UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-2359, 01-1002

ALBERTSON'S, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Albertson's, Inc. ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board order against the Company. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which empowers

the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)); the Company owns and operates retail stores in Ohio.

The Board's Decision and Order issued on October 31, 2000, and is reported at 332 NLRB No. 104. That order is a final order under Section 10(e) of the Act. The petition for review, filed by the Company on November 13, 2000, and assigned case number 00-2359, was timely, as was the Board's cross-application for enforcement, filed on January 2, 2001, and assigned case number 01-1002; the Act places no time limitation on such filings. On December 15, 2000, this Court granted leave to the United Food and Commercial Workers Union, Local 555, AFL-CIO ("Local 555") to intervene in the instant proceeding on the side of the Board. The Salvation Army, the Camp Fire Boys and Girls, and Bi-Mart, Inc., filed briefs *amicus curiae* in support of the Company.

ORAL ARGUMENT STATEMENT

The Board believes that this case involves the application of well-settled principles to straightforward facts, and that argument, therefore, would not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests that it be permitted to participate.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discriminatorily refusing to permit Local 555 to solicit employees for union membership and to distribute union literature to company employees in the immediate exterior of the Company's stores.

STATEMENT OF THE CASE

The instant unfair labor practice cases came before the Board on complaints issued by the General Counsel pursuant to charges filed by Local 555 and Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production, Local 582, affiliated with International Brotherhood of Teamsters, AFL-CIO ("Local 582"). (D&O 1, A 6.)[1] The parties jointly moved to transfer the consolidated proceedings to the Board for a decision on stipulated facts, waiving hearing before, and a decision by, an administrative law judge. (D&O 1, A 6; A 73.) The Board granted the motion and approved the stipulations. (Order Approving Stipulations, Granting Motion, and Transferring Proceeding to the Board, Dec. 18, 1996, A 153.) Subsequently, the Board (Chairman Truesdale and Member Liebman, Member Hurtgen, dissenting) issued its

[1] "D&O" references are to the Board's decision and order. "Stip." refers to the Motion to Transfer Proceedings to the Board and Stipulation of Facts. "Stip. Ex. 1" refers to exhibits pertaining to Local 582 attached to that motion; "Stip. Ex. 2" refers to exhibits pertaining to Local 555 attached to that motion. All other documents are referred to by their respective captions. "A" references are to the deferred Appendix, which was filed by the Company on June 28, 2001. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

decision and order on October 31, 2000, finding that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by ordering representatives of Local 582 and Local 555, who were engaged in peaceful soliciting, to leave the immediate exterior of its stores. (D&O 5, A 10.)

The Company filed a petition for review of the Board's order, and the Board filed a cross-application for enforcement of that order. In light of the Court's decision regarding "do not patronize" solicitations in *Sandusky Mall Co. v. NLRB*, 242 F.3d 682 (6th Cir. 2001), which was issued subsequent to the filing of this case, the Board has elected not to seek enforcement of that portion of the order addressing the Company's refusal to permit Local 582 to distribute information to customers in support of a limited product boycott.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Local 555 Attempts To Distribute Literature to Employees at the Company's Stores as Part of Its Organizing Campaign; the Company Denies Local 555 Representatives Access and Threatens To Call the Police

The Company operates retail grocery stores nationwide, including four stores in Clark County, Washington, two stores in Bend, Oregon and one store in Redmond, Oregon. (D&O 1, A 6; Stip. Ex. 2 at 2, A 77.) Local 555 has represented the Company's employees for approximately 40 years. Its bargaining units include the Company's grocery and meat employees in 47 of the Company's stores throughout

Oregon and Washington, including 2 of the stores in Clark County. (D&O 2, A 7; Stip. Ex. 2 at 5, A 80.) The Company maintains a written "no-solicitation policy" that governs appeals by its employees and by outside groups. That policy provides, in pertinent part, "Non-employees may not solicit, distribute literature or use sound devices on Company premises at any time . . . ." (D&O 1-2, A 6-7; Stip Ex. 2 at 7, A 82.) In the past, however, the Company has allowed Local 555 access to its stores to inform employees about Local 555 and to solicit new nonmember employees to become members of the union. (D&O 2, A 7; Stip. Ex. 2 at 5, A 80.)

1. The Clark County stores

In 1995, the Company had recently acquired 2 stores in Clark County. (Stip. Ex. 2 at 2, A 77.) Pursuant to the then-current collective-bargaining agreement, the Company agreed to recognize Local 555 as the representative of its employees in those stores, pending authorization from a majority of the unit employees. (Stip. Ex. 2 at 3, A 78.) In April 1995, Local 555 began an organizing campaign among the employees of the 2 stores. (D&O 2, A 7.) As part of its organizing campaign, Local 555 representatives entered the stores to talk to employees and distribute union literature, and placed union literature on car windshields in the parking lots. (D&O 2, A 7.) The Company notified Local 555, in a letter dated May 1, 1995, that its conduct violated the Company's no-solicitation policy. (D&O 2, A 7.)

