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Mr. Gould here undertakes a study of the legal problems of union activity on company property with regard to union solicitation of membership and distribution of union literature. After a study of several recent cases the author expresses his dissatisfaction with the rationale advanced in many of the cases and the failure of the tribunals to appreciate the realities of industrial relations.

Trade unionism is not an accepted principle in this country today. Of course, this fact, in deep contrast to most industrially advanced Western nations, is partially explicable in terms of heavy investment taking place in many hitherto rural areas. It is further attributable—once again only in part—to the quite often accurate characterization of "big labor" as a wielder of powers, sometimes arbitrary, in a manner reminiscent of the swashbuckling entrepreneurs against whom the unions reacted. On the other hand, collective bargaining is an almost venerable institution in many basic industries. The National Labor Relations Act maintains an encouragement of its "practice and procedure" as a basic policy of the United States.[1] Yet there is a pronounced disparity in atmosphere between many established collective bargaining relationships and industries or regions which are nominally unionized or unorganized.[2]

Since Congress has chosen to proscribe a good deal of picketing of an organizational and recognitional nature in the Landrum-Griffin amendments to the act[3] it is quite likely that the grounds for union-

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The viewpoints expressed by the author in this article are his own and do not necessarily represent those of the National Labor Relations Board or any of its Members.

1. 49 Stat. 449, 29 U.S.C. § 151 (1958): "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection."

2. See Gould, *Taft-Hartley Revisited: The Contrariety of the Collective Bargaining Agreement and the Plight of the Unorganized,* 13 LABOR L.J. 348 (1962).

3. 73 Stat. 544, 29 U.S.C. § 158 (b)(7) (Supp: I, 1959): "It shall be an unfair

management combat will shift in this area somewhat to less specifically regulated and, more important, protected organizational techniques. Already this is a process that seems to be in motion insofar as union activity on company property is concerned. A great majority of such union campaigns are primarily if not solely aimed at obtaining the worker's allegiance. Thus, for the most part, this approach is free of the objections to picketing posed by Congress and the Supreme Court[4]—the pressure or "coercion" brought to bear upon the employer through the public and outside non-employees as a result of conduct which bears no legitimate relationship to real campaigning to persuade the employees who have the choice of joining a union. It was the judgment of Congress that instances of such coercion suffered by the employer and the potential deprivation of employee opportunity to select representatives of their own choosing because of a bargain made over their heads should be prohibited by the act.[5] But union solicitation and distribution of literature to employees on company premises would seem to fit more easily into a category of "persuasion" rather than "coercion."[6]

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labor practice for a labor organization or its agents . . . 7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees where such picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period not to exceed thirty days from the commencement of such picketing: *Provided*, that when such a petition has been filed the Board shall forthwith without regard to the provisions of Section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver, transport any goods or not to perform any services."

4. See especially the concurring opinion of Mr. Justice Douglas in Bakery & Pastry Driver's Union v. Wohl, 315 U.S. 769 (1942); *Cf.* Cafeteria Employees v. Angelos, 320 U.S. 293 (1943); AFL v. Swing, 312 U.S. 321 (1941); Thornhill v. Alabama, 310 U.S. 88 (1940); see also International Bhd. of Teamsters v. Newell, 356 U.S. 341 (1958); International Bhd. of Teamsters v. Vogt, 354 U.S. 284 (1957); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Carpenter & Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942); Milk Wagon Driver's Union v. Meadowmore Dairies, 312 U.S. 287 (1941). Newell and the Court's recent holding in Local 760, NLRB v. Fruit and Vegetable Packers and Warehousemen, 377 U.S. 58 (1964), upholding consumer picketing at a secondary situs in the face of an apparently strong congressional prohibition, mark out a possible renaissance of the *Thornhill* doctrine's protection of picketing as free speech.

5. See COX, LAW AND THE NATIONAL LABOR POLICY 20-47 (1960).

6. Distinctions between picketing and solicitation are, however, sometimes difficult

Indeed, for a number of years the National Labor Relations Board and the courts have promulgated rules—frequently confusing, ambiguous, and, according to the thesis of this article, without a proper appreciation for logic or realistic analysis of industrial relations—within the broad scope accorded by Congress under the National Labor Relations Act. The pace is now a quickening one. It heralds an ever growing need for proper analysis and understanding of the realities confronting the parties in what is, more often than not, a hard struggle for some of the wage earners' loyalties.

In *Republic Aviation v. NLRB*,[7] the Supreme Court set forth the ground rules concerning union activity on company property. To this day they would appear (the operative word being appear) to remain the basis of adjudication. This case presented the Court with the question of whether the right of employees to pass out union "authorization" cards during non-working time, to pass out union literature in the parking lot and to wear union insignia at any time was a protected one under section 7 of the act.[8] Moreover, the Court was asked to uphold the Board's presumption that employer prohibition of such activity was violative of section 8(a)(1) *without* the discriminatory motive that this provision normally requires for the finding of an unfair labor practice.[9] Mr. Justice Reed, writing for the Court, held this to be a protected activity and ratified the Board's principle that impingement of such rights could be rationalized only by an employer's legitimate business interest in production and discipline.[10] Normally this defense was to be limited to working time

to draw. *Cf.* William J. Burns Int'l Detective Agency Inc., 136 N.L.R.B. 431 (1962).

7. 324 U.S. 793 (1945), *consolidating* Le Tourneau v. NLRB, 143 F.2d 67 (5th Cir. 1944).

8. 49 Stat. 452, 29 U.S.C. § 157 (1958): "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, 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 authorized in Section 8(a)(3)."

9. 73 Stat. 544, 29 U.S.C. § 158(a)(1) (Supp. I, 1959): "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7."

10. In accordance with this principle it has been held that a non-solicitation rule or prohibition drawn so broadly as to encompass non-working time is presumptively unlawful. *Cf.* NLRB v. Linda Jo Shoe Co., 307 F.2d 355 (5th Cir. 1962); Olin Indus. Inc. v. NLRB, 191 F.2d 613 (5th Cir. 1951); NLRB v. Illinois Tool Works, 153 F.2d 811 (7th Cir. 1946); NLRB v. Edinburg Citrus Ass'n, 147 F.2d 353 (5th Cir. 1945); Carter Carburetor Corp. v. NLRB, 140 F.2d 714 (8th Cir. 1944); NLRB v. Denver Tent & Awning, 138 F.2d 410 (10th Cir. 1943); Remington Rand Corp., 141 N.L.R.B. 1052 (1963); Walton Mfg. Co., 126 N.L.R.B. 697 (1960); I. F. Sales Co., 82 N.L.R.B. 137 (1949), *aff'd per curiam*, 188 F.2d 931 (6th Cir. 1951). *Accord*, NLRB v. Thompson Ramo Woolridge, 305 F.2d 807 (7th Cir. 1962); NLRB v. Essex Wire Corp. 245

although special exceptions to the presumption,[11] retail department stores was to become one,[12] were permitted.

F.2d 589 (9th Cir. 1957); Aluminum Extrusions, Inc., 148 N.L.R.B. No. 167, 57 1219 (1964); Gotham Shoe Mfg. Co., Inc. 149 NLRB No. 80, 57 L.R.R.M. 1385 (1964); Parker Seal Co., 149 N.L.R.B. No. 73, 57 L.R.R.M. 1429 (1964); R.E.D.M. Corp., 149 N.L.R.B. No. 98, 57 L.R.R.M. 1463, (1964); Mallory Plastics L.R.R.M. 1219 (1964); Gotham Shoe Mfg. Co., Inc. 149 N.L.R.B. No. 80, 57 L.R.R.M. Co., 149 N.L.R.B. No. 138, 58 L.R.R.M. 1014 (1964); Higgins Indus., 150 N.L.R.B. No. 25, 58 L.R.R.M. 1059 (1964); Kern's Bakery, Inc., 150 N.L.R.B. No. 87, (1965); Jas. H. Matthews & Co., 149 N.L.R.B. No. 18, 57 L.R.R.M. 1253 (1964); Welsh Co., 149 N.L.R.B. No. 37, 57 L.R.R.M. 1321 (1964); Aerodex Inc., 149 N.L.R.B. No. 25, 57 L.R.R.M. 1261 (1964); Bannon Mills, Inc., 146 N.L.R.B. No. 81, 55 L.R.R.M. 1370 (1964); Certain Teed Prod. Corp., 147 N.L.R.B. No. 160, 56 L.R.R.M. 1431 (1964); Ertel Mfg. Corp., 147 N.L.R.B. No. 39, 56 L.R.R.M. 1197 (1964); Firestone Steel Prod. Co., 147 N.L.R.B. No. 57, 56 L.R.R.M. 1283 (1964); Hunt Electronics, 146 N.L.R.B. No. 155, 56 L.R.R.M. 1092 (1964); Lau Blower Co., 146 N.L.R.B. No. 146, 56 L.R.R.M. 1087 (1964); Park Edge Sheridan Meats Inc., 146 N.L.R.B. No. 32, 55 L.R.R.M. 1296 (1964); Ben Dictator Co., 143 N.L.R.B. No. 94, 53 L.R.R.M. 1472, (1963); Reeves Broadcast & Dev. Corp. (WHTN-TV), 140 N.L.R.B. 466 (1963); Elias Bros. Big Boy Inc., 137 N.L.R.B. 1057 (1962), *modified*, 325 F.2d 360 (6th Cir. 1963); General Indus. Electronics, 138 N.L.R.B. 1371 (1962); Idaho Potato Processors, Inc., 137 N.L.R.B. 910 (1962), *aff'd*, 322 F.2d 573 (9th Cir. 1963); Plant City Steel Corp., 138 N.L.R.B. 839 (1962), *aff'd*, 331 F.2d 511 (5th Cir. 1964); Adrian Steel Co., 130 N.L.R.B. 847 (1961); Altamount Shirt Corp., 131 N.L.R.B. 112 (1961); Becker-Durham Inc., 130 N.L.R.B. 1356 (1961); Rollash Corp., 133 N.L.R.B. 464 (1961); Texas Aluminum Co., 131 N.L.R.B. 443 (1961), *aff'd*, 300 F.2d 315 (5th Cir. 1962); Arrow Press, 122 N.L.R.B. 890, *reversed*, 272 F.2d 112 (7th Cir. 1959); Jackson Tile Mfg. Co., 122 N.L.R.B. 764 (1958); J. E. Hamilton & Sons Inc., 120 N.L.R.B. 1468 (1958); Miller Elec. Mfg. Co. Inc., 120 N.L.R.B. 298 (1958); Pacemaker Corp., 120 N.L.R.B. 987 (1958); Armstrong Tire & Rubber Co., 119 N.L.R.B. 382 (1957), *aff'd*, 262 F.2d 812 (5th Cir. 1959); Limestone Mfg. Co., 117 N.L.R.B. 1689 (1957).

Where an amicable relationship indicates that the rule's breadth arises out of a mistake, a remedial order need not issue. General Dynamics, 145 N.L.R.B. No. 81, 55 L.R.R.M. 1041 (1963); Compare Solo Cup Co., 144 N.L.R.B. No. 153, 54 L.R.R.M. 1293 (1963); W. Ralston & Co., Inc., 131 N.L.R.B. 912 (1961), *aff'd per curiam*, 298 F.2d 927 (2d Cir. 1962).

11. In the landmark decision of Peyton Packing Co., 49 N.L.R.B. 828, 843-44 (1943), *aff'd*, 142 F.2d 1009 (5th Cir.), *cert. denied*, 323 U.S. 730 (1944), the Board set forth the governing principles of law: "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 province 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 a discriminatory 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 made the rule necessary in order to maintain production and discipline." However, the question of defining luncheon and rest periods can be a difficult one. *Cf.* Canton Cotton Mills, 148 N.L.R.B. No. 56, 57 L.R.R.M. 1033 (1964).

12. Meier & Frank Co., 89 N.L.R.B. 1016 (1950); Goldblatt Bros., 79 N.L.R.B. 1262 (1948); J. L. Hudson Co., 67 N.L.R.B. 1403 (1946); May Dep't Store Co.,

Thomas v. Collins[13] dramatized the Court's willingness to place some of the efforts of non-employee organizers, as well as employees[14] within the sweep of the first amendment. The Court, while invalidating under the fourteenth amendment a state licensing requirement for union speakers, was careful to limit their protection to "free speech alone" or "merely giving and acquiring information" from "urging a course of action" which might involve the "collection of funds or securing subscriptions." This dichotomy between the realm of ideas and commercial undertakings, a distinction necessarily tortuous and almost artificial, was followed again in *Staub v. City of Baxley.*[15] In considering the limitations that the state and the employer may lawfully impose, *Republic, Thomas* and *Staub* require us to answer the traditionally appropriate questions concerning the time, place and manner[16] in which petitioners seek to conduct the activity in question.

It is, of course, a truism that the respective limitations permitted may not be analogous. The fact that *Thomas* and *Staub* do not necessarily involve activity on the private property of non-consenting owners serves to inhibit any rapid comparisons. But, nevertheless, the Board's present distinctions, when viewed in the light of the Court's approach in those cases and with regard for internal consistency, are—to say the least—curious. The Board in *Stoddard-Quirk Mfg. Co.*[17] has recently held that different rules are to be applicable

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59 N.L.R.B. 976 (1944), *aff'd,* 154 F.2d 533 (8th Cir. 1946). See particularly the dissenting opinion in Meier, *supra,* of Members Houston and Styles at 1022 and compare N.L.R.B. v. Great Atl. & Pac. Tea Co., 277 F.2d 759, 762, 764, (5th Cir. 1960); Maxam Buffalo Inc., 139 N.L.R.B. 1040 (1962); Marshall Field & Co., 34 N.L.R.B. 1 (1941).

13. 323 U.S. 516 (1945). *Cf.* Hill v. Florida, 325 U.S. 538 (1945).

14. In Marsh v. Alabama, 326 U.S. 501 (1948), the Court, speaking through Mr. Justice Black, cited *Republic* as a case in support of both constitutional and statutory rights for employees on company property. But see Mr. Justice Reed's dissent at 513.

15. 355 U.S. 313 (1958); *accord,* Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961); See Note, 70 HARV. L. REV. 1271 (1957).

16. See Cantwell v. Connecticut, 310 U.S. 296 (1940).

17. 138 N.L.R.B. 615, 616 (1962); "Implicit here . . . is a limitation on the apparent scope of the principles enumciated in Walton. . . ." Neither *Stoddard-Quirk, Walton* nor *Peyton Packing* has sought to categorize the wearing of union insignia as solicitation or distribution. Apparent indecision on this point is refleeted in Brewton Fashions Inc., 145 N.L.R.B. No. 1, p.3 n.4, 54 L.R.R.M. 1329 (1963); but see Aladdin Indus. Inc., 147 N.L.R.B. No. 167, 56 L.R.R.M. 1388 (1964); *Cf.* Kimble Glass Co. v. NLRB, 230 F.2d 484 (6th Cir. 1956), *affirming* 113 N.L.R.B. 577 (1955); Fabri-Tex, Inc., 148 N.L.R.B. 156, 57 L.R.R.M. 1213 (1964); Boeing N.L.R.B. No. 70, 53 L.R.R.M. 1400 (1963); American Screen Prod. Co., 138 N.L.R.B. 87 (1962); Edmont Mfg., 139 N.L.R.B. 1528 (1962); Bilton Insulation, Inc., 129 N.L.R.B. 1296 (1961); Mayrath Co., 132 N.L.R.B. 1628 (1961), *aff'd,* 319 F.2d 424 (7th Cir. 1963); Standard Fittings Co., 133 N.L.R.B. 928 (1961);

to conduct defined as "solicitation" and that defined as "distribution." In this case, a previous attempt to codify the law without regard to such problems was discarded over the strong dissent of Members Fanning and Brown.[18] The Board majority wrote the following.

> The distinguishing characteristic of literature as contrasted with oral solicitation—and a distinction too often overlooked—is that its message is of a permanent nature and that it is designed to be retained by the recipient for reading or re-reading at his convenience. Hence, the purpose is satisfied so long as it is received.[19]

Thus, the Board held that the need for union distribution was less than for solicitation, and that the employer's interest in order and cleanliness was more adversely affected by the former than the latter. This proposition was not a novel one[20] as the Board has upon occasions upheld the exclusion of union literature from the plant premises in the interest of cleanliness[21] and because of the availability of alternate effective means of communication.[22] In *Stoddard-Quirk*, however, a more limited expulsion, from the plant's "working area," was envisaged.

Stoddard-Quirk then presumes that literature has an effectiveness which, unlike solicitation, is quite separable from plant working areas.

Stewart Hog Ring Co., 131 N.L.R.B. 310 (1961); Babcock & Wilcox Co., 128 N.L.R.B. 239 (1960); Murray Ohio Mfg. Co., 128 N.L.R.B. 184 (1960); Spielman Motor Sales Inc., 127 N.L.R.B. 322 (1960); United Butchers Aubatoir Inc., 123 N.L.R.B. 946 (1959); Murphy Diesel Co., 120 N.L.R.B. 917 (1958), *reversed*, 263 F.2d 301 (7th Cir. 1959); Caterpillar Tractor Co., 113 N.L.R.B. 553 (1955), *reversed*, 230 F.2d 357 (7th Cir. 1956); Graber Mfg. Co., 111 N.L.R.B. 167 (1955); Safeway Stores Inc., 110 N.L.R.B. 1718 (1954); Cherry Rivet Co., 97 N.L.R.B. 1303 (1952); Salant & Salant Inc., 92 N.L.R.B. 417 (1950). Insignia is protected where employees have contact with the public to the extent that it is reasonable and does not detract from the establishment's dignity. NLRB v. Floridan Hotel of Tampa, Inc., 318 F.2d 545 (5th Cir. 1963); Daylight Grocery Co., 147 N.L.R.B. No. 100, 56 L.R.R.M. 1318 (1964); Harrahs Club, 143 N.L.R.B. 1356 (1963), *reversel*, 57 L.R.R.M. 2198 (9th Cir. 1964). See especially Gimbel Bros., 147 N.L.R.B. No. 62, 56 L.R.R.M. 1287 (1964), where unidentified union flowers in a retail store were held to be unprotected. And see Power Equip. Co., 135 N.L.R.B. 945 (1962), *modified*, 319 F.2d 861 (6th Cir. 1963), wherein the Sixth Circuit indicated that the wearing of union bowling shirts in an industrial establishment is a qualified right.

18. Stoddard-Quirk, *supra* note 17, at 625.

19. *Id.* at 620.

20. See Vanderheyden, *Employee Solicitation and Distribution: A Second Look*, 14 LABOR L.J. 781, 786 (1963). There is not a great abundance of articles dealing with solicitation and distribution problems. But see Burke, *Employer Free Speech*, 26 FORDHAM L. REV. 266 (1957); Daykin, *Employees' Right to Organize on Company Time and Property*, 42 ILL. L. REV. 301 (1947); Hanley, *Union Organization on Company Property—A Discussion of Property Rights*, 47 GEO. L.J. 266 (1958); for a very recent discussion, see Note, 112 U. PA. L. REV. 1049 (1964).

21. Tabib-Picker & Co., 50 N.L.R.B. 928 (1943).

22. Monolith Portland Cement Co., 94 N.L.R.B. 1358 (1951); Newport News Children's Dress Co., 91 N.L.R.B. 1521 (1950); *contra*, American Book-Stratford Press Inc., 80 N.L.R.B. 914 (1948).

It will be retained for subsequent reading. But this is quite contrary to the Board's other assumption—the peculiar needs that the employer has in dealing with plant littering. As the dissent points out, there is no basis upon which to assume the envisaged results. Will not the average worker, according to the majority rationale, retain literature and not litter? Why, as the dissent asks, should one expect workers to throw pamphlets down at their work stations and not in non-working areas?[23]

A decision more appreciative of industrial realities might have been reached had the *Stoddard-Quirk* majority viewed this problem from another vantage point. The employer is probably more concerned with employee distraction than littering which could possibly, at worst, involve expanded janitorial services. One might expect more serious problems arising out of the circulation of authorization cards, the protracted discussions and, perhaps, arguments involved in signing a pledge of association and transfer of money.[24] This would seem to raise at least as many problems as the distribution of literature.

Furthermore, the Board, notwithstanding *Thomas* and *Staub*, has placed the commercial undertaking on a plane superior to conduct more directly akin to free speech. Of course, solicitation is of primary importance in the organizational drive. That fact reflects itself through the inordinate sensitivity displayed by the majority in response to the dissent's suggestion that authorization cards must be characterized as distribution and thus be excluded from the plant proper. But matter which is purely informational is generally, in any context, the least disruptive and thus the first conduct to be protected. Hence the priorities are reversed. This is not to suggest another reversal but rather only to advocate a return to a broader categorization treating solicitation and distribution as one type of activity for these purposes as was done in *Walton Mfg.*[25] In addition to a failure to produce visible benefits, *Stoddard-Quirk* subjects labor and management to the unnecessary detriment of uncertainty, an element far too prevalent in this area of the law even before the advent of this case. As mentioned before, the categorization of authorization cards was the source of great dispute between the majority and minority views.

23. Stoddard-Quirk, *supra* note 17, at 630 n.23.

24. Very often, however, union dues will not be exacted while workers are being organized. See Note, 70 HARV. L. REV. 1271 (1957).

25. 126 N.L.R.B. 697 (1960). At the same time it should be recognized that free speech inherent in union "discussion" is protected in the plant proper, as well as solicitation through authorization cards under *Stoddard-Quirk*. See Southwire Co., 145 N.L.R.B. No. 127, 55 L.R.R.M. 1151 (1964); *Cf.* NLRB v. Great Atl. & Pac. Tea Co., 277 F.2d 759, 762 (5th Cir. 1960).

Stoddard-Quirk dictum supports inclusion of these cards within the definition of solicitation.[26] Subsequently, however, the Board equivocated[27] and then resolved the question in favor of solicitation,[28] the result hinted at in *Stoddard-Quirk*. The weighty resolution of such relatively unimportant questions would seem to argue more clearly than any illogical reasoning which the case contains, for that doctrine's implausibility. *Stoddard-Quirk's* crucial defect, in this writer's opinion, stems from the great confusion which will necessarily exist in the minds of workers and employers, most of whom are not party to sophisticated collective bargaining relationships in industries like auto and steel, as to what their respective rights are, even on a day-to-day basis. The worker acts upon peril of discharge when indulging in the activity which may subsequently be classified as "distribution." The employer risks back pay liability in the same process. Because the distribution of literature is not excluded from plant premises, but rather only working areas,[29] the parties must also hazard the sometimes difficult guess of determining what are working and non-working areas.[30]

Of course, *Stoddard-Quirk* is correct in pointing out a *factual* distinction that is beyond dispute. But, by way of answer, the critic must question the functional desirability of this approach. Even the experienced labor lawyer might, at first blush, have difficulty with the lengthy and rather complicated Board order that *Stoddard-Quirk* now requires.[31] It would seem that the problems will cause more hardship to the parties and prove more irksome to the Board than any benefit to be gained. And this area, as we shall see below, is sufficiently

26. Stoddard-Quirk, *supra* note 17, at 620 n.6: "Wholly distinguishable, of course, is the situation where an employee is asked to sign an authorization card. Our dissenting colleagues exploit a semantic gambit by analogizing the solicitation of signatures on authorization cards to the distribution of 'literature.' This gambit, we respectfully suggest, is directed neither to the facts of this case nor to the facts posed therein."

27. Gale Prod., 142 N.L.R.B. 1246, 1248 (1963).

28. Southwire Co., *supra* note 25.

29. Stoddard-Quirk, *supra* note 17, at 621 n.7: "Surely, even in small plants employees are not so chained to their work stations that they have no opportunity to distribute or receive union literature in some nonworking area at some time during the course of a normal 8-hour day, *e.g.*, luncheon breaks, restroom periods, coffee breaks, timeclock punching, clothes changing, auto parking and simple entry into and departure from the plant."

30. Willow Maintenance Corp., 143 N.L.R.B. 64 (1963), *aff'd per curiam*, 332 F.2d 367 (2d Cir. 1964); Minneapolis Honeywell Regulator Co., 139 N.L.R.B. 849 (1962); Miller Charles & Co., 148 N.L.R.B. No. 158, 57 L.R.R.M. 1211 (1964).

31. See, *e.g.*, General Indus. Electronics Co., 138 N.L.R.B. 1371, 1373 (1962): "Cease and desist from maintaining, enforcing, or applying a rule prohibiting employees from soliciting membership in any labor organization during nonworking time or from distributing literature on behalf of any labor organization during nonworking time in nonworking areas of Respondent's plant . . . ."

problematical without *Stoddard-Quirk*, so as to occupy the full attention of the Board and the courts for some time to come.

