).

[30]241 N.L.R.B. No. 141, 101 L.R.R.M. 1062 (1979).

the strength of the employer's property interest, the fact the trespassers were not employees, and the free-standing nature of the store. Instead, he rooted his discussion in the "effectiveness" and/or "costliness" of alternate communication, failing to place any burden of proof upon the union that it had attempted such communication.

For example, the Law Judge rejected the use of mass media, such as newspapers, radio, and television by saying

> It appears to me to be a reasonable assumption that the cost of [an effective advertising campaign] would be prohibitive. . . . It seems . . . that the element of cost cannot be ignored . . . . One can only guess at the frequency and duration of any advertising that would be required to be effective.

He further stated that mass media suffers from being wholly impersonal and offers no opportunity to exchange ideas with employees and to present the union's message with any degree of persuasiveness. Likewise, he rejected the use of billboards saying that billboards, assuming one was available for rental, suffers from the impersonal nature of their appeal.

He rejected the use of sound trucks, utilization of banners and/or posters outside the store parking lot; the use of mail, telephone, home visits and/or personal contacts; rejected the idea of handbilling at public entrance ways to the parking lot on the grounds that it would be impossible to distinguish between employees and other lawful users of the parking lot; he rejected the use of road median for distribution of literature for safety

and traffic hazard reasons and dismissed the use of bus stops, restaurants and other public places near the store citing that these would be too problematic and hit-or-miss to be effective.

In summary, the Judge based his analysis on a desire to insure the effectiveness of the union's publicity campaign with as little cost as possible. This approach simply is wrong. It completely ignores the Supreme Court's guidelines in its accommodation test in accordance with Central Hardware, Babcock & Wilcox.

He found that the owner had diluted his interests by opening it up to the public, and considered the quasi-public nature of the property as an additional reason for concluding that the company's property rights should yield to the Section 7 rights of its employees.

Not surprisingly the Board saw fit to adopt the Administrative Law Judge's opinion with only brief comments which went wholly to the effectiveness of the union's activities.

Nevertheless. the Fourth Circuit reversed the Board's decision and principally held that under the Babcock & Wilcox case the burden is squarely upon the union to demonstrate that non-trespassory attempts have been made to contact employees but that no reasonable alternate communication exists. The Court felt that the union should have at least made a serious attempt to organize a company before it can complain about a lack of access to the

employer's property. It concluded by holding that the ultimate question is not whether the organizational contact of employees is difficult but whether the difficulty can be reasonably overcome.

Shortly after the Board's decision in Giant Foods was issued, the Board decided the case of Seattle-First National Bank,[31] wherein the owner of an office building violated Section 8(a)(1) by threatening to arrest union members who were handbilling in the foyer of a restaurant located on the forty-sixth floor.

The restaurant employees had gone on strike, and union members, including at least one striking employee, commenced handbilling customers in the foyer, as well as picketing and handbilling on the public sidewalks at the building's entrances and exits. The owner sought an injunction in state court, but the state court stayed its proceedings when it was preempted by the union's filing of an unfair labor practice complaint with the Board. The case was argued directly to a Board panel which concluded that the threatened arrest made by the owner to the picketers when they refused to leave the foyer of the restaurant violated Section 8(a)(1) of the Act.

The Board concluded that the union was engaged in "primary, economic strike activity,"[32] which activity

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[31] 243 N.L.R.B. No. 145, 101 L.R.R.M. 1537 (1979).

[32] 101 L.R.R.M. at 1538.

was protected by Section 7 of the Act. The Board analyzed the factual setting to that in Hudgens. As in Hudgens and Giant Foods the Board held that the communications were intended for non-striking restaurant employees and potential restaurant customers. Notwithstanding the fact that the parties stipulated that those people entering the building were very likely to see the picket signs advertising the labor dispute on the public sidewalks, the Board concluded that restricting the picketing to the public sidewalks would exceedingly hinder the union's efforts to communicate a meaningful message to the intended audience. The Board observed that it was difficult to determine the restaurant's customers until they were about to enter the restaurant from the foyer and that other customers might not be aware of or have plans to eat in the restaurant when they first entered the building. The Board found the "union's presence in the foyer . . . essential to its ability to effectively communicate with its intended audience."[33] [Emphasis added.]

On review, the Ninth Circuit[34] upheld the Board's holding that the building owner violated the Act by ordering the union members to leave the foyer area. The Circuit Court seemed to base its decision on Hudgens and explained that picketing on private property, such as the

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[33]101 L.R.R.M. at 1538.

[34]Seattle-First National Bank v. NLRB, 105 L.R.R.M. 3411 (1980).

shopping mall in that case, was not protected by the First Amendment, but instead those disputes are to be decided with reference only to the property rights on the one hand of the employer and the Act on the other, with as little destruction of one as is consistent with the maintenance of the other.

The Court recognized that when the Board balanced the rights of the parties in the Hudgens remand, critical to its decision was its finding that the picketers could not identify potential customers of the strike target before they reached the immediate vicinity of the target store. Since reaching a contrary result would insulate store owners in malls from threat of the picket weapon, seen as vital to the efficacy of strikes, the Board determined that the owner's property rights would have to yield to the employee's Section 7 rights.

The Ninth Circuit reasoned that in the instant case it was hard to see how a limited number of foyer pickets, behaving in a way that would avoid annoying the non-restaurant tenants of the forty-sixth floor, would substantially injure the owner's property rights. What burden there was on property rights was justifed by the petitioner's general invitation to the public to patronize the restaurant. Barring the pickets from the foyer, the Court pointed out, would substantially injure the union because they would be unable to bring their message, in an effective way, to a substantial portion of the restaurant's

clientele. Although the Court acknowledged that the Supreme Court in Hudgens had stated that a union does not have an absolute right to conduct its picketing at the optimum point of effective, the Court returned to its point that the burden on the petitioner was minimal.

The Court concluded by suggesting that picketing in support of an economic strike is at the core of the National Labor Relations Act. In noting that the Board's order failed to limit the number of pickets permitted in the foyer and/or to proscribe their conduct, remanded the case to the Board for the purpose of imposing such restrictions on the picketing.

Here again it seems that the Court has based a part of its decision on the justification that the petitioner has sanctioned an invitation to the public to patronize the restaurant. The Ninth Circuit comments as though Logan Valley had not been earlier overruled. Likewise, both the Board and the Ninth Circuit continue to talk in terms of the most effective means of communication with the intended audience at the most effective place of communication rather than placing particular emphasis on alternative means of communication.

I submit that the Board has incorrectly strayed from the law of Babcock, Hudgens and Sears. While Babcock and Hudgens require a balancing test, with particular emphasis on alternate communication, the Board in Hutzler, Giant

Foods and Seattle-First National Bank, instead has sought to ensure Section 7 activity at the most effective locus.

A proper analysis should be a balancing test of all relavant factors, with special emphasis on the union's ability or inability to prove lack of reasonable alternate communication. Particularly, a reviewing tribunal should consider first the nature of the Section 7 activity in question--is it in fact action protected by Section 7; secondly the character of the union representatives--are they employees or non-employees; thirdly who the activities are intended to benefit--the employers' employees or the union's constituents; fourth the nature of the employer's property right--is the owner the one asserting the property right--is the property open to the public--is there a danger of enmeshing other employers; and, most importantly, whether the union has proven no reasonable alternative means of communication.

B. Solicitation on Employer's Premises

Both the Board and the courts have recognized the importance of protecting employee freedom to communicate among themselves in exercising their organizational rights. The mere grant of organizational rights is of little, if any, value unless employees are permitted to be fully

informed about the merits, or lack thereof, of self-organization.

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, guarantees to employees the right to "self-organization, to form, join, or assist labor organizations." The extent of this guarantee was set forth in the Supreme Court's decision of Central Hardware Co. v. NLRB[35] wherein the Court stated:

> Section 7 of the National Labor Relation Act, as amended, 61 Stat. 140, 29 U.S.C. § 157, guarantees to employees the right to 'self-organization, to form, join, or assist labor organizations.' This guarantee includes both the right of union officials to discuss organization with employees, and the right of employees to discuss organization among themselves. Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer 'to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed' in Section 7. But organizational rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organizational rights." [Footnotes and citations omitted.] 407 U.S. at 542-543.

As early as 1945 the Supreme Court recognized that the guarantees established under Section 7 included both the right of union officials to discuss organization with employees, and the right of employees to discuss organization among themselves.[36]

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[35]Central Hardware Co. v. NLRB, 407 U.S. 539, 92 S. Ct. 2238, 33 L.Ed.2d 122 (1972).

[36]See Thomas v. Collins, 323 U.S. 516, 533-534 (1945).

Early in the history of the administration of the National Labor Relations Act the Board recognized the importance of freedom of communication to the free exercise of organizational rights. In Peyton Packing Co., 49 N.L.R.B. 828 (1943), enforced, 142 F.2d 1009 (5th Cir.) cert. denied 323 U.S. 730 (1943), the Board disagreed with a trial examiner and concluded that the company's posted notice prohibiting solicitation of any kind by any employee while on the property of the company, or while working on company time, was engaged in an unfair labor practice. The Board established presumptions of validity or invalidity as follows:

> The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the provience of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for disciminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances makes the rule necessary in order to maintain production or discipline." 49 N.L.R.B. at 843-844. [Emphasis added.]

Thereafter, the Supreme Court sustained the two presumptions announced by the Board in Peyton Packing Co.

when it decided the case of Republic Aviation Corp. v. NLRB.[37] It upheld the Board's ruling that an employer may not prohibit its employees from distributing union organizational material in non-working areas of its industrial property during non-working times absent a showing by the employer that a ban is necessary to maintain plant discipline or production. The employer had adopted a no-solicitation rule before the onset of any employee organizational activity. The rule was applied impartially against all forms of solicitation.[38]

The Court decided that the rule was overbroad because it restricted employee solicitation on the employer's premises during non-working time and it's enforcement therefore, constituted an unlawful interference with the employees organizational rights. Notwithstanding the fact that the rule was enforced in a non-discriminatory manner, the Court concluded that in the absence of special circumstances, no-solicitation rules that extend to non-working time interferes with the basic rights of employees to form, join, or assist labor organizations, citing with approval the Board's presumptions in Peyton Packing Co.

The Court concluded that this standard was an acceptable adjustment between the undisputed right of

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[38]The rule provided:

"SOLICITATION OF ANY TYPE CANNOT BE PERMITTED IN THE FACTORY OR OFFICES."

self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishment. The Court recognized that the opportunity to organize and proper discipline are both essential elements in a balanced society.[39]

It should be noted that the standards applicable to solicitation and distribution outlined in Republic Aviation for employees, differs substantially from the standards to be applied to non-employee organizers. See National Labor Relation Board v. Babcock and Wilcox Co., supra, wherein it was 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 would enable it to reach the employees with its message and if the employer's notice or order does not disciminate against the union by allowing other distribution.