In July 1995, Local 555 representatives attempted to distribute authorization cards to employees of the 2 recently acquired Clark County stores, but company supervisors denied them access to the stores and asked them to leave. (D&O 2, A 7; Stip. Ex. 2 at 5, A 80.) In a letter dated July 13, 1995, the Company advised Local 555 that "union representatives are prohibited from entering our parking area as well as our stores." (D&O 2, A 7; Stip. Ex. 2 at 5, A 80.)

In October 1995, Local 555 again attempted to distribute literature to employees of one of the Clark County stores, but a company representative asked them to leave the store's exterior areas. (D&O 2, A 7; Stip. Ex. 2 at 5, A 80.) By letter dated November 29, 1995, the Company advised Local 555 that its no-solicitation policy prohibited union organizing at its stores, and warned that it would call the police if Local 555 representatives sought access to the Clark County stores for any reason. (D&O 2, A 7; Stip. Ex. 2 at 5, A 80.)

2. The Bend and Redmond stores

Local 555 represents the meat department employees in the Bend and Redmond stores. (D&O 2, A 7; Stip. Ex. 2 at 3, A 78.) Although the grocery department employees in those stores are not represented by any union, the Company has recognized Local 555 as the sole bargaining agent for meat department employees in the Bend and Redmond stores. (Stip. Ex. 2 at 3-4, A 78-79.) In early 1996, Local 555 representatives attempted to distribute union literature to grocery department

employees in those 3 stores. (D&O 2, A 7.) By letter dated February 27, 1996, the Company informed Local 555 that its no-solicitation policy prohibited union organizing, and advised Local 555 that it would ask the police to evict union representatives from its stores if they persisted in their organizing effort. (D&O 2, A 7; Stip. Ex. 2 at 5, A 80.)

B. Despite the Company's No-Solicitation Policy, the Company Allows Outside Organizations To Solicit at Its Stores

The Company permitted various outside organizations to engage in regular solicitation outside its Clark County, Bend, and Redmond stores, and inside those stores in inclement weather. (D&O 2, A 7; Stip. Ex. 2 at 6-7, A 81-82.) At each of the 5 stores, the Company allowed Salvation Army bellringers to solicit customers for 1 month each year between Thanksgiving and Christmas. (D&O 2, 4, A 7, 9; Stip. Ex. 2 at 6, A 81.) At the two Clark County stores, the Company permitted customer solicitation by the Girl Scouts, Boy Scouts, Brownies, and youth and school groups. (D&O 2, 4, A 7, 9; Stip. Ex. 2 at 6, A 81.) The Company allowed customer solicitation at the Bend and Redmond stores by the Girl Scouts, Campfire Groups, Veterans of Foreign Wars, Disabled Veterans of America, and other youth and school groups. (D&O 2, 4, A 79; Stip. Ex. 2 at 6, A 81.)

The Girl Scouts were granted access to the Clark County stores to sell cookies twice a year for 2 weeks each time. (D&O 2, A 7; Stip. Ex. 2 at 7, A 82.) The Girl Scouts in Bend and Redmond were granted access to sell cookies for a continuous 16-

day period each year. The Boy Scouts sold products for a total of 2 months a year, 1 month in the fall and another in the spring. The other outside organizations generally solicited for anywhere from a few days to 1 month. (D&O 4, A 9.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing stipulated facts, the Board found that the Company violated Section 8(a)(1) of the Act by discriminatorily ordering representatives of Local 555 and Local 582, who were engaged in conduct protected by the Act, to leave the immediate exterior of its stores.[2] To remedy the Company's unfair labor practices, the Board's order requires the Company to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board's order requires the Company to post and maintain copies of a remedial notice at the stores where the violations occurred.

SUMMARY OF ARGUMENT

An employer violates Section 8(a)(1) of the Act if it denies a union access to its premises for organizational purposes while allowing similar conduct by other outside organizations. Given the undisputed evidence that the Company permitted a variety of

[2] As noted in the Statement of the Case, above, the Board is not seeking to enforce its order as to the Company's actions in response to Local 582's handbilling activities.

outside organizations to solicit at its stores for substantial periods of time, the Board was warranted in finding that the Company violated Section 8(a)(1) of the Act by discriminating against Local 555 when it forced union representatives to cease soliciting employees for membership and distributing union literature in the immediate exterior of its stores, while permitting other outside groups to use its facilities for similar activities.

Contrary to the Company's assertion, it is not absolved from a finding of discrimination simply because the organizations it allowed to solicit were non-profit or noncommercial. An employer's tolerance of nonemployee charitable solicitation is probative evidence of discrimination against nonemployee organizing activity. Moreover, treating union and charitable solicitation as comparable activities avoids the impermissible temptation to distinguish the two by labeling an employee's right to self-organization harmful to business. On the facts presented here, there is no basis for distinguishing between the permitted solicitation by the charitable organizations and the prohibited union solicitation, as neither interfered with the Company's operations more than the other.