I. Non-Employee Organizers and the "Captive Audience"

Undoubtedly the most debated aspect of union activity on company premises has centered around the "captive audience" situation, the employer's effort to convey his views of trade unionism to the employees through speeches on company time and property where attendance is normally required.[32] Judge Hand in *NLRB v. Federbush Co.*[33] eloquently described the peculiar difficulties presented to the Board by such affirmative campaigning:

> Language may serve to enlighten a hearer though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and pro tanto the privilege of "free speech" protects them; but, so far as they also disclose his wishes as they generally do, they have a force independent of persuasion. . . . What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first.[34]

Obviously the employer-employee relationship varies significantly in many enterprises. Intelligent administration of the statute requires that this factor be under thorough scrutiny.[35] At the same time, the Board has most recently indicated that recognition of the "economic realities of the employer-employee relationship . . ." may provide greater latitude in setting aside elections influenced by employer captive audiences.[36] Despite large union treasuries, there must be a presumption that, in organizational campaigns where employers utilize the company premises for electioneering, the preponderance of strength lies in the hands of management. This disparity between union power in established bargaining relationships is especially evident in rural areas and regions such as the South where unions are not yet institutions. This seems to be acknowledged by a literal reading, to be discussed below, of a Supreme Court decision generally

32. See Texas City Chem. Inc., 109 N.L.R.B. 115 (1954), wherein the speech in question took place at a dinner paid for by the employer and attendance, with families, was voluntary. *Cf.* Sam'l Bingham's Son Mfg. Co., 80 N.L.R.B. 1612 (1948).

33. 121 F.2d 954 (2d Cir. 1941); *Cf.* NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941); NLRB v. American Tube Beuding Co., 134 F.2d 993 (2d Cir. 1943); NLRB v. Ford Motor Co., 114 F.2d 905, 913 (6th Cir. 1940).

34. NLRB v. Federbusb, *supra* note 33, at 957.

35. See, *e.g.*, Burke, *supra* note 20, at 288, 289.

36. Dal-Tex Optical Co., Inc., 137 N.L.R.B. 1782, 1786-87 (1962); See also Oak Mfg., 141 N.L.R.B. 1323 (1963); Trane Co., 137 N.L.R.B. 1506 (1962).

cited to exclude non-employee organizers from company property.[37] The deleterious impact of the captive audience upon self organization efforts has been aptly described in the following comment:

> while they are in the plant, employees customarily obey the instructions of the company supervisors and officials. Habitual responses of this type tend to operate whether the employee is responding to the desires of the employer that he should perform some shop operation or that he should pursue some less objective course—such as voting against a certain union. . . . [T]he display of power inherent in the compulsory audience is itself of considerable psychological significance. Field studies indicate how deep-rooted is the feeling among workers that their future welfare depends upon "not crossing the boss."[38]

In order to meet this problem, and thus the act's purpose of spreading collective bargaining, the Board, in *Clark Bros.*,[39] sought to proscribe the employer captive audience as unlawful. Noting the employer's control over employees during paid time, the Board hinted at a future doctrine in lamenting management's "exclusive access" to the workers' minds. Section 8(c) of the Taft-Hartley Act, as amended, inscribed a proviso protecting non-coercive free speech which was specifically devised to overrule *Clark Bros.* The Board acknowledged such intent[40] and was thus put to new means to effectuate equal opportunity for unions and employers.

The Supreme Court, in *Kovacs v. Cooper*[41] provided some insights into the problems that confronted the workers in *Clark Bros.* In that case, the Court held that comment on a labor dispute transmitted through a loud speaker going through public streets could be constitutionally prohibited as "loud" and "raucous" under a local ordinance. One might say that the employer's speech cannot necessarily be characterized in such a manner and that the privacy of the home which the Court accorded much solicitude to in *Kovacs,* is not analogous to the rights of employees on plant premises. A partial, but poor, answer to this could be contained in the frequent use of loudspeakers for employer addresses.[42] That, however, could be avoided with marginal difficulty, especially in small plants where loud-

37. NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956).

38. Note, 14 U. CHI. L. REV. 104, 108-09 (1946).

39. 70 N.L.R.B. 802 (1946) (Member Reilly dissenting).

40. Babcock & Wilcox, 77 N.L.R.B. 577 (1948); *Cf.* S & S Corrugated Paper Mach. Co., 89 N.L.R.B. 1363 (1950).

The proviso reads as follows: "The expressing of any view, argument, or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

41. 336 U.S. 77 (1949); See the vigorous dissent of Mr. Justice Black at 102.

42. *Cf.* Phillips Control Corp., 129 N.L.R.B. 1485 (1961).

speakers are not needed and the speech cannot be viewed as loud or raucous and where, incidentally, workers are often in greatest need of the act's protection. But, more important to our problem is the Court's concern in reconciling cases upholding the constitutional right to solicit at private homes[43] which emphasized the unlimited breadth of their approach to this captive audience problem:

> The unwilling listener is not like the passerby who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loudspeakers. . . .[44]

In its pristine form then, the overruling of *Clark Bros.* can be premised only upon employer property rights. On the other hand, one must consider the argument advanced in some of the cases, that the plant is more than employer property, rather it is the community where the worker spends most of his existence. Thus, returning to and comparing *Kovacs*, this argument would of necessity analogize at least some of the rights sought after in the plant to those which can be enjoyed in the streets or so-called public places. Thus for instance it would not be entirely facetious, though admittedly unrealistic and impractical, to inquire if the wearing of earplugs[45] or devices that would drown out the employer's speech would be protected by section 7 and the first amendment. Since the overruling of *Clark Bros.* rejected the constitutional right of non-assembly, could *Kovacs* be employed as a vehicle to obtain the right not to listen? Judge Hand once again advanced the most sensible proposal to bridge the gap left by *Clark Bros.* and the Board was soon to find it acceptable.

In *NLRB v. Clark Bros.*,[46] the Second Circuit rejected the Board's *Clark Bros.* doctrine, but indicated by way of dictum that a violation could be found if the employer refused a union's request to reply. Implicit here was a utilization of the non-employee organizer on company premises so as to redress the organizational imbalance and to answer questions for which some expertise about trade unionism is prerequisite. The Board accepted this principle in the landmark case of *Bonwit Teller*[47] In that case the Board announced the prin-

43. *Cf.* Breard v. Alexandria, 341 U.S. 622 (1951); Martin v. Struthers, 319 U.S. 141 (1943).

44. Kovacs, *supra* note 41, at 86. (Emphasis added.)

45. It would be somewhat tendentious to argue that this would fall within the category of union insignia. Insignia which is not identified as union material would not seem to be protected. See Gimbel Bros., 147 N.L.R.B. No. 62, 56 L.R.R.M. 1287 (1964).

46. 163 F.2d 373 (2d Cir. 1947); *contra*, NLRB v. Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946).

47. 96 N.L.R.B. 608 (1951) (Member Reynolds dissenting).

ciple of an employee's "right to hear both sides of the story under circumstances which reasonably approximate equality." The confusing element of this case arose from the peculiarly broad no-solicitation rules accorded retail department stores such as Bonwit Teller. Because Bonwit Teller had a privileged rule prohibiting solicitation in selling areas during both working and non-working hours, the Board noted that its result was "particularly persuasive" and "compelling." The Board, relying on *Republic*, reasoned that "an otherwise valid no-solicitation rule violates the Act where it is enforced and applied in a discriminatory manner. . . ." The *Bonwit* theory however is not entirely clear because the Board concluded with the remark that the rule's scope made the holding "particularly compelling." The case's unfortunate and imprecise language may have done more than anything else to cloud the law in this area. On appeal the Second Circuit abandoned the *Bonwit* doctrine in so far as it was independent of a no-solicitation rule or derived from *Republic* (thus retreating from their holding in *Clark Bros.*) and graciously accepted the alternative holding that the Board had posed for them in dictum. Judge Hand, writing for the majority,[48] held that the Board's order was too broadly drawn:

> [T]he violation here was the discriminatory application of the no-solicitation rule. If Bonwit Teller were to abandon that rule, we do not think it would then be required to accord the Union a similar opportunity to address the employees each time Rudolph [the employer] makes an anti-union speech. Neither the Act nor reason compels such an "eye for an eye, tooth for a tooth" result so long as the avenues of communication are kept open to both sides.[49]

The Second Circuit continued to apply the "avenue of communication" approach in subsequent cases.[50] This alteration of the *Bonwit Teller* doctrine was destined to play a significant role. But the Board went on to apply the *Bonwit* principle to an industrial establishment without broad rules prohibiting solicitation in *Biltmore Mfg.*[51] Subsequently the Board edged away from reliance on the no-solicitation rule and thus closer to the notion that employer

48. Bonwit Teller, Inc. v. NLRB, 197 F.2d 640 (2d Cir. 1952).

49. *Id.* at 646.

50. See NLRB v. American Tube Bending Co., 205 F.2d 45, 46 (2d Cir.), *affirming* 102 N.L.R.B. 735 (1953): "since the respondent refused to allow any solicitation during non-working hours, that was in itself an unfair labor practice, for it did not operate a retail store; and it was an added unfair practice for it to address solicitation during non-working hours, that was in itself an unfair labor practice, for not join the statement that it is not an unfair labor practice for an employer to address his employees . . . ." 205 F.2d at 47.

51. 97 N.L.R.B. 905 (1951). *Biltmore* is distinguishable from *Bonwit* and other cases involving union rebuttals to a captive audience in that here an employee rather than a non-employee requested an opportunity to reply.

utilization of plant premises for captive audience speeches is so devastating as to make the existence or non-existence of any solicitation rule irrelevant.[52] In *Metropolitan Auto Parts*[53] where a no-solicitation rule was not in existence, both the *Republic* and Second Circuit "avenues of communication" theories were discarded in finding both an 8(a)(1) violation and unfair conduct warranting a new election.[54]

Currently the Board believes that both the Board and Second Circuit opinions in *Bonwit Teller* are "legally sound."[55] That rather contradictory comment will require much explanation in future cases. It cannot be clear whether the Board now accepts (1) the notion implicit in *Republic* that the speech itself is a violation of the no-solicitation rule as the employer's only legitimate prohibition stems from a concern for production or discipline which cannot be present when the employer himself takes the worker's attention; (2) the idea that plant premises are too important in the organizational campaign and captive audiences too harmful to go without correction upon proper request; or (3) Judge Hand's "avenues of communication" concept. One would hope however that the Board is adopting one of the first two courses of action. There is some support for the first choice.[56] The second possibility would seem, in the light of subsequent cases to be the least likely one. However, Supreme Court cases which have intervened since *Bonwit* and the general tenor of Board reasoning in *May Dep't Stores*,[57] all indicate that the Board is adopting the third course of action. That approach cannot be cited correctly as the Board's version of *Bonwit* and this ambiguity should be clarified at the first opportunity.

The Sixth Circuit was not as hospitable to the *Bonwit Teller* doctrine as Judge Hand. Rather than qualify or modify the doctrine, that court rejected it outright. In *NLRB v. Woolworth*[58] the first amendment's possible applicability was discussed at length with the conclusion that *Bonwit* might well violate the Constitution. To begin

52. See, Bellknap Hardware & Mfg. Co., 98 N.L.R.B. 484 (1952); Bernadin Bottle Cap Co., Inc., 97 N.L.R.B. 1559 (1952); *Cf.* F. W. Woolworth Co., 105 N.L.R.B. 214 (1953); Shirlington Supermarket Inc., 102 N.L.R.B. 312 (1953), *aff'd*, 224 F.2d 649 (4th Cir.), *cert. denied*, 350 U.S. 914 (1955); Onondaga Pottery Co., 100 N.L.R.B. 143 (1952); Wilson & Co. Inc., 100 N.L.R.B. 1512 (1952).

53. 102 N.L.R.B. 1634 (1953).

54. Chairman Herzog, concurring in part only, would have set the election aside because of unfair conduct but would not have found an 8(a)(1) violation. This is a distinction that will be developed below.

55. May Dep't Stores Co., 136 N.L.R.B. 797, 799 (1962).

56. James Hotel Co., 142 N.L.R.B. 761 (1963). In this case captive audience addresses were considered solely in terms of a violation of the no-solicitation rule. A violation, however, was not found.

57. 136 N.L.R.B. 797 (1962).

58. 214 F.2d 78 (6th Cir. 1954), *reversing* 102 N.L.R.B. 581 (1953).

with, the court indulged in a slight misstatement of the question at hand in characterizing it as a question of whether the union was entitled to reply to captive audiences for an "equal amount of time during working hours. . . ." Although this error is only slight, it nevertheless has served as a red flag for a judiciary hostile, and rightfully so, to inflexible remedies. The *Bonwit* doctrine is not necessarily so rigid as "equal time" but rather the right to reply under "similar circumstances" or, as quoted above, the right to "approximate" equality. Indeed the employer need not even countenance the right of "reply" but could, pursuant to *Bonwit*, purposely schedule the union speech before his contemplated address.[59] The caveat here, however, should be to restrict the employer's latitude to a rule of reasonableness. For instance, it would be grossly unfair to permit management to offer the union an opportunity to make a speech three or four weeks before the election and then present their side in the immediate interval before election eve.

In *Woolworth*, the Sixth Circuit stated that the constitutional question could be skirted because of congressional enactment of section 8(c) which, the court said, "imposes no limitation upon the expression of the employer's views except that they must not contain a threat of reprisal or force or promise of benefit."[60] Thus the court said that the constitutionality of congressional enactment need not be considered. The court recognized that section 8(c) was motivated, at least in part, by constitutional considerations. But the following comment, when squared with the result reached, makes *Woolworth* a model of judicially created assumptions:

> The purpose of the enactment was to guarantee to employers as well as unions the right of free speech. In view of the legislative history of the principle embodied in the First Amendment . . . its addition to the original National Labor Relations Board Act is an authoritive direction given by Congress to the Board to apply the First Amendment on behalf of the employer as well as the employee. The section was enacted to remedy the situation which arose from the holdings of the Board under the Wagner Act that it was an unfair labor practice for an employer to address his employees in opposition to a union even though his address was entirely uncoercive.[61]

The court was perfectly correct in its conclusion that section 8(c) was aimed at *Clark Bros.* But of course *Clark Bros.* was not the issue in *Woolworth*. The idea that section 8(c) is premised on first amendment considerations is also a valid one. The Seventh Circuit, prior

59. See Note, 61 YALE L.J. 1066, 1078 (1952).
60. Woolworth, *supra* note 58, at 79.
61. *Id.* at 79, 80.

to *Woolworth*, in *NLRB v. La Salle Steel Corp.*[62] had succinctly analyzed 8(c)'s meaning as a simple incorporation of the *Thomas v. Collins* free speech principle into the act. The Sixth Circuit assumed, however, that the plant was the employer's forum and that the union's forum, when contact was possible as it was in *Woolworth*, was relegated to non-company property such as the meeting place utilized in *Thomas*.

Employer dominance of plant property rather than free speech was the underlying assumption in *Woolworth*.[63] The court holds that section 8(c) derives from the first amendment and, as *Thomas* had already stated, free speech in labor disputes is for both parties. Section 8(c) ordered the Board not to thwart, through *Clark Bros.*, the free speech rights of employers while on plant premises. This did not affect the corresponding question of union rights on company property. Furthermore, if the Seventh Circuit is correct, the impact of section 8(c) is to accord *more* authority to union free speech and thus, arguably, advance the Constitution into the area from which the Sixth Circuit has found it to be excluded.

It is, of course, possible to rationalize *Woolworth* as excluding *non-employees* rather than *employees* from company property, a distinction that the Supreme Court was to draw two years later. But this distinction did not seem of importance at this time, although, admittedly this could have been another judicial assumption not worthy of discussion. If so, however, a subsequent Sixth Circuit decision upholding the right of non-employees to be on company property, even without the *Woolworth* captive audience, would be quite contradictory. The court's answer to this could well be that available contacts in the latter case were quite unlike those available in *Woolworth*,[64] or that the company speeches, as distinguished from other types of solicitation, which were present in *Woolworth*, are more inherently disruptive to production. These distinctions may have some justification, but they go unstated. One must read *Woolworth* as primarily grounded on broader considerations.[65]

To say that union free speech may be exercised on what is, according to property law,[66] company property is not to say that the union may utilize company property unrelated, or at least not

62. 178 F.2d 829, 835 (7th Cir. 1949), *cert. denied*, 339 U.S. 963 (1950).

63. The concurring opinion of Judge Miller (though premised on a different factual analysis) articulates this assumption more explicitly. Woolworth, *supra* note 58, at 84-86.

64. NLRB v. Ranco, Inc., 222 F.2d 543 (6th Cir. 1955), *affirming per curiam* 109 N.L.R.B. 998 (1954).

65. *Cf.* NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948).

66. See the concurring opinion of Mr. Justice Frankfurter in Marsh v. Alabama, *supra* note 14, at 511.

directly related[67] to the plant enterprise. For instance, in *Bendix Corp.*[68] it was held lawful for an employer to refuse to permit his equipment to be used for the production of union literature. The employer's requirement that he control the "use" of his own equipment was a "reasonable one." Even where an employer, unlike the fact situation in *Bendix Corp.*, indulged in affirmative action, such as captive audience speeches or distribution of literature, it would seem unreasonable, on this basis alone,[69] to require the employer to permit the union to use management equipment to publish replies or copies of a speech that the union might give. Here property is of a more personal nature. It is not so closely related to the worker as to give him the vested interests that may be applicable to plant premises.

Judge McAllister, dissenting in *Woolworth*, would appear to have written the superior opinion there. He asserted that the court was bound by the broad guidelines enunciated in *Thomas* to the effect that "the Act included the right of the employees to freely discuss and be informed concerning their collective bargaining rights and the correlative rights of the union to discuss with and inform them concerning the matters involved. . . . "[70] Prophetically the dissent articulated the concept that seems to be the dominant theme, in part, for the Board and some of the courts: "the place of work has been recognized to be the most effective place for the communication of information and opinion concerning organization."[71] But, as if to counter this perceptive dissent, the *Woolworth* majority was able to rely on a new Board decision which philosophically superceded *Bonwit* and quite certainly overruled the *Bonwit Teller* doctrine.

In *Livingston Shirt*,[72] the Board held that, in the absence of either an unlawful broad no-solicitation rule which prohibited union access to company premises on other than working time, or a privileged broad no-solicitation rule, an employer did not commit an unfair labor practice through a pre-election speech on company time and premises while denying the union's request for an opportunity to reply. The *Livingston Shirt* rule would seem to be an acknowledgement of the Second Circuit's views. However, some very strong dictum makes the tenor of *Livingston Shirt* considerably more extreme. The Board equated the union hall (thereby assuming that

67. See NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949).

68. 131 N.L.R.B. 599 (1961), *aff'd*, 299 F.2d 308 (6th Cir.), *cert. denied*, 371 U.S. 827 (1962).

69. This is not to say that a discriminatory use might not, in a proper case, afford use or access to the union.

70. Woolworth, *supra* note 58, at 90.

71. *Id.* at 91.

72. 107 N.L.R.B. 400 (1953) (Member Peterson concurring separately and Member Murdock dissenting).

one would always be in existence) with the employer's premises and said that there would be no difference between permitting union replies to captive audience addresses than requiring the employer's admission to the union hall. It is thus clear that *Livingston Shirt* meant to reject completely the *Bonwit* notion of inherent inequality resulting from captive audiences: "an employer's premises are the natural forum for him just as the union hall is the inviolable forum for the union to assemble and address employees."[73] The short answer to *Livingston Shirt* might be that of accepting the analogy of the union hall and company premises as a serious one and thus attempt to devise a rule that would give the employer an opportunity to respond at a union meeting. Although there could be potential surveillance violations of section 8(a)(1), the result to be hoped for in these cases is a free flow of ideas where employees can, *in actuality*, hear both sides of the question. In any event, surveillance should be of insignificant concern in the organizational campaign at the point when the union has come out into the open to the extent of challenging company speeches. Of course, the timing may not be that of the union because of employer affirmative action.

The really surprising aspect of *Livingston Shirt* dictum is the almost Marxist class warfare notion of what the rules of the game are to be: "we do not think one party must be so strangely openhearted as to underwrite the campaign of the other."[74] Many portions of the act stem from deep distrust of both parties' "good intentions." But it is one thing to recognize such a pattern and to try and remedy it with solutions, and it is another matter to encourage it. The latter is what the Board did in *Livingston Shirt*.

Finally, *Livingston Shirt* conjured up unreal visions of *Bonwit*, characterizing that decision as a "forensic seesaw" which would require replies ad infinitum. As pointed out above, this is a false analysis of *Bonwit*. That case permitted the employer, perhaps wrongly, to adjust all timing problems to his needs.

The *Livingston Shirt* rationale is almost identical to *Woolworth* except for the latter case's emphasis on constitutional questions. The *Livingston Shirt* majority could not afford to speak constitutionally, even if they were able[75] because of a companion case, *Peerless Plywood*.[76] In this case it was held that a speech within twenty-four hours of the election would require the election to be set aside, as

73. *Id.* at 406.

74. *Id.* at 406.

75. Although an administrative agency has no power to adjudicate constitutional questions, it may express opinions.

76. 107 N.L.R.B. 427 (1953).

distinct from an unfair labor practice violation.[77] *Peerless Plywood* held that the "real vice" was the "last minute character" of the speech. The rule here, which deals with only speeches and not literature,[78] goes to the difficulties involved in a union reply in such a short time and the inevitable effect of propaganda just before the election. Since the rule only prohibits speech and not literature, *Peerless Plywood* implicitly accepts the charge that an employer's speech is an especially powerful weapon in the hands of management. It is interesting to note, however, that *Peerless Plywood,* analytically speaking, is more of an encroachment upon section 8(c) than was *Bonwit.* During the twenty-four hour period speech is prohibited entirely. Neither a monologue nor a dialogue is contemplated, only silence. Conduct which necessitates setting aside an election, however, cannot be protected by 8(c), unlike the situation in unfair labor practice cases.[79]

This does not detract from the significance of the problem that *Peerless Plywood* seeks to meet. *Bonwit* as interpreted by the Second Circuit, emphasized the inequities arising from employer speeches just before the election. In the wake of *Bonwit,* some argued that the fact that one of the employer's speeches was two hours before polling time, thereby making an effective reply impossible, was the dominant theme.[80]

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77. Pursuant to section 9(c)(1) of the act the Board is to resolve a question of representation through an election by secret ballot. In determining whether an election should be set aside the Board must examine the standards of election conduct which are "considerably more restrictive than the test of conduct which may amount to interference, restraint, coercion violative of Section 8(a)(1)." TWENTY-EIGHTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 60 (1963). A pre-election atmosphere of "laboratory conditions" is the requisite standard. General Shoe Corp., 97 N.L.R.B. 499 (1951).

78. See Carlton Forge Works, 146 N.L.R.B. No. 94, 55 L.R.R.M. 1407 (1964) (Member Brown dissenting on other grounds).

79. In election cases the Board is not limited, as it is in unfair labor practice proceedings, by the free speech provision of section 8(c). See, for instance, TWENTY-FIFTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 50 (1960).

The rationale for setting an election aside is cogently summarized in TWENTY-EIGHTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 56 (1963): "An election will be set aside and a new election directed if it was accompanied by conduct which, in the Board's view, created an atmosphere of confusion or fear of reprisals which interfered with the employees' freedom of choice of a representative as guaranteed by the Act. In evaluating the interference resulting from specific conduct, the Board does not attempt to assess its actual effect on the employees, but rather concerns itself with whether it is reasonable to conclude that the conduct tended to prevent a free formation and expression of the employees' choice."

80. See most recently Claymore Mfg. Co. of Arkansas, Inc., 146 N.L.R.B. No. 153, 55 L.R.R.M. 1080 (1964), wherein a Board majority (Chairman McCulloch and Member Brown dissenting) refused to set aside an election one of the grounds being that the union had ample time in which to reply to propaganda circulated throughout a small rural community.

Peerless Plywood's complete prohibition of speech is not the most telling argument against that case:

> The administrative process for setting aside an election normally takes about six months, while an election left standing bars a new election under the Act, for a period of a year. Under the instant decision, an employer uncertain of winning against an undesired union has little to lose and much to gain from attempting to influence the election by calling and speaking to an employee assembly within the twenty four hour period. If he loses the election despite the speech he has lost nothing: if he wins, the election will be set aside but he has gained approximately six months before the administrative process is completed and a new election held—he has gambled only the possibility of winning without the speech, which would have barred the union for a year. Such tactics, immune from a cease and desist order, could be repeated a number of times. This possibility of abuse . . . seems to require now that . . . all speeches within the twenty four hour period [be] unfair labor practices as well as grounds for setting aside an election.[81]

The Board's vastly increased case load during the ten years since that was written makes this problem more intolerable.[82] It is further submitted that the twenty-four hour period is unrealistically short and that a longer period, providing more alternatives and remedial flexibility, would be more sensible and compatible with free speech principles. This point will be expanded below.