Moreover, it was recognized in Central Hardware Co. v. NLRB, supra, that the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' Section 7 rights. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) proscribed non-working areas of the employer's premises; and (iii) the duration of organization activity. In short, the principle

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[39]324 U.S. at 797-798.

of accommodation announced in Babcock is limited to labor organization campaigns, and the "yielding" of property rights it may require is both temporary and minimal. 407 U.S. 545.

Again in 1974 in Essex International, Inc., 211 N.L.R.B. 749, 86 L.R.R.M. 1411, the Board established presumptions of validity, or the lack thereof, between "working time" and "working hours." "Working time" as defined by the Board is meant that period of time spent by employees in the actual performance of their jobs as distinguished from "working hours" which the Board considers to encompass that period of time from the start of a work shift until its completion. The Board elaborated as follows:

> The Board from time to time has been confronted with situations in which prohibitions against solicitation or distribution during 'working hours' or during 'working time' has been challenged. In our view, there is a clear distinction to be drawn between the terms 'working hours' and 'working time.' The term 'working hours' connotes the period of time from the beginning to the end of a working shift. Thus, the use of that term in a no-solicitation or no-distribution rule is reasonably calculated to mean that employees are prohibited from engaging in any form of union solicitation or distribution of union literature from the time they 'clock in,' or begin their workshift, until the time they 'clock out,' or end their workshift. By contrast, the term 'working time' or 'work time' connotes the period of time that is spent in the perforance of actual job duties, which would not include time alloted for lunch and break periods. Thus, the use of that term in a no-solicitation or no-distribution rule would clearly convey the meaning to employees that they were free to engage in solicitation or distribution during lunch and break periods which occur

during their 'working hours.' 86 L.R.R.M. at 1412.

However, the Court did point out that an employer could rebut the presumption of invalidity by offering extrinsic evidence that in the context of a particular case the "working hours" language was communicated to employees or applied in such a way as to convey an intent to clearly permit solicitation during break times or other periods when employees were not actively at work. 86 L.R.R.M at 1412.

Later cases applied the Essex doctrine in deciding the validity of various no-solicitation, no-distribution rules, but the doctrine predictably did not always cover the different factual circumstances of each case.

In NLRB v. Florida Medical Center, Inc.,[40] the hospital promulgated a no-solicitation rule in its employees manual prohibiting solicitation of any kind "on hospital time" or property without special permission of the hospital and defined "hospital time" to mean those hours that an employee is paid to work. Example: An off-duty employee can only solicit another off-duty employee. The employer contended that the phrase "hours when an employee is paid to work" should be interpreted to cover only solicitation during actual working time and in a working area. The United States Court of Appeals for the Fifth Circuit did not agree, holding: "With regard to the

[40]576 F.2d 666, 98 L.R.R.M. 3144 (5th Cir. 1978).

time during which employees might engage in solicitation, the rule was inherently ambiguous and we construe that ambiguity against the employer."[41]

In another Fifth Circuit case, Florida Steel Corp. v. NLRB,[42] the Court was faced with a rule prohibiting solicitation "on the company's time." The Court interpreted its validity to hold that the phrase could easily have been seen as barring solicitation during the entire time the employee was "clocked in," including such non-working time as rest periods and coffee breaks, and therefore held that the rule was overlybroad and violated Section 8(a)(1) of the Act.

One ingenious employer tried a different tactic and promulgated a rule prohibiting both unauthorized solicitation, except such solicitation during employee's non-working time as is protected by the National Labor Relations Act, and unauthorized distribution of literature, except such distribution during non-working time in

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[41]576 F.2d at 670, 98 L.R.R.M. at 3146.

[42]529 F.2d 1225, 92 L.R.R.M. 2040 (5th Cir. 1976); see also Wometco Coca-Cola Bottling Co. of Nashville, 225 N.L.R.B. No. 69 (decided March 31, 1981) wherein the Board decided that an employer had committed an unfair labor practice when he advised employees that workers who sign union cards on company property or "on company time" would be terminated. The Board concluded that the employer could not lawfully forbid employees from signing union cards on company property without some restriction as to time. Nor could the employer lawfully forbid its employees to execute union cards "on company time" since such language failed to make clear that employees were free to sign union cards during break times even when on the clock.

non-working areas as is protected by the National Labor Relations Act. The Board held that these rules were invalid on their face because of their ambiguity, declaring it immaterial that the employer might interpret and apply them lawfully. Chrysler Corp. v. NLRB, 227 N.L.R.B. 1256, 95 L.R.R.M. 1448 (1977). However, the Sixth Circuit Court of Appeals denied enforcement and concluded contrary to the Board, that the rules were not ambiguous. vague or confusing.[43]

On July 31, 1981, the NLRB announced new standards for evaluating proportedly over-restrictive no-solicitation rules. In TRW, Inc.,[44] the Board held that a no-solicitation rule that restricts union solicitation to the employee's non-working time is presumably illegal. This is a drastic change in the Board's policy. Under the prior Board's decision in Essex International, Inc., supra, such a rule was presumably lawful.

The employer in TRW, Inc. promulgated two different no-solicitation rules. The first rule prohibited solicitation during "working time." Under Essex International, this rule was presumably valid. Approximately eight months after promulgating the first rule, the employer distributed an employee handbook that contained a "working hours" restriction on union solicitation. Under Essex

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[43]Chrysler Corp. v. NLRB, 595 F.2d 364, 101 L.R.R.M. 2837 (6th Cir. 1979).

[44]257 N.L.R.B. No. 47, 107 L.R.R.M. 1481 (1981).

International, this rule was presumably invalid. As expected, the employer's defense was that the "working hours" restriction was communicated and applied in a way that conformed with the earlier lawful "working time" restriction.

Instead of concerning itself with whether the employer rebutted the presumptive invalidity of its later rule, the Board reevaluated the wisdom of the Essex International distinctions. It should be noted that Essex was a 3-2 decision with members Fanning and Jenkins dissenting. Actually in holding Essex the Board had overruled its prior decision in Avon Convalescent Center, Inc.,[45] a case in which members Fanning and Jenkins had formed part of the majority. Apparently Fanning and Jenkins had been awaiting an opportunity to overrule Essex as soon as a new Board member (Zimmerman) was appointed who was persuaded to go along with their view on no-solicitation distribution rules.

In any event the Court in reevaluating the wisdom of Essex concluded that there was no meaningful distinction between the two terms, i.e., "working time" and "working hours," and that either term, by itself, is reasonably susceptible to an overbroad interpretation. Therefore a "working time" or "working hour" restriction is illegal unless it is accompanied by further explanation.

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[45]200 N.L.R.B. No. 99, aff'd 490 F.2d 1384 (6th Cir.).

In reaching this conclusion, the Board outlined standards for evaluating whether a no-solicitation rule is overbroad. The Board first noted that since employers must allow their employees to engage in union-organizing activities during their break and meal periods, a rule that either directly restricted such activity or because of its ambiguity, could be read as restricting such activity is presumably unlawful.

Next, the Board made it clear that the promulgator of an ambiguous no-solicitation rule bears the risk that the rule may be found unlawful. The Board concluded by noting that an employer who truly does not intend to mislead its employees will accompany the no-solicitation rule with a clear statement that it does not apply during break and meal periods, or other specific times during the workday when employees are not supposed to be working. Accordingly, a no-solicitation rule that merely prohibits solicitation during "working time" is now presumably illegal unless it is accompanied by further explanation.

Employers' rules banning union solicitation have been upheld as a proper exercise of the employers' right to maintain production or discipline in cases where their purpose was to prevent the disruption of work schedules and production.

In NLRB v. Sioux City & New Orleans Barge Lines[46] the employer operated tugboats on various rivers between Sioux City, Iowa and New Orleans. Three unions sought to organize its employees who worked shifts lasting from 30 to 60 days and spent extensive time away from the boats during leave or vacation time. The boats traveled continuously at high speeds and contained hazardous materials capable of producing serious injury. In addition, casual visitors to the boat were generally accompanied by company personnel. In refusing to enforce the Board's order allowing union access to the employees on the vessels, the Court stated that permitting non-employee organizers to board the tugboats would require the employer to:

> (1) To expend additional time and effort to aid union representatives in hazardous boarding and disembarking operations while the boats are on the run, or to substantially interfere with continuous operations by stopping the tugboats; (2) To coordinate visits from union personnel from three unions by advising union officials of the location of the vessels and by communicating with boat captains advising and authorizing each visitation; (3) To assume, through its captains or supervising personnel, the duty of directing or taking union organizers to an appropriate place on board for meeting crewmen not on watch; and (4) To supply personnel to enforce reasonable rule and regulations so that, while on board, union organizers do not interfere with the work of on-duty crewmen. Thus, permitting three unions to have access to an employer's property under the circumstances of this case imposes a substantial burden both on the employer's property rights and on his production. 472 F.2d at 756.

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[46] 472 F.2d 753 (8th Cir. 1973) denying enforcement of 193 N.L.R.B. 382, 78 L.R.R.M. 1580 (1971).

Here the appellate court denied access to the company property, even though it recognized that by doing so it caused a union hardship in communicating with employees; however, the balance of interest rests with the employer's preservation of its production and operations. See also Willington Mill Div., West Point Mfg. Co. v. NLRB, 330 F.2d 579 (4th Cir.) cert. denied 379 U.S. 882 (1964), wherein the Court upheld the employer's ban on union solicitation as a proper exercise of its right to maintain production and discipline and to prevent the disruption of work schedules and production.

Normally off-duty employees who return to work to solicit employees working on another shift are treated as if they are non-employees.[47] In GTE Lenkurt, Inc.,[48] the Board stated its reason for considering off-duty employees and non-employees the same for purposes of solicitation on the employer's premises as follows:

> It seems apparent that for purposes not protected by this Act off-duty employees and non-employees would be invitees to the same extent, and one is no more entitle than the other to admission to the premises. We are unable to conclude that a different rule is required when union organization is involved, and, absent a showing of inability to reach the employees otherwise, we see no justification for holding that an employer's right to control ingress to his property must give way for that purpose. 83 L.R.R.M. at 1686.

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[47]Diamond Shamrock Co. v. NLRB, 443 F.2d 52 (3rd Cir. 1971).

[48]204 N.L.R.B. 921, 83 L.R.R.M. 1684 (1973).