The Court should defer to the Board's definition of discrimination because it requires the interpretation of the National Labor Relations Act--a responsibility entrusted to the Board. The Board's construction of the Act is reasonable, consistent,

longstanding, and in harmony with Supreme Court precedent. It is, therefore, entitled to deference.

This case is distinguishable on its facts from *Cleveland Real Estate Partners* and *Sandusky Mall*. Each of those cases involved union solicitations urging a consumer boycott--an activity aimed at putting economic pressure on an employer. That issue is not presented in this case, where Local 555 was engaged only in organizing activity. Because the facts of *Cleveland Real Estate Partners* and *Sandusky Mall* did not require the Court to determine whether a ban on organizing activity constituted discrimination, another panel of this Court is not bound by the limited definition of discrimination espoused in those decisions: the employer's favoring of one union over another.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCRIMINATORILY REFUSING TO PERMIT LOCAL 555 TO SOLICIT EMPLOYEES FOR UNION MEMBERSHIP AND TO DISTRIBUTE UNION LITERATURE IN THE IMMEDIATE EXTERIOR OF THE COMPANY'S STORES

A. Applicable Principles and Standard of Review

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice "for an employer to interfere

with, restrain, or coerce employees in the exercise of the rights guaranteed by [S]ection 7."

The right to organize lies "at the very core of the purpose for which the [Act] was enacted." *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978). *Accord NLRB v. Town & Country Electric*, 516 U.S. 85, 91 (1995) (recognizing that one of the Act's purposes is to protect "the right of employees to organize"); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 126 (1944) (same). That core right, however, is "not viable in a vacuum." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-543 (1972). Its effectiveness "depends in some measure on the ability of employees to learn the advantages and disadvantages of organization" from union organizers and others who have the capacity to furnish employees with "information essential to the free exercise" of that right. *Id.* *Accord Thomas v. Collins*, 323 U.S. 516, 533-534 (1945) (recognizing "the right of the union, its members and officials . . . to discuss with and inform the employees concerning matters involved in their choice" of whether to select union representation).

While recognizing those rights, the courts have also recognized that, "[g]enerally speaking, an employer cannot be compelled to permit nonemployee union agents to distribute literature or solicit memberships on the employer's property." *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996)

("*Packard*"). *Accord Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533, 537 (1992). However, that general rule "admits of two important exceptions," which represent separate lines of inquiry. *Packard*, 97 F.3d at 587. *Accord NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) ("*Babcock & Wilcox*"). First, under the "inaccessibility" exception, an employer violates Section 8(a)(1) if it denies a union access to the employer's property "where the union has no other reasonable means of communicating its message to employees." *Packard*, 97 F.3d at 587. *Accord Lechmere, Inc. v. NLRB*, 502 U.S. at 533-534; *Babcock & Wilcox Co.*, 351 U.S. at 112.[3]

Second, under the "discrimination" exception, an employer violates Section 8(a)(1) if it denies a union access to its premises "while allowing similar distribution or solicitation by nonemployee entities other than the union." *Packard*, 97 F.3d at 587. *Accord Lechmere, Inc. v. NLRB*, 502 U.S. at 535 (union entitled to access to employer's property if "the employer's access rules discriminate against union solicitation") (quoting *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978)); *Babcock & Wilcox*, 351 U.S. at 112 (union entitled to access if employer "discriminate[s] against the union by allowing other distribution"); *Albertson's, Inc. v. NLRB*, 161 F.3d 1231, 1237 (10th Cir. 1998) (employer violates Act "merely by

[3] The parties agree that the "inaccessibility exception" is not in issue in this case. *See* Br 11.

enforcing a no-solicitation policy in a discriminatory manner").

To determine whether an employer has discriminated against union access, the Board applies a "disparate treatment" analysis. *Food Lion, Inc.*, 304 NLRB 602, 604 (1991), and cases cited. Under that analysis, an employer violates the Act by refusing to allow nonemployee union agents to engage in protected activity on its property, where, "by rule or practice," the employer permits similar activity by other outside organizations in similar circumstances. *Accord Packard*, 97 F.3d at 587.

If an employer is shown to have treated nonunion solicitations more favorably than union solicitations, the Board will find a Section 8(a)(1) violation, unless the employer can demonstrate either that: (1) the nonunion solicitations consist of only "a small number of isolated 'beneficent acts,'" constituting "narrow exceptions" to the employer's otherwise absolute policy against outsider solicitation (*Hammary Mfg. Corp.*, 265 NLRB 57, 57 n.4 (1982), and cases cited); or (2) the nonunion solicitations the employer permits involve activities that are "integrally related" to its business. *Rochester General Hospital*, 234 NLRB 253, 259 (1978). *Accord Packard*, 97 F.3d at 592.