NLRB v. Babcock & Wilcox[83] and *NLRB v. United Steelworkers*[84] (*Nutone* and *Avondale Mills*) are a watershed in solicitation law. Neither case presented a captive audience problem, but both have had a profound impact on speeches as well as other types of solicitation.

In *Babcock*, the Supreme Court specifically distinguished the rights of non-employees[85] from employees insofar as the right to

81. Note, 54 COLUM. L. REV. 632, 635 (1954).

82. At the present time it is true, however, that a special expediting unit resolves representation cases more quickly than the normal process.

83. 351 U.S. 105 (1956), *consolidating* Ranco, Inc., 109 N.L.R.B. 998 (1954), *aff'd per curiam*, 222 F.2d 858 (10th Cir. 1955). *Cf.* Caldwell Furniture Co., 97 N.L.R.B. 1501, *aff'd per curiam*, 199 F.2d 267 (4th Cir. 1952), *cert. denied*, 345 U.S. 907 (1953); Carolina Mills Inc., 92 N.L.R.B. 1141, *aff'd*, 190 F.2d 675 (4th Cir. 1951).

84. 357 U.S. 357 (1958).

85. Employees who are part of an appropriate bargaining unit are nevertheless considered as nonemployees when on the physically separate premises of the same employer. Great Atl. & Pac. Tea Co., 123 N.L.R.B. 749 (1959), *aff'd*, 277 F.2d 759 (5th Cir. 1960). A more liberal spirit is displayed in Cranston Print Works Co., 117 N.L.R.B. 1834, 1842 (1957), *reversed*, 258 F.2d 206 (4th Cir. 1958): "In determining to whom this right to distribute union literature extends, we believe that the materiality of employment interests of all employees of a single employer, whether they are working, or on strike, or on leave of absence or sick leave, or temporary lay off, or temporary transfer, or have been discriminatorily discharged or about to quit, is no less determinative of this right than it is of the right to engage in other self-organization activities fostered and protected by the Act."

distribute literature on company parking lots was concerned. In that case the Court clearly adhered to the *Republic* rationale for employees.[86] The exact holding of the case is not entirely obvious. *Stoddard-Quirk* might argue for the proposition that the holding, whatever it is, is strictly limited to cases involving "distribution" (the union organizers in all the cases adjudicated were handbilling parking lots) as distinguished from "solicitation." But the *Stoddard-Quirk's* majority's own disclaimer on this point[87] blunts that argument's sharpness. The holding then, encompassing both solicitation and distribution, would appear to be the following:

> It is our judgment . . . that an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.[88]

Besides the linguistic ambiguities contained in the quotation above, the Court's concluding remarks in the *Babcock* opinion lead one to believe that the existence of alternate routes of communication is to be the only, or primary, consideration affecting the rights of non-employee organizers. Yet a literal reading of the quoted passage supports the view that an employer may exclude non-employees only if *both* of two factors are present: in short, that the Court's opinion must be read conjunctively rather than disjunctively.

Since *Babcock* did not overrule the Court's decision in *NLRB v. Stowe Spinning*,[89] it would appear that that case's holding to the effect that an employer could not discriminatorily exclude non-employees from company property is preserved. On the other hand, the channels of communication theory, especially if read as an exclusive criterion would relegate the *Stowe* case to the company town or isolated enterprise category. Certain dictum of the Court in *Stowe* would support the latter view.[90] But the Board did not seem to place this interpretation on the case in *Bonwit*.[91] And the Court, in *Babcock*, notes the importance of the discrimination present in *Stowe*.

As indicated above, *Babcock* retains the theory of cases like *NLRB*

86. Babcock, *supra* note 83, at 113: "The distinction [between nonemployees and employees] 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 or discipline." (citing *Republic*).
87. Stoddard-Quirk, *supra* note 17, at 619 n.5.
88. Babcock, *supra* note 83, at 112.
89. 336 U.S. 226 (1949).
90. *Id.* at 230.
91. See Bonwit, *supra* note 47, at 613 n.10.

v. Lake Superior[92] which permitted non-employees to enter on company property in isolated lumber camps where the employees lived on company property and could not be reached through other means. In *General Dynamics*[93] the Board has indicated a propensity to brush aside the concept of discrimination as a relevant factor and to substitute the necessity of special considerations in upholding union claims, *e.g.*, company town. However, it is beyond doubt that the Court, in *Stowe*, unlike the Board[94] premised the violation on discrimination and not geography.

In post-*Babcock* cases, the Board, while reluctant to find violations on this basis, has adhered to the concept of discriminatory 8(a)(1) violations as applicable to acts committed against non-employees on company property.[95] Such reluctance was overcome in the *Salyer Stay Ready*[96] dissent of Chairman McCulloch which found a violation in the case of violence committed against an organizer in a public street.[97] The extreme fact situation presented in *Salyer Stay Ready* (and the case's ability to attract only one member in support of a violation) point up some of the incongruities inherent in *Babcock*.

Republic says that discrimination is presumptively evident when an employer prohibits solicitation on non-working time because the activity conducted at such a time in most instances does not hurt production. But the organizer, in ordinary circumstances, cannot be on company property during working time at which time his activity would raise the employer's only defense accorded under *Republic*. How then does one find discrimination? Perhaps something extra is needed. This must be the approach that brought forth Chairman McCulloch's dissent in *Salyer Stay Ready*. It is not quite facetious to say that in order to find a violation, barring evidence of

92. *Supra* note 65. See also NLRB v. Waterman Steamship Corp., 309 U.S. 206 (1940).

93. 137 N.L.R.B. 1725 (1962) (Member Brown dissenting).

94. Stowe Spinning Co., 70 N.L.R.B. 614 (1946); *cf.* Phillips Petroleum Co., 92 N.L.R.B. 1344 (1951), wherein the Board held that a company violated section 8(a)(1) in a company town setting without the discrimination present in Stowe.

95. Bludworth Const. Co., 123 N.L.R.B. 385 (1959), but see the dissent of Members Rodgers and Bean at 389: "In that case [*Babcock*] the Supreme Court ruled squarely that if no other 'distribution' is allowed, the exclusion of nonemployee organizers from company property is to be tested against the availability of other channels of communication with the employees. To the extent that our colleagues have applied the Babcock & Wilcox rule in this case, we are in accord with what they have done. We disagree with them, however, to the extent that they have superimposed upon the Babcock & Wilcox rule an additional test of 'discriminatory violation.' The Supreme Court decision in Babcock & Wilcox is not, in our opinion, susceptible to this treatment. Our colleagues are therefore in error."

96. 136 N.L.R.B. 1210 (1962). *Cf.* Southwire Co., 133 N.L.R.B. 83 (1961), *aff'd per curiam*, 313 F.2d 638 (5th Cir. 1963).

97. *Id.* at 1211.

violence, one must find near hatred for the union on the part of the employer or at least a background of discriminatory conduct. Yet, as we shall see, there are good reasons, not articulated in the dissent, for analogizing this case's public street to *Stowe's* meeting hall and making them crucial considerations.

To return to *Babcock,* the Court there spoke of the absence of "other distribution" as a necessary element in the exclusion of union organizers. Presumably this means *outside* activity such as charities[98] or the organization of a competing or incumbent union. On this point it is not clear if the union seeking entrance must be admitted to the plant proper or working areas and/or be admitted during working hours if the charities or other unions are given such privileges. The Board, in *General Dynamics,* said that *employee* activity could not constitute "other distribution"[99] though other factors argued for a result contrary to the one reached in that case. However, it would seem that any employer agents, such as visiting businessmen and other community leaders who make speeches or distribute literature would constitute "other distribution."[100]

The crucial question concerns the status of the employer's own activity. *Livingston Shirt,* we must remember, served to immunize a good deal of employer campaigning. In *Goldblatt Bros.,*[101] an election case, the Board promulgated the somewhat astonishing rule that an employer could not violate his own no-solicitation rule. This was a complete repudiation of any *Bonwit* theory and the Supreme Court provided some corrective relief in *NLRB v. United Steelworkers.*[102] This decision consolidated two Board cases which the Court held were "controlled by the same considerations." Since the dissent, as written by Mr. Chief Justice Warren, premised its reasoning on a distinction between the cases, it becomes important to study the separate facts of each.

In *Nutone, Inc.,*[103] the Board held, as in *Goldblatt Bros.,* that valid plant rules do not "control" the employer's action and that such employer freedom was in the nature of "management prerogatives." Here a company rule prohibiting both solicitation during working time and distribution on company property by employees was promulgated prior to an organizational drive but was not enforced until the campaign was being conducted. The union did not challenge

98. *Cf.* Mira-Pak Inc., 147 N.L.R.B. No. 126, 56 L.R.R.M. 1355 (1964); Revere Camera Co., 133 N.L.R.B. 1657 (1961), *aff'd,* 304 F.2d 162 (7th Cir. 1962).

99. *Supra* note 93.

100. NLRB v. American Furnace Co., 158 F.2d 376 (7th Cir. 1946). *Cf.* Byrds Manufacturing Corp., 140 N.L.R.B. 147 (1962).

101. 119 N.L.R.B. 1711, 1714 (1958).

102. *Supra* note 84.

103. 112 N.L.R.B. 1153 (1955).

the rule's validity in itself (though even under *Stoddard-Quirk* the distribution rule would be bad), but rather charged that the company violated 8(a)(1) by their distribution of literature in the face of the rule. The Board majority held that expressions of opinion were protected by section 8(c) and could, apparently, under no circumstances other than coercion be unfair labor practices. According to the Board, *Nutone* was governed by the principle of *Livingston Shirt*. The dissent of Member Murdock distinguished *Livingston Shirt* as relating to speeches and maintained that union halls, the *Livingston Shirt* counterpart of employer speeches, were not appropriate for the distribution of literature. More important, Member Murdock noted the "surcharged atmosphere" of independent unfair labor practices in *Nutone* and thus distinguished *Woolworth* where the employer speech stood alone. On appeal, Judge Prettyman writing for the District of Columbia Circuit Court,[104] reversed the Board majority but narrowed Member Murdock's dissent. With regard to section 8(c) the court commented:

> It wipes out the obligation of an employer to afford affirmatively to his employees equal opportunity with himself to distribute or solicit. But it does not wipe out the basic rule that in order to enforce a no-distribution rule against employees the employer must have a valid reason.[105]

The court held that the defense of concern for production and efficiency were thus eliminated by the employer's activity.

In *Avondale Mills*,[106] the Board found a violation of the act. In this case the company maintained that it had a "long standing" rule on solicitation but the workers testified that they knew of no such rule. The Board said:

> instead of generally publicizing its newly adopted or revived rule to employees, as one would expect of an employer solely concerned with plant production and efficiency, the Respondent, at the very inception of the Union's membership drive singled out a number of employees ostensibly suspected of engaging in union solicitation during working hours to be warned against a repetition of the reported offense. Apparently, antiunion solicitation was not made an offense.[107]

Furthermore the Board noted that "talking" on a number of subjects was permitted, that supervisors utilized discussions with employees during working hours to make unlawful threats and interrogations and that there was no "concrete evidence" to show that production was "impaired" by union solicitation. Thus, distinguishing *Nutone*,[108]

104. United Steelworkers v. NLRB, 243 F.2d 593 (D.C. Cir. 1956).
105. *Id.* at 600.
106. 115 N.L.R.B. 840 (1956).
107. *Id.* at 841.
108. *Id.* at 842 n.8: "The Board's decision in Nutone Incorporated, 112 N.L.R.B.

the Board held that the rule was "invoked" to defeat self organization rights and thus violated section 8(a)(1). The Fifth Circuit reversed the Board on the rule's validity and held that *Nutone* required a contrary result.

In *Steelworkers,* Mr. Justice Frankfurter, speaking for the majority of the Court, seemed to pledge obedience to the *Republic* theory.[109] The Court, using solicitation and distribution as interchangeable terms, posed the question presented in this fashion:

> The very narrow and almost abstract question here derives from the claim that when the employer himself engages in antiunion solicitation that if engaged in by employees would constitute a violation of the rule, particularly when his solicitation is coercive or accompanied by other unfair labor practices, his enforcement of an otherwise valid no solicitation rule against the employees is itself an unfair labor practice. We are asked to rule that the coincidence of these circumstances necessarily violates the Act regardless of the way in which the particular controversy arose or whether the employer's conduct to any considerable degree created an imbalance in the opportunities for organizational communication.[110]

To do this, the Court said, would show "indifference" to the Board's responsibility to recognize diverse circumstances. Here there was no indication in the record of either case "that the employees or the unions on their behalf requested the employer, himself engaging in anti-union solicitation, to make an exception to the rule for pro-union solicitation."[111] Although the Court noted the "clear anti-union bias" of both employers, it refused to assume that such a request would be rejected "although it might well have been open to the Board to conclude as a matter of industrial experience . . ." that a request was futile. This then was the case's first defect in the view of Mr. Justice Frankfurter.

Second, the Court admonished the Board for not finding whether the rule had "truly diminished the ability of the labor organizations involved to carry their message to the employees." Citing the *Babcock* rule of alternate communications as "highly relevant," the majority opinion stated the following:

> [T]he Taft-Hartley Act does not command that the labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers nor that they are entitled to use a medium of communication simply because the company is using it.[112]

1153, does not preclude reliance on the anti-union conduct of the Respondent's supervisors as evidence of discriminatory motivation underlying the adoption or revival of the no-union-solicitation rule."

109. NLRB v. United Steelworkers, *supra* note 84, at 361.

110. *Id.* at 362.

111. *Id.* at 363.

112. *Id.* at 364.

Thus, the Court said, mechanical answers would not avail and that where plant location, facilities and other resources made union communication opportunities *"at least as great as the employer's ability to promote the legally authorized expression of his anti-union views,* there is no basis for invalidating these otherwise valid rules."[113] The Court was careful to state that, in proper circumstances, an employer could commit an unfair labor practice by violating his own rule but that "there must be some basis in the actuality of industrial relations for such a finding."[114]

Justices Black and Douglas dissented in both cases as they would have affirmed Judge Prettyman's opinion in *Nutone.* They joined Mr. Chief Justice Warren's dissent in *Avondale Mills.* For the Chief Justice, the "pivotal distinction" between the cases was that the anti-union activity was coercive in itself, whereas this element was lacking in *Nutone.*

The dissent dismissed Mr. Justice Frankfurter's concern with a failure to request as a "slender reed." Here, said the dissent, "in contrast to *Babcock* and *Republic* we are not concerned . . . with the validity of these rules per se. The no-solicitation rule under examination here may well be valid if fairly applied."[115] While holding that section 8(c) protected non-coercive speech, the dissent at the same time viewed "plant premises and working time" as "decisive factors" that argued, in *Avondale Mills,* for a violation.

II. The Impact of *Babcock* and *Steelworkers*

A careful reading of the *Steelworkers* majority opinion indicates that *Goldblatt Bros., Woolworth* and certainly the Board's version of "management prerogatives" in *Nutone* are no longer good law. Moreover, to the extent that the Board in *Nutone* characterized *Livingston Shirt* as support for absolute non-coercive employer free speech under 8(c), *Steelworkers* would seem also to have set that doctrine aside. At the outset of *Steelworkers,* Mr. Justice Frankfurter stated that no one claimed that the employer may not "under proper circumstances" engage in non-coercive anti-union speech protected by the statute. Thus the right of non-coercive speech was qualified into a right pertaining to "proper circumstances." This is the Board's position in *Bonwit*—that is to say, that the circumstances are proper if the union has an opportunity to reply. At the same time, *Steelworkers* makes it clear, at least in the non-captive audience area, that the Court's position will not always coincide with *Bonwit's* per

113. *Ibid.*
114. *Ibid.*
115. *Id.* at 367.

se finding of unlawful conduct when an employer discriminatorily violates his own rule during working hours. But the point is that *Steelworkers* stands for the proposition that there are circumstances in which non-coercive employer speech is not lawful. I realize that this analysis will come as a great and perhaps unpleasant surprise for many and appear to be hair splitting to others. My opinion is, however, supported by the Court's statement that an employer may, once again in certain circumstances, commit an unfair labor practice by non-coercive anti-union solicitation.

Of course the *ad hoc* approach laid down in *Steelworkers* would seem to be more of a reaction to per se rules rather than representative of a sensitivity to free speech questions àla *Woolworth*. And on this point one should not be able to argue, as Member Murdock did in his *Nutone* dissent, that the Court does not intend a limitation on speech as opposed to literature. As mentioned above, the Court used solicitation in its broad generic sense and one can rightfully assume, especially in view of the Court's citation of *Bonwit* (Second Circuit version) and *Woolworth*, that captive audience speeches fall within the sweep of this opinion. Curiously enough, the dissent of Chief Justice Warren brooks no accommodation with any concept which can draw unfair labor practices out of non-coercive speech.

There is a countervailing argument to all of this. The Court held that *Babcock* was "highly relevant"[116] in determining whether plant rules have been fairly applied. One can reasonably read *Babcock's* "other distribution" criterion as implicit exclusion of employer activity. But the above mentioned characterization of 8(c) probably answers this argument well enough to make the reader conclude, especially in the context of "highly relevant" remarks, that the Court is referring to the rule of alternate routes of communication. If *Babcock* is read to sanction employer distribution, then *Steelworkers* serves merely to qualify that interpretation.

One of the biggest areas of confusion in *Steelworkers* is that case's treatment of *Republic*. Justice Frankfurter stated that the union made no attempt to carry its message, presumably through non-plant media, to the employees and further, citing *Republic*, that this was a vital consideration in determining the rule's validity. Unlike *Babcock*, *Republic* deals with employees and the lawful limitation of their rights. As mentioned above, Justice Frankfurter cites that case approvingly. Here, however, the Court is citing *Republic* for what it clearly does not stand for. The Court in *Republic* noted the following:

116. *Id.* at 363.

> Neither in the *Republic* nor the *Le Tourneau* cases can it properly be said that there was evidence or a finding that the plant's physical location made solicitation away from company property ineffective to reach prospective union members. Neither of these is like a mining or lumber camp where the employees pass their rest as well as their work time on the employer's premises so that union organization must proceed upon the employer's premises or be seriously handicapped.[117]

Similarly the Board, in its *Le Tourneau*[118] opinion expressly disavowed the theory advanced in *Steelworkers*.

It is, of course, within the Court's prerogative to overrule or limit *Republic*. *Steelworkers*, however, cites *Republic* correctly and then incorrectly to support a new doctrine. One must conclude respectfully that Justice Frankfurter has misapplied that case. This mistake, small in itself, is responsible for a good portion of the cloudiness that afflicts solicitation law today.

The distinction between non-employees and employees as set forth in *Babcock*, where non-employees sought access, is further blurred by the *Steelworkers* (where only employees' rights, and not those exercised by non-employees on their behalf, were in question), holding that a request must be made and the Court's other worldy observation that, despite clear anti-union bias, it need not be viewed as futile. The Court overlooks the fact that the employer rule anticipates the request insofar as employees are concerned, and most emphatically denies it. Affirmative campaigning by the employer in the face of the rule would mean, if anything, a slighter chance that the employer would heed a request. The necessity of request serves a good purpose where non-employees seek access to company property. Unlike the employees, they are strangers to the premises and the employer has a legitimate risk in protecting himself against liability, among other things. Perhaps the Court, by requiring the request from either the union or the employees, is hinting at a distrust of the union-employee relationship or, as is implied in *Babcock*, a skepticism concerning the actual interest that workers have in exercising their rights of union activity. But, of course, the request is not enough. The Court grafted some rather important qualifications on the *Babcock* rule concerning the availability of other channels of communication, as we shall see below. Because the Board did not meet this question "the concrete basis for appraising the significance of the employer's conduct is wanting."[119]

Let us see what these alternatives are. The idea that personal

117. Republic Aviation, *supra* note 7, at 798-99.
118. Le Tourneau Co. of Georgia, 54 N.L.R.B. 1253, 1261, *reversed*, 143 F.2d 67 (5th Cir. 1944).
119. *Supra* note 109, at 364.

contacts at home suffice for organizing employees before a Board election is totally unrealistic. House contacts are of use in the very early stages of the campaign when the union effort may still be secretive. By its very nature, the purpose here must be to gain a few key supporters. It is a tactic usually employed before questions of non-employee rights on company property begin to arise.[120] Moreover, it must be recognized that policies which relegate the union to ringing door bells may cause irritating, though not usually technical, invasions of individual privacy. Mr. Justice Reed, the author of *Babcock*, was extremely sensitive to the values of privacy in one's own home in other cases. The *Babcock* rule, in this request, runs counter to the consideration of privacy.[121]

Livingston Shirt extols the values of the union hall but even assuming the *existence* of a union hall, the distance and inconvenience of night meetings cannot begin to compare with the employer's resources.[122] The Board has held, in *Joseph Bancroft*,[123] that a union hall plus other means of communication are not necessarily enough to provide the pre-election laboratory conditions required by the act.

There appears to be no statutory right given to the union to obtain addresses and phone numbers of the employees.[124] Perhaps this would or should constitute an undesirable violation of privacy. Thus the ability to contact employees, as in the recently decided *Gimbel Bros.*[125] where the union was able to obtain less than half of the addresses, will be seriously limited. Radio and TV cannot seriously be viewed as having any comparative value.

Judge Clark has accurately summarized the problem in the recent and important decision of *NLRB v. United Aircraft*:

> The chances are negligible that alternatives equivalent to solicitation in the plant itself would exist. . . . The solicitors have no opportunity for personal confrontation so that they can present their message with maximum persuasiveness. In contrast the predictable alternatives bear without exception the flaws of greater expense and effort, and a lower degree of effectiveness. Mailed material would be typically lost in the daily flood of printed matter which passes with little impact from mailbox to waste basket. Television and radio appeals where not precluded entirely by cost, would

120. See Note, 65 YALE L. J. 423 (1956).

121. This does not mean that the Board, where other alternatives are not available, will not recognize the importance of union access to company-owned homes occupied by the workers. See Joseph Bancroft & Sons Co., 140 N.L.R.B. 1288 (1963). *Cf.* NLRB v. Lake Superior, 167 F.2d 147 (6th Cir. 1948).

122. See 61 YALE L.J. 1066, *supra* note 59, at 1074, 1076.

123. 140 N.L.R.B. 1288 (1963).

124. See Excelsior Underwear Inc., Case No. 11–RC 1876 (1964). *Cf.* NLRB v. Great Atl. & Pac. Tea Co., 277 F.2d 758 (5th Cir. 1960), upholding the right of employees to obtain addresses during working time.

125. 147 N.L.R.B. No. 62, 56 L.R.R.M. 1287 (1964).