However, the Board has been extremely cautious in establishing no-access rules which would unduly interfere with the rights of employees to communicate freely with workers on other shifts. In Tri-County Medical Center[49] the Court established that a no-access rule is considered valid only if it: (1) limits access solely with respect to the interior to the plant and other working areas; (2) is clearly dissiminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaged in union activity.

C. Special Rules For Retail Department Stores and Health Care Institutions

The Board and courts have determined that the nature of at least two employee businesses namely, retail department stores and health care institutions, may provide special circumstances which necessitate limitations on employees solicitation and distribution rights.

In the retail department store situation it seems to be settled law that an employer may prohibit employee solicitation in the store's public area even during

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[49]222 N.L.R.B. No. 174, 91 L.R.R.M. 1323 (1976).

non-working time because of the nature of the business.[50] However, the limitation on solicitation will not be extended to non-selling areas of the store on break time, in rest rooms, and during waiting time. NLRB v. Daylin, Inc. 496 F.2d 484 (6th Cir. 1974); G.C. Murphy Co., 171 N.L.R.B. 370, 68 L.R.R.M. 1108 (1968).

By amendment to the National Labor Relations Act, non-profit health care institutions were brought within the coverage in 1974. Shortly thereafter the Board was confronted with the problem of balancing the interest of employees in self-organization with those of patients undergoing treatment at hospitals and other health care institutions.

In St. John's Hospital & School of Nursing[51] the Board determined that employee solicitation and distribution could be prohibited, even during non-working time, in "strictly patient care areas" such as operative, patient rooms, X-ray rooms and therapeutic areas. The Board stated:

> [A] hospital may be warranted in prohibiting solicitation even on non-working time in strictly patient care areas, such as the patients' rooms,

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[50]Meier & Frank Co., 8 N.L.R.B. 1016, 26 L.R.R.M. 1081 (1950); Marshall Field & Co., 98 N.L.R.B. 88, 29 L.R.R.M. 1305 (1952), enf'd 200 F.2d 375 (7th Cir. 1953); Goldblatt Bros., Inc., 77 N.L.R.B. 1262, 22 L.R.R.M. 1153 (1948); May Dept. Stores Co., 59 N.L.R.B. 976, 15 L.R.R.M. 173 (1944), enf'd as modified, 154 F.2d 533 (8th Cir.), cert. denied 329 U.S. 725 (1946).

[51]222 N.L.R.B. 1150, 91 L.R.R.M. 1333 (1976), enf'd in part and denied in part 557 F.2d 1368 (10th Cir. 1977).

> operating rooms, and places where patients receive treatment, such as X-ray and therapy areas. Solicitation at any time in these areas might be unsettling to the patients--particularly those who are seriously ill and thus need quiet and peace of mind. Consequently, banning solicitation on non-working time in such areas as described above would seem justified . . . . 91 L.R.R.M. at 334.

However, the Board also concluded that an overlybroad no-solicitation or no-distribution rule would be invalid if applied to cafeterias and lounges simply because patients may have access to them stating:

> As to the restrictions in visitor areas other than those involved in patient care, the possibility of any disruption in patient care resulting from solicitaton or distribution of literature is remote. As to the restrictions in patient access areas such as cafeterias, lounges and the like, we do not perceive how patients would be affected adversely by such activities. On balance, the interest of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit union representation. 91 L.R.R.M. at 334.

However, the Tenth Circuit disagreed with the Board's distinction between "patient care areas" and other areas to which patients have access and concluded that employee solicitation and distribution could be restricted in its cafeterias and gift shops in the same manner that restaurants and retail stores do.[52]

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[52]St. John's Hospital & School of Nursing, Inc. v. NLRB, 557 F.2d 1368 (10th Cir. 1977), the Circuit Court stated:

> [T]he conceeded fact that solicitation may be unsettling to patients, and the absence of any record evidence to support the distinction between the sensibilities of bedridden vis-a-vis ambulatory patients we are compelled to conclude

In the following year both the District of Columbia and the Sixth Circuit followed the Tenth Circuit's holding in St. John's Hospital and likewise denied enforcement of a Board's order allowing employee solicitation and distribution in cafeterias as well as other areas where patients had access.[53] However, the Seventh Circuit and the First Circuit appeared to have taken a different approach toward the Board's policy in so far as it applied to the hospital's cafeteria and gift shops.[54]

The Supreme Court in its first decision dealing with hospital solicitation, Beth Israel Hospital v. NLRB,[55] attempted to resolve the conflicts among the Courts of

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> that the balance struck by the Board is unsupported and unreasonable. In contrast the Hospital's restriction on solicitation in all patient access areas comports with the realities of modern hospital care, where the emphasis is on having the patient ambulatory as soon as possible, and strikes a reasonable, easily applicable balance between the interests of the Hospital in maintaining the tranquil atmosphere essential to quality patient care and the self-organizational interests of the employees. 557 F.2d at 1375.

[53]The District of Columbia Circuit: Baylor University Medical Center v. NLRB, 578 F.2d 351 (D.C. Cir. 1978)

Sixth Circuit: NLRB v. Baptist Hospital, Inc., 576 F.2d 107 (6th Cir. 1978).

[54]Seventh Circuit: Luthern Hospital of Milwaukee, 564 F.2d 208 (7th Cir. 1977)

First Circuit: Beth Israel Hospital v. NLRB, 554 F.2d 477 (1st Cir. 1977), aff'd. 437 U.S. 483, 98 L.R.R.M. 2727 (1978).

[55]437 U.S. 483, 98 L.R.R.M. 2727 (1978).

Appeals, and upheld the Board's decision that a health care facility must permit employee solicitation and distribution during non-working time in non-working areas, unless a ban on solicitation can be justified "as necessary to avoid disruption of health care operations or disturbance of patients."[56]

The Court reasoned that the no-solicitation rule was invalid because it extended to areas not devoted to patient care, namely, the hospital's cafeteria and coffee shop. It concluded that the Board had properly balanced the competing interest of the hospital and its employees based on the fact that the areas of contention were shown to be the natural gathering places for employees, and one in which the risk of harm to patients was relatively low in comparison with other locations in the hospital. A three-day survey conducted by petitioner revealed that 77 percent of the cafeteria's patrons were employees while only 9 percent were visitors and 1.5 percent were patients. In upholding the Board's finding of a violation the Supreme Court observed:

> The Board determined, however that the balance should be struck against prohibition in areas other than immediate patient-care areas such as lounges and cafeterias absent a showing that disruption to patient care would necessarily result. . . . 437 U.S. at 495.

Left unresolved in Beth Israel Hospital was the mets and bounds of the terms "immediate patient-care areas."

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[56]437 U.S. at 507.

The following year the Court defined that term in Baptist Hospital v. NLRB,[57] to mean any area used for treatment or therapy of patients and all areas immediately contigeuous that are accessable to or likely to be frequented by patients and their visitors. Specifically, the Court determined that the union may carry on its representation drive in the lobbys, gift shop, cafeteria and entrances on the first floor, certain public areas elsewhere where patients are not likely to be found, and in various other "employee only" areas of the hospital complex.

This decision substantially affirms the Board's presumption that a no-solicitation rule that bans union activity in a non-workplace during non-work time violates the Act even in the context of a health care institution.

However, the Supreme Court did affirm the Sixth Circuit's conclusion that the hospital had successfully rebutted the Board's presumption against the validity of the no-solicitation rule with respect to corridors and sitting rooms adjacent to or accessible to areas used for the treatment or therapy of patients through the testimony of doctors and other hospital administrators.

The Supreme Court cautioned the Board in the words of Beth Israel Hospital as follows:

> '[T]he Board [bears] a heavy continuing responsibility to review its policies concerning

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[57]244 U.S. 773, 99 S. Ct. 2598, 61 L.Ed.2d 251 (1979).

> organizational activities in various parts of hospitals. Hospitals carry on a public function of the upmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized.' 437 U.S. at 508, quoting Beth Israel Hospital v. NLRB, supra, 554 F.2d at 481." 101 L.R.R.M. 2562.

In subsequent hospital cases, the Board has continued to define "immediate patient-care area" narrowly.[58] However, there has been mixed results of the Board's decisions on appeal.

The Ninth Circuit affirmed the Board's finding that the hospital's prohibition of employees from soliciting in a breakroom that was adjacent to the operation room was violative of the Act.[59] The hospital had argued that the area was a "sitting room" on a patient-care floor, and thus was an area where the employer could permissibly prohibit solicitation under the standards set in Baptist Hospital, supra.

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[58]See Liberty Nursing Homes, Inc., 245 N.L.R.B. No. 153, 102 L.R.R.M. 1517 (1917) [rule prohibiting solicitation in non-immediate patient care area where patients or visitors could overhear discussions about the union held invalid]; Medical Center Hospitals, 244 N.L.R.B. No. 116, 102 L.R.R.M. 1105 (1979), enf'd w'out opin'n, 106 L.R.R.M. 2546 (4th Cir. 1980) [rule prohibiting solicitation on walkway outside hospital held invalid]; Vassar Bros. Hospital, 243 N.L.R.B. No. 67, 102 L.R.R.M. 1024 (1979) [rule banning solicitation in corridor adjacent to cafeteria held invalid where the area was neither patient-care nor patient-access area].

[59]NLRB v. Los Angeles New Hospital, 640 F.2d 1017, 106 L.R.R.M. 2855 (9th Cir. 1981).

The Board concluded that the room was an employee lounge and not a sitting area for visitors. The Court agreed by finding that there was substantial evidence on the record as a whole to support the Board's conclusion, and that there was no evidence presented by the employer to show that the solicitation in question had disturbed others in the operating room sufficiently to show a disruption to patient care which would necessarily result in the absence of a complete ban on solicitation in the area.

Similarly the First Circuit has upheld the Board's finding that a hospital's no-solicitation rule was overlybroad since it did not permit solicitation during the full range of non-working time in areas not involved with patient-care.[60] Here again, the Court noted that there was a lack of any evidence of disruption of patient care or disturbance of patients.

However the District of Columbia Circuit has taken a more restrictive view of no-solicitation rules in the health care industry. In Baylor University Medical Center v. NLRB,[61] the Court denied enforcement of the Board's order finding that the Medical Center's no-solicitation rule was invalid and remanded the case for further consideration. The Court held that the Board erred in presuming that solicitation in areas not directly devoted

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[60]Eastern Maine Medical Center v. NLRB, 658 F.2d 1, 108 L.R.R.M. 2234 (1st Cir. 1981).