Finally, a reviewing court must affirm the Board's factual findings if they are supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488-491. The court may not displace the Board's choice between two fairly conflicting views of the evidence even if the court would justifiably

have made a different choice had the matter been before it de novo. *Id.* at 488. *Accord McLean Trucking Co. v. NLRB*, 689 F.2d 605, 608 (6th Cir. 1982).

B. The Board's Reasonable Construction of the Act Is Entitled to *Chevron* Deference

The Board's construction of the Act must be upheld if it is a "permissible" construction, even if that construction was not "the only one [the Board] permissibly could have adopted" and even if it was not the one "the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-844 and n.11 (1984) ("*Chevron*"). *Accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-399, 408-409 (1995); *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1119 (6th Cir. 1997) (courts must accord *Chevron* deference to Board's interpretation of the Act).

Critical to this case is a recognition of the fact that, to the extent the Board's definition of "discrimination" construing no-solicitation rules requires the interpretation of statutory provisions, the controlling standard of review is that set forth in *Chevron*. There, the Supreme Court ruled that if "Congress has directly spoken to the precise question at issue," then "the [reviewing] court as well as the [administrative] agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-843. But "if the statute is silent or ambiguous with respect to the specific issue, . . . a court may not substitute its own construction of a

statutory provision for a reasonable interpretation made by . . . an agency." *Id.* at 843-844. Those principles apply to review of the Board's construction of the Act. *See Holly Farms Corp.*, 517 U.S. at 398-399. *Cf. Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) (pre-*Chevron* decision: where Board's construction "is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute"). Where, additionally, the Board's construction is longstanding, it is entitled to even greater deference. *Holly Farms Corp.*, 517 U.S. at 409; *Pattern Makers v. NLRB*, 473 U.S. 95, 115 (1985).[4]

Consistent with *Chevron* principles, it has long been recognized that the task of delineating the scope of employees' rights under the Act "is for the Board to perform in the first instance." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 558 (1978). *See also NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1119 (6th Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998) (Board's adjudications interpreting the Act are entitled to *Chevron* deference). As the Supreme Court has observed, applying national labor policy "is often a difficult and delicate responsibility, which the Congress committed primarily to [the Board], subject to limited judicial review . . . ." Accordingly, "[t]he judicial role

[4] The Board's statement (D&O 4, A 9) that its consistent definition of discrimination is in harmony with the Supreme Court in *Babcock & Wilcox* does not indicate that the relevant jurisprudence originated with that opinion. Rather, the Board was merely pointing to *Babcock* to illustrate that the Board's definition of discrimination under the Act is consistent with Supreme Court law--all the more reason to accord *Chevron* deference here.

is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978) (citations omitted) (employer may not restrict literature distribution to employees in nonwork areas, absent affirmative showing of interference with maintenance or discipline).

In accordance with that mandate, this Court has declared that the question of whether there has been discrimination under the Act is one of statutory interpretation. *See, e.g., Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1216 (6th Cir. 1997) ("The Supreme Court's jurisprudence reflects Congress' intent to allow the Board to delicately balance an employee's right to organize with an employer's property right").

The precise legal question presented in this case is whether the Board's construction of the term "discrimination" in the circumstances presented here should receive judicial deference under *Chevron*. The statutory construction problem arises because Section 8(a)(1) of the Act states in general terms that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7," but does not more specifically state the conduct by which an employer can "interfere with, restrain, or coerce." Similarly, Section 7 of the Act does not contain an exhaustive list of the rights available to employees. Consequently, because Congress has not "directly spoken to the precise

question at issue . . . the question for the court is whether the [Board's] answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-843. *Accord Webcor Packaging, Inc.*, 118 F.3d at 1119.

Here, the Board reiterated (D&O 4, A 9) what has been its consistent construction of "discrimination" under the Act, namely, that "an employer that denies a union access to its property while regularly allowing other individuals, groups, and organizations to use its premises for various activities unlawfully discriminates against union solicitation."[5] Moreover--as the Board reasonably stated (D&O 4-5, n.15, A 9-10), in explaining why that definition treats all but de minimis charitable solicitation as relevant to a discrimination finding--"[a]n employer's judgment of worthiness of purpose cannot claim priority over the statutory guarantee provided for union solicitation."

Reviewing courts have repeatedly concluded that the Board's definition of discrimination in the no-solicitation context is an acceptable construction of Section 8(a)(1) of the Act. Thus, early on, the Supreme Court upheld the Board's statutory analysis in *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 230-232 (1949), agreeing that an employer unlawfully discriminated against a union when it denied the union the use of a meeting hall, although nonprofit organizations were allowed to use the hall. The

[5] Although the Court denied enforcement of the Board's order in *Sandusky Mall*, the cases cited by the Court in its opinion support the deference due the Board's construction of the Act as it pertains to discrimination.