> suffer from competition with the family's favorite programs and, at best, would not compare with personal solicitation. Newspaper advertisements are subject to similar suppressions. Sidewalks and street corners are subject to vicissitudes of climate, and often force solicitation at such awkward times, as when employees are hurrying to and from work.[126]

Since *Steelworkers* is a step beyond *Babcock* in requiring "effective" communication for the union, the Supreme Court could logically concur, in another case to come, with the Second Circuit's practical interpretation of what is effective. But as will be pointed out, such concurrence will require some hard swallowing of previous abhorrences for per se rules. One of the most dismaying aspects of the above mentioned rule is, as the Second Circuit noted,[127] the endless litigation that results. The parties are rarely sure of their rights and a hostile employer will nearly always refuse to admit the organizer. It may be much better from his standpoint to litigate and then, at the hearing, list the media available to the union. From the union's standpoint, the doctrine can be confronted only with subterfuge. If the union seeks to obtain every possible media and spends a large amount of money in doing so, the employer will say that a finding of a violation is an attempt to insure success for the union.[128] A dilemma is thus posed for the union. It must, in its own interest, do the best campaigning possible but, at the same time, convince the Board that such campaigning is worthless. It is not reasonable to assume that the union will act against its own interests in either situation. It is reasonable to assume that the union will do its best in both situations and thus deprecate and minimize the extent of its own activity. This temptation of perjury makes it more appropriate to place the burden of proof in this matter on the employer, as will often happen in practice, and thus require evidence from the party whose interest it will serve.[129]

In the light of *Steelworkers*, this burden for the employer is quite logical. Although it is often overlooked, *Steelworkers* indicates that opportunities for reaching employees with a pro-union message must be, at a minimum, equal to those of the employer.[130] The Court said that where opportunities "are at least as great as the employer's ability to promote legally authorized expression of his anti-union views, there is no basis for invalidating these 'otherwise valid' rules."[131] In keeping with the Court's *ad hoc* approach, one cannot

126. 324 F.2d 128, 130 (2d Cir. 1963), *cert. denied*, 376 U.S. 951 (1964).
127. *Id.* at 130.
128. See Great Atl. & Pac. Tea Co., 97 N.L.R.B. 295, 299 (1951): "the unions' success in overcoming this impediment is not dispositive."
129. *Cf.* General Dynamics, 137 N.L.R.B. 1725, 1728 (1962).
130. See Comment, 72 YALE L.J. 1243, 1258 (1963).
131. Steelworkers, *supra* note 84, at 364.

say that opportunities that are less than equal will *always* result in an unfair practice. The important factor is that the presumption, to the extent that one can speak of presumptions under *Steelworkers*, should shift at least so as to place a burden of proof upon the employer.[132] Nevertheless one must draw back from speaking about presumptions in this context. For it seems clear that if the NLRB General Counsel does not introduce evidence concerning other media, an employer would be on sound grounds in moving to dismiss on the pleadings. This is a part of the General Counsel's case which he must come forward with in order to have the charge of an unfair labor practice sustained.[133]

However, the Board and courts should recognize the great difficulties that the *Babcock* criteria impose upon the General Counsel. Investigation of what media the union could or did use will inevitably turn upon the financial resources at hand. But it would be a terrible mistake to get involved with this factor as it will not answer the important questions. Union financial resources are, generally speaking, very plentiful. It is also true that not enough of these resources have been employed in organizational campaigns and for this the unions only can be blamed. However, the Board should not concern itself with this interesting sidelight. It is now charged with ascertaining the effectiveness of media in each particular case. This is entirely separate from and irrelevant to the union's financial abilities to purchase radio and television time.

The Board should accept evidence of the existence of alternate routes of communication. If, as normally seems to be the case, the union does not have the addresses of all employees and, more important, cannot readily obtain an audience of most of the workers on, for instance a television program or at a meeting, the Board should hold that the alternatives are not effective enough to constitute meaningful equality. Paradoxically, insofar as radio and television are concerned, this might require the company town setting, or something very similar, and one station which would in fact reach a small number of people who are not diverted by competing entertainment. I do not believe that one can seriously speak of adequate or effective communication where the union must go to the workers,

132. See Note, 64 COLUM. L. REV. 780, 785 (1964).

133. After a charge of an unfair labor practice has been filed, the Regional Director of the Board may issue a complaint "if it appears . . . that formal proceedings in respect thereto should be instituted . . . ." A hearing is then held before a Trial Examiner of the Board and the rules of evidence applicable to the district courts of the United States "so far as practicable" will be used. Upon issuance of a decision by the Trial Examiner the case is transferred to Washington where any party may take exception to the decision, record and proceedings. See *NLRB Rules and Regulations and Statements of Procedure* § 8, as amended, 2-16 (1962).

through any means, who are spread out in the cities, suburbs or rural areas. The union is put to a hollow gesture when it must compete over television in, for instance, the New York-New Jersey area for the votes of a very small portion of that population. All of this the Board must take into account, even though in so doing it may imitate the approach taken by the Second Circuit in *United Aircraft* and thus risk the ire of those yet adhering to *Steelworkers*. Practically speaking, the Board would simply list other media without articulating the presumption in which it must indulge.

It is indeed amazing that the *Steelworkers* opinion contains the implicit assumption that, more often than not, or even half of the time, the union will have available communications that are "at least" equal. It would be difficult to envisage many organizational struggles where the union's extra-plant communications were superior to those of the employer. Surely this was not lost on the Court in both *Babcock* and *Steelworkers* where the union is denied at least in some instances, what everyone, including the Court, recognizes as the most effective media, the plant itself. Is it really possible to assume that the union has equality and possibly more, without the use of the plant?

In *May Department Stores*,[134] the Board held that inequality or an "imbalance" was to be presumed in retail department stores and thus required the employer to accede to a union request to reply to a captive audience speech on company time and property. Most certainly *Babcock* and *Steelworkers* do not, as the *May* majority asserts, "require" the arrived at result.[135] To begin with, *Steelworkers* does not necessarily subscribe to even the Second Circuit version of *Bonwit* in finding presumptively, that retail department stores with broad no-solicitation rules present an "imbalance." *Steelworkers* cites *Bonwit* and the similar concurring opinion in *Woolworth* by way of comparison if anything, to the *Babcock* criterion. It is correct for the Board to say that the no-solicitation rule in *May* is broader than those presented in *Steelworkers*.[136] But *Steelworkers* is a blow for the *ad hoc* approach. And, as the dissent of Member Rodgers and the Sixth Circuit's *May* opinion (in which the Board was reversed)[137] state, the Board did not conduct an evaluation of opportunities related solely to the facts set forth in *May*, but rather characterized them as "catch-as-catch-can methods of rebuttal."[138] The Board's answer must be, in part, that these channels are unreal and, to the

134. 136 N.L.R.B. 797 (1962).
135. *Id.* at 800.
136. *Id.* at 800-02.
137. May Dep't Stores v. NLRB, 316 F.2d 797 (6th Cir. 1963).
138. *Id.* at 801-02.

extent that they are susceptible of investigation, incapable of evaluation on an *ad hoc* basis, especially when compared to the employer captive audience. This Board analysis of the facts of life, an assessment that will not normally be otherwise, might obtain a better reception now that the Court seems more inclined to accept the Board's presumptions concerning industrial relations.[139]

May follows the *Steelworkers* equality of communications thesis, but qualified in a manner so as to carefully rebut a potential and perhaps justifiable Supreme Court assertion that *Steelworkers* has been misread. Thus the *May* opinion analyzes *Steelworkers* as a requirement of "balance." In addition to the varying interpretations that can be drawn from that word, the Board, because *May* involves a department store where workers are "uniquely handicapped,"[140] is able to find a "glaring imbalance" in organizational opportunities. Perhaps this is out of acknowledgement of the Court's words in another portion of *Steelworkers* which speak of imbalance of a "considerable degree."

In any event, the question of equality or even balance is avoided in *May*. But when the Board meets the normal factory situation with ordinary solicitation rules, which it expressly declined to comment on in *May*,[141] it will by necessity risk more in the way of interpretation.[142] In such a case the Board must, on its facts, meet the question

139. See, *e.g.*, NLRB v. Erie Resistor, 373 U.S. 221 (1963).

140. Marshall Field, 98 N.L.R.B. 88, *modified*, 200 F.2d 375 (7th Cir. 1952); and see Montgomery Ward & Co., 150 N.L.R.B. No. 130 (1965), wherein the Board refused to apply the *May* doctrine in a department store with no-solicitation rules applicable only to non-working time. Here, however, the Board might have found a violation and yet avoided the *Livingston Shirt* issue because of two factors present in this case. One is that the locality prohibited the distribution of literature on public streets and thus precluded union distribution at employee entrances. This should weight the balance against union communication in what is, according to the Board's own rationale, an important area. Second, the rule was not announced or publicized to employees. Although the employer adhered to the rule in regard to employees who solicited for the union, the failure to articulate it could have an inhibitory effect on union action. See notes 194 and 195 *infra* and cases cited therein. On the other hand, not only was solicitation permitted on non-working time but also non-employee organizers were permitted to solicit, under reasonable rules, in "public" areas. The organizers were not, however, permitted to distribute literature. See also S. Klein Department Stores, Inc., 149 N.L.R.B. No. 49, 57 L.R.R.M. 1321 (1964), wherein the Board applied the *Babcock* criteria and did not find a violation where a non employee organizer was ejected from a retail store parking lot.

141. May, *supra* note 137, at 800 n.11: "It is not necessary to, and we do not pass upon the Livingston Shirt case insofar as it affects non-department store situations." But see Atlantic Mills Servicing Co., 8 RD-235 (1962), wherein the Board affirmed the Regional Director's failure to extend May to the industrial establishment in a representation case. See also McCulloch Corp. Case No. 21, R.C. 8228 (1964).

142. It might be possible to argue that because one of the *Livingston Shirt* exceptions exists where there is an "unlawful broad no-solicitation rule (prohibiting union access to company premises ou other than working time)" an employer must afford

of balance and perhaps, with a mind for enforcement in the courts, clarify its meaning. That would be the leap at the precipice. For unless the Board decides to adhere to the Court's *ad hoc* approach, and evaluate each case on the basis of its own facts (attempting to explain how this is done)[143] it must utilize the dreaded per se rules.[144] One defense—and a weak one at that—would be that *Stoddard-Quirk* now limits *Steelworkers* to distribution problems. This is implausible in light of the *May* opinion (although the Board has subsequently characterized *May* as "oral solicitation" as against "distribution"[145]) and the presence of solicitation in *Avondale Mills.*

The only escape would have been for the Board to distinguish *Steelworkers* from *May* on the basis of a "captive audience" in *May.* But in any event that is now too late. A resuscitation of the Board's *Bonwit Teller* doctrine which the Board already claims to approve of in *May,* will require conflict with *Steelworkers* on the *ad hoc* question.

A defense for *May* would be that as *Babcock* exculpates from its sweep those exceptions to the rule, such as lumber camps,[146] so also are retail department stores to be reasonably viewed as one of the exceptions. But since *Steelworkers* sets up the higher standard of equality and "effective" communications, the unions could expect that the quid pro quo is the *ad hoc* approach and the sacrifice of any implied interpretations of *Babcock.* Of course, the Board, in *May* could be interpreting "other distribution" to mean *employer* action.[147] Yet, once again it is reasonable to assume that the *Steel-*

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the union a reply where non-employees are excluded from company premises. However, *Babcock* seems to counter this argument.

Thus Member Rodgers would appear to be correct in asserting that *Livingston Shirt,* as it preceded *Babcock,* did not contemplate a distinction between employees and non-employees. See May, *supra* note 134, at 806 n.25.

143. This is not to say that no case can yield facts which are capable of evaluation. Thus, for instance, in a large metropolitan area employees in a small plant (numbering perhaps 30-40) could not be reached—effectively or otherwise—by radio or television media.

144. The Fourth Circuit has, in Wellington Mill Division v. NLRB, 330 F.2d 579, 589-90 (4th Cir. 1964), accepted the opposite presumption. Within the context of a discharge arising out of disparate enforcement of a no-solicitation rule, the Court wrote the following: "we are of the opinion that, generally, an employer may not be held to have been acting discriminatorily in distributing antiunion literature and otherwise engaging in antiunion solicitation while at the same time enforcing a rule prohibiting activities on the part of its prounion employees which disrupt regular work schedules and interfere with production . . . [citing *Steelworkers*]. Implicit in the Supreme Court's holding in this regard is the proposition that an employer may, without being charged with discrimination, discharge employees who violate a valid no-solicitation rule while concurrently sanctioning the distribution of antiunion material. Were it otherwise, the employer would be powerless to enforce the rule."

145. Stoddard-Quirk, *supra* note 17, at 618 n.4.

146. Babcock, *supra* note 83, at 111.

147. May, *supra* note 134, at 802: "While it is true that the Supreme Court in Babcock & Wilcox held that an employer may normally put a union to the task of

workers ad hoc approach supercedes anything that *Babcock* might have meant by "other distribution." Moreover, because the Board in the subsequent paragraph of *May* speaks of effectiveness in communication, one is tempted to think that *Steelworkers* occupies primary attention and that in considering the problems of employer affirmative conduct we must now look to *Steelworkers* rather than *Babcock.*

The difficulty is that adherence to *Steelworkers* on this point requires a departure from the *Republic* theory which, as we have seen, seems to be accepted in *Bonwit.* This conflict must be resolved by the Supreme Court.

In this writer's opinion the great importance of *May* lies in its most articulate answer to certain assumptions implicit in *Babcock* and *Steelworkers.* It must be remembered that the Court in *Babcock* affirmed judgments in the Fifth[148] and Tenth Circuits[149] premised in large part upon an assumed divergence of interest between union and employee. In prophetic anticipation, perhaps, of the philosophical underpinnings of section 8(b)(7),[150] the Fifth Circuit for instance, noted that "no employee is involved, no employee is complaining and no rights of employees have been involved or abridged."[151] Justice Frankfurter's *Steelworkers* opinion reflects the same turn of mind. Ironically, the statute requires that employees have the benefit of the outside union representative as part of the duty to bargain.[152] Thus the workers with the established relationship have, so to speak, a preferred position through their right to "outside counsel." This right of the workers takes on a synthetic value which is increasingly exaggerated if it cannot be utilized at the place of work.[153] The retort that, unlike the employees in *Babcock,* they have a previously demonstrated interest in unionism, while only a qualified truth, misunderstands the real facts of organizational campaigns. A demonstrated interest, in any formal or legal sense of the word, means

organizing employees through such channels, it indicated that such right was not absolute, but was limited to those circumstances, where the effectiveness of such channels of communication was not diminished *by employer conduct or by other circumstances.*" (Emphasis added.)

148. NLRB v. Babcock & Wilcox, 222 F.2d 316 (5th Cir. 1955), *reversing* 109 N.L.R.B. 485 (1954); *cf.* Monsanto Chem. Co., 108 N.L.R.B. 1110 (1954), *rev'd,* 225 F.2d 16 (9th Cir. 1955).

149. NLRB v. Seamprufe, Inc., 222 F.2d 858 (10th Cir. 1955), *reversing* 109 N.L.R.B. 24 (1954).

150. *Supra,* note 2. The provision was intended by some to combat "blackmail" picketing through which corrupt unions could coerce employers into signing union contracts without employee participation. Benefits and dues did not always balance out equitably. See COX, LAW AND THE NATIONAL LABOR POLICY 20-47 (1960).

151. Babcock, *supra* note 83, at 319.

152. *E.g.,* Fafnir Bearing Company, 146 N.L.R.B. No. 179, 56 L.R.R.M. 1108 (1964).

153. Note, 65 YALE L.J. 423, 427 (1956).

exposure to threats and retaliation[154] and perhaps more important, an early employer campaign to diminish such interest. Such a doctrine would require some of the pro-unionism that the organizer hopes to obtain before he has the chance to obtain it. It would be preferable, as has been suggested elsewhere,[155] to presume the interest unless there is a showing to the contrary.

May, then, relates the union-employee interests in terms of access to company property, so as to answer effectively the problems raised in *Babcock*:

> The normal effectiveness of such channels stems not alone from the ability of a union to make contact with employees, away from their place of work, but also from the availability of normal opportunities to employees to discuss the matter with fellow employees at their place of work. The place of work is that one place where all employees involved are sure to be together. Thus it is the one place where they can all discuss with each other the advantages and disadvantages of organization and lend each other support and encouragement. Such full discussion lies at the very heart of the organizational rights guaranteed by the Act, and it is not to be restricted except as the exigencies of production, discipline and order demand. It is only where opportunities for such discussion are available, limited, of course, by the need to maintain production, order and discipline, that the election procedures established in the Act can be expected to produce the peaceful resolution of representation questions on the basis of a free and informed choice. Where such discussion is not allowed, the normal channels of communication become clogged and lose their effectiveness. In such circumstances, the balance in 'opportunities for organizational communication' is destroyed by an employer's utilization of working time and place for its antiunion campaign.[156]

It is obvious that much of this dictum goes beyond the *Steelworkers* situation and really to a pure *Babcock* problem without employer conduct. This is perhaps what distracted the Sixth Circuit's *May* opinion, a decision that is classic for its misapplication of the rules of law.[157] The Sixth Circuit reversed the Board and instead of relying on the grounds available to them under *Steelworkers*, held that *Babcock* "puts the union to the use of methods of communication other than contact on the employer's premises if other means are available to the union." Even assuming that *Babcock* does not contemplate employer action by "other distribution" (as the Sixth Circuit undoubtedly believes) any protection for the employer is superceded here by *Steelworkers*. Even if the Sixth Circuit is correct

154. See *Administration of the Labor-Management Act by the NLRB*, 87th Cong., 1st Sess. (1961).

155. *Supra*, note 151, at 429.

156. May, *supra* note 137, at 802.

157. May Department Stores v. NLRB, 316 F.2d 797 (6th Cir. 1963); see also Note, 32 FORDHAM L. REV. 378, 382 (1963).

in its interpretation of *Babcock* and in its belief that that case is the controlling one, *Steelworkers'* characterization of section 8(c), upon which the Sixth Circuit's decision is ultimately based, contradicts the qualified analysis of the proviso enunciated by Justice Frankfurter. Once again, the only defense would be *Stoddard-Quirk's* finite differentiation of media. Besides being a weak argument, the Court's opinion affords little evidence that this theory is being relied on. *Stoddard-Quirk* is not cited. Here of course the citation would work to the court's disadvantage due to the higher status accorded solicitation in that case and the comparison of less stringent standards for the captive audience set forth in *Steelworkers.*

Curiously, the Sixth Circuit's view of section 8(c) is the one articulated by Chief Justice Warren in his *Steelworkers* dissent. We must hope that that Court does not become prey to a related portion of the dissent. The opportunity will be presented to them shortly in the appeal of *Montgomery Ward & Co.*[158]

In *Montgomery Ward* the Board was presented with a department store situation with broad no-solicitation rules and a similar pre-election speech on company time and property. The Board "respectfully" disagreeing with the Sixth Circuit, held that "in order to allow a proper balance to be maintained," the company must accede to a union request for reply. A violation of section 8(a)(1) was found and the election set aside. But here, as in *Avondale Mills,* the company had committed an independent violation of the act, thus, the Board said, creating a glaring imbalance "here more than in *May.*" This, of course, is the crucial distinction relied upon in the *Steelworkers* dissent.[159] If the Sixth Circuit should reach for this bit

158. 145 N.L.R.B. No. 88, 55 L.R.R.M. 1063 (1964). Regrettably, the Sixth Circuit appears to have followed the very approach warned against herein subsequent to completion of this article. Montgomery Ward & Co. v. NLRB, 58 L.R.R.M. 2115 (6th Cir. 1965).

159. Two separate violations have been found where employer circulation of withdrawal slips violated an otherwise valid rule in NLRB v. Hill & Hill Truck Line, 266 F.2d 883 (5th Cir. 1959), *affirming* 120 N.L.R.B. 101 (1958); Standard Mfg. Co., 147 N.L.R.B. No. 169, 56 L.R.R.M. 1445 (1964); Atlantic Paper Co., 121 N.L.R.B. 125 (1958); Air Control Prods. Inc., 139 N.L.R.B. 607 (1962); *cf.* Hydes Super Mkt., 145 N.L.R.B. No. 122, 55 L.R.R.M. 1143 (1964); W. R. Hall Distrib., 144 N.L.R.B. No. 123, 54 L.R.R.M. 1231 (1963); Hawkins Container Co., 145 N.L.R.B. No. 62, 55 L.R.R.M. 1020 (1963); Radio Kemental Indus. Inc., 144 N.L.R.B. No. 62, 54 L.R.R.M. 1106 (1963); United Biscuit Co., 101 N.L.R.B. 1552 (1952), *aff'd,* 208 F.2d 52 (8th Cir. 1953); Nebraska Bag Co., 122 N.L.R.B. 654 (1958); General Marine Corp., 120 N.L.R.B. 1395 (1958); Hurd Corp., 143 N.L.R.B. No. 29, 53 L.R.R.M. 1383 (1963); Red Rock Co., 84 N.L.R.B. 521 (1949); Hexton Furniture Co., 111 N.L.R.B. 342 (1955); Wix Corp., 140 N.L.R.B. 924 (1963); Brown Transport, 140 N.L.R.B. 954 (1963); Great Atl. & Pac. Tea Co., 144 N.L.R.B. No. 151, 54 L.R.R.M. 1296 (1963); S. H. Kress & Co., 137 N.L.R.B. 1244 (1962). *But see* Perkins Machine Co., 141 N.L.R.B. 697 (1963), wherein employer solicitation through revocation cards was not violative of the act where they were distributed in contempla-

of allurement, they will enunciate an unfortunate and, at best, unimportant rule. In this type of case the Court could simply prohibit what is unlawful under previously existing law without any reference to a union reply. There can be a new election and a cease and desist order on the basis of the independent violation which is, in itself, unrelated to the union's right to reply. But the really incongruous aspect of the *Montgomery Ward-Avondale Mills* approach is that the remedy must be framed in alternatives—one of which is an unlawful act.[160] The entire theory is best forgotten.

The above conflict between *Republic* and *Steelworkers*, which must permeate all discussion of this subject, has presented itself clearly in post *Steelworkers* cases involving employees—especially without an employer violation of his valid rule. In *Time-O-Matic v. NLRB*,[161] the Seventh Circuit held that *Republic* was still the law and that "the *Steelworkers* case involved an admittedly valid no-solicitation rule and a very narrow question of whether an employer who actively engaged in anti-union solicitation could properly enforce an otherwise valid no-solicitation rule against the union."[162] But in *NLRB v. Rockville Manufacturing*,[163] the Third Circuit held that the governing criteria in all cases concerning employees were those set forth in *Babcock*. The Third Circuit inverted the presumptions and said that the charging party had the burden of proof where *Republic* had made the same rule bad per se. The court, as if by concession, stated that the Board was also obliged to consider evidence concerning the possibility of employee anti-union literature at the same time. This points up the fallacy inherent in *General Dynamics* and perhaps any disjunctive reading of *Babcock*. The anomaly of other interpretations, as the Third Circuit seems to sense, is the preferred position accorded anti-union activity.

In *NLRB v. United Aircraft*,[164] the Second Circuit dealt with the same issue. Because of its direct frontal attack on the *Babcock* criteria and, more important, the *Steelworkers* characterization of *Republic* in that respect, this case assumes great importance. Judge Clark, writing for the court, took direct issue with *Steelworkers* by citing the dissent's analysis of *Republic* rather than that of the majority

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tion of the escape period provided for in the maintenance of membership contract between the parties.

160. Montgomery Ward & Co., Inc., 145 N.L.R.B. No. 88, 55 L.R.R.M. 1063 (1964); Avondale Mills & Textile Workers Union of America, AFL-CIO, 115 N.L.R.B. 840 (1956).

161. 264 F.2d 96 (7th Cir. 1959), *affirming* 121 N.L.R.B. 179 (1958).

162. *Id.* at 100.

163. 271 F.2d 109 (3rd Cir. 1959), *reversing* 121 N.L.R.B. 288 (1958).

164. *Supra* note 126, *affirming* 139 N.L.R.B. 39 (1962), *cert. denied*, 376 U.S. 951 (1964). See in this regard Note, 64 COLUM. L. REV. 780 (1964).

which was dismissed as a "passing reference." If the court had applied *Steelworkers*, they would have had to require a request of employees in the face of a Board holding that an employer cannot "predicate the exercise of a section 7 right upon its own authorization."[165] Thus the court, in *United Aircraft*, distinguished *Steelworkers* in a manner similar to that of *Time-O-Matic*: "We cannot read the Court's dictum as erasing the important qualifications established in Republic that no such showing was required where employees alone were involved."[166]

On this point the Second Circuit is at the heart of the matter. As mentioned before, *Steelworkers* criteria—both request and alternate communications—were previously applicable only to non-employees.[167] Although there is a possibility that the Supreme Court did not fully understand this, *Steelworkers* involved *only employees*.[168] In *W. T. Grant Co.*[169] the Board[170] held, in a discharge case, that an employer violated the Act when a no-solicitation rule was "unfairly and discriminatorily applied" between pro-union and anti-union employees. This is very much in accord with previous Board law[171] and skirts the *Steelworkers* question as it does not involve the employer directly. But in *Wellington Mill Division*[172] a question more directly concern-

165. J. R. Simplot, 137 N.L.R.B. 1552 (1962); *contra*, NLRB v. Shawnee Indus., Inc., 333 F.2d 221 (10th Cir. 1964). In support of the former case see most recently Aerodex, Inc., 149 N.L.R.B. No. 25, 57 L.R.R.M. 1261 (1964); East Texas Steel Castings Company, Inc., 150 N.L.R.B. No. 121 (1965); Jas. H. Matthews & Co., 149 N.L.R.B. No. 18, 57 L.R.R.M. 1253 (1964); Yale & Towne, Inc., No. 26–CA–1706, Trial Examiner's Decision, August 31, 1964.

See also Edmont Mfg., 139 N.L.R.B. 1528 (1962); Mayrath Co., 132 N.L.R.B. 1628 (1961), *aff'd*, 319 F.2d 424 (7th Cir. 1963), wherein the Board has held that, insofar as insignia is concerned, it is the employer who must come forward and inform the employees as to the reason behind his request that they remove insignia. *Cf.* Gallagher Drug Co., 116 N.L.R.B. 1263 (1956); Miller Elec. Mfg. Co., 120 N.L.R.B. 298, 313 (1958); Young Spring & Wire Corp. 138 N.L.R.B. 643 (1962).