[61]662 F.2d 56, 108 L.R.R.M. 2041 (D.C. Cir. 1981).

to patient care does not disrupt patient care. It emphasized that there was evidence that witnessing union solicitation tends to undermine both patient's and visitor's confidence in the hospital and that a concentration of patients and visitors in the cafeteria at certain times might warrant restrictions on solicitation during those times.

The Court also suggested that there might be other available and alternative areas for solicitation. The different considerations to be given the health care industry may make a Board inquiry into the availability of alternative areas appropriate.

D. Distribution on Employer's Premises

The Board and the courts have struck a slightly different balance between the organizational rights of employees and the employers' property rights as it concerns the distribution of literature and materials. Whereas solicitation, being oral in nature, impinges only upon the employers' interest to the extent that it occurs on working time, distribution of literature, because it carries the potential of littering the employer's premises, raises a

hazard to production whether it occurs on working time or non-working time.[62]

Therefore it has been determined that the organizational rights of employees can be adequately satisfied if they are permitted to distibute materials and literature during non-working time in non-working areas.[63] A presumption of invalidity arises if the no-distribution rule is therefore not limited to working time or to the working areas of the plant.[64]

The presumption of invalidity when an employer attempts to regulate the distribution of material in his plant in non-working areas and on non-working time may be rebutted by the showing "that special circumstances make

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[62]Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 51 L.R.R.M. 1110 (1962).

[63]Babcock & Wilcox Co., 351 U.S. 105, 76 S. Ct. 679, 100 L. Ed. 975 (1956); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 65 S. Ct. 982, 98 L. Ed. 1372, rehearing denied 325 U.S. 894 (1945).

[64]National Labor Relations Board v. Transcon Lines, 599 F.2d 719 (5th Cir. 1979) wherein the Court determined that a no-distribution rule for over the road drivers prohibiting distribution in the driver's room which was found to be a mixed use area for both work and relaxation remarked as follows:

> ". . . An employer may lawfully prohibit his employees from distributing literature concerning their working conditions in work areas or during work time. But a rule that extends the prohibition to non-working areas during non-working time is presumably invalid unless the employer shows that a ban is necessary to maintain plant discipline or production." 599 F.2d at 721. (Citations omitted.)

the rule necessary to maintain production or discipline."[65]

If the employer proves "special circumstances" the rule is not automatically found valid, however. The Court merely proceeds to the next step in its analysis: a balancing of the employee's interest in distributing material and the employer's interest in controlling such distribution with the rule in question. Only if the Court finds that the employer's interest outweighs the employee's will the rule ulitmately be found invalid. McDonnell Douglas Corp. v. NLRB, 472 F.2d 539, 545-46 (8th Cir. 1973). See also American Cast Iron Type Company v. NLRB, 600 F.2d 132 at 135-136 (8th Cir. 1979).

In the McDonnell Douglas case the Eighth Circuit refused to enforce the Board's order finding that McDonnell's rule limiting solicitation and distribution on company property by off-duty employees violated the Act. The Court found that the company had overcome the presumption of invalidity by producing evidence that such a restriction was a precaution against a breach in national security, and made the following observation:

> In sum, we conclude that the examiner and the majority rendered only lip service to the balancing of interest test. This record conclusively shows that McDonnell is engaged in highly sophisticated operations in manufacturing aircraft. missles, space vehicles, and military

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[65]Republic Aviation Corp. v. NLRB, 324 U.S. at 803-804, n. 10, 65 S. Ct. at 988; see also Eastex, Inc. v. NLRB, 437 U.S. at 573, n. 22, 98 S. Ct. 2505.

> airplanes, and that much of its production is militarily sensitive and classified secret by the United States government. It can hardly be gainsaid that McDonnell should be permitted to exercise such control over its premises and its employees when they are not on duty as to afford adequate protection to these operations. Of course, [the employer] cannot interfere with its employees' rights to distribute literature and orally solicit on behalf of unions except to the extent it is necessary to maintain production, discipline, security or other important interests. But the Board's majority failed to consider responsibly and give weight to all of the relavent factors which are involved in the extensive operation of McDonnell, and failed to work out an adequate adjustment between the undisputed right of self-organization assured to the employees and the equally undisputed right of McDonnell to maintain discipline and security in its establishment. 472 F.2d at 547.

When the Board and courts have been confronted with distribution rules as to non-employees, on the employer's premises, they have concluded that the same rules applicable to the right of soliciting should apply. That is, 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 and if the employer's notice or order does not disciminate against the union by allowing other distribution.[66]

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[66]NLRB v. Babcock & Wilcox Co., 351 U.S. 105 at 112, 76 S. Ct. 679, 100 L. Ed. 975 (1956).

> It is our judgment, however, that an employer may validly post his property against non-employee distribution of union literature if reasonabl efforts by the union through other available channels of communication will enable

E. Distribution Activities Which Are Unprotected Because of Their Content

Conduct falls within the protection of the National Labor Relations Act if it involves the exercise of a right

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it to reach the employee with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the order in these cases permit.

This is not a problem of always open or always closed doors for union organization on company property. Organizational rights are granting to workers by the same authority, the National Government, that preserves property rights. Accommodations between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with the through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

The determination of the proper adjustments rests with the Board. Its rulings, when reached on findings of fact supported by substantial evidence on the record as a whole, should be sustained by the courts unless its conclusions rest on erroneous legal foundations. Here the Board failed to make a distinction between rules of law applicable to employees and those applicable to non-employees.

The distinction is one of substance. No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production

guaranteed to employees by Section 7, 29 U.S.C.A. § 157.[67] To determine whether activity is protected

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or discipline. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803. But no such obligation is owed non-employee organizers. Their access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. No such conditions are shown in these records.

The plants are close to small well-settled communities where a large percentage of the employees live. The usual methods of imparting information are available. . . . The various instruments of publicity are at hand. Though the quarters of the employees are scattered they are in reasonable reach. The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employers' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available. 351 U.S. 112-114. [Footnote citations omitted.]

[67]Texas Instruments Incorporated v. NLRB, 637 F.2d 822 (1st Cir. 1981).

Section 7, as amended by the Taft-Hartley Act, provides:

Employees shall have the right to self-organize, 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

under Section 7 as "concerted activities for . . . mutual aid or protection," the courts and the Board have liberally construed the language to mean that all acts reasonably related to the employees' jobs or to their status as employees is protected.[68] Thus, almost any activity directed at wages, hours, or terms and conditions of employment is for mutual aid or protection.

Prior to the Supreme Court's decision in Eastex, many circuit courts had restricted the "mutual aid or protection" clause to matters which were directly under the employer's control.[69] The Supreme Court in Eastex rejected the employer's contention that Section 7's "mutual

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[68]Eastex, Inc. v. National Labor Relations Board, 215 N.L.R.B. 271, 274 (1974) enf'd, 550 F.2d 198 (5th Cir. 1977), aff'd, 437 U.S. 556 (1978); G & W Elec. Specialty Co., 154 N.R.L.B. 1136, 1137-38 (1965), enforcement denied, 360 F.2d 873 (7th Cir. 1966).

[69]G & W Elec. Specialty Co., 154 N.R.L.B. 1136, 1137-38 (1965), enforcement denied, 360 F.2d 873 (7th Cir. 1966) [refusing to enforce Board order because circulation of a petition concerning management of an employee-run credit union "involved no request for any action upon the part of the company and did not concern a matter over which the company had any control"]; NLRB v. Bretz Fuel Co., 210 F.2d 392, 296 (4th Cir. 1954) [strikes and picketing to protest proposed mining legislation not protected concerted activity because it was not "intimately connected with the employees' immediate employment"]; however see: Kaiser Engineers v. NLRB, 538 F.2d 1379 (9th Cir. 1976) [when court found activity to be concerted and within the protection of Section 7 when an employee sent a letter to Congress opposing changes in the immigration laws that would have permitted the importation of alien engineers. The court recognized that federal immigration policy is clearly outside the control of management however the court held that the issue was closely related to the employment security of the engineer as employees and thus was protected].

aid or protection" clause protects only concerted activity by employees that is directly at conditions that he as an employee has authority or power to change or control. The Court's response to this argument was as follows:

> We believe that petitioner misconceives the reach of the 'mutual aid or protection' clause. The 'employees' who may engage in concerted activities for the 'mutual aid or protection' as defined by § 2(3) of the Act, 29 U.S.C. § 152(3), to 'include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise. . . .' This definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own. In recognition of this intent, the Board and the courts long have held that the 'mutual aid or protection' clause encompasses such activity. Petitioner's argument on this point ignore the language of the Act and its settled construction.
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> We also find no warrant for petitioner's view that employees loose their protection under the 'mutual aid or protection' clause when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. The 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.' Thus, it has been held that the 'mutual aid or protection' clause protects employees from retaliation by the employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause. To hold that activity of this nature is entirely unprotected--irrespective of location or the means employed--would leave employees open to retaliation for much legitimate activity that

> could improve their lot as employees. As this could 'frustrate the policy of the Act to protect the right of workers to act together to better their working conditions,' NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962), we do not think that Congress could have intended the protection of § 7 to be as narrow as petitioner insists.
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> It is true, of course, that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause. It is neither necessary nor appropriate, however, for us to attempt to deliniate precisely the boundaries of the 'mutual aid or protection' clause. That task is for the Board to perform in the first instance as it considers the wide variety of cases that come before it. Republic Aviation Corp. v. NLRB, 324 U.S., at 798; Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). To decide this case, it is enough to determine whether the Board erred in holding that distribution of the second and third sections of the newsletter is for the purpose of 'mutual aid or protection.' 437 U.S. 564-568. [Footnotes and citations omitted.]

Not all conduct that can, in some general sense, be characterized as an exercise of rights enumerated in Section 7 of the National Labor Relations Act is afforded protection. For example, concerted activity that violates state or federal law, that irresponsibly exposes an employer's property to possible damage or that constitutes insubordination or disloyalty may be found to fall outside the scope of the Act even if undertaken in the interest of self-organization or collective bargaining. Texas Instruments Incorporated v. National Labor Relations Board, 637 F.2d 822, 823 (5th Cir. 1981). That Court stated:

> While it is true that the Supreme Court has recognized a right in employees to exchange organizational information as a necessary incident to 'the right to self-organize' expressly guaranteed by Section 7, . . . It is also true that an abstract invocation of this right does not automatically shield an employee's acts from sanction under a company rule. Not all conduct that can, in some general sense, be characterized as an exercise of a right ennumerated in section 7 is afforded the protection of the Act. . . . [R]ights under section 7 must in each instance be understood in relation to the concrete facts of a particular case. 637 F.2d at 829-830. [Citations omitted.]