Court later reiterated its acceptance of the Board's interpretation in *Babcock & Wilcox*, holding, in agreement with the Board, that an employer may prohibit nonemployee union solicitation as long as the employer's order "does not discriminate against the union by allowing other distribution." 351 U.S. at 112. It is important to note that in *Babcock & Wilcox*, the Supreme Court did not make any attempt to narrow the discrimination exception--as the Company urges the Court to do here--acknowledging in its opinion that "[t]he determination of the proper adjustments rests with the Board." *Id.*

Other courts have continued to endorse the Board's interpretation in cases subsequent to *Babcock & Wilcox.* For example, in *Four B Corp. v. NLRB*, 163 F.3d 1177, 1184 (10th Cir. 1998), the court suggested that charitable and union activity are comparable for a discrimination analysis, and found that an employer discriminated against a union by banning solicitation by union organizers while permitting various charitable groups to solicit customers periodically. Accordingly, the Board's interpretation of the Act is entitled to deference.

Contrary to the Company's suggestion (Br 28), the court in *Four B Corp.* did not hold that an unlawful motive theory was the only basis on which a violation could be premised; rather, the case supports the principle that a violation may be premised on *either* a disparate treatment theory *or* an unlawful motive theory. *See also Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 804-805 (D.C. Cir. 1987) (a no-solicitation

rule is unlawful if "applied in a discriminatory manner or maintained for discriminatory reasons"); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1270 (7th Cir. 1980) (employer's "double standard" violates Section 8(a)(1)).

C. The Board Reasonably Found that the Company Disparately Enforced Its No-Solicitation Rule Against Local 555

As shown in the facts, the Company refused on several occasions to allow Local 555's nonemployee representatives to solicit employees and distribute organizing literature to them in front of two of its newly acquired Clark County stores. Subsequently, the Company refused to allow Local 555 to engage in that same activity at its stores in Bend and Redmond. Applying the principles discussed in the preceding sections, the Board found (D&O 4, A 9) that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) because its prohibitions--backed up by a threat to call the police--fell within the "discrimination" exception to the general rule that an employer can bar nonemployee union organizers from its property. *See Babcock & Wilcox*, 351 U.S. at 112. That exception was triggered in the instant case, the Board found (D&O 4, A 9), because the Company allowed outside nonprofit organizations to engage in solicitation and distribution of literature on its property. As we now show, the record amply supports the Board's findings.

The Company regularly allowed a range of outside groups to solicit on its property for substantial periods of time. On a daily basis during November and

December, the Company permitted Salvation Army representatives to stand in front of its store entrances and solicit customers and employees for donations. (D&O 2, 4, A 7, 9.) The Company permitted Girl Scouts to sell cookies on its property for between 16 days and 1 month each year, and permitted the Boy Scouts to sell products for 2 months each year. (D&O 2, A 7.) The Brownies, Campfire Groups, other youth and school groups, and veterans' groups were also allowed to solicit in the immediate exterior of the Company's stores. (D&O 4, A 9.)

Given the undisputed evidence that the Company permitted this variety of outside organizations to solicit at its stores for substantial periods of time, the Board was fully warranted in finding that the Company engaged in unlawful disparate treatment by refusing to grant Local 555's organizers the same access to the immediate exterior of the stores. *See Packard*, 97 F.3d at 588-592 (hospital discriminatorily prohibited nonemployee union agent from distributing organizing literature outside hospital's cafeteria, where it permitted insurance companies, child services organizations, credit unions, and several vendors to solicit employees on hospital property).

Although conceding that it permitted other outside entities to solicit on its property, the Company attacks (Br 22) the Board's finding that its ejection of Local 555 constituted unlawful discrimination. The Company does not contend that the solicitation it permitted in this case was "integrally related" to its business functions

and purposes. Instead, the Company asserts that, because it permitted only "familiar" charitable organizations, its prohibition on union solicitation was not the kind of discrimination contemplated by the Supreme Court in *Babcock & Wilcox*. The Company's claim is refuted by the record in this case and by the long line of Board and court precedent, discussed above.

As an initial matter, as described above, the Company routinely permitted a wide variety of solicitations that consumed, at a minimum, more than four months throughout each year. Accordingly, the Company did much more than simply permit the small number of isolated charitable solicitations that would exempt it from a finding of discrimination under the exception recognized by the case law. *Hammary Mfg. Co.*, 265 NLRB 57, 57 n.4 (1982) (employer does not violate Act if it permits small number of isolated "beneficent acts" as narrow exceptions to no-solicitation rule). That exception is a narrow one that examines the "quantum of . . . incidents" involved to see whether an employer has permitted more than a small number of solicitations. *Packard*, 97 F.3d at 591 n.8 (quoting *Serv-Air, Inc.,* 175 NLRB 801, 801-802 and n.3 (1967)). Thus, the exception recognized in *Hammary Mfg. Co.* turns not on the *character* of the nonunion solicitations, but on their frequency or regularity. 265 NLRB at 57 n.4.