166. NLRB v. United Aircraft, *supra* note 126, at 132.

167. See the dissenting opinion of Member Leedom in May, *supra* note 134, at 808 n.33: "Although Nutone involved the rights of employees its principles, insofar as they preclude a finding of violation, apply a fortiori to nonemployees." See NLRB v. Babcock & Wilcox, *supra* note 83.

168. See Biltmore Mfg. Co., 97 N.L.R.B. 905 (1951), wherein an employee requested an opportunity to reply to a captive audience speech. The Board noted the stronger case presented because of this factor.

169. 136 N.L.R.B. 152 (1962), *rev'd on factual grounds*, 315 F.2d 83 (9th Cir. 1963).

170. Chairman McCullough and Member Leedom did not participate in *W. T. Grant.*

171. Armstrong Cork Co., 109 N.L.R.B. 1341 (1954); Crand Cent. Aircraft, Inc., 103 N.L.R.B. 1114, (1953); Goodall Co., 86 N.L.R.B. 814 (1949); Merrimac Hat Corp., 85 N.L.R.B. 329 (1949); Allen-Morrison Sign Co., 79 N.L.R.B. 904 (1948); Macon Textiles Inc., 80 N.L.R.B. 1525 (1948). *Cf.* Phillips Control Corp., 129 N.L.R.B. 1485 (1961); Franchester Corp., 110 N.L.R.B. 1391 (1954); General Motors Corp., 73 N.L.R.B. 74 (1947).

172. 141 N.L.R.B. 819 (1963), *reversed*, 330 F.2d 579 (4th Cir. 1964).

ing employer conduct was presented to the Board. In *Wellington,* an employer had a no-solicitation rule banning any person from engaging in "union organization during working hours." The employer distributed literature during working hours and fired an employee who brought pro-union sections of this literature to the attention of other workers—also during working time. The Trial Examiner found a violation through disparate application of the rule. The Board, however, avoided this issue and held that the rule was a mere "pretext." This is probably a sound conclusion but that finding does not excuse avoiding the real issue—application of the rule. The Board wrote the following: "[since] there was no *actual* application and enforcement of the no-solicitation rule against McKinney, there is no basis for the Trial Examiner's finding that the rule was disparately applied and enforced against him in violation of the Act."[173]

However, Member Rodgers, in dissent, viewed *Wellington* as indistinguishable from *Steelworkers* in that here again the employer utilized what was, according to the dissent, a perfectly lawful prerogative. Subsequently the Fourth Circuit adopted Member Rodgers' dissent[174] though it refused to consider the rule at issue.

In *Wellington* the Board seems to approach the *Steelworkers* problem with much trepidation. Of course, here the rule itself is not challenged in that the cease and desist order is meant to cure the unlawful discharge and not a general pattern of discrimination. But one is able to appreciate the evasiveness of *Wellington* if, at the same time, the perils of applying *May* to the normal plant situation, which have been mentioned earlier, are properly understood.

It is indeed anomalous that *W. T. Grant* should be the setting in which the trade unionist gets redress, while in *Wellington,* where the employer brings pressure to bear which must, by the nature of his position, have a more deleterious effect on self-organization, the worker cannot be sure of his protection. The same can be said for a comparison of *United Aircraft* and *Steelworkers.* It does not make sense for the worker to have more liberty when the employer does not act than when the employer does campaign. Even *Steelworkers,* in embroidering on *Babcock,* seems to have recognized that truism.

173. *Id.* at 820. The Board has exhibited extreme reluctance to characterize any solicitation during working hours as protected and concerted activity. *See* Aladdin Indus. Inc., 147 N.L.R.B. No. 167, p. 2, n.2., 56 L.R.R.M. 1388 (1964). *Cf.* Daniel Constr. Co., 145 N.L.R.B. No. 130, 55 L.R.R.M. 1162 (1964); Story Oldsmobile, Inc., 140 N.L.R.B. 1049 (1963); Sears, Roebuck & Co., 123 N.L.R.B. 1236 (1959); I. C. Sutton Handle Factory, 119 N.L.R.B. 951 (1957), *aff'd,* 255 F.2d 697 (8th Cir. 1958); Milwaukee Elec. Tool Corp., 112 N.L.R.B. 1135 (1955), *rev'd,* 237 F.2d 75 (7th Cir. 1956).

174. Wellington Mills Div. v. NLRB, *supra* note 172. *But see* NLRB v. Overnite Transp. Co., 308 F.2d 284, 290 (4th Cir. 1962).

Surely common sense dictates that the worker must have more freedom to act when the employer does so. One would think that any court which invokes a rule concerning access or communication would premise, in part, its reasoning upon the quantum of pressure brought to bear by both parties. But the law today does not seem concerned with the emergence of common sense. There is a legal fixation with section 8(c) as an absolute principle and an uncalled for restriction on the use of that proviso for the employer alone.

In *Gimbel Bros.*[175] the Board has indicated that it will not go beyond the saving operation conducted in *Wellington. Stoddard-Quirk* would appear to make *Gimbel Bros.* distinguishable from *May* even though both cases arise in the department store context. The no-distribution rule in *Gimbel Bros.* which affects both working and non-working time in "working areas" cannot be viewed as broad and privileged—thus there is less need to remedy an imbalance. However, the concurrence here of *Stoddard-Quirk* dissenters makes it possible that this is not the prime, or at least ouly, consideration. Of course, *Gimbel Bros.* presented other factors which argue for the union handicap in self-organization which the Board has found in department stores. On the other hand, the no-solicitation rule was not drawn as widely as Board rules permit.

It may be quite difficult to appreciate the considerations that persuaded a unanimous Board to find no violation and not to set the election aside in *Gimbel Bros.* One might rely upon the opinion's concern with the failure of the union or the employees to request equal distribution rights. The citation of *James Hotel Co.*,[176] where employees made no request to answer captive audience addresses, may well signify a determination to reject complaints which involve employees claiming rights under the *Republic* theory. Thus, the lack of non-employee organizers and the issuance of a consequent request would seem to be the great distinguishing characteristic in both *Gimbel Bros.* and *James Hotel.* It should be pointed out that captive audience sessions were undertaken by the employer in both cases, although the Board took little note of this factor in the former case.

I do not think that the failure of the *Gimbel Bros.* opinion to discuss the captive audience can argue for differentiation on this basis from *May.* It is true that the captive audience presents a unique situation which should be arguably viewed as sui generis and, as the Board said in *Metropolitan Auto Parts,* unrelated to the no-solicitation rule. But as already mentioned, *May* has surrendered this approach despite

175. 147 N.L.R.B. No. 62, 56 L.R.R.M. 1287 (1964); *cf.* Stoddard-Quirk, *supra* note 17, at 618 n.4; Beiser Aviation Corp., 135 N.L.R.B. 399 (1962).

176. 142 N.L.R.B. 761 (1963).

the special comparison drawn to captive audience cases in *Steelworkers*. Further analysis of the pros and cons of the captive audience in *May* and literature distribution in *Gimbel Bros.* makes for a rather unsatisfactory situation.

May and *Gimbel Bros.* can be compared in diverse postures which, as might be expected, will lead the observer to opposite conclusions. From the employer's standpoint, it is probably worse to have production halted when the union gives a speech than to have employees pass out handbills on working time—an activity which does not in itself stop the enterprise. However, it is just possible that the latter could be more harmful in a prolonged campaign than the more dramatic (and perhaps volatile) but comparatively shorter union rebuttal speech. The probable answer to this is the question posed by *Republic*—is it possible for the employer himself to be harmed, to any significant degree, when he is engaging in the same conduct.

On the other hand it is possible to argue that no-distribution rules are less disadvantageous to the unions and the employees than no-solicitation rules and prohibitions on "union talk" and union replies to employer speeches. That argument (conforming to the spirit of *Stoddard-Quirk*) is extremely dependent upon how the advocate frames it. It seems clear that the captive audience technique has a greater, more telling impact on the worker—as perhaps motion pictures do—[177] than employer handbilling. But *May* and *Gimbel Bros.* do not arise in vacuo, but rather within the context of some specific muscle flexing by the opposition. Countervailing power is required for the immediate threat. And in *Gimbel Bros.* the theory (which is often advanced in connection with the *Stoddard-Quirk* rationale) that employees can be given literature just outside the plant doors does not often hold true in department stores where the union cannot distinguish customers from employees[178] and where variegated work schedules force employees to come and go at any time throughout the day.[179]

Theories about what is more or less disadvantageous in these cases do not seem realistic enough to command primary attention. But then, this reasoning is premised upon the belief that *Stoddard-Quirk* is good law. *Gimbel Bros.* points up in part, the tenuous reasoning of the former case.

Finally, one is forced to rationalize *Gimbel Bros.* and *James Hotel*

177. *Cf.* Plochman & Harrison—Cherry Lane Foods, Inc., 140 N.L.R.B. 130 (1962).

178. This assumes that the union campaign does not consist of advising the public about the existence of an organizational campaign.

179. Marshall Field, *supra* note 140. See also Meier & Frank Co., 89 N.L.R.B. 1016 (1950); Goldblatt Bros., 77 N.L.R.B. 1262 (1948). *Cf.* the dissenting opinion of Members Houston and Styles, 89 N.L.R.B. 1016, at 1022 (1950).

in terms of non-employees vis-á-vis employees and the lack of request. But this, as has been argued earlier, is incongruous in the light of the relative weakness of employees without outside assistance and the unrealistic notion that most workers will make procedurally correct requests. Indeed, whether grounded upon *Stoddard-Quirk* considerations or those annotated above, the decisions in both cases, and especially in *Gimbel Bros.* where the employer campaign was more widespread and heavily fortified, are weak ones and a retreat from the ideas propounded in *May*.

There is one further variant that flows from *Steelworkers*. It is present in the *Avondale Mills* case and must have been, in part, what the Court refers to in both cases as clear anti-union bias. *Avondale Mills* contained a so-called unwritten, dormant no-solicitation rule which, according to the employer, had always existed. In view of the Court's failure to suspect the good faith promulgation of the *Avondale* rule, the Board's subsequent holding in *Star-Brite Industries*[180] is not a surprising one. In that case the Board held that a promulgation of a no-solicitation rule, for working hours, even though oral and an on the spot pronouncement to one or two employees, simultaneous with an organizational drive was not in itself discriminatory. In this case *Steelworkers* was apparently interpreted in a manner similar to the Third Circuit's approach in *Rockwell*, as the rule concerning employees only was not viewed as an "unreasonable impediment"[181] to organization and thus was lawful. Moreover, the Board noted that the decision could not be altered because the rule did not embrace other types of solicitation. The reasoning is somewhat reminiscent of the *Livingston Shirt* notion that employers should not have to subsidize union organizing. "It would be an anomaly to recognize that an employer may lawfully adopt such a rule, yet to hold that he may not do so when the occasion for its use arises."[182]

The Board was not always consistent in its adherence to *Star-Brite*[183] and Member Fanning, who did not participate in the case, admitted to a certain distrust for its rationale in a subsequent dissent[184] which did not present the exact same issue. The *Star-Brite*

180. NLRB v. New England Upholstery, 268 F.2d 590 (1st Cir. 1959); United Fireworks Mfg. Co. v. NLRB, 252 F.2d 428 (6th Cir. 1958); 127 N.L.R.B. 1008 (1960); Haleyville Textile Co., 118 N.L.R.B. 1157 (1957).

181. *Cf.* Carolina Mirror Corp., 123 N.L.R.B. 1712 (1959).

182. Star-Brite, *supra* note 180, at 1011.

183. *Compare* Laub Baking, 131 N.L.R.B. 869 (1961), *with* New Orleans Furniture Mfg. Co., 129 N.L.R.B. 244 (1960), *and* Cook Paint & Varnish Co., 129 N.L.R.B. 427 (1960).

184. See Midwestern Instruments, Inc., 131 N.L.R.B. 1026 (1961). (Chairman McCulloch and Member Brown not participating). Member Fanning dissenting,

rule incorporates three basic elements and it must be discussed accordingly: (1) timing of a work hours rule simultaneous with the union organization; (2) oral or on the spot promulgation which does not necessarily contemplate a general rule of which all employees have knowledge; (3) the background pattern and/or present existence of "social" solicitation during working time. *Star-Brite* seems to say that all three elements added together in the same case do not make an otherwise valid rule unlawful.

As of this writing, *Star-Brite* has not been overruled.[184a] But in reality something of a pincer movement has begun to form against that case's assumptions and reasoning. In *Memphis Publishing Co.*,[185] it was held that an employer could not prohibit union activity during work hours in retaliation for certain types, at least, of protected activity. In this case the employer had previously permitted the union to hold activities extending even to grievance hearings and union elections during working time. This privilege was, however, withdrawn when the union filed an unfair labor practice charge against the employer. Such action in itself was held unlawful without mention of *Star-Brite*. The holding can of course be limited to the case's facts and thus be viewed as the basic protection which an agency must provide in order that its administrative processes be utilized effectively.[186]

Perhaps a rule creating a presumptive violation on the basis of timing alone would be unfair, but the matter of oral promulgation is particularly insidious. This is even more arbitrary than a rule which is vague and not specific enough to provide the average worker with the forewarning that he should be entitled to as a basic matter of due process.[187] To permit an employer suddenly to invoke a new

found, as opposed to the majority, that the Trial Examiner was correct in finding an 8(a)(1) violation where a no-solicitation rule was interpreted by the parties as applicable to coffee breaks: "Without passing on the merits of the Star-Brite decision as applied to a presumptively valid no-solicitation rule, it is clear that it has no application to the instant case." *Id.* at 1030. And further: "I find it difficult to believe that the Star-Brite decision was intended to foreclose reliance on factors which reinforce the presumption of invalidity of a rule that applies to nonworking time." *Id.* at 1030 n.11. One must interpret the above adherence to a viewpoint which, while not necessarily declaring rules invalid on the basis of timing alone, most certainly considers it as an important factor in determining the rule's legality. *Accord,* NLRB v. Linda Jo Shoe Co., 307 F.2d 355 (5th Cir. 1962).

184a. Subsequent to the completion of this article the Board, Member Leedom dissenting, has held in Wm. H. Block Co., 150 N.L.R.B. No. 30, 57 L.R.R.M. 1531 (1964), that the *Star-Brite* doctrine is, to some degree, overruled.

185. 133 N.L.R.B. 1435 (1961); *accord,* Cornell-Dubilier Corp. 111 N.L.R.B. 277 (1955); *cf.* Sinko Mfg. & Tool Co., 149 NLRB No. 21, 51 L.R.R.M. 1281 (1964).

186. *Cf.* Young Spring & Wire Corp., 138 N.L.R.B. 643, 654 (1962).

187. Florida Sugar Corp., 142 N.L.R.B. 460 (1963); Ripley Mfg. Co., 144 N.L.R.B. No. 106, 54 L.R.R.M. 1202 (1963); Mitchell Concrete Prods. Co., 137 N.L.R.B. 504

or dormant rule against a union supporter, especially when, as so often happens, a loose disciplinary system has been in existence,[188] smacks of elemental unfairness and illegality. Yet this is what *Star-Brite* permits.

Subsequently, the Board seems to have repudiated the proposition that oral promulgation to an employee is not suspect, but once again without mentioning *Star-Brite*.[189] The Ninth Circuit, however, reversed—partially on the basis of that case—and held that not only was oral promulgation to an individual good but also that legitimate misinterpretation of such a rule is no defense.[190] In view of the elaborate definitions in *Stoddard-Quirk*, this dictum becomes nothing short of catastrophic. Presumably, the Board will not accede to the Ninth Circuit opinion.

The third aspect of *Star-Brite* is extremely important for purposes of inquiry with regard to the first two. It would seem that the Board, once again deviating from the *Star-Brite* philosophy, now holds that an employer may "possibly" prohibit union activities during working time, but that the rule's validity when orally enunciated, is dependent upon its application in regard to non-union and, of course, anti-union conduct.[191]

In another case[192] the Board relied upon background evidence to support a finding that promulgation and application of the rule was unlawful. Here a rule had existed for ten years but was repeatedly breached in practice in that baseball pools and gambling concerning sports activities were conducted during work time. When union

(1962); Anderson-Rooney Operating Co., 134 N.L.R.B. 1480, 1491 (1961); Western Corrugated Inc., 122 N.L.R.B. 1021 (1959).

188. This is most apt to be the case in an unorganized plant where a contractual and more formal relationship that generally comes with unionization is lacking.

189. W. T. Grant, *supra* note 169, see especially the dissenting opinion of Member Rodgers at 155.

190. NLRB v. W. T. Grant, *supra* note 169, at 83, 84: "Misunderstanding of this rule by the employee does not protect the employee from discharge."

191. Baker Hotel of Dallas, Inc., 134 N.L.R.B. 524, 538-39 (1961), *aff'd*, 311 F.2d 528 (5th Cir. 1963). *Accord*, Southern Materials Co., 145 N.L.R.B. No. 2, 54 L.R.R.M. 1314 (1963); *cf.* Nachman Corp., 144 N.L.R.B. No. 34, 54 L.R.R.M. 1068 (1963). A similar inquiry into employer motivation will take place where the Board seeks to reinstate a dischargee who engages in solicitation during working time. The existence of an unlawfully broad rule may serve to help. See NLRB v. Idaho Potato Processors, 322 F.2d 573 (9th Cir. 1963); Mira Pak Inc., 47 N.L.R.B. No. 126, 56 L.R.R.M. 1355 (1964); Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358 (1949); R.E.D.M. Corp., No. 22—CA-1743, Trial Examiner's Decision August 26, 1964. *But see* Wah Chang Corp. v. NLRB, 305 F.2d 15 (9th Cir. 1962); NLRB v. Empire Mfg. Corp., 260 F.2d 528 (4th Cir. 1958); NLRB v. William Davies Co., 135 F.2d 179 (7th Cir. 1943).

192. Revere Camera Co., 133 N.L.R.B. 1658 (1961), *aff'd*, 304 F.2d 162, 165 (7th Cir. 1962): "The basis for the rule is an employer's rightful concern over production and discipline—not a right of the employer to aid the objective of those employees opposing union representation."

organization began at the plant, union solicitation during work hours was prohibited. The employer's countenancing of anti-union petitions at the same time, however, make this case an exaggerated example and thus distinguishable from the normal *Star-Brite* case. But in adopting the trial examiner's findings, the Board placed much reliance on the above mentioned activities. This approach would appear inconsistent with the *Star-Brite* assumption that union activity is *all* that an employer would be interested in prohibiting and the degraded value of section 7 rights implicit therein. While *Star-Brite* does not specifically preclude background evidence of other solicitation, its subsequent application supports such an interpretation.[193] Indeed it is also evident that the Board is returning to its pre-*Star-Brite* rule[194] and invalidating rules, or more normally the utilization of such rules, pertaining to working time when other "special" solicitation is countenanced at the same time.[195] This is undoubtedly the meaning of the Board's recent comment that rules timed with union organization, though not unlawful under *Star-Brite*, would be unlawful in a "proper case."[196]

There will be cases where evidence that the employer has, in the past or perhaps the present, permitted non-union solicitation should not constitute an unlawful practice. For instance, it is quite unreasonable to compare an occasional charitable solicitation with the havoc that could be created by union activity during working time. Such a pattern should not, in itself, tie an employer's hands in regulating organizational efforts so as to protect production. The existence of gambling pools and sports discussion presents a closer case. Although this can be conducted in a most orderly manner in orga-

193. *Supra*, note 184.

194. Olin Indus., Inc. v. NLRB, 191 F.2d 613 (5th Cir. 1951); Old King Cole, Inc., 117 N.L.R.B. 297 (1957), *aff'd per curiam*, 250 F.2d 791 (6th Cir. 1958); Jacques Power Saw Co., 85 N.L.R.B. 440 (1949); Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358 (1949).

195. Mira Pak, Inc., 147 N.L.R.B. No. 126, 56 L.R.R.M. 1355 (1964); Standard Mfg. Co., 147 N.L.R.B. No. 169, 56 L.R.R.M. 1445 (1964); Sweetwater Rug Co., 148 N.L.R.B. No. 54, 57 L.R.R.M. 1061 (1964); Ripley Mfg. Co., 144 N.L.R.B. No. 106, 54 L.R.R.M. 1202 (1963); Elias Bros. Big Boy, Inc., 137 N.L.R.B. 1057 (1962), *modified*, 325 F.2d 360 (6th Cir. 1963); Idaho Potato Processors, Inc., 137 N.L.R.B. 910 (1962), *aff'd*, 322 F.2d 573 (9th Cir. 1963); see Canada Dry Corp. No. 1—CA—4427 Trial Examiner's Decision, July 10, 1964, wherein it was held that a discharge was a violation of the act where employer motivation rested on "unauthorized" use of the bulletin board and where no such rule was found to be in existence prior to the discharge; see also Conso Fastener Corp., 120 N.L.R.B. 532, 544 (1958); George C. Knight Co., 102 N.L.R.B. 1198 (1953); Ford Radio & Mica Corp. 115 N.L.R.B. 1046 (1956), *rev'd on other grounds*, 258 F.2d 457 (2d Cir. 1958); Glen Raven Silk Mills, Inc., 101 N.L.R.B. 239 (1952), *modified*, 203 F.2d 946 (4th Cir. 1953).

196. Georgia-Pacific Corp., 132 N.L.R.B. 612 (1961); *cf.* Threads, Inc., 132 N.L.R.B. 451 (1961).

nized plants[197] such may not always be the case where the employment relationship is less well regulated. Employee passions can run high in this area although an employer would be correct in asserting that union discussion can have a more sustained and seriously argumentative effect among workers. Nevertheless, for the purpose of these cases it would be proper to view these categories as roughly analogous and thus place a burden on the employer who has permitted sports activity and then promulgated an otherwise valid rule simultaneous with the union's advent. Certainly this principle should be applied in isolated discharge cases not involving the rule itself. This is where the practical needs of employees, much more than legal theory, require thorough examination of employer motivation. Of course the employer could, when the occasion demands, present facts specifically pointing out the disorder that was resulting from union activity as distinguished from other types of solicitation.

Insofar as timing itself is concerned, the trend marked out by *Memphis Publishing* would appear to be preferable to *Star-Brite*, although as previously noted, *Memphis Publishing* is an extreme example. Not only is this so because of the implicit threat to the Board's administrative processes, but also because in that case the employer had already permitted union activity and could not now argue that it was something new and more disadvantageous to plant efficiency. Nevertheless, *Memphis Publishing* is a step away from the *Star-Brite* notion that the union activities' uniqueness lies not only in the possible disorder but also in the fact that this is something which it is natural for the employer to be against. The national labor policy is not well served when antagonisms, which are undoubtedly real, are so pampered.

In this writer's opinion, the best solution here would be the overruling of *Star-Brite*. In its place the Board might substitute the following language:

> We hold that when employer promulgation of an otherwise valid rule is in clear response to its knowledge of union organizational activity and where background evidence indicates an appreciably less rigid employer attitude in general disciplinary matters, that the rule is retaliation prohibited by the Act and thus presumptively invalid. Respondent relies on *Star-Brite*, where the Board said that "it . . . would be an anomaly to recognize that an employer may lawfully adopt such a rule, yet to hold that he may not do so when the occasion for its use arises." We believe that this dictum fails to appreciate the valid criteria of production and discipline through which an employer may justify an impingement on Section 7 rights. An employer who is concerned with his legitimate interest in efficiency will have announced or required his employees to understand

197. See SWADOS, ON THE LINE (1957).

> a proper rule prohibiting solicitation during working time prior to union organizational efforts. If union solicitation leads to employee distraction or inefficiency, an employer may promulgate a rule to safeguard the success of his business operation. To the extent that *Star-Brite* is inconsistent with this principle, that case is hereby overruled.

The Board should however make it clear that a prior rule need not necessarily be in published form but rather that it must be generally announced or understood prior to union activity. It would be inflexibly legalistic to hold that the rule must be written out and read by everyone. My approach strikes a middle ground on this point. It does the same in requiring loose discipline in order to create a presumption with respect to timing. If an employer had carefully regulated the working time of his employees prior to an organizational campaign the Board would then be confronted with a different and less compelling argument for a violation.