Likewise, the First Circuit in the case of Keosaian v. National Labor Relations Board, 630 F.2d 36, 38 (1st Cir. 1980) recognized:

> It is firmly established that an employee's conduct may be so offensive, disruptive, or destructive of the employer's business as to go beyond the protection of section 7, even if the goals of the conduct are within the protection of section 7. . . . The exact location of the dividing line between protected and excessive activity is sometimes difficult to discern. . . . [Citations omitted.]

Distribution by employees of certain types of materials may be prohibited where the content of the materials is such that the distribution activity is not protected, concerted activity within the contemplation of section 7 of the National Labor Relations Act.

This situation has arisen in recent years when employees have attempted to distribute political literature on company premises.

The Board decided in Ford Motor Co., 221 N.L.R.B. 663, 90 L.R.R.M. 1731 (1975), enf'd 546 F.2d 418, 93 L.R.R.M.

2570 (3rd Cir. 1976), that "purely political tracts" were sufficiently removed from the employees interest as employees so as to remove distribution of such material from protection under the "mutual aid or protection" clause. The facts in the case indicate that an employee union member who was also a member of a militant subgroup sought to distribute two issues of the subgroup's newsletter on two dates within the plant gates and was refused permission by the employer. The first newsletter addressed forced overtime and also contained general political statements. The second newsletter was found to be a "political tract" unrelated to the employees' problems and concerns. The Board concluded that the first newsletter which contained "mixed literature" was protected under the Act but that the second newsletter was not since it contained no substantial protected matter.

The Board has also held that where the written material is "mixed" and includes "social comments" as well as matters pertaining to working conditions, the employer may not prohibit distribution of the literature on non-working time and in non-working areas.[70]

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[70]Samsonite Corp., 206 N.L.R.B. 343, 84 L.R.R.M. 1369 (1973). See however Veeder-Root Company, 327 N.R.L.B. 186 (decided Aug. 28, 1978) wherein an employer was engaged in unlawful interference when it suspended one employee and issued a written warning to another for distributing literature that made "false," offensive, and "malicious" statements about the employer. The two employees were also handing out to company employees on a public street before working hour a flyer urging attendance at the May Day rally. The Court concluded that although the flyer was

This issue as to whether or not the content of the distribution can be of such a nature as to lose its protection under the concerted activities within the contemplation of section 7 of the Act was first confronted by the Supreme Court in Eastex, Inc. v. NLRB.[71]

Here the question was whether an employer's refusal to permit employees to distribute a union newsletter in non-working areas of the employers property during non-working time violated Section 8(a)(1) fo the Act. The newsletter was divided into four sections. The first and fourth sections urged employees to support and participate in the union and generally applauded the benefits of union solidarity. The second section incouraged employees to write their legislators to oppose incorporating the state's "right-to-work" statute into a revised state constitution, warning that incorporation would weaken the unions and improve the edge that business had at the bargaining table. The third section noted that the President had recently vetoed a bill to increase the federal minimum wage from $1.60 to $2.00 per hour, compared this action to the

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"mainly political in nature" it contained a paragraph harshly criticizing the employer regarding working conditions, and since there were no statements in the literature urging anyone to do anything which would disrupt company discipline, and there was not evidence of any disruption or interuption of normal workings activities after the distribution, and even though the reference to the company was misleading if not inaccurate or false, the Court concluded that the two employees were engaged in lawful protected concerted activity.

[71] 437 U.S. 556, 98 L.R.R.M. 2717 (1978).

increase of prices and profits in the oil industry under administration policies, and admonished: "As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today."

The employer claimed the distribution of the second and third sections were not protected since the "mutual aid or protection" clause of Section 7 protected only concerted activities by employees that is directly at conditions that their employer has the authority or power to change or control. Both the Board and the Court of Appeals agreed that the distribution was protected under the Act.

The Supreme Court asked two questions. First the Court wanted to make a determination, apart from the location of the activity and distribution of the newsletters, whether that kind of activity is protected under the Act from employer interference. Secondly, the Court asked whether the fact that the activity took place on the employer's property gives rise to a countervailing interest in the employer that outweighs the exercise of Section 7 rights in that location.

The Court took an extremely broad view of the "mutual aid or protection" clause and held that the test proposed by the employer as to whether or not the activity pertains to something over which the employer has power or authority to change or control is too narrow.[72]

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[72] 437 U.S. at 563 et al. See discussion of this issue beginning at page 53 et al.

The Court agreed with the Board that the "right-to-work" issue was sufficiently related to employees' interest because union security is central to the union concept of strength through solidarity and is a mandatory subject of bargaining in other than right-to-work states. As to the presidential veto the Board reasoned that minimum wage inevitably influences wage levels derived from collective bargaining, even though far above that minimum and concerned by these employees for the plight of other employees might gain support for them at some future time when they might have a dispute with their employer.

With respect to the Court's second question concerning the fact that the activities took place on the employers property, and whether or not this gives rise to a counter-vailing interest in the employer that outweighs the employees' exercise of their Section 7 rights, the Court noted that this case closely resembled Republic Aviation since it was a management interests that were primarily implicated rather than property interests. Since we are dealing with employees and not non-employees as in the Babcock & Wilcox case, the Court concluded that the rationale expressed in Republic Aviation should be extended to cases of non-organizational material which was nevertheless protected by Section 7.

The Court decided not to distinguish among distribution of protected materials on the basis of the content of each distribution. It noted, however, that the

protection of the Republic Aviation rule need not be extended to every in-plant distribution of literature that fell within the protective ambit of Section 7. It reasoned that a balance should be struck between employees' interest in distributing literature that dealt generally with matters affecting them as employees, as opposed to self-organization or collective bargaining and the employer's management interest.

Finally, it observed that such considerations were a new area for the Board and the courts, and that it's solution required, "an evolutionary process for its rational response, and not a quick, definite formula as a comprehensive answer."[73]

Thus, it is clear from these cases it is for the Board to decide in each case, after a balancing of the employees' Section 7 rights against the employers' management interests, whether a particular distribution of non-organization literature is protected or not. The Court reasoned:

> It is true, of course, that some concerted activity bears a less immediate relationship to employees' interest as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause. It is neither necessary nor appropriate, however, for use to attempt to delineate precisely the boundaries of the 'mutual aid or protection' clause. That task is for the Board to perform in the first instance as it considers the wide variety of cases that come before it. 437 U.S. at 568.

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[73] 98 L.R.R.M. at 2724.

The Court also stressed that it anticipated a "case-by-case" Board consideration of the various cases to come before it.

In January of 1979 the Associate General Counsel gave an advisory opinion in Tektronix, Inc.[74] After reviewing the Republic Aviation case and Eastex, the General Counselor concluded that it was clear from those case that it was for the Board to decide in each case after a balance of the employees' Section 7 rights against the employers' management interest, whether a particular distribution of non-organizational literature is protected or not.

He observed that the inflamatory political literature which was removed from the top of the employee's desk contained only a small part of material arguably protected by Section 7 of the Act. It generally accused all employees of collaborating with Nazis was not so immediate and apparent as to, on balance, permit intrusion on the employer's right to maintain discipline in his plant and thus the discharge of the employee was not violation of the Act.

In 1979 the Associate General Counsel issued another advisory opinion in the case of Chrysler Corp. Sterling Stamping Plant[75] wherein, a leaflet which was being

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[74] 1978-79 CCH NLRB ¶ 20,213.

[75] 1979-80 CCH NLRB ¶ 20,248.

distributed by employees in a non-work area of an employer's plant on non-work time was found not to be entitled to the protection under the National Labor Relations Act since it contained primarily political literature supporting the Iranian Revolution with only a de minimus amount of Section 7 related material. The primary purpose of the distribution of the literature was political and was unrelated to the employees' concerns as employees. The opinion reasoned that:

> It is clear, then, that literature which contains both material which is protected by the Act and material which is not will not lose the Act's protection merely because of the presence of material in the latter category. This is not to say, however, that 'mixed literature' whose basic thrust is political and outside the ambit of Section 7, and which is 'mixed' only by virtue of an infinitesimal degree of arguably protected material, is automatically cloaked with the Act's protection which privileges its distribution without employer interference. The Board has never so held. Thus, in all these 'mixed' literature cases cited above, the employment-related protected material was primary and the unprotected material insignificant by comparison. That the decisions would have been different had the basic thrust or primary purpose been unprotected was suggested by the ALJ in United Parcel Services, Inc., supra, when he concluded that the newspaper was protected because the basic thrust was 'for an objective protected by the statute and not the other way around.'

In Kelly v. United States Postal Service, 492 F. Supp. 121 (D.C. S.D. Ohio, W.D. 1980), postal employees who had been dismissed because they had worn buttons and shirts with unpopular political messages thereon sued for an order mandating their reinstatement. The shirts bore the

language "Death to the Shah--U.S. Imperialism Get Your Bloody Hands Off of Iran."

The Court citing from Eastex pointed out that they may well be types of employee conduct or speech that are so purely political or so remotely connected to the concerns of employees as employees as to be beyond the protection of the Act. It observed that the Board had determined that the private employers census of a "purely political tract" distributed by an employee did not constitute an unfair labor practice, citing the Ford Motor case, supra. The Court concluded that the message contained on the T-shirts and buttons of the plaintiffs easily fell into the category of "purely political" and that they did not relate to the plaintiff's job or to their status or condition as employees and are not connected to the interests of employees as employees and therefore are not protected from the employer's census by Section 7.

In UAW Local 174 (Firestone Steel Products Co.) v. NLRB, 645 F.2d 1151, 106 L.R.R.M. 2561 (D.C. Cir. 1981), the Court was asked to determine whether or not a union's distribution of a leaflet during non-working time in non-working areas of the employer's premises was a measure of "mutual aid or protection" of employees, and whether the employer did commit an unfair labor practice in refusing to allow such distribution. Wherein the principal thrust of the leaflets was to induce employees to vote for specific candidates for governor, United States senator, and State

Supreme Court justice and was not to educate employees on political issues relavent to their employment conditions.

The Court upheld the Board's decision that the employer had not committed an unfair labor practice when he denied a union permission to distribute the leaflets to its employees during non-working time in non-working areas of the plant. The Board found that the leaflet was primarily aimed at inducing employees to vote for specific candidates for political office and therefore did not bear a significantly close relationship to employees' interest to constitute concerted activity for the mutual aid and protection of employees within the meaning of Section 7 of the Act.

The D.C. Circuit contrasted the newsletter in the Eastex case with the leaflet that Local 174 sought to distribute. Unlike the newsletter in Eastex, the purpose of the handout in the present case was to encourage employees to vote for certain identified candidates for political office because they had received union support. The leaflet did not seek to educate employees on political issues that may have an effect on their employment conditions. The focus of the material was on the candidates in the pending election. The Court pointed out that the distribution of the newsletter in Eastex was protected under Section 7 because the newsletter discussed "right to work" laws and minimum wage levels, two topics of "immediate economic concern to employees." On the other

hand, the content of the leaflet in this case did not bear an immediate relationship to the employees interest as employees and thus was unprotected.