Moreover, the Company's assertion (Br 22) that its tolerance of charitable solicitation may not be used as evidence of discrimination in a case like this one runs

counter to the settled case law that treats an employer's tolerance of nonemployee charitable solicitation as constituting discrimination under *Babcock & Wilcox*. As the D.C. Circuit noted in *Packard* (97 F.3d at 587-588 n.4), the Supreme Court itself found discrimination against union solicitations where the nonunion solicitations allowed were all charitable or noncommercial in nature. Thus, the Court held that an employer engaged in "discrimination" against nonemployee union organizers by allowing other outside entities that it characterized as "similarly situated" to solicit on its property. *NLRB v. Stowe Spinning Co.,* 336 U.S. 226, 233 (1949). As the lower court's decision, and that of the Board, in that case plainly show, those other outside entities were *all* charitable or noncommercial. *See NLRB v. Stowe Spinning Co.,* 165 F.2d 609, 610 (4th Cir. 1947) (appellate court noted that employer had allowed property to be used for church banquets, Ladies Aid society meetings, a Christmas party for school children, and a safety school for employees); *Stowe Spinning Co.*, 70 NLRB 614, 621 (1946) (Board cited same evidence).

Other cases have confirmed that an employer's tolerance of charitable solicitation by outside entities is probative evidence of discrimination against nonemployees engaged in union organizing activity. *See, e.g., Belcher Towing Co. v. NLRB*, 614 F.2d 88, 90 (5th Cir. 1980) (no-solicitation rule discriminatory if employer permits solicitation by charitable organizations or other nonunion solicitation but prohibits nonemployee union solicitation); *Food Lion, Inc.,* 304 NLRB 602, 604

(1991) (employer discriminated against nonemployee union organizer, where it permitted solicitation by Salvation Army, Knights of Columbus, Girl Scouts, Lions Club, and others). The Board's treatment of charitable and union solicitation as comparable activities in this context is in accord with the Supreme Court's view that "the degree of intrusion [on property rights] does not vary with the content of the material" being discussed. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 573 (1978) (affirming Board's interpretation of "mutual aid and protection" clause of Section 7 of the Act). [6]

Indeed, treating union and charitable solicitation as comparable activities avoids the impermissible temptation of employers to distinguish the two by treating other solicitation as beneficent while deeming union solicitations antagonistic to its

[6] Moreover, the Supreme Court has found that the workplace "is uniquely appropriate" for the exchange of employees' views concerning union representation, and an employer may not interfere with an employee's right to solicit union support absent a reasonable concern about maintaining production or discipline. *Republic Aviation v. NLRB*, 324 U.S. 793, 798, 802-803 and n.10 (1945). Consequently, an employer has no meaningful property right that can be invoked to justify interfering with employees' exercise of their Section 7 right to organize. *Id.* *Accord Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 803-804, 806-809 (D.C. Cir. 1987) (discrimination found where employer allowed "social solicitations for beneficent purposes" but prohibited employees from soliciting each other for organizing purposes); *NLRB v. Lou DeYoung's Market Basket, Inc.*, 406 F.2d 17, 22 n.3 (6th Cir. 1969) (discrimination found where employer allowed employees to solicit for Christmas gifts, but prohibited union solicitation); *NLRB v. Challenge-Cook Bros. of Ohio, Inc.*, 374 F.2d 147, 152-153 (6th Cir. 1967) (discriminatory for employer to permit bulletin board postings soliciting for social and religious organizations, while prohibiting postings of union materials).

business. To treat organizing activity as such would conflict with a fundamental principle--namely, that protecting the employees' right to self-organization "furthers the wholesome conduct of the business enterprise." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941). *See also NLRB v. Town & Country Electric*, 516 U.S. 85, 94 (1995) (union organizing is not inherently inconsistent with employer's interests); *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 n.4 (D.C. Cir. 1987) (rejecting notion that "union solicitation is more disruptive of the workplace and less promotive of employee morale and cohesion than beneficent solicitation"). Treating organizing activity in that manner would also undermine the equally fundamental principle that the right to self-organization lies "at the very core of the purpose for which the [Act] was enacted." *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978). *Accord Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1372 (7th Cir.), *cert. denied*, 118 S.Ct. 46 (1997*); Emery Realty, Inc. v. NLRB*, 863 F.2d 1259, 1262 (6th Cir. 1988).

Here, other than subjective preference, the Company has no meaningful basis for distinguishing between the solicitations by nonprofit organizations on the one hand, and those by Local 555 on the other. All stand on the same footing as regards the purpose behind the Company's no-solicitation rule, which presumably is to prevent disruption in the Company's operations and inconvenience to customers. The Company has not shown, nor even attempted to show, that Local 555's attempted

solicitation--necessarily brief discussions with employees about the union and the distribution of membership materials--was any more disruptive than those allowed by the Company, which involved similar distributions.[7]

D. Neither *Cleveland Real Estate Partners* Nor *Sandusky Mall* Precludes Enforcement

In *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 464 (6th Cir. 1996) ("*CREP*"), the Court held that, in a product-boycott setting, where the union is attempting to achieve its ends by harming an employer, union activity cannot be equated with charitable solicitation. As discussed below, the Court's disagreement with the Board in that case is not implicated here, as the Court expressly limited its holding in *CREP* to situations involving a union's economic attack against an employer. *See Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1213 (6th Cir. 1997). Where, as here, the union is engaging in core Section 7 organizing activity no more injurious to