III. Property Rights and the Quasi-Public Problem

In dictum intended to defend a recent decision upholding employee rights to solicit on company property the Board stated the following:

> Their place of work is the *one* location where employees are brought together on a daily basis. It is the *one* place where they clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.[198]

But another judicially recognized concept is that of employer property rights. This concept is responsible, in part, for the characterization of solicitation rights as those which are based "traditionally" outside the plant.[199] Thus the above quoted passage raises a considerable conflict of principles. In *Marsh v. Alabama*,[200] the Supreme Court held that the constitutionally protected right to distribute literature in the business or "regular shopping center" of a company owned town was superior to property rights insofar as that case was concerned. In *Marsh* the Court, citing *Republic*, said that the more an owner "for his advantage opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[201] The Court further categorized bridges, ferries, and turnpikes as operations which have "essentially a public function" and subject to state regulation.

198. Gale Products, 142 N.L.R.B. 1246, 1249 (1963). (Emphasis added.)
199. *E.g.*, Woolworth, *supra* note 58.
200. 326 U.S. 501 (1946).
201. *Id.* at 506.

Refusing to accord citizens in a company town an inferior constitutional status because of legal title, the Court held that municipal or corporation interests notwithstanding,[202] property rights were not sufficient to restrict these "fundamental liberties." Mr. Justice Frankfurter's more limited conclusions in a highly significant concurring opinion were as follows:

> Title of property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations. And similarly the technical distinctions on which a finding of "trespass" so often depends are too tenuous to control decision regarding the scope of the vital liberties guaranteed by the Constitution.[203]

Thus both the majority and, to some degree, concurring opinions in *Marsh* provide for the preponderence of free-speech through handbills as dominant over the property interest involved. *Marsh* is then the touchstone of departure for the argument on behalf of labor union activity as opposed to employer property interests. *Babcock*, as outlined above, severely qualified the right of non-employee organizers to be on company parking lots. The attempts to reconcile *Marsh* and *Babcock* are bound to produce tensions very shortly. If nothing else, the phenomenal advent of shopping centers will assure that confrontation.

While the property which the union sought to utilize in *Bendix*[204] may have been too personal in nature and unrelated to the enterprise to make an employer refusal unlawful, the Supreme Court held in *NLRB v. Stowe Spinning Co.*[205] that a company could be required to afford the union access to a hall in order to conduct an organizational meeting. While it is extremely doubtful that the Court, in any circumstances, would have held the union entitled to use property of a more personal unrelated nature, such as, for example, a home,[206] *Stowe's* peculiarities should be noted. The Court was careful to set forth the problem presented as that of a "company-dominated North Carolina mill town" and thus unlike "the vast metropolitan centers where a number of halls are available within easy reach of prospective union members." In the final analysis however, the Court's opinion seems premised upon the disparate treatment accorded to the union. The cease and desist order requiring union access was framed conditionally, as are the union rebuttal cases, upon disparate treatment in the future.

202. *Id.* at 507.
203. *Id.* at 511. Compare the dissent of Mr. Justice Reed in which Chief Justice Stone and Mr. Justice Burton concurred. *Cf.* Tucker v. Texas, 326 U.S. 517 (1946).
204. *Supra*, note 68.
205. 336 U.S. 226 (1949).
206. *Cf.* Breard v. Alexandria, 341 U.S. 622 (1951).

One cannot then analyze this case in terms of a company town alone, Mr. Justice Jackson notwithstanding.[207] The Court, acknowledging the distinction between a hall and the previous outer limits of a parking lot staked out by *Le Tourneau*,[208] understood and measured the possibility that this was a more basic property right.[209] The relationship to the employer's business is less and thus inclines toward a more personal right—one that is itself constitutionally protected.[210] But, in another sense, more analogous to *Marsh*, the property rights must diminish. This results from the access which the public at large has to a hall. Viewed in this light, the Court's approach is a brilliant one as it bottoms the arrived at result upon the existence of unlawful discrimination. Since the hall is a difficult piece of property to reach, in terms of the enterprise, the approach must be a cautioned and restrained one.[211] *Marsh* involves normal governmental activity and thus the principle is not easily qualified. While debatable, this would seem certainly not as strong in *Stowe*. How better to formulate *Stowe* than as a right relative to public access. According to my analysis of *Marsh* and *Stowe*, the company town domination in those cases is secondary. Today's controversy concerning union rights on shopping centers makes this approach necessary for consideration. Curiously, the Board has never decided a case in this area.

In *Breard v. Alexandria*,[212] the Court, referring to *Marsh* and a companion case, said that "in neither case was there dedication to public use but it seems fair to say that the permissive use of the ways was considered equal to such dedications."[213] Most certainly there is no dedication in *Stowe*. This concept of "permissive use" would seem applicable to shopping centers if viewed as analogous to a "public street or walk" which, although private property, is more accessible to the general public.[214] This is how the problem was analyzed in *Amalgamated Clothing Workers of America v. Wonderland Shopping Center*.[215] In this case the Michigan Supreme

207. Stowe Spinning, *supra* note 89, at 235.

208. *Id.* at 229, 230.

209. Hanley, *Union Organization on Company Property—A Discussion of Property Rights*, 47 GEO. L.J. 266, at 280 (1958).

210. See the dissent of Justice Reed. Stowe Spinning, *supra* note 89, at 236.

211. *Cf.* Phillips Petroleum, *supra* note 94, wherein the Board found a violation without employer discrimination. See also the Board's opinion in Stowe Spinning Co., 70 N.L.R.B. 614 (1946).

212. 341 U.S. 622 (1951).

213. *Id.* at 643.

214. Comment, 10 STAN. L. REV. 694, 699, 700 (1958).

215. 122 N.W.2d 785 (1963); *contra*, Moreland Corp. v. Retail Store Employees Union, 50 L.R.R.M. 2092 (Wis. 1962); See in this regard, 49 VA. L. REV. 1571 (1963).

Court,[216] without utilizing the *Breard* rationale, held that the "dedicated use" was that of a "modern public marketplace" in which the public's right to free speech could not be denied. Here again as in *Stowe*, there is an indication that a major, if not crucial, element in the holding consists of the "arbitrary" and discriminatory power to select who shall and shall not exercise their rights.[217]

The Board in *Marshall Field and Company*[218] held employees "uniquely handicapped" by department store no-solicitation rules, could have the benefit of non-employee union organizers on a company owned adjacent street which was available to the public. But *General Dynamics*[219] made clear the limited scope to be given *Marshall Field* and *Marsh* through Board interpretation. In *General Dynamics*, the company owned a "public thoroughfare" which was used by the public. The incumbent union employees were permitted to handbill on the street and similar rights were denied non-employee organizers of the charging party. The Board held that disparity of treatment[220] for non-employees and employees was lawful under *Babcock* and that under the same case's doctrines, the complaining union had adequate alternate channels of communication. The adequacy argument notwithstanding, it would seem reasonable to assume that the Board was correct in interpreting "other distribution" as at least partially exclusive of employees rights under section 7. This would open up the employer to attack every time he acquiesced in statutory rights for employees.

The important aspect here, however, is that of the "public thoroughfare" and the relationship of *Marsh* and *Babcock*. Applicability of the *Marsh* rationale, the Board admitted, was not "without persuasive content."[221] But the Board held that *Babcock* was the controlling case and had limited *Marsh* to its company town factual context. Member Brown, dissenting[222] pointed out that *Babcock* concerned company property from which the public was excluded and asserted that "the Board Members unduly extend the reach of the *Babcock*

216. Reference here is to the concurring opinion of Mr. Justice Black and Mr. Justice Smith.

217. Wonderland, *supra* note 215, at 797. The Court noted that the property owner's power to exclude was "undesirable not by law but by the arbitrary decision of the property owner."

218. 98 N.L.R.B. 88 (1952), *aff'd on this point*, 200 F.2d 375 (7th Cir. 1952); *cf.* Bausch & Lomb Optical Co., 72 N.L.R.B. 132 (1947); Brown Shipbuilding Co., 66 N.L.R.B. 1047 (1946); United Aircraft Corp., 67 N.L.R.B. 594 (1946).

219. 137 N.L.R.B. 1725 (1962).

220. The employer was able to argue that there was no disparity between treatment accorded non-employee organizers and the rest of the public. Management prohibited all "commercial" solicitation by outsiders on the thoroughfare.

221. *Supra*, note 219, at 1729.

222. *Id.* at 1730. Member Fanning did not participate in this case.

and *Wilcox* decision in applying it to the present facts."[223] The dissent also argued that *Marsh* did not turn on the availability of communications theory[224] promulgated in *Babcock*. This is undoubtedly correct and becomes clear if one only traces Justice Reed's dissent in *Marsh* and other cases where he continually propounded the theory which the Court eventually accepted in *Babcock*.[225] *Marsh* could not in any event be structured on availability as petitioner there could have easily distributed literature on public property. I believe that Member Brown's dissent, in terms of legal analysis, is the better view.

Public access to private property is an important factor in determining the scope of the constitutional and statutory right to inform. The right becomes more valuable when one recognizes the general unavailability of picketing to the organizing union because of section 8(b)(7).[226] The majority's interpretation of *Babcock* in *General Dynamics* would make the organizational plight a more desperate one.

Babcock did not undertake to overrule *Marsh*. As the *General Dynamics* majority notes, *Babcock* does not mention that case. Indeed a good argument can be advanced for the consistency of *Babcock* with *Stowe*, if not *Marsh* itself. This thesis proceeds upon the idea that *Babcock* must be read conjunctively, as mentioned earlier, and thus, although there is no union right to access (as in *Stowe*), disparate treatment will be unlawful. Implicit in Member Brown's *General Dynamics* dissent is the relatively (more so than in *Babcock*) unrelated-to-the-enterprise nature of the thoroughfare. This may be a less compelling argument when advanced for employees pursuant to *Republic* but it is more persuasive for the rights of non-employees as derived from *Stowe*. Here the non-employee cannot be excluded in the name of discipline as the enterprise's distance eliminates this defense. Discriminatory intent may loom more important. The *Stowe* theory becomes clearer when one observes, as do Member Brown and the Trial Examiner, in *General Dynamics* the disparate treatment accorded to employees and the public as distinguished from non-employee organizers. The *General Dynamic* majority's response to this argument insofar as the public is concerned must be to invoke *Marsh* as a company town case. There is no other way out. But, insofar as the argument touches upon employees, there can be no distinction between them and non-employees as the thoroughfare is more separate and thus distinguishable from the *Babcock* parking lot. To the extent that discrimination could exist, it would be preferable to give non-employees the same rights as the general public and

223. *Id.* at 1731.
224. *Id.* 1731, n.10.
225. *Supra*, note 14, at 513.
226. *Id.* at 509; see also, Comment, 10 STAN. L. REV. 694, 700 n.34 (1958).

preclude employee rights on the alternate communications theory with a reverse twist—to the effect that these rights can be exercised *inside* the plant pursuant to *Republic*. The limited scope given to *Marsh* in *General Dynamics* would appear to be Board-imposed.

Of course the Board has deliberately involved itself (though it may now be forced to do so by *Steelworkers*) in the special categorizations of employees so as to encourage analysis which speaks of a company town and the department store, and *Babcock* would seem to have preserved this. On the other hand, *May* deprecates the "customary" channels to which the non-employee organizer is relegated in *General Dynamics* as "catch-as-catch-can." Although that principle can be restricted to captive audiences, or their equivalent, we have already noted the Board's reluctance to do so.

The missing link which does not permit Member Brown's dissent to be as persuasive as it should be is the analogy to be drawn between *Marsh* and *Republic* where no discrimination is needed and *Stowe* and *Babock* where, in part, it is necessary. *Marsh* cannot completely answer the question posed in *General Dynamics*. *Stowe* does. That case articulates the right to access if the property is open to others in an area where *Republic* type defenses against employees are not available and where no legitimate distinction exists. Member Brown's argument becomes stronger when the separate identity of the thoroughfare vis-á-vis the plant is recognized. But the above mentioned *Stowe* dictum and the majority's determination to see *Marsh* as a special case, may have deterred the use of an opinion more vulnerable linguistically. But if valor was needed, the dissent could well have buttressed this argument with discretion. *Babcock* interprets *Stowe*, as does this analysis, on the basis of discrimination and not the company town.[227]

Within the confines of this analysis, however, union rights in shopping centers might be perilous. For clearly the shopping center is more closely related to the enterprise in question than the thoroughfare in *General Dynamics* and the hall in *Stowe*.[228] One can appreciate the brevity and general approach of Member Brown's dissent if it is motivated by a concern to avoid this dilemma. Yet here it is possible to overcome this problem and the *Babcock* alternate communications criteria by directing attention to the existence of a strong economic invitation of the owner. Once again this is not the parking lot from which the public is excluded, but rather an area which seeks out non-employees. It can be argued that this invitation makes the

227. Babcock, *supra* note 83, at 111 n.4.

228. In one sense Stowe's hall could be viewed as more directly related to the business. This would be arguable if the hall was considered to be business in itself.

shopping center case a comparably stronger one for the union. And this enterprise takes on a factor present in *Marsh.* The public—and the employee to a greater degree—must spend a considerable amount of time there. The nature of the enterprise—stores for all the consumers needs—compels this.

It would be dangerous to justify "quasi-public" use or "permissive use" in terms of dedication as was done by the Michigan Court.[229] That requires the rather artificial conclusion that the owner is inviting an individual onto private property so that the customer can exercise free speech rights. The law will appear foolish if it implies such a dedication for it is clear to anyone that the owner's motivations are purely those of business. To the extent that handbilling is tolerated or welcomed, one must view such a concession in the same light. Surely goodwill for the business is the basic consideration. It should then be clear that under this approach union organizers will be excluded even where other groups are allowed to handbill the shopping center. It will be a rare property owner that envisages a union advertisement of a dispute with one of his lessees—upon whose profits he depends—as in his business interest. If the law is to interpret this union activity as within dedication's penumbra, we should understand that legal interpretation has been stretched to its outer limits. This is why the dissenting opinion of Chief Justice Carr is able to score a very sound point on the majority in emphasizing the property's business purpose.[230] Thus it would seem that there is much to be said for avoidance of this issue in *General Dynamics.* The concept of permissive use, as enunciated in *Breard,* is preferable from the standpoint of realism.

Of course, the argument on behalf of union rights in shopping centers is not without distracting qualities. While the Board may properly hold that *Babcock* is not applicable on quasi-public grounds, the same argument points up the *very* large extension that such a holding would graft onto *Republic* or, for that matter, *any case thus far decided.* Although it is a possible by-product in those cases, even *General Dynamics* and *Stowe* do not reach the question of informing the public at large about a labor dispute. We have already noted the somewhat hostile reaction of both Congress and the Court in regard to picketing and its impact on the public. If a labor union could convince the Board that its activity is directed at employees and not customers, it would be easier to decide in favor of union rights. Of course, such a limited holding would undoubtedly

229. Wonderland, *supra* note 215, at 795.

230. *Id.* at 785. Strictly speaking there is no majority or dissenting opinion because the case resulted in a tie vote by the Michigan Supreme Court. But such reference is made to the opinions because the vote's effect is to affirm the trial judge's opinion.

be challenged in the courts under the *Babcock* theory. But public handbilling would present squarely the *Marsh* issue and, as already stated, could well take the Board beyond *Marsh* because of the activity's potential (and hoped for) impact vis-á-vis the owner. In this sense, the religious literature in *Marsh* cannot be related normally to the public or private owner.

The course that shopping center owners might follow (and will increasingly follow, I believe, if union pressure becomes stronger) is that of prohibiting handbilling of any kind in order to avoid the charge of discrimination. Thus "other distribution" would no longer be available to the Board under *Babcock* and a court might be less willing to accuse the owner, as is done in *Wonderland,* of arbitrary action insofar as union activity is concerned. Here one must seek the guidelines from *Marsh.* For in that case discrimination is not an element or, at the very least, an important one. If we can analogize the contemporary shopping center to *Marsh's* business district, the question will begin to answer itself. Clearly the owner's exclusion of religious literature could not stand. Consequently, the last hurdle, under the assumption of a proper analogy, is an equation of union literature and religious literature. *Thomas* teaches us that the equation must be made and that qualifications can be made only when the activity merges into commercial solicitation. It is unlikely that this problem would be raised in a shopping center case involving the public. Normally the union, when it is concerned with the public, wishes to inform and does not intend to engage in conduct which consists of financial solicitations. Thus the chance that both legal disadvantages—the public and commercial solicitation—would be raised in one case is improbable.

But the argument could be made that the owner's business losses are analogous to the potential harm to the community inherent in commercial activity as apparently contemplated in *Thomas.* This then would make the crucial question turn on whether the shopping center owner's losses can be viewed as potential injury to the community and thus make union handbilling susceptible to regulation. This proposition's merit, if any, derives from the concept which is urged to support union rights. If the shopping center is a necessary element of existence and thus quasi-public, the owner will say, is not the business harm done to it a harm for the community. Aside from the horror with which most American employers would view an argument which—even if it suited immediate purposes—implies a public nature for private property, the proposition must fail on account of the Supreme Court's sensitivity to first amendment and section 7 rights.

The Board should distinguish *General Dynamics* from shopping centers and hold that in the latter case permissive use and the center's importance to the community compel the application of section 7 rights for non-employee distribution. This would, of course, lead to a re-examination and retreat from the *Marsh* analysis. But the potential benefits would far outweigh the possible embarrassment resulting from a confession of error. Moreover, the Board should emphasize the legitimate need to fill the void in peaceful organizing tactics left especially by section 8(b)(7). And because of the spread out areas which shopping centers serve, the lack of public sidewalks and adjacent high speed highways, it is possible (though not probable) that a presumptive imbalance in organizational opportunities could be found under *Babcock*. However, this approach utilized in *May* has been taken under the apparently distinguishable criteria set forth in *Steelworkers*. But there is no sign which contradicts a continuing increase in shopping centers as a way of economic life in the burgeoning suburbs. This factor, despite the argument that rights of non-employees vis-á-vis non-employers (center owners) is a tenuous one,[231] weighs heavily in favor of section 7 rights.[232] Indeed, as the California Supreme Court has recently stated in a case presenting the more questionable free speech form of picketing in a shopping center "the interest of the union . . . rests upon the solid substance of public policy and constitutional right: the interest of the plaintiff [owner] lies in the shadow cast by a property right worn thin by public usage."[232a]

Similarly, one cannot but attach the importance of the *Breard* concept to other enterprises which, by their nature, are dependent upon public access. This is part of the teaching to be derived from Mr. Justice Douglas' concurring opinion in *Garner v. Louisiana*.[233] This opinion raises the most slippery aspect of these cases: what is state action? The Board need not concern itself with this question in deciding the breadth of section 7 rights. But the courts must look to the meaning of state action in order to apply the first amendment. *Marsh* must hinge on the concept of state action and the state court's enforcement of the trespass statute.[234] This principle, subse-

231. See Note, 73 HARV. L. REV. 1216, 1217-18 (1960).

232. Chairman McCulloch's dissent in Salyer Stay Ready, *supra*, might support the viewpoint that section 7 rights increase in proportion to the less direct relationship.

232a. Schwartz-Torrance Investment Corp. v. Bakery and Confectionary Workers, 57 L.R.R.M. 2036, 2040 (Cal. 1964); the court's inclination to view picketing as free speech under the *Thornhill* doctrine has been recently substantiated in NLRB v. Local 760, Fruit and Vegetable Packers and Warehousemen, 377 U.S. 58 (1964). See especially the concurring opinion of Mr. Justice Black.

233. 368 U.S. 157 (1961); see Justice Douglas' concurring opinion *id.* at 177.

234. See Note, 73 HARV. L. REV. 1216, 1217-18 (1960).

quently articulated in *Shelley v. Kraemer*,[235] bids us make the judgment of public and private rights in terms utilized above. It does not necessarily turn on the governmental nature of the business in question. And this is the excess—in the opinion of this writer—in which Mr. Justice Douglas' opinion indulges.

While Justice Douglas stated the *Marsh* proposition that "the police are supposed to be on the side of the Constitution . . ."[236] the concurring opinion seems to have gone a step further in characterizing restaurants as "public facilities." Since Justice Douglas further remarked that a restaurant could be private property for many purposes and public for others, it might be fair to restrict the conclusion to cases like *Garner* which concern racial discrimination.[237] One is obliged to note the opinion's analogy of restaurants to those industries "affected with a public interest" and the theory that "a license to establish a restaurant is a license to establish a public facility and necessarily imparts, in law, equality of use for all members of the public."[238] The former proposition might expand "state action" beyond the enterprise which is viewed as governmental in nature. The same can be said for the latter although this example of state action is comparatively less blurred. Any theory which relies on what is and what is not governmental is sure to flounder. In Sweden the shopping center might always be a private cooperative. In Britain steel may soon be owned by the government. To decide cases on this basis would tempt a resurrection of the judicial incorporation of economic philosophy that Mr. Justice Holmes so eloquently persuaded us to abandon.[239] Nor can the importance in its effect on the public interest be utilized as Justice Douglas suggests. Beyond the same questions of economic judgment by the courts, one must look back to *Republic* and thus recognize that while the steel industry, for instance, affects the public interest, this cannot logically argue for the rights of *anyone* to wander round company property in search of constitutional rights. The public interest example is simply not relevant.

Yet the idea of public access is a good one. Of course, to the extent that the products sold are more elemental and, as in the case of shopping centers, cover a wide variety of necessities, the argument for a constitutional right becomes stronger. State enforcement of trespass statutes or civil suits in regard to these cases would be state action which offends the fourteenth amendment. This

235. 334 U.S. 1 (1948).
236. Garner, *supra* note 233, at 177.
237. *Id.* at 177, 181.
238. *Id.* at 181, 182, 184; *Contra*, Note, 77 HARV. L. REV. 361, 364 (1963).
239. *E.g.*, Hammer v. Dagenhart, 247 U.S. 251, 277, 280 (1918).

should apply to parking lots of retail department stores[240] and supermarkets which are open to the public as well as to employees. This principle could be applied in a limited fashion to the store itself—even in the department store where the employer has a legitimate concern in preserving, without disruption, the customer-employee relationship. The question is only when and how.[241] It might be possible to have brief non-employee handbilling (here a *Stoddard-Quirk* distinction could be important) during slack hours. If Justice Douglas' opinion becomes a prevailing one, such activity might have good constitutional backing. The Board could devise or have the parties devise regulations. However, it should be noted that this notion of rights runs afoul of what the Board now considers the organizer's rights to be in department stores.[242] Perhaps the disruption of the customer-employee relationship is too important to justify the logical consequences of the *Garner* concurrence. But these considerations do not seem to apply to shopping centers and retail store parking lots.[243] Perhaps new rulings upholding union organizing rights in these areas would justifiably permit the Board and the courts to preclude activity proximate to the customer-employee relationship.

Wonderland points up the fact that state action, in the sense in which it has been discussed herein, will not always be the question. This is because the union, in *Wonderland*, never went on the shopping center property to run the gauntlet of state criminal prosecution, but rather sought a declaratory judgment of their constitutional rights. Suppose the state had decided in favor of the property owner defendant. Is this state inaction so as to violate the fourteenth amendment?[244] Suppose, to carry this a step further, that the court's decision was more dependent upon petitioner's need for a declaratory judgment than the merits of the free speech issue. It would appear that the important element here is enforcement in the courts and not, primarily, police action as such. This is the holding of *Shelley* and *Marsh*. If the courts do not allow petitioner to exercise his rights, the constitutional infringement would appear equally detrimental in both declaratory judgments and trespass violations. But

240. *Cf.* People v. Goduto, 21 Ill. 2d 605, 174 N.E.2d 385 (1961), *cert. denied*, 368 U.S. 927 (1961).

241. *Cf.* Cantwell v. Connecticut, 310 U.S. 296 (1940).

242. See May, *supra* note 137, at 801 n.16. *But see* Marshall Field, *supra* note 218; Associated Dry Goods Corp. (Lord & Taylor Div.), 103 N.L.R.B. 271 (1953), *aff'd*, 209 F.2d 593 (2d Cir. 1954); Goldblatt Bros., 77 N.L.R.B. 1262 (1948).

243. In fact they do not even apply to the employee—only the parking lot in Babcock.

244. See Note, 49 VA. L. REV. 1571, 1578 (1963).

the theme of state inaction is an important one and we shall return to it presently.