The Court noted that in Eastex no election was pending and no particular candidates were named. The focus of those materials was issues, not candidates. However here, the principal thrust of the leaflet was to induce employees to vote for specific candidates, not to educate them on political issues relevant to their employment conditions.

The latest case to construe the Eastex doctrine is Fun Striders, Inc. v. National Labor Relations Board.[76] Here the Court was confronted with the issue as the whether or not the employer had committed an unfair labor practice by discharging and refusing to reinstate four employees whom he believed had distributed certain literature during an unannounced employee work stoppage. The leaflets distributed by the employees urged other employees to engage in violent struggles against management. The leaflets also advocated violent revolution and destruction of all bosses and armed revolution of all the working class, they finally urged employees to strike and to form a union.

The Administrative Law Judge found that the distribution of the leaflets was a protected activity. The employer contends that the judge applied an incorrect legal

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[76]658 F.2d 716 (9th Cir. 1981).

standard in making this finding. He argues that the judge should have considered the political content of the leaflets. However the Court concluded under the Eastex doctrine that since the leaflets contained both political as well as non-political matters relating to employees' interest distribution is protected.

Secondly, the employer argued that the violent, Communist nature of the material in the leaflets provided a legitimate business reason for his failure to reinstate the employees who were distributing the literature. The Court agreed that in a Section 8(a)(1) discharge case, if a employer can demonstrate a legitimate, substantial business reason for the dismissal, the burden shifts to the Board to establish that the primary motive of the discharge was to penalize the employee for his protected activity. It reasoned that since the leaflets urged the employees to engage in a violent struggle against management and the employer reasonably believed that this advocacy threatened to inject violent confrontation into his plant, that constituted a legitimate and substantial reason to keep those he believed had distributed the offending leaflets out of the plant by refusing to reinstate them. The Court found that the employer's act was of an entirely legitimate motive, the business need to preserve peace, which precludes a finding of a Section 8(a)(1) violation.

So even though the Court held that the content of the distribution was protected. It concluded that the employer

had shown sufficient business justification to prohibit reinstatement of the offending employees and was therefore not guilty of an unfair labor practice.

In summary, I agree with the dissent entered by Justice Rehnquist and the Chief Justice in Eastex when they observed that it was not necessary for the Court to determine the scope of the "mutual aid or protection" language of Section 7 to conclude that Congress never intended to require the opening of private property to the sort of political advocacy involved in that case.

I submit that in the mixed-content cases wherein the literature contains both political matters as well as non-political matters relating to employer's interest, the ability of the Board to draw a line of distinction will be most difficult. Employers' properties should not be turned into public forums. The better approach would be to use the analysis in Babcock & Wilcox to determine if reasonable alternative means of communicating the political nature of the literature to the employees exist in areas other than on the employer's premises.[77]

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[77]For other cases dealing with content of distribution other than of a political nature see Texas Instruments Incorporated v. National Labor Relations Board, 637 F.2d at 822 (1st Cir. 1981), wherein the Circuit Court concluded that the company's rule prohibiting deliberate disclosure of confidential company information was valid on its face and validly applied to penalize union organizers for dissiminating confidential wage survey materials which had come to employees' attention irregularly and outside proper channels and which employees continued to distribute despite employer's warning that pursuant to the rule,

F. The Parameters of the Weingarten Rule

The inherit flexibility of Section 7 langauge, "to engage in other concerted activities for the purpose of . . . mutual aid or protection" has permitted the National Labor Relations Board, in the exercise of its administrative expertise[78] and broad enforcement

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continued distribution would subject them to summary termination.

See also: National Labor Relations Board v. Local Union No. 1229, International Brotherhood of Electrical Workers, 346 U.S. 464 (1953) [there the Supreme Court held that the employer had lawfully discharged ten employees "for cause" within the meaning of § 10(c) of the Act when during negotiations for a new contract the technicians launched a vitriolic attach on the quality of the company's television broadcast by issuing and distributing 5,000 handbills throughout the public sector surrounding the company's premises. The Court concluded that there is no more elemental cause for discharge of an employee than disloyalty to his employer, and that while Section 7 does give rights to employees to engage in concerted activities for the purpose of collective bargaining and other mutual aid or protection, it does not weaken the underlying contractual bonds and loyalties of employer and employee. The Court concluded that since the handbills had no discernible relation to the pending labor controversy nor to any labor practices of the company and did not refer to wages, hours or working conditions, it cannot be considered protected activity under Section 7 of the Act, and therefore the employer's discharge of the employees was lawful].

For an excellent article on circumstances under which employees through their activities lose the protection of Section 7 see Protected Concerted Activity in the Non-Union Context: Limitations on the Employer's Rights to Discipline or Discharge Employees, by Judith Johnson, Vol. 49, Mississippi Law Journal 839 at 869 et al. (1978).

[78]This refers to the judicial policy of relying upon the judgment of the Board in interpreting the Labor Act. Such reliance is based upon the Board's greater expertise in analyzing varying fact patterns and applying

powers,[79] to interpret the Section's general clause as encompassing a variety of circumstances that may not have been contemplated when the provision was enacted.

One such circumstance involves the employer-conducted interview of an employee. The Board had interpreted the general clause of Section 7 to include the right of employees to representation during certain of these interview and has successfully established this right in the courts.

National Labor Relations Board v. Weingarten[80] provided the United States Supreme Court with its first opportunity to consider the issue of the right to representation of employees involved in an employer-conducted interview. The Court approved the Board's construction that Section 7 creates a statutory right in an employee to refuse to submit, without union representation, to an interview which he reasonably fears may result in discipline.

The following criteria were established by the Court to determine when this right arises and to define its

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the provisions of the Act to them. Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667 (1961); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

[79]Section 10(a), National Labor Relations Act provides in part: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a) (1976).

[80]202 N.R.L.B. 446, 82 L.R.R.M. 1559, enf. denied 485 F.2d 842 (1973), rev'd and remanded 420 U.S. 251 (1975).

parameters. First, an employee's right to representation arises only if the employee requests represenatation and only if he reasonably believes that the investigation will result in disciplinary action. Secondly, the employee must have a reasonable basis for fearing adverse consequences or discipline as a result of the interview. In this regard, the Court intimated that an objective determination of reasonableness would be used, stating that a reasonable basis could not be founded upon "such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." Third, the function of the union representative must be limited; the employee is not required to bargain with the representative and may insist upon hearing only the employee's own account of the matter under investigation without any clarification of the facts or helpful suggestions from the representative. Fourthly, the employee can waive the right and participate in an interview unaccompanied by his union representative. Lastly, the employer, upon the employee's request for representation, can refuse the request, terminate the interview, and carry on his investigation.

One of the most difficult issues to be resolved by the Board and courts is the determination of what is meant by an employer-called "interview."

In Certified Grocers of California, Ltd.,[81] the Board squarely held that Section 7 right to representation is not limited to investigatory interviews and that the employee is entitled to representation during a purely disciplinary interview. However, the Court of Appeals for the Ninth Circuit denied enforcement of the Board's decision,[82] stating that Weingarten does not apply when the decision to discipline has already been made and the "interview" is conducted merely to explain the decision.

The Board then reversed its decision in Certified Grocers in deciding Baton Rouge Water Works Co.[83] There the Board held that an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing him of, and acting upon, a previously made disciplinary decision. However, the Board cautioned that if an employer engaged in any conduct beyond merely informing the employee of a previously made disciplinary decision, the protections set forth in Weingarten would come into play. The Board stated:

> We stress that we are not holding today that there is no right to the presence of the union representative at any 'disciplinary' interview. Indeed, if the employer engages in any conduct beyond merely informing the employee of a

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[81] 227 N.L.R.B. 1211 (1977).

[82] NLRB v. Certified Grocers of California Ltd., 587 F.2d 449 (9th Cir. 1978).

[83] 226 N.L.R.B. No. 161, 103 L.R.R.M. 1056 (1979).

> previously made disciplinary decision, the full panoply of protections accorded the employee under Weingarten may be applicable. Thus, for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach. In contrast, the fact that the employer and employee thereafter engaged in a conversation at the employee's behest or instigation concerning the reasons for the previously determined discipline will not, alone, convert the meeting to an interview at which the Weingarten protections apply.
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> In summary, as long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union representation exists under Weingarten when the employer meets with the employee simply to inform him, or impose, that previously determined discipline. 103 L.R.R.M. at 1058.

Many of the issues arising from the Weingarten rule confronted the Fifth Circuit Court of Appeals in the case of Anchortank, Inc. v. National Labor Relations Board.[84] There the employer sought review of a determination by the Board that it had violated the Act by refusing to permit an employee to have a union representative present at an investigatory hearing which resulted in discipline. To complicate matters the interview was held during the hiatus between the union's challenged victory in a representation

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[84] 618 F.2d 1153 (5th Cir. 1980).

election and at subsequent certification as bargaining representative.

The company took the position that there was no right to such representation of the employee in the absence of a certified union. The Court determined that the critical issue to resolving the dispute was under what conditions will an employee's request for a union representative at an interview constitute a "concerted activity for the purpose of . . . mutual aid or protection . . . within the meaning of Section 7." The Board's order could only be enforced if the employee's request for the presence of a non-employee union representative constituted a Section 7 concerted activity.

The Court, in reliance on Weingarten, recognized that if the union had been certified or voluntarily recognized by the company when the employee requested union representation, their request would clearly have been a Section 7 concerted activity. However, the Court concluded that Weingarten did not control the resolution of this case, for at the time of the request for union representation, the union had been neither certified nor voluntarily recognized as a bargaining representative.

The Court then undertook an examination of the scope of Section 7. It proceeded to compare the test of concerted activity as set forth in the case of NLRB v.

Interboro Contractors, Inc.,[85] which is the leading proponent of the view that an effect on the group suffices to render an employee's action "concerted" for the purposes of Section 7, and the case of Mushroom Transportation Co. v. NLRB[86] which is the leading case holding that an activity of a single employee is concerted only if "it was engaged in with the object of initiating or inducing or preparing for a group action or that it had some relation to group action in the interest of the employees." 330 F.2d at 685. The Court concluded that it seemingly appeared the Supreme Court in Weingarten adopted the Interboro approach as to what constituted concerted activity, then stated:

> However, for the purposes of our present discussion we need not decide whether the Supreme Court has approved the Interboro approach, because, before a representation election is conducted, an employee's request for union representation at an interview does not satisfy even this more lenient view of Section 7. We conclude that before a representation election is held, the presence of a union representative does not have the effect on other employees essential to satisfaction of the Interboro standard for concerted activity; thus, the employee's actions in seeking the presence of the representation at that time does not constitute concerted activity. 618 F.2d at 1162. [Footnotes omitted, emphasis added.]