[7] The Company cites (Br 17-19) numerous "employment discrimination" cases to make the point that a showing of discrimination cannot be made without evidence that those similarly situated have been treated differently. Implicit in the Company's attempt is a supposition that organizational activity is not similarly situated, that is, it is of less importance than charitable solicitations. To the contrary, as this Court has recognized, "core Section 7 rights are deserving of the greatest protection." *Meijer, Inc. v. NLRB*, 130 F.3d at 1213. Nor is there merit to the Company's contention (Br 12) that the Board's application here of the discrimination exception is prompted by "frustration" that the exception was narrowed by the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). To the contrary, the Board's decision is fully consistent with *Lechmere*, which did not alter the discrimination exception previously recognized by the Supreme Court in *Babcock & Wilcox*, 351 U.S. at 112. Instead, the issue in *Lechmere* was the application of *Babcock & Wilcox*'s inaccessibility exception--an issue that is not presented here. 502 U.S. at 539 (1992).

the employer's interests than charitable solicitation, the reasons for drawing distinctions between those two types of solicitations disappear.

In both *CREP*, 95 F.3d 457, 464 (6th Cir. 1996), and *Sandusky Mall Co. v. NLRB*, 242 F.3d 682 (6th Cir. 2001) ("*Sandusky Mall*"), the Court disagreed with the Board and found that "discrimination . . . means favoring one union over another, or allowing employer-related information while barring similar union-related information." *CREP*, 95 F.3d at 465; *Sandusky Mall*, 242 F.3d at 686. Hence, the Court held that an employer did not engage in discrimination by allowing charitable solicitation while barring nonemployee union agents from entering its property to urge consumers to boycott the employer's business. *CREP*, 95 F.3d at 464; *Sandusky Mall*, 242 F.3d at 692. The issue in those cases was whether union solicitation urging a consumer boycott--an activity aimed at putting economic pressure on an employer--is comparable to charitable and other nonunion solicitation for purposes of determining whether an employer has discriminated. *CREP,* 95 F.3d at 461-462; *Sandusky Mall*, 242 F.3d at 692. Although the Board adheres to its position in those cases, that issue is simply not presented in this case, where Local 555 sought access only to engage in organizing activity.

The Court has explicitly acknowledged the limited reach of the *CREP* decision. Thus, in *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1213 (6th Cir. 1997), the Court specifically stated that the *CREP* definition of discrimination favoring one union over

another applied to situations where a union is engaged in "non-organizational, informational picketing directed at the general public." *Id.* Noting that the "Supreme Court's jurisprudence reflects Congress' intent to allow the Board to delicately balance an employee's right to organize with an employer's property right," the Court explained that there exists a hierarchy of rights. *Id.* at 1216. Thus, as the Court stated, because "employee organizational rights are at the 'core' of the Act's concerns," they deserve "the greatest protection," and "employees' rights of self-organization should reflect the primacy of those rights over the employer's property rights." *Id.* at 1213. Explaining that it did "not wish to disturb the precarious doctrinal balance that the Supreme Court has established by blurring the categorical distinctions that the Court has instituted," the *Meijer* Court "decline[d] to adopt *CREP*'s narrow definition of discrimination" where a union was engaged only in organizational picketing. *Id.*

Similarly, *Sandusky Mall* itself limited the application of its decision when it framed "the specific issue before this court" as "whether [the employer] may be compelled to permit non-employee union members to trespass on the mall's property *for the purpose of distributing handbills urging mall customers not to patronize non-union employers*." *Sandusky Mall*, 242 F.3d at 685 (emphasis added). Because the Court already had "addressed precisely that issue in *Cleveland Real Estate Partners v. NLRB*," it considered itself bound to apply *CREP*'s narrow definition of discrimination. *Id.*

To decide the discrimination issues presented in those earlier cases, it was unnecessary to reach the question whether unlawful discrimination "means favoring one union over another, or allowing employer-related information." *CREP*, 95 F.3d at 465. Rather, it was sufficient to decide that the conduct involved in those cases "is not similar conduct to that of civil and charitable organizations who . . . use the mall in a limited way deemed beneficial." *Sandusky Mall*, 242 F.3d at 692. Inasmuch as the relevant language was unnecessary to the result, it was dicta, and another panel of the Court is free to disagree. *See BE&K Constr. Co. v. NLRB*, Nos. 99-6469 & 00-5012 (6th Cir. April 9, 2001), at slip op. 6 (court should "appropriately address[] only the case then before it"). *Accord Alexander v. Sandoval*, 2001 WL 408983 at *5 (U.S. Supreme Court, April 24, 2001) (courts are bound by holdings, not by language used in opinion); *Hagans v. Lavine*, 415 U.S. 528, 533 (1974) (where an issue was not raised in a case, the question remains open and a judicial decision is not binding precedent when a subsequent case raises the issue). Accordingly, another panel of the Court is free to apply a different definition of discrimination.