One final word should be said about property rights. Much has been written about the separation of ownership and control in modern industry and its effects on corporation policy.[245] We no longer premise our political thinking about the company upon the assumption that we are confronted with the old style entrepreneur. If we devise policy on these assumptions in other areas, so also should we treat property rights in labor cases with less deference for traditional and customary rights. That which is traditional and customary is no longer here. Is the shopping center traditional? The Michigan Supreme Court is right to say that it is not. In fact the shopping center, though clearly distinguishable from the normal example, is nevertheless a classic example of separation as between ownership and control. It would be fair to say that many of the unorganized firms may be smaller and may thus contain the older organization and conservative attitudes. But I believe that the courts must extract themselves from what is, as Professor Galbraith would put it, a vested interest in an idea.[246] It is time to re-examine the notion implicit in *Babcock*—that property ownership is a near absolute defense to constitutional or statutory rights, insofar as unions are concerned. Thus it is submitted that the rhetoric concerning employer property rights indulged in in *Stoddard-Quirk*, for instance, is unfortunate and unnecessary.[247] The law must adapt itself to a recognition of plant-site activity's importance and, at the same time, the substantial interests that an employer has in the well being of his enterprise.[248]

IV. A NOTE ON PRE-EMPTION

The problems arising from pre-emption—the exclusion of state jurisdiction when the federal government extensively regulates or dominates a particular subject matter—make it probable that state inaction, far from being unconstitutional, may normally be a con-

245. See, for instance, BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION (1954); CROSLAND, THE FUTURE OF SOCIALISM (1956); MEANS, THE CORPORATE REVOLUTION IN AMERICA (1962).

246. GALBRAITH, THE AFFLUENT SOCIETY (1958).

247. Stoddard-Quirk, *supra* note 17, at 620.

248. It is possible to argue that the unions, now in possession of large treasuries, should be required to pay compensation for non-employee access, like the rental fee in Stowe. This has a certain merit to it in that unions themselves are financially healthy and would be quite able to pay. But how can one assess compensation? Handbilling in the parking lot will require janitorial services which the union could pay for. But the employer may not see the union obligation in so limited a sense. *Cf.* Schneider v. State, 308 U.S. 147 (1939).

stitutional prerequisite for state courts confronted with the contending rights of organizers and property owners or employers. In the landmark *Garmon* case[249] the Supreme Court held that "When an activity is arguably subject to §7 and §8 of the act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[250] The "arguably" concept is a far reaching one. But *Garmon* also preserves traditional state sovereignty in cases where violence and threats to the public order are present. This will cause difficulty in cases where the employer or owner seeks the assistance of the state police and courts in ejecting non-employee organizers from company property. Doubts are now aggravated because the Supreme Court has deliberately withheld comment on the obvious tensions involved in reconciling pre-emption with the application of state trespass statutes.[251] This issue has been more recently presented in *People v. Goduto*.[252]

In that case the Illinois Supreme Court was confronted with an alleged trespass on a department store parking lot which was open to customers and employees. Union organizers entered the lot to distribute union leaflets and questionnaires to store employees. The employer informed the organizers that no such activity could be conducted without company permission. The organizers, however, refused to leave, declaring that they had a legal right to be on the lot. The court held that their subsequent arrest and conviction was proper under *Garmon* as "when a person refuses to leave another's property after he has been ordered to do so, a threat of violence becomes imminent."[253] The court reasoned that if the state had not intervened, the company would have been reduced to self-help and thus potential violence. But the court was visibly troubled by *Garmon's* explicit acceptance of primary jurisdiction for the Board[254] and the careful scrutiny for evidence of violence to which state

249. 359 U.S. 236 (1959); *Cf.* Hill v. Florida, 325 U.S. 538 (1945); See also Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); Gould, *The Garmon Case: Decline and Threshold of "Litigating Elucidation,"* 39 U. DET. L.J. 539 (1962); Gregory, *Federal or State Control of Concerted Union Activities*, 46 VA. L. REV. 539 (1960); Meltzer, *The Supreme Court, Congress and State Jurisdiction Over Labor Relations*, 59 COLUM. L. REV. 6 (1959).

250. Garmon, *supra* note 249, at 245-46.

251. Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957).

252. 21 Ill. 2d 605, 174 N.E.2d 385 (1961), *cert. denied*, 368 U.S. 927 (1961); See Note, 60 MICH. L. REV. 1010 (1962). *Cf.* Retail Clerks Local No. 1564 v. Your Food Stores of Sante Fe, Inc., 225 F.2d 659 (10th Cir. 1955).

253. *Id.* at 387.

254. *Contra*, International Union, Local 232, U.A.W., A.F.of L., v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949). *Cf.* NLRB v. Insurance Agents International Union, 361 U.S. 477, 493 n.23 (1960).

court records are subjected. Mere *potential* violence, the court seemed to say, requires an examination of *Garmon's* impact on *Babcock*. The latter case, however, laid the foundations upon which the court built its case. Conceding the possibility of pre-emption under *Garmon* (and thus the "arguably" test) the court held that state courts could not be divested of jurisdiction where, as here, the organizers did not utilize Board processes. It is possible that the result achieved is correct, although the court's reasoning is quite unsound.

Implicit in *Goduto* is the assumption that the employer—evidently guided by his understanding of the law—will always seek to remove organizers from his property. The court is aided in this assumption by its own conclusion that constitutional rights are not at stake[255] and thus state action is no obstacle. *Babcock*, it must be admitted, does sound a rather poignant ring for the employer's plight. Suffice it to say that that case, viewed from almost any analysis, would seem to require litigation. And to the extent that it affords clarity, the merits are presumptively resolved in favor of the employer. The latter viewpoint frees him from *Garmon*, but it is not one which the court accepts. Thus the employer invokes a state criminal action in the face of ambiguities and negates exclusive federal jurisdiction. A failure by the organizers to file an unfair labor practice charge is not the answer.

Suppose that an employee solicits during a lunch hour and thus remains clearly and not arguably with the ambit of protected activity. Are we not faced with analogous circumstances if the employer discharges him and he refuses to leave the premises? Management will interpret such action as a challenge to its authority. Is not violence imminent so as to justify similar state action? Suppose, to take a more marginal case, an employee is discharged just before clocking in or out?[256] Is the state always entitled to resolve the merits of the unclear 8(a)(3) charge in favor of the employer? If the employee has acted within his rights—as he clearly has in our first example—does the state act correctly in employing its power against him? Assuming that the answer is no, does *Garmon* permit the state to withhold an equal standard of protection for the workers whose rights are only "arguably" protected? It is highly probable that such employee cases can present the courts with rights questions even more uncertain than those of non-employees. And the argument that non-employees should choose Board processes is equally ap-

255. Goduto, *supra* note 252, at 390: "this freedom of solicitation is the result of a regulatory statute and not a constitutional right." (citing *Republic*). *Contra,* Marsh v. Alabama, *supra* note 200.

256. *Cf.* Remington Rand, Inc., 103 N.L.R.B. 152 (1953); Midland Mfg. Co., 134 N.L.R.B. 10 (1961).

plicable to employees. It is, of course, more hazardous if the organizer is precluded, as is the case now, from obtaining a declaratory judgment or advisory opinion from the Board which determines his rights, This compels the organizer to risk criminal prosecution, as in *Goduto*, in order to travel the road which *Goduto* says should have been utilized beforehand. To make matters worse, the union, if it files a charge subsequent to court action, is entirely dependent upon the Board to enjoin the state court proceeding in federal district court.[257] Finally, the Seventh Circuit's decision in *Marshall Field*[258] upholding the statutory right of non-employee organizers to solicit on a company-owned street open to customers and employees under the *Marsh* principle, would seem to push non-employee rights in *Goduto* beyond the "arguably" level. The Board's holding, premised upon the organizational difficulties of department store employees, would seem in point in determining *Goduto*. But, as mentioned above, there is now some doubt about that holding's viability.[259]

The Illinois Court's conclusion, however, is probably all that the state judiciary can do within the framework of existing law. The crucial distinction between employees and non-employees must turn on the control that the employer is able to exercise in each case. Presumably, more power can be exerted upon employee conduct—especially if the power takes the form of an order rather than that of outright discharge. In either case the employee may file a charge. In the former instance it is readily apparent that violence is hardly a problem. One can also assume that the former example is the more prevalent. This is in contrast to that of the non-employees in *Goduto*. In *Goduto* the employer is relatively helpless without state interference or his own affirmative action. The employer cannot trigger an 8(a)(3) proceeding through discharge, as would be the case with employees and, more important, management requests will be without force of authority. Yet one must ultimately premise agreement (or perhaps sympathy) with the Illinois court on the vagueness of federal law. The employer's concern with non-customers moving around on his property and with the consequent risk of liability to

257. Capital Service, Inc. v. N.L.R.B., 347 U.S. 501 (1954). *Cf.* Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955). Under *Capital Service* the Board may enjoin action pursuant to section 10(1) of the act on the grounds that such action is "necessarily in aid of jurisdiction." 28 U.S.C. § 2283 (1958). A more thorough analysis is contained in Comment, 74 HARV. L. REV. 726 (1961); Comment, 27 U. CHI. L. REV. 738 (1960). Concerning the problems posed above, the adjudicatory process, as outlined, makes the union's position even more disadvantaged than that normally imposed in a picket line injunction. To make the picket line case analogous, one would have to assume that not only was the union not guilty of violence but that also employer instigated violence precipitated the injunction.

258. 200 F.2d 375 (7th Cir. 1952).

259. May, *supra* note 242.

other invitees is a legitimate one. This factor, when coupled with the grave shadows of doubt cast over this area by *Babcock*, makes plausible the court's conclusions.

One would hope that the Board will create an advisory opinion process similar to that utilized for other types of jurisdictional questions, which would be available to unions, employees and employers.[260] It is obvious that more clarity than *Babcock* affords is needed. Perhaps the Supreme Court will reconsider that case at an appropriate time. But, acting within the confines of *Babcock*, the Board should clarify the principles applicable to non-employees on public access property, such as in *Goduto*, without unnecessary qualifications. One necessary qualification might well be that organizers register with the owners before entering onto company property. It is to be hoped that the Board resolves the existing doubts in favor of access for organizers. Certainly this would be the preferable answer in *Goduto* where employees—as distinguished from the public—were solicited.

A post-*Goduto* development highlights a possible avenue through which the employer might alleviate his vulnerability under Board auspicies rather than those of the states. It is accepted that non-employee conduct on company property that is tinged with violence is unlawful under section 8(b)(1)(A) of the act.[261] The Supreme Court has held that that provision does not extend to peaceful activity such as picketing, as the Board once contended, but rather is restricted to "rough stuff" or violence.[262] But the Court seems to have retreated somewhat from that approach in *ILGWU v. NLRB*[263] where the non-violent execution of a contract between an employer and a minority union was held to violate that provision. *General Motors Corp.*[264] makes it clear that *ILGWU* may now be an impetus to application of 8(b)(1)(A) to the *Goduto*-type case. If so, the employer, theoretically is not helpless. In *General Motors*, the Board held that the union as well as the employer violated the act by maintaining in effect a contract restricting the solicitation rights of employees other than activity conducted on behalf of the signatory union. This new vista propounded by the Board without discussion would seem to graft onto 8(b)(1)(A) something like the "interfer-

260. This suggestion is contained in Note, 70 YALE L.J. 441 (1961). This proposal, however, does not appear to contemplate access for unions and employees as well as employers.

261. 73 Stat. 544, 29 U.S.C. § 158(b)(1)(a) (Supp. I, 1959): "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7. . . ." *Cf.* J. A. Banta, 116 N.L.R.B. 1787 (1956).

262. NLRB v. Drivers Local Union, 362 U.S. 274 (1960).

263. 366 U.S. 731 (1961).

264. 147 N.L.R.B. No. 59, 56 L.R.R.M. 1241 (1964).

ence" concept previously relating to 8(a)(1) alone.[264a] But the holding, if adhered to, makes it arguable that the employer (or the employee) in *Goduto* could obtain relief from the Board.

It should be noted that some state courts seem unaware of the preemption's impact on labor cases. The Michigan Supreme Court, for instance, adopted the trial judge's notion that such difficulties were overcome through lack of a "labor dispute." *Babcock* notwithstanding, the union's dispute with this secondary employer would lead to secondary boycott and publicity proviso problems covered in section 8(b)(4),[265] But the court did not address itself to the problem. The California Supreme Court has held that the preemption question need not be reached where the union activity in question is free speech.[265a] This is erroneous as the jurisdictional question should be the first problem with which a court must deal. The Washington Supreme Court held, without discussion of *Babcock*, that handbilling *and* picketing are "arguably" subject to other section 8(b) provisions.[266] The concurring opinion, however, premised jurisdiction, as did Michigan, on the non-existence of a "labor dispute."[267] One would hope that, if nothing else, Chief Justice Warren's characterization of the solicitation problem as a "labor dispute"[268] would clarify this point for the state judiciary. *Garmon* focuses attention on sections 7 and 8. Indeed, read literally, that case can be interpreted as encompassing more.[269] But under either test, the Michigan Supreme Court should not be able to retain jurisdiction in *Wonderland.*

V. Competing Unions and the Collective Bargaining Agreement

It is fundamental that employees may solicit or distribute literature on plant premises for any number of unions and that a company

264a. But see Brief for the National Labor Relations Board in the United States Court of Appeals for the Sixth Circuit, General Motors Corp. v. NLRB, p. 13, n.12 (October, 1964): "As noted above the union is not contesting enforcement of the Board's order against it. In any event the Union's participation in the unlawful restraint of employee rights, through execution of the collective bargaining agreement was violative of Section 8(b)(1)(A) of the Act, as the company's participation was violative of Section 8(a)(1) Cf. International Ladies Garment Workers Union v. NLRB 366 U.S. 731, 738...."

265. 61 Stat. 141, 29 U.S.C. § 158(b)(4) (1958).

265a. Schwartz-Torrance Investment Corp. v. Bakery and Confectionary Workers, 57 L.R.R.M. 2036, 2040 (Cal. 1964). It is quite likely that the picketing here was organizational and thus a question for the Board under section 8(b)(7). Alternatively it would be preempted because of *Babcock* and the Board's obligation to determine the rights of non-employee organizers on private property."

266. Freeman v. Retail Clerks Union, 58 Wash. 2d 426, 363 P.2d 803 (1961). *Cf.* Moreland Corp. v. Retail Store Employees Union, 50 L.R.R.M. 2092 (Wis. 1962).

267. Freeman v. Retail Clerks Union, 58 Wash. 2d 426, 363 P.2d 803, 806 (1961).

268. Steelworkers, *supra* note 84, at 368.

269. Garmon, *supra* note 249, at 245.

which restricts the rights of employees favoring one union while allowing another union to conduct its activities on company premises will violate, not only 8(a)(1) but also possibly 8(a)(2) which prohibits company dominated unions.[270] The Board has recently held that section 7 rights are not only those of all competing unions but also belong to the candidates campaigning for union office within an incumbent bargaining representative.[271] But, as should be expected, these campaigns which often pit worker against worker, more so than against employers, are often those in which employer defenses may be invoked successfully on behalf of rules that are presumptively invalid. This area, especially if it encompasses those cases where protected anti-union activity is conducted at the same time, would seem to present a situation in which the employer may quite often say, with justification, that disputes *among* workers imperil production[272] and that allegedly defamatory or inflammatory statements place solicitation beyond its proper bounds.[273] Therefore it is not surprising that the cases, where possible, have carefully hedged against an unnecessary bestowal of equal privileges for both sides. More specifically, this has become an area where the Board has attempted to preserve the desired stability which is important to the collective bargaining relationship by prohibiting non-employee access to the enterprise for the purpose of ousting the incumbent. But, insofar as employees alone are concerned, this is a policy which is now thundering off the tracks.

It has been held that union business representatives may—without

270. See IAM v. NLRB, 311 U.S. 72 (1940); *Cf.* Harrison Sheet Steel Co. v. NLRB, 194 F.2d 407, 410 (7th Cir. 1952); Sinko Mfg. & Tool Co. 149 N.L.R.B. No. 21, 57 L.R.R.M. 1281 (1964).

271. General Aniline & Film Corp., 145 N.L.R.B. No. 119, 55 L.R.R.M. 1126 (1964).

272. *Cf.* Caterpillar Tractor Co. v. NLRB, 230 F.2d 357 (7th Cir. 1956); Stuart F. Cooper Co., 136 N.L.R.B. 142 (1962); United Aircraft Corp., 134 N.L.R.B. 1632 (1961).

273. See NLRB v. United Aircraft, *supra* at 126, n.1; Patterson-Sargent Co., 115 N.L.R.B. 1627 (1956); *cf.* Walls Mfg. Co., 137 N.L.R.B. 1317 (1962), *aff'd*, 321 F.2d 753 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 923 (1963); Blue Bell, Inc., 107 N.L.R.B. 514 (1953), *rev'd*, 219 F.2d 796 (5th Cir. 1955); Hood v. Stafford, 56 L.R.R.M. 2340 (Tenn. 1964). The Supreme Court has held the Tennessee courts to be without jurisdiction in a shopping center in Liner v. Jafco, 375 U.S. 301 (1964). 49 Stat. 452, 29 U.S.C. § 158(a)(2) (Supp. I, 1959): "It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ." Maryland Drydock Co. v. NLRB, 183 F.2d 538 (4th Cir. 1950); Thor Power Tool Co., 148 N.L.R.B. No. 131, 57 L.R.R.M. 1161 (1964); Frohman Mfg. Co., 107 N.L.R.B. 1308 (1954); El Mundo Broadcasting Corp., 108 N.L.R.B. 1270 (1954). Misrepresentations before an election present a somewhat analogous problem. *Cf.* NLRB v. Trancoa, 303 F.2d 456 (1st Cir. 1962); United Aircraft Corp., 103 N.L.R.B. 102 (1953).

The only other tenable defense available to an employer is that of a safety hazard. Remington Rand, Inc., 103 N.L.R.B. 152 (1953).

contractual authority and where workers are not easily accessible off company property—gain access for the purpose of assisting grievance processing.[274] The same agent must be admitted to aid in negotiating a new contract.[275] At the same time, the Board has made it clear that such access, even where pursuant to contractual authority, must be utilized for grievances and not solicitation or campaigning against an outside union.[276] But an apparently less ticklish question is presented where no relationship is yet established and non-employee organizers seek privileges equal to their counterparts who campaign on behalf of another union. The above-mentioned considerations do not exist in that, presumably, a relationship such as the act contemplates is lacking. And although one must speak in a qualified manner here, to the extent that an agreement between one campaigning union and employer is asserted, it is important to inquire carefully into the union's position as a bona fide representative of the employees. Equal access for rival organizers acts as a barrier to the company-union agreement of which Justice Frankfurter warned in *Steelworkers*.[277]

Thus the Second Circuit has held that, upon proper request, it is unlawful for management to bar access for one union's organizers while another union enjoys such privileges.[278] It is unfair for an employer to prohibit one union's rebuttal of a captive audience speech while another union can reply.[279] Ironically, the Board's real problem here has developed out of judicial reliance upon the *Steelworkers* case which expressed great concern for the 8(a)(2) abuses that might flow out of employer acquiescence in union solicitation privileges. In *GEM International, Inc.*[280] the Board held that an organizer who was prevented from distributing material on the walk in front of the store, refused names and addresses of employees and ejected

274. NLRB v. Cities Serv. Oil Co., 122 F.2d 149 (2d Cir. 1941), *affirming* 25 N.L.R.B. 36 (1940); Richfield Oil Corp., 49 N.L.R.B. 593 (1943), *aff'd*, 143 F.2d 860 (9th Cir. 1944); General Petroleum Corp., 49 N.L.R.B. 606 (1943).

275. Fafnir Bearing Co., 146 N.L.R.B. No. 179, 56 L.R.R.M. 1108 (1964).

276. Laub Baking Co., 131 N.L.R.B. 869 (1961). *Laub* intimates that, absent contractual authority, the Board will not protect the union representatives' right of access. But for the employee the right to process grievances on company property would appear to be an implied one. Market Basket, 144 N.L.R.B. No. 145, 54 L.R.R.M. 1263 (1963); *Cf.* Crucible Steel Castings Co., 101 N.L.R.B. 494 (1952); Cullman Elec. Co-op., 99 N.L.R.B. 753 (1952).

277. Steelworkers, *supra* note 84, at 363.

278. Majestic Molded Prods., Inc. v. NLRB, 330 F.2d 603 (2d Cir. 1964), *affirming* 143 N.L.R.B. 71 (1963).

279. KFSD-TV, 111 N.L.R.B. 566 (1955).

280. 137 N.L.R.B. 1343 (1962). *Cf.* Fiore Bros. Oil Co., 137 N.L.R.B. 191 (1962); Holyoke Cinema Shops, Inc., 139 N.L.R.B. 1321 (1962); Salmirs Oil Co., 139 N.L.R.B. 25 (1962); Bargain City USA, Inc., 129 N.L.R.B. 93 (1960); Dixie Bedding Mfg. Co., 121 N.L.R.B. 189 (1958).

from the retail store for failure to produce the store's "membership card" (company forbade "membership" for those employed by a labor union) was unlawfully denied access equal to that of other organizers who solicited during work time, even though a formal request for access was not made. The Board found that a request was not necessary as the complainant's presence in the store was "tantamount to notice." But, while finding an 8(a)(2) violation and an unlawful unionshop contract, the Board, in dictum, stated that the futility of a request was "conjectural."[281] This helped provide the basis for a most unfortunate reversal by the Eighth Circuit.[282] That court said section 8(a)(1) "imposes no special duty upon employers for the benefit of nonemployee organizers. . . . It is only where (and insofar as) the employees themselves would be denied organizational rights that the employer must permit outside organizers to come onto the premises; the organizers' own interests are entirely secondary."[283] Analogizing *Steelworkers* hostility to per se violations vis-á-vis employer action, the Eighth Circuit concluded that "the enforcement of an otherwise valid no-solicitation rule against one union, but not against another, is not per se illegal. The employees' right to organize is certainly no less basic or entitled to protection than is their right to choose among different bargaining representatives."[284] Thus, carrying *Steelworkers* one step further, the court held that the union's failure to request access at an "appropriate level" was fatal despite the Board finding of notice. Notice, said the court, was presented with "clearer evidence" in *Steelworkers*. Since that case invoked anti-union solicitation and was not unlawful per se, surely, it was reasoned, preference as to a particular type of solicitation is not unlawful. Thus the court held that *GEM* presented a weaker argument for violation than the one rejected by the Supreme Court.

There is an obvious logic to this reasoning. As mentioned earlier, employer anti-union action will have the most impact on the worker's mind and it is, to say the least, strange to approve of the employer's rights but, in the same context, restrict the rights of others opposed to the union. Presumably, the court, pursuant to *Steelworkers'* reasoning would have found no violation if nonemployees had conducted an anti-union campaign. The act, however, should condemn both fact situations as unlawful. Logic on this point is in the camp of the Eighth Circuit. But *Steelworkers* is a "narrow" question applicable only to employer action and it should be treated as such.

281. *Id.* at 1346.
282. GEM Int'l, Inc. v. NLRB, 321 F.2d 626 (8th Cir. 1963).
283. *Id.* at 631.
284. *Ibid.*

In the final analysis, the Eighth Circuit reversed the Board on the failure to make a request. *Steelworkers* notwithstanding, it is clear that a non-employee must make a proper request for similar privileges. The employer's attitude towards both unions bears out the futility of request. One must conclude that the Board's choice of the word "conjecture" in approaching this question served as a wedge for the court's conclusion. But here our criticism must be primarily directed at the Supreme Court. It is to be regretted that cases will stand or fall on the concept of out-dated pleadings. *GEM* should make it clear that the request criterion can prove quite harmful with respect to some of the considerations that prompted its use in *Steelworkers*—the potential 8(a)(2) violation.

Suppose, however, that there is no competition in the initial organizational campaign and that a lawful collective bargaining aggreement is negotiated between the parties. Suppose, further, that the union signs a contract in which it agrees not to engage in solicitation or distribution on company property until the agreement's expiration. Is such a bargaining away of section 7 rights an effective promise which union members are obliged to keep? Most Board decisions have assumed in dictum that the union may bargain away the right to solicit and distribute.[285] A couple of cases have relied on this assumption as a conclusion of law.[286] In the recent *Gale Products* case[287] the Board appeared slightly hesitant about meeting the question. But it would now seem that the earlier holdings and dictum are viewed as correct.[288]

The importance of *Gale Products* lies in that decision's impact on the rights of minority unions where the majority union, as exclusive representative, contracted away union activity on company property. In *Gale Products* the Board said that minority union organizational activity brought into focus "an altogether different problem" than that concerning the majority union, as here the restrained conduct contained an "expression of dissatisfaction with that labor organization." It was noted that "a salutary purpose may be achieved by refusing to disturb concessions yielded by either party through the processes of collective bargaining." But the Board held that no

285. Burroughs-Wellcome & Co., 68 N.L.R.B. 175, 176 (1946); May Department Stores, 59 N.L.R.B. 976, 988 n.17 (1944); North American Aviation, Inc., 56 N.L.R.B. 959, 962 n.2 (1944).