The Court noted that the union representative's ability to affect the entire bargaining unit depends upon the status of the union representative as the unit's

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[85] 388 F.2d 495 (2d Cir. 1967).

[86] 330 F.2d 683 (3d Cir. 1964).

collective-bargaining representative who, once familiar with the workplace and it's disciplinary problems, is in a position to engage in collective bargaining and the proceedings of grievances in order to serve all employees.

However, it reasoned that after a representation election is held, and the union is victorious, the situation radically changes, stating:

> The situation is radically altered, however, after a representation election is held, and the union is victorious, even if that victory is challenged. At that point, the request of the employee for union representation takes on an entirely different character; the nature of the activity changes. No longer is the employee asking for the participation of a non-employee who is in a position to represent only the employee's individual interests. Instead, after the union's victory in even a challenged election, the employee's request for union participation is 'engaged in with the object of initiating or inducing or preparing for group action [and has] some relation to group action in the interest of the employees.' After the union has won the election, the employee quite properly perceives his request to be one for the concerted mutual aid and protection of his fellows, for the union then stands in for all the unit employees. . . . Accordingly, under even the more stringent Mushroom test, the employee's request for union representation by a union which has won a challenged election is concerted activity for mutual aid and protection; the request is therefore protected by Section 7. 618 F.2d at 1162. [Footnotes and citations omitted, emphasis added.]

Now that the Court has decided that the employee's request is a protected activity it then went on to determine whether the employer's denial of the request violated the Act.

> Resolution of this question depends upon a determination whether the employee's Section 7

right to union representation outweighs an employer's right to exclude non-employees from his property" [citing Eastex, Babcock & Wilcox and Republic Aviation.] 618 F.2d at 1163.

. . .

We believe that the situation in Babcock & Wilcox is analogous to that existing when an employee asks for the presence of a union representative before a representation election has been conducted. Since an employee always has a right to the presence of another employee at an interview, . . . an alternative method of obtaining representation exists which is not disruptive of the employer's property rights. Moreover. before an election has been held, the presence of another employee will better serve both the requesting employee and the bargaining unit than the participation of a non-employee union representative since the former, but not the latter, will be familiar with the workplace and will represent the interests of employees other than the requesting employee. . . . We thus conclude that before a representation election is held, an employer may nondiscriminatorily exclude from his property a union representative who is to represent an employee in an interview, and that this result would obtain even if the employee's request is concerted activity within the meaning of Section 7.

The balance between the employees' Section 7 rights and the employer's property rights shifts drastically once the union has been either voluntarily recognized or certified as collective-bargaining representative. . . . Once the union has attained the status of the exclusive collective-bargaining agent, the alternative to its presence at an interview, the participation of another employee, becomes a far inferior substitute. Since the union is the proper party to the prosecution of grievances and the processes of collective bargaining, and because the union is best able to safeguard the interest of all the employees it has been chosen to represent, . . . At an interview a union representative is better able to fulfill the functions envisioned in Weingarten than is another employee. Accordingly, when the union has been certified or voluntarily recognized as bargaining agent, the employer's property rights must yield to an employee's request for union

> representation. 618 F.2d 1163-1164. [Citations and footnotes omitted, emphasis added.]

The Court then recognized that the situation confronting them, i.e. when the union had won a challenged election but had not yet been certified, falls within the interstices of the two alternatives discussed above, it concluded:

> We believe that this situation [wherein a union has won a challenged election but has not yet been certified] is analogous to that in which the employer, in the face of a union's challenged election victory, unilaterally changes conditions of employment that are mandatory subjects of bargaining. In such a situation, prior to resolution of the election challenge, the employer may assert his prerogative to manage his plant without interference at the risk that his conduct will violate Section 8(a)(5) if the union has indeed won the election and is later certified. . . . Similarly, when an employee requests the presence of a union representative from a union which has won a challenged election, the employer may assert his right to exclude non-employees from his property and conduct an interview after denying the employee's request for union representation at the risk that this conduct will violate Section 8(a)(1) if the union has indeed won the election and is later certified. Since the union in this case was certified, petitioner lost its gamble in denying union representation to Charles N. Kittley. Thus, if those interviews were the type at which the employees were intitled to representation, petitioner's conduct violated Section 8(a)(1). . . . 618 F.2d 1164-1165. [Footnotes and citations omitted.]

Next, the Court undertook the task of distinguishing the difference between a "investigatory" interview and a "disciplinary" interview, and concluded the following:

> In summary, as long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained

> prior to the interview, no Section 7 right to union representation exists under Weingarten when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline. To the extent that the Board has in the past distinguished between investigatory and disciplinary interviews, in light of Weingarten and our instante holding, we no longer believe such a distinction to be workable or desireable. It was this distinction which Certified Grocers abandoned, and to that extent we still believe the decision was correct. Thus, the full perview of protections accorded employees under Weingarten apply to both 'investigatorv' and 'disciplinary' interviews, save only those conducted for the exclusive purpose of notifying an employee of previously determined disciplinary action. . . .
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> We agree with the Board's reading of Section 7 in Baton Rouge Water Works, for we conclude that even under the Interboro standard, no concerted activity for mutual aid or protection exists when a union representative is present at an interview 'held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision. . . . Since the disciplinarv decision has already been made, the union representative cannot safeguard 'the interest of the entire bargaining unit by exercising vigiliance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.' . . . Similarly, because there is no fact-finding at such an interview, the union representative cannot aid the employer and employee by furthering the former's investigation of the incident at issue. . . . What occurs at such an interview is of interest only to the disciplined employees; it cannot affect the interests of the other unit employees. Therefore, we hold that Section 7 does not grant an employee the right to representation at an interview conducted solely to inform the employee of, and acting upon, a predetermined disciplinary decision." 618 F.2d 1166-1168. [Footnotes and citations omitted.]

More recently the Fifth Circuit has had another opportunity to determine the parameters of the Weingarten rule. In Lennox Industries, Inc. v. National Labor

Relations Board,[87] the Court was asked to determine the parameters of an investigatory confrontation in order to decide whether union representation was required at a meeting between an employee and his supervisor when no discipline was intended by the employer.

The Board concluded that the employer had violated the Act by refusing the employee's request for a union representative. However, the employer argues that the employee had no right to a union representative because discipline was never intended to result from the meeting, and no discipline in fact resulted. Therefore, the employee did not reasonably fear discipline and thus the meeting was not "investigatory" and no union representative was therefore required.

The Court reasoned as follows:

> Employee Nestle was asked questions concerning both his poor work performance and his less than friendly altercation with his supervisor. Such questioning is investigatory in that it is designed to elicit responses which might well result in discipline against the employee. Moreover, even if the employer had previously decided that discipline would definitely not result from the interview in question, information could be elicited at that interview which might enable the employer to build a case against the employee, culminating in discipline at some later date. Hence an interview like the one in the case at bar where the employee is asked questions about poor work or an altercation with a supervisor is by its very nature 'an investigatory interview in which the risk of discipline reasonably inheres.'. . .

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[87] 637 F.2d 340 (5th Cir. 1981).

> Insofar as it is inconsistent with this analysis, we reject the language in Eighth and Ninth Circuit opinions which suggest that it is only when disciplinary action is 'probable' or 'seriously considered' that the right of representation arises. . . . Such language is plainly inconsistent with the dictates and rationale of the Supreme Court in Weingarten. An interview may well be 'investigatory' and may well reasonably include the 'risk of discipline' even though the employer is not seriously contemplating discipline at the time the interview is conducted. Indeed, a purpose of the interview may be to decide whether discipline against an employee is an option to be seriously considered. Furthermore, an interview in which work-related questions are asked of an employee, but which the employer does not intend to result in discipline may nevertheless result in discipline if the employee surprises his employer with an answer which the employer finds unsatisfactory or threatening. The Weingarten rule is designed to protect such 'fearful' or 'inarticulate' employees from the inadvertent results of their answers during work-related interviews. . . . For the Weingarten rationale to be effectively achieved, courts must not narrow the scope of the doctrine as enunciated by the Supreme Court: it is whenever the risk of discipline reasonably inheres in an investigatory interview that a union representative is required, and not merely when disciplinary action is 'probable' or 'seriously considered.'. . . We break no new ground, but merely restate the words of Weingarten in holding that where an interview is designed to elicit informtion which might reasonably result in discipline--either immediately or at some time in the future--a union representation is required if the employee so requests. Because the risk of discipline is inherent in interviews focusing upon poor work or upon an employee/supervisor confrontation, we agree with the Board and find that a union representative was required in the case at bar. 637 F.2d 344. [Citations and footnotes omitted.]

Finally, the Court decided what was necessary in order to constitute a request for the presence of a union representative at a meeting by an employee, and held that:

> The rationale of Weingarten does not require an employee to repeat his request for union representation each time the subject changes during a meeting with company officials. Such a rule would be both burdensome for the employee and tedious for the company officials. As long as one or more company officials are aware of the employee's desire and request for the presence of a union representative, a single request will suffice for the multiple subjects of a single meeting, or for multiple meetings which are part of a 'single, interrelated episode,' as here. The union representative's admission ticket gained by the employee's orginal request entitles the employee to representation during both ends of the doubleheader. 637 F.2d at 345.

Recently, the Fifth Circuit was confronted with the issue as to whether or not a union in its collective bargaining agreement with an employer could waive the rights granted employees under the Weingarten decision to have a union representative present at an investigatory interview.

In Prudential Insurance Company of America v. National Labor Relations Board,[88] the employer contended that the Board incorrectly found it in violation of the Act by refusing an employee's request to have a union representative present at an investigatory interview in which the employee reasonably believed would result in disciplinary action. The employer contends that the union in its collective bargaining agreement with the employer had waived the employee's rights under Weingarten to have union representatives present at investigatory interviews. The language of the agreement provided as follows:

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[88] 661 F.2d 398 (5th Cir. 1981).

The union further agrees that neither the union nor its members shall interfere with the right of the employer: . . . To interview any Agent with respect to any phase of his work without the grievance committee being present.