E. The Company's Additional Contentions Are Without Merit

The Company does not advance its cause by citing (Br 20) *Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37 (1983), in which the Supreme Court held that a union's First Amendment rights were not violated when it was denied access to a public school's internal mail system. As discussed above, an employer's

exclusion of nonemployee union solicitation will not be deemed discriminatory if the only nonunion solicitation it permits involves activities that are "integrally related" to its business. *Rochester General Hospital*, 234 NLRB 253, 259 (1978). *Accord Packard*, 97 F.3d at 592. Central to the Court's decision in *Perry* was the fact that the groups permitted to use the intraorganization mail system--namely, scouting and youth organizations--were engaged in activities of educational relevance to students, and, therefore, those activities were "integrally related" to the school's primary educational purpose, a fact that would be relevant under the Board's analytical framework. *Perry Education Assn.*, 460 U.S. at 48. Here, the Company does not claim--nor could it plausibly claim--that the nonunion solicitations it permitted are integrally related to the retail grocery business.

The Company is no more persuasive in relying on (Br 20) *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995), in which the court held that an employer did not discriminate by refusing to allow union postings on its bulletin boards. In that case, as the Seventh Circuit pointed out, the employer had strictly prohibited postings by such organizations as the Boy Scouts, Kiwanis, the VFW, the Red Cross, the United Way, and others, and permitted only a very narrow exception for the posting of employee "swap-and-shop" notices. *Id.* As the Seventh Circuit later held in *J.C. Penney Co., Inc. v. NLRB*, 123 F.3d 988, 997 (7th Cir. 1997), the

Guardian case is readily distinguishable from cases--like this one--in which an employer has taken an inconsistent, discriminatory approach to solicitation.

Finally, the Company's citation (Br 26) to the unpublished decisions in *NLRB v. Pay Less Drug Stores Northwest, Inc.*, 1995 WL 323832 (9th Cir. May 25, 1995), and *Riesbeck Food Markets, Inc. v. NLRB*, 1996 WL 405224 (4th Cir. July 19, 1996), is equally unpersuasive. Both of those cases involved a union boycott solicitation that sought to harm the employer's business. Thus, these decisions are comparable to this Court's decisions in *CREP* and *Sandusky Mall*, but distinguishable from this case.

Accordingly, under the principles discussed above, the Board was warranted in finding that the Company violated Section 8(a)(1) of the Act by disparately enforcing its no-solicitation rule against union solicitation.

F. The Arguments Made By *Amici* Do Not Compel a Different Result

The Salvation Army and the Camp Fire Boys and Girls, both non-profit organizations, and the Bi-Mart, Inc. chain of retail stores have filed amicus briefs in support of the Company's petition for review. The Salvation Army (Salvation Army Amicus Br. at p. 7) and the Camp Fire Boys and Girls (Camp Fire Amicus Br. at p. 5) assert, in identical language, that the Board's decision will "diminish the fundraising ability of charitable organizations by reducing the locations where charities are able to effectively solicit contributions from the public." Retail store chain Bi-Mart, Inc. contends (Bi-Mart Amicus Br. at p. 2) that the Board's decision precludes it from

permitting charitable solicitation at its stores, a blow to its campaign to foster good will in the communities it serves. Those arguments demonstrate the amici's misunderstanding of the Board's decision and are without merit.

As shown above, the Board's decision in this case is not a departure from precedent. Rather, it merely reiterates and applies (D&O 4, A 9) the Board's longstanding definition of discrimination--namely, that the law does not tolerate disparate treatment of unions that are engaging in non-boycott solicitations. Courts have acknowledged the permissibility of that standard at least as far back as *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 230-232 (1949). Because the amici have not asserted that their operations were affected by this rule previously, they cannot reasonably assert that, although the rule has not changed in half a century, it now deprives them of rights.

In any event, the amici's arguments are based on an illogical interpretation of the Board's decision. The Board's rule prohibiting the Company from discriminating against union organizing, in order to preserve the rights guaranteed to employees under Section 7 of the Act, does not mean that an employer cannot or will not permit charitable solicitation. As discussed above, the Board's decision does not require that an employer allow access to organizations that seek to harm the employer economically. Instead, the Board's decision merely requires that an employer grant equal opportunity to organizations that engage in similar conduct and have a similar

effect on the employer's ability to do business. The Board's attempt to ensure fair access to organizations is a proper goal of the National Labor Relations Act, which Congress entrusted the Board to oversee. *See Meijer, Inc.*, 130 F.3d at 1213.

Finally, Bi-Mart, Inc.'s interests are not implicated here. According to its statement of interest (Bi-Mart Amicus Br. at p. 1), Bi-Mart operates stores only in Washington and Oregon. Its business thus falls squarely