286. Fruitvale Canning Co., 90 N.L.R.B. 884, 885 (1950); W. T. Smith Lumber Co., 79 N.L.R.B. 606, 616 (1948); *but see* Clinton Foods, Inc., 112 N.L.R.B. 239, 263 (1955).

287. 142 N.L.R.B. 1246, *reversed*, 57 L.R.R.M. 2164 (7th Cir. 1964); *accord*, General Motors Corp., 144 N.L.R.B. No. 83, 54 L.R.R.M. 1172 (1963) (See Note, 16 STAN. L. REV. 456 (1964).

288. General Motors Corp., *supra* note 264.

"special circumstances" apparently affecting production and discipline[289] existed to rebut the presumption of invalidity. Absent such circumstances, "neither an employer nor an incumbent union is entitled . . . to freeze out another union by trenching on statutory rights of employees to engage in protected activities."[290] Chairman McCulloch and Member Leedom dissented on the grounds that the contracting away of solicitation rights is less basic to employees than the already permissible no-strike clause.[291]

Gale Products is then something of a departure from the goal of contractual stability. It would be possible, and indeed I believe preferable, to tolerate this derailment as a petty inconvenience were it not for the fundamental basis upon which the case is decided. For *Gale Products* turns upon the existence of minority union activity which is not party to the contractual prohibition. Now this is brew most heady. Indeed, what the Board seeks to do is to turn, at the very least, the spirit of the Supreme Court *J. I. Case*[292] decision upon its head. The seemingly converse question in *J. I. Case* was whether an individual contract could not be effective as a waiver of any benefit to which the employee otherwise would be entitled under the collective bargaining agreement. Here, of course, the question is whether the collective agreement can waive otherwise existent individual rights. But the Court's language, in *J. I. Case*, points up the *Gale Products* conflict:

> [W]here there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive to industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of

289. Gale Prods., *supra* note 287, at 1249. Thus 28TH ANNUAL REPORT OF THE NLRB 64 (1963), would appear to be in error: "the majority was of the view that the validity of a contractual waiver of employee rights must depend upon whether the interference with the employees statutory rights is so great as to overrule any legitimate reasons for upholding the waiver and concluded that in this case a finding of contractual waiver was unwarranted because the employer's only basis for the prohibition was the elimination of interference with production."

290. Gale Prods., *supra* note 287, at 1249.

291. See Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939). The dissent also argues that the contract places employees in the same position that non-employees have pursuant to *Babcock*. This argument, which invokes the *Stoddard-Quirk* notions about literature and distribution, would seem to push that case one step further. As presently devised, *Stoddard-Quirk* distinguishes, for the most part, between working and non-working time areas. Here access is entirely precluded. In cases pertaining to distribution alone the proposition has been rejected inferentially. *Cf.* General Motors Corp., *supra* note 264. Armco Steel Corp., 148 N.L.R.B. No. 126, 57 L.R.R.M. 1132 (1964); *cf.* Getreu v. Armco Steel Corp., 56 L.R.R.M. 2501 (S.D. Ohio 1964).

292. J. I. Case v. NLRB, 321 U.S. 332 (1944).

> representatives. . . . The workman is free if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution of the collective result.[293]

To *J. I. Case,* the retort of *Gale Products* must be that minority solicitation rights are inextricably tied to the representation process and that the majority's overwhelming power requires sensitivity to employees who would not otherwise possess meaningful organizational techniques. In many instances this may be the case. But it should be understood that the broad sweep of *J. I. Case* is antithetical to *Gale Products* insofar as the former case propounds almost complete dominance of collective bargaining over that of the minority group or the individual.[294] More specifically, *J. I. Case* stands for the proposition that advantages for individuals must be specifically provided for in the collective bargaining agreement. Few (though some) unions would sign an agreement which would place them in such an unfavorable competitive position. The more probable course of action would be a contract which specifically contemplates the minority union and one which states that the prohibition must apply to all or that such rights are subject to joint consultation between the union and the employer.[295]

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293. *Id.* at 338, 339.

294. See General Indus. Co., 110 N.L.R.B. 712 (1954), wherein the Board applied, to some extent, the *J. I. Case* approach to a solicitation case. In *General Industries* the contractual prohibition could have been interpreted as applicable to only MESA Local 18, the contracting union. As written, it covered working time but, in fact, the contract was enforced in regard to unregulated break periods. The Board found that the UAW adherents were lawfully discharged for soliciting on company time and that the respondent had not interfered with their rights during non-working time. More important, however, was the Board's disposal of the complaints insofar as it dealt with Respondent's warning against the wearing of UAW badges, activity protected during both working and non-working time. In this regard, the Board said that "Uniform application of the no-solicitation contract provision required that Respondent accord MESA no greater privileges, even as incumbent bargaining representative, that it allowed the UAW." 110 N.L.R.B. at 726. Thus the Board assumed that MESA could bargain away the otherwise protected minority right to wear insignia during working time so long as the contract was not discriminatorily enforced. *Cf.* NLRB v. Monarch Tool Co., 210 F.2d 183 (6th Cir. 1954).

295. See article XXII of the contract in Wah Chang Corp., 124 N.L.R.B. 1170 (1959), *rev'd on other grounds,* 305 F.2d 15 (9th Cir. 1962), which stated the following: "There shall be no soliciting or petitioning in the plants without the consent of the Company and the Union." *Cf.* Art. IV, § 5 of the contract in Ford Motor Co. (Sterling Plant, Chassis Parts Division), 131 N.L.R.B. 1462 (1961), which stated the following: "The right of the Company to make such reasonable rules and regulations, not in conflict with this agreement, as it may from time to time deem best for the purpose of maintaining order, safety, and/or effective operation of the Company's plants, and after advance notice thereof to the Union and the employees, to require compliance therewith by employees, is recognized. The Union reserves the right to question the reasonableness of the Company's rules or regulations through the

Gale Products then reaches in where the contract is silent and gives an advantage to the minority. But one can more easily appreciate the principle articulated by focusing attention on a few hypothetical cases. Are, for instance, a minority of employees, disenchanted with union leadership, able to conduct solicitation campaigns in a manner similar to members of other unions? The answer is that neither *Gale Products* nor previous law appear to contemplate this type of protection.[296] Thus the decision will assist employees in ridding themselves of the incumbent union but will not permit them to work within the framework in a more moderate, peaceable fashion. Will the incumbent union be precluded from solicitation when anti-union petitions supporting *no other union* are circulated by employees? The answer must be yes. For here the dissatisfaction is with the union. Probably, moreover, preferential treatment for all parties except the incumbent union will extend to outsiders such as the mayor and local businessmen and, of course, it must extend to the employer himself. The illogic in *Steelworkers* teaches us that employer's rights are to be on a plateau beyond those of the employees or anyone else. Now *Gale Products* cannot view these above mentioned possibilities with much alarm. Indeed, that case, in order to disadvantage the incumbent with such a grand sweep, must see the industrial community in terms of powerful unions possessing bargaining and economic power that means inpregnability to rival or minority action. This is part of the truth, but only part. Let us try to categorize to the extent that it is possible, a few bargaining relationships and analyze the impact of *Gale Products* in each case.

The first category is the relatively stable collective bargaining relationship where the union is secure and potential unfair labor practices and grievances of average individuals may be settled in an amicable fashion by the company and the union—often over the head of the workers. The automobile industry might be a good example. This is the situation where *Gale Products* has the greatest validity. Notwithstanding the craft rumblings of a few years back, minority union solicitation would not be terribly harmful to the incumbent. Not only does the incumbent enjoy a secure position but it is also fundamental that union power here is a great potential for abuse against the individual. And here, paradoxically, the *Lincoln*

grievance procedure." In *Wah Chang* the Board interpreted the rule as unlawfully giving the Union veto power over other employees. In *Ford Motor Co.* the question of union veto through exclusive utilization of the grievance procedure was not reached. *Cf.* Humphrey v. Moore, 375 U.S. 335 (1964).

296. A close case might be presented by the so-called "rebel" movement to oust an incumbent union. *Cf.* Cushman Motor Delivery Co., 141 N.L.R.B. 146 (1963), *rev'd*, 327 F.2d 396 (7th Cir. 1963).

Mills[297] quid pro quo of which the *Gale Products* dissenters speak has a greater relation to actual fact.

One's hesitations become nagging doubts, however, when we look at the second category. Here the union has a fair amount of strength—accountable, perhaps, to the funds of an international union which does not restrict itself to one industry—but is not able to obtain a union shop provision in the contract. Thus, there will be constant efforts to extend organization to those who remain non-members. Moreover, there may often be counter efforts on the part of dissidents and those opposed to unionism generally. The *United Aircraft* case adumbrates the importance, perhaps the special importance, that the courts may give to such a union's organizational effort.[298] But in our hypothetical case, the union gives up this right. Here there are disadvantages not only to the incumbent but also to the orderly existence of the plant community. Also, tensions can be severely exacerbated where the union and its members find their hands tied in an election campaign. Will the incumbent be likely to have a fair chance of gaining or even retaining members? The cruel irony is that, even accepting the dissenters' rather doubtful proposition that the union has received a quid pro quo, most certainly it was not for minority union activity (excluding for the moment other types). If the incumbent survives the contract in the face of heavy bombardment, one can well imagine the difficulties in discussing this provision again. Once the union understands the clause's legal impact, its members may find no quid pro quo acceptable (and of course may be most unwilling to give up something else for recognition of that question). So much for the future of the collective bargaining.

It may be argued that probabilities favor relatively few problems in the above situation. That, however, is not the case with our third category where the union is economically weak (perhaps in a newly organized plant) and where the dissenters' quid pro quo concept is, more often than not, a mythical concept. Mythical, that is to say, unless the quid pro quo be viewed simply as the opportunity to have a union contract. In these circumstances *Gale Products* may

297. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). The quid pro quo here is most likely to be union bulletin board privileges.

298. NLRB v. United Aircraft, *supra* note 126, at 131. It has been suggested that the grievance procedure be used as the exclusive machinery to treat solicitation problems. This argument may have some validity, at a certain point, where handbilling about plant conditions is concerned. But it is not quite clear how the Board could effectively decide which activity is subject to which process. Organizational activity *qua* organizational is not appropriate to the grievance process. But there will be instances where the activity might partake of both elements—grievance and organizational. *Cf.* Laub Baking, *supra* note 183; Minneapolis-Honeywell Regulator Co., 139 N.L.R.B. 849 (1962).

serve as a convenient weapon for the employer who wishes to rid himself of the union. The union cannot take a strike and survive. The employer offers a contract with, among other restrictions, a prohibition of solicitation. Indeed, to satisfy the dissenters' ideas about collective bargaining, we could even assume that several benefits, through which the union can convince the membership that there is some improvement from the old order, are made contingent upon acceptance of the clause. The union will be hard put to resist. If and when the clause is accepted the employer, under *Gale Products*, can begin his own campaign with impunity. The same can be done by employees. One wonders if the decision's authors contemplated these consequences.

The last possibility is, theoretically, the one case where *Gale Products* might be useful. Practically speaking, however, little would be accomplished. This is the case where management deals with its own creation—the company dominated union. Obviously here the company wants as little trouble as possible and could quite easily stop solicitation. Minority union activity is to be welcomed. But the other practical problem is that the company's strength is great and if it is able to create a union for its needs, one should safely assume that a uniform application of the contract for *all* employees will take place.

It then becomes obvious that these diverse bargaining relationships would require the Board to examine each case carefully to see whether or in what manner to apply *Gale Products*. This the Board cannot and should not do. Thus the concurring opinion of Member Jenkins in *General Motors Corp.*[299] would seem to be the better (or

299. *Supra*, note 264. The *Gale Products* dissent argues, of course, for the antithesis of member Jenkins' position—prohibition for all parties. This too may be a better viewpoint than that of the majority. But the dissent's analogy to the legality of the more basic strike waiver is misleading. The strike is more basically disruptive insofar as the entire bargaining relationship and the enterprise is concerned. Therefore measures in the nature of emergency procedures may be tolerated. Furthermore, unlike the strike weapon, solicitation rights will be exercised on a more continuous day to day basis. The analogy, moreover, overlooks the important qualification of the strike waiver which is its legal ineffectiveness when an employer commits a major unfair labor practice. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); *Cf.* Arlan's Dep't Store, 133 N.L.R.B. 802 (1961). The dissent does not appear to contemplate exceptions to solicitation prohibitions. The Seventh Circuit's reversal in NLRB v. Gale Products, 57 L.R.R.M. 2164, 2165 (7th Cir. 1964), is a slightly less ambitious position than that advanced by the Board dissenters: "The contract provisions here assailed did not strip the employees of fundamental rights guaranteed by the Act. The provisions preclude only a convenient—*albeit a most effective*—way of their exercise. Employees are free to forego their qualified rights to on-the-premises organizational activities in favor of the available alternatives thereto. The 'desirability' of collective bargaining contract provisions from the standpoint of either the employees or the employer is not the measure of their validity. Moreover, the arrangement here involved is conducive to the stabilization of labor relations and thus in harmony with a prime objective of the

perhaps it is more mathematically accurate to say best) view in this area. Solicitation rights are too closely related to the act's essence, the spread of collective bargaining, to permit a legally effective waiver. Surely this is the teaching of the *Republic* holding to the effect that illegal anti-union motives are not necessary to a violation when an employer unduly prohibits such conduct. This kind of per se violation can be found only when the conduct in question is so intimately related to the "encouragement or discouragement" of union membership as to make proof of discrimination superfluous.[299a] The contract provision should be considered a nullity by the Board. The alternatives, as I have attempted to demonstrate, are much too costly.

This is not to say that minority rights are to be left unguarded. But the crucial word should be "minority" rather than "minority union." *Gale Products* tries to encourage the potentially damaging battle between unions and, at the same time, proportionately weakens the inclination to resolve differences within the established union. The effect is not proportionate alone, but, as has been pointed out above, a failure to protect the solicitation rights of intra-union insurgents who are normally protected by the act.[300] This will canalize the dispute *between* unions and not within the existing structure. The most telling criticism of *Gale Products* is that which alleges misplaced energy. Suffice it to say that there are many other more profitable routes for the Board to take.[301] *Gale Products* is not one of them.

VI. Conclusion

This article makes no secret of the writer's disappointment with the rationale advanced in many of the cases and the failure to appreciate the industrial realities about which Mr. Justice Goldberg has

Act." (Emphasis supplied.) The Board cannot impose the substantive terms of a private collective bargaining agreement. NLRB v. American National Insurance Co., 343 U.S. 395 (1952). However, even the Seventh Circuit seems to concede the illegality of contractual prohibition in regard to some "fundamental rights." An employer could not obtain a collective "yellow dog" contract. Conversely, the union and employer cannot negotiate a union security agreement of exeessive breadth for contract bar purposes. Paragon Products Corp., 134 N.L.R.B. 662 (1961). Query, would the court have arrived at a different conclusion if the prohibition was so broad as to encompass, for instance, all speech regarding union activity? *All* speech? Does the visible presenee of a quid pro quo—union bulletin board privileges in this case—enter into the conclusion of law?

299a. *Cf.* Radio Officers' Union v. NLRB, 347 U.S. 17 (1954); but compare NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).

300. General Aniline & Film Corp., *supra* note 271.

301. *E.g.*, Miranda Fuel Company, Inc., 140 N.L.R.B. 181 (1962), *rev'd*, 326 F.2d 172 (2d Cir. 1963).

lectured his brethren most recently.[302] For instance, if there is any one contribution which *Steelworkers* has made it would be that case's uniform approach to the various forms of union activity. The Court is correct in concluding inferentially that the differences are relatively inconsequential. But now *Stoddard-Quirk* has removed the little good that had been done.[303]

The more important damage, however, has been brought about by the attempt to link the right to reply to captive audiences with the breadth of no-solicitation rules. That is, in itself, the beginnings of the alternate channels of communication thinking in this area. From there it has been an easy process to preclude the employee's right to an effective forum at the place of work.

Labor and management deserve a deliverance from the morass of law that has been handed down. More than anything else, the law must have clarity and a practical appreciation for the parties' needs.[304] This, judging by either of these two examples, it does not have at present.

The Board could effectively eliminate *Livingston Shirt* and, at the same time, skirt the above mentioned shoals set down in *Steelworkers*. For *Steelworkers* deals with an unfair labor practice and not the laboratory conditions which are necessary for the proper pre-election atmosphere. It is within the Board's discretion to hold that a denial of a union rebuttal will set the election aside but not constitute an unfair practice.[305] *Gimbel Bros.*, however, afforded the Board this opportunity within the distribution context; but it was rejected. If the Board will not upset an election when only an *ad hoc* ruling is needed, a presumption would seem, in the captive audience case, inconsistent and indeed completely contrary to *Steelworkers*. But the representation process, despite its above mentioned shortcomings, may be the most desirable context in which to deal with the captive audience without considering the no-solicitation rule. Section 8(c) is a barrier to unfair labor practices and not representation cases. Reliance on the latter might pacify such courts as the Sixth Circuit which has, in *May* and *Woolworth*, displayed much obsequiousness

302. Humphrey v. Moore, 375 U.S. 335, 351 (1964).

303. One encouraging sign in this respect, however, is James Hotel, *supra* note 176, wherein captive audience addresses were at least considered in terms of violating an otherwise valid non-retail-no-solicitation rule. This did not involve union rebuttal as in *Bonwit Teller* but simply an alleged violation of employee rights premised as such in *Republic*.

304. Minneapolis-Honeywell Regulator Co., *supra* note 298.

305. For instance, in Atkins Saw Div. Case No. 26 R.C. 2060 (June 9, 1964), an election was set aside where management's authorization was required in order to solicit. The request problem would seem to be bypassed; *accord*, Edmont, Inc., 139 N.L.R.B. 1528 (1962); Great Atl. & Pac. Tea Co., *supra* note 124.

to that proviso. Certainly the Fourth Circuit, in *NLRB v. Shirlington Supermarkets Inc.*[306] has noted the distinction favorably.

Similar problems arising where unions already represent the employees might be more profitably handled in section 8(a)(5) proceedings involving the refusal to bargain.[307]

Conversely, it would be proper in cases like *Steelworkers* and *Gimbel Bros.* (which was both an unfair labor practice and a representation proceeding) to find an 8(a)(1) violation without setting aside the election. It would be desirable to order a new election where employer action is close to the eve of the election and the results are truly affected by such last minute intervention. Where the employer's campaign is more drawn out, a request for equal opportunity, not normally required where only employee rights are concerned, might be required by the Board. This procedure would discourage a union, hopelessly out of contention, from abusing Board processes by sitting back, losing heavily, and then obtaining a new election. While employer solicitation or distribution in this context is 8(a)(1) conduct, uncritical utilization of Board election machinery would be unwarranted and inequitable.

Republic sets forth a rule which, in either the 8(a)(1) or representation proceedings, has real application. If management is interested in production it will not disrupt it. To the extent that it does, the Board is entitled to fashion remedies for what is presumptively unlawful, with this disinterest in mind. This does not mean that one should fall prey to the iron clad inflexible rules which Judge Hand warned against in *Bonwit*. All that should remain, for the most part, is *Republic's* presumptive discrimination and the importance of the place of work as a forum.

The remedies that the Board can devise could take several shapes. For instance, the *Peerless Plywood* twenty-four hour prohibition of pre-election speech is much too short in dealing with the problem that the Board sets out to solve. Why not extend the period to one week? Is that not a more accurate reflection of time necessary to rebut a sophisticated employer argument? Surely it cannot be done so effectively in twenty-four hours. This proposal need not prohibit speech in toto—as *Peerless Plywood* does—but simply could require union rebuttals to any employer speech within that period. Perhaps, within that framework, the employer should not be required to accede to a union request before the one week period. Instead, the union

306. 224 F.2d 649, 652, 653, (4th Cir.), *cert. denied,* 350 U.S. 914 (1955).

307. *Cf.* General Elec. Co. No. 2—GA—7581, Intermediate Report of Trial Examiner, April 1, 1963. 73 Stat. 544, 29 U.S.C. § 158(a)(5) (Supp. I, 1959): "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees. . . ."

and/or the employees would have the right to distribute literature during a portion (perhaps regulated) of working time so as to answer company arguments. The union could be given a statutory right to have its literature posted on the plant bulletin board. Here the union would not be harmed so severely as by an election eve speech which goes without answer. The employer, on the other hand, would not have the large disruption of production that an oral rebuttal might entail, but rather a continuous, more orderly union campaign of distribution. Finally *Peerless Plywood's* exclusion of literature from that rule's coverage should be rescinded. Incidentally, this type of solution would have some merit in the *Gale Products* context. The Board could compromise the incumbent union's disadvantage by permitting all unions to campaign during a designated period preceding the election.[308] This could be done also in the case of intra-union campaigns.

Another proposal would be to give the union the right to the employer's mailing list of employees when the employer mails out propaganda.[309] Landrum-Griffin requires that the incumbent union officers give the opposition such lists.[310] This regard for equality should have some applicability in the present context. Of course it should be recognized that this proposal is of limited value. Clearly union access to mailing lists is not adequate to deal with captive audience addresses.

It has also been suggested that, in the captive audience case, an employer be permitted to overcome a presumption of illegality through evidence that non-employee organizers had previously been allowed to solicit on company premises.[311] This is a very sensible approach which the Board, at times, seems to follow.[312] In fact,

308. A period before the expiration of the contract—considerably longer than that envisaged for a reply to the captive audience—might be appropriate as a compromise between employee free choice and the stability derived from the contract bar's prohibition of Board representation elections. *Cf.* Montgomery Ward & Co., 143 N.L.R.B. 587 (1963); General Cable Corp., 139 N.L.R.B. 1123 (1962). The pre-expiration solicitation period should properly precede the period in which competing unions may file representation petitions. See Leonard Wholesale Meats, 136 N.L.R.B. 1000 (1962); Deluxe Metal Furniture Co., 121 N.L.R.B. 995 (1958). This is because such unions would need time in which to campaign for the necessary "showing of interest," an administrative determination of employee interest in the union which is a prerequisite to further representation proceedings. See NLRB, RULES & REGULATIONS § 102-63 (1962).

309. Excelsior Underwear Inc., Case No. 11—RC—1876 (1964); K. L. Kellog & Sons, Case No. 21—RC—9855 (1964).

310. 73 Stat. 519, 29 U.S.C. § 401(c) (Supp. I, 1959).

311. Burke, *Employer Free Speech*, 26 FORDHAM L. REV. 266, at 290.

312. *Cf.* Rath Packing Co., 115 N.L.R.B. 302 (1956); KFSD-TV, 111 N.L.R.B. 566 (1954). See also Johnston Lawn Mower Corp., 110 N.L.R.B. 1955 (1954).

313. *But see* note 143 *supra.*

Livingston Shirt might be read to contemplate the solution.[313] Hesitancies spring, however, from the wisdom or lawfulness of requiring the employer to do, for purposes of future evidence, what he may not be required to do under the Court's holding in *Babcock*.

Once again, we ought to remember that there are varying standards of proof requisite to an unfair labor practice charge and to that involved in setting aside a representation election.[314] A statutory violation is not necessary to a finding that the election was not conducted in laboratory conditions.[315] Thus the Board should feel free, in a proper case, to order a new election—even outside the captive audience case—where 8(a)(1) standards are not met. This is an aspect that is often overlooked by many. The Board, where doubtful that the courts will give an understanding review of a case, might be wise in restricting the issues to the election and the atmosphere surrounding it. The important limitation here is the ease with which unscrupulous employers can flout this type of Board process. And, as mentioned above, in unfair labor practice cases, *Republic* should be the guide.

Those who answer proposals to deal with the imbalance that is present in most organizational campaigns, by declaring that the act does not guarantee success, are simply not talking to the problem.[316] Of course the act does not guarantee success. But it does provide the framework within which to effectively facilitate the goal of employee self-organization. This is the problem with which the Board must grapple.

May dramatizes the importance of company premises as the center of organizational activity for *all* parties. The problem goes even beyond the protected response to employer campaigning. The Court could not make a more significant gesture in this crucial area of labor law than that of overruling *Babcock* and *Steelworkers*. The traditional concepts upon which these cases depend and the manifold ambiguities contained therein, both make it alarmingly necessary for the Court to write on a fresh slate. Nothing is to be gained by delay.

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314. McCulloch Corp., *supra* note 142.

315. Increased reliance on the representation process also obviates the mechanical utilization of equal opportunity rules where unions are already the collective bargaining representative. *Cf.* Anchor Rowe Mills, Inc., 86 N.L.R.B. 1120 (1949).

316. Hanley, *supra* note 209, at 301, 307.