The Court reasoned as follows:

Since the Weingarten right to representation at an interview with the employer 'plainly effectuates the most fundamental purposes of the Act,'. . . an initial question is whether it can be waived by a union contract. The Weingarten decision provides no clear indication whether a contractual waiver of this important right is permissible . . . The Board has not yet ruled on the question of waiver, but the Board's General Counsel has issued a formal opinion holding that a waiver would be valid. . . .

Other congressionally given fundamental rights, such as the right to strike, may be bargained away contractually by the union. . . . Since the right to representation only inheres upon the employee's request, it is clear that the employee's silence can be an effective waiver of the right. Since the individual can waive his Weingarten right and the Supreme Court has recognized the right of a contracual waiver for other such fundamental rights, it would appear that a contracual waiver of the Weingarten right is possible.

Identifying the Weingarten right as an individual right does not mean that it cannot be contractually waived by the union. A union is allowed a great deal of flexibility in serving its bargaining unit during contract negotiations. It makes concessions and excepts advantages it believes are in the best interest of the employees it represents. . . . This flexibility includes the right of the union to waive some employee rights, even the employee's individual statutory right. Courts which have invalidated a clear contractual waiver of an employee's individual statutory right have done so only when the waived right affects the employee's right to exercise his basic choice of bargaining representative. . . . The union should therefore be able to waive the employee's Weingarten right for other concessions during negotiations.

> Such a contractual waiver, however, must be 'clear and unmistakable.'. . .
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> Throughout the negotiations, Prudential maintained the stand that union representation in any employee interview was an interference with its business. Although the union indicated that Prudential's position was contrary to the law, Prudential made clear that it considered the clause a waiver of the Weingarten right. Given Prudential's position and the Union's acquiescence, it is unmistakable that the union waived the Weingarten right. Indeed, it is not clear what the clause waived if it did not waive the Union's Weingarten right. . . .
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> We hold that the Union agreement waived the Weingarten right which was the basis of the unfair labor charge. We therefore deny enforcement of Board's order." 661 F.2d 400-401. [Footnotes and citations were omitted.][89]

The question has also arisen as to what rights the employee's representative has at the investigatory interview. The Fifth Circuit has held that an employer did not violate the employee's right to union representation at the investigatory interview by insisting the representative remain silent until after such time that the employee had given his own account of what occured.

In Southwestern Bell Telephone Co. v. NLRB[90] the employer was investigating the possible theft of some Bell climbing hooks and safety belts which were found to have been pawned in a shop by one of Bell's employees. The

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[89]But see, United States Postal Service, 254 N.L.R.B. 50, 106 L.R.R.M. 1168 (1981), wherein the Board held that the employee's Weingarten rights were unaffected by the signing of a Miranda waiver at the outset of the interview.

[90]667 F.2d 470 (5th Cir. 1982).

employee was summoned to a meeting with his supervisors, who had also informed the employee's union steward. The employee and union steward had consulted before the meeting and the employee was advised not to say anything. At the time of the meeting, the employee requested the presence of his union representative and the union steward was brought to the meeting. The union steward was informed of what had occured prior to his arrival and then was requested by the investigator that the representative was not to answer any of the questions put to the employee, that he wanted the employee to answer the questions and then afterwards if the representative thought he had any questions then he could ask them but that the employer wanted the employee to be the one to answer the questions initially.

During the meeting the employee became highly emotional and stated that "in spite of his representative's advice not to say anything," he wished to confess to the theft. At the end of the questioning, the investigator asked the union representative if he had any questions or clarifications that he wished to make before the interview concluded. The union representative added nothing, and the employee at no time throughout the interview attempted to solicit the union representative's advice or counsel.

The Board decided that the employer had violated the employee's right to union representation by requesting the representative not to interfere with the questioning.

The Court disagreed with the Board and analyzed the issue as follows:

> The fifth provision [here the Court has just completed a discussion of the Weingarten decision] in the contours and limits is the most relevant to the case at hand. It states:
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> > Fifth. the employer has no duty to bargain with any union representative who may be permitted to attend the investigative interview. The Board said in Mobil, 'We are not giving the union any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective bargaining negotiations.'. . . The employer has no duty to bargain with the union representative at an investigatory interview. 'The representative is present to assist the employee and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation.'
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> Id. [420 U.S. 251] at 259-260, 95 S. Ct. at 965.
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> This provision applies directly to the circum stances of this case. McQuiller was present at the investigatory interview and was allowed to 'assist the employee,' 'to clarify the facts,' and to 'suggest other employees who may have knowledge of them,' but Bell insisted that it was only interested at that time in hearing the employee's own account of what occured. Bell informed McQuiller of the meeting, allowed him time to consult with Gottschalk. McQuiller did consult with Gottschalk prior to the interview, and McQuiller was told that when Hubbard had completed his interview he would be free to make any additions, suggestions, or clarifications he desired. Gottschalk was not told that he could not consult with McQuiller and Gottschalk avowed that he was going against McQuiller's advice in making a statement.

> In the decision in the present case, the Board has, therefore, made an unwarranted extension of the employee's Weingarten rights. . . . The union representative has the right to make additions and clarifications to the meeting. This right is not without restrictions, however. The limitations in the instante case were within the parameters set forth by the Supreme Court in Weingarten and did not interfere with McQuiller's ability to assist Gottschalk, to clarify facts, or to bring additional relevant facts to Hubbard's attention. We therefore hold that Gottschalk's Weingarten rights were not violated. 667 F.2d at 473-474.

The final consideration under the Weingarten rule deals with what remedy is appropriate for violation of the rights granted thereunder.

In Kraft Foods, Inc.,[91] the Board held that an employee is not entitled to a make-whole remedy, such as reinstatement, backpay, etc., if he suffers discipline based upon information gathered before he undergoes an interview in violation of his Weingarten rights. On the other hand, in Illinois Bell Telephone, Co.[92] and Southwestern Bell Telephone, Co.[93] the Board held that it was appropriate to grant the remedy of reinstatement and backpay where unlawful investigatory interviews were held. and the employees were disciplined or discharged for conduct that was the subject of the interviews. Thus, in determining an appropriate remedy for a violation of an

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[91] 251 N.L.R.B. No. 6, 105 L.R.R.M. 1233 (1980).

[92] 251 N.L.R.B. No. 128, 105 L.R.R.M. 1236 (1980).

[93] 251 N.L.R.B. No. 61, 105 L.R.R.M. 1246 (1980).

employee's Weingarten rights, the Board uses a two-step analysis.

First, the Board determines whether the General Counsel has made a prima facie showing that a make-whole remedy such as reinstatement. backpay, and expungement of all disciplinary records is warranted. This is accomplished when the General Counsel proves that the employer conducted an investigatory interview while denying the employee union representation and subsequently disciplined the employee for conduct that was the subject of the unlawful interview. Secondly, after the General Counsel makes his prima facie showing of the appropriate-ness of a make-whole remedy, the employer has the burden of proving that its decision to discipline the employee in question was not based on information obtained at the unlawful interview. Where the employer meets its burden, a make-whole remedy will not be ordered. Instead, a traditional cease-and-desist order will be given.[94]

The Eighth Circuit has concluded that an order of backpay and reinstatement is procluded when the facts demonstrate that the employee's effected their own discharge by stealing company property, notwithstanding the fact that there was substantial evidence that the employee's requested and were denied union representation

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[94] 105 L.R.R.M. at 1233.

at an investigative interview in which employees reasonably believed would result in disciplinary action.

In Montgomery Ward & Co. v. National Labor Relations Board[95] the Court disagreed with the Board's decision that a "make-whole" relief was appropriate when the evidence clearly indicated that the firing was a direct result of the admitted thefts of the employees and not the result of the employee's insistence on the presence of a union steward during an investigatory hearing in which the company disallowed union representation. The Court stated:

> However, the determination that the proper remedy should be backpay and reinstatement is clearly prohibited by the language of the National Labor Relations Act. NLRB v. Potter Electric Signal Co., 600 F.2d 120 (8th Cir. 1979) is dispositive of the remedy issue. In Potter, we held that where it is clear that employees were discharged for good cause and not for requesting union assistance at an investigatory interview, Section 10(c) of the Act, 29 U.S.C. § 160(c), procludes an order of backpay and reinstatement under such circumstances.
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> In the case, like Potter the employee's effected their own discharge by stealing and the section 8(a)(1) violation was simply incidental to the investigation which proceeded the firing. Thus, the Board lacks the power to order reinstatement or backpay for employees discharged for theft of company property, because to do so would violate Section 10(c) as interpreted in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 85 S. Ct. 398, 13 L.Ed.2d 233 (1964); NLRB v. Potter Electric Signal Co., supra, 600 F.2d at 124. 664 F.2d at 1097.[96]

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[95] 664 F.2d 1095 (8th Cir. 1981).

[96] See also Coyne Cylinder Company, 251 N.N.L.B. No. 198, 1980-81 CCH N.L.R.B. ¶ 17,419 at 28,104, wherein

IV. CONCLUSION

This article has attempted to demonstrate the analysis used by the Board and the courts in undergoing their task of drawing a line at which the employees' rights begin under the Act and the employer's prerogatives end. Given the different factual contexts in which these rights conflict, the task is most difficult.

In the access cases, it does seem that the Board has not strictly adhered to the Babcock & Wilcox doctrine when it talks in terms of the most efficient or least costly means of communication with the employees rather than whether there exists a reasonable alternative means of communication. Further clarification by the Supreme Court may be in order.

In the political content literature cases, the task of the Board arranging these along a spectrum with "pure political tracts" on one end and content pertaining solely to matters of labor relations on the other will eventually become unworkable when the Board is faced with a mixed-content case wherein the political message and the

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the Kraft doctrine was applied in a case involving the discharge of an employee for smoking marijuana on the job, the Court stated:

> ". . .[T]he employer was not required to reinstate the employee or give him backpay since the employer sustained this burden of showing that its decision to discharge the employee was not based on information obtained during the unlawful interview. . . ."

labor relations message are equally asserted. Standards for guidance are lacking.

A much better approach would be to adopt the Babcock & Wilcox analysis and determine if there are other reasonable means of communication by which the political information could be made available to the employees. It seems that avenues such as public political rallies and campaigns would be just as effective in reaching the employees. Particularly, in light of the fact that the Board is, in effect, turning the workplace into a political forum much to the detriment of the employer's property rights. When these two rights are analyzed the statutory right afforded the employees under the Act must give way to the Constitutional property rights of the employer.

Finally, in the Weingarten context, the Board should meticulously examine each case in order not to formulate rule which would stagnate the free flow of communication between supervisors and employees. Given the economics of the time, this line of communication should be at its widest posture. Conversely, the Board and the courts should exercise great diligence and caution before finding that such a basic fundamental right has been waived by the union through its collective bargaining negotiations.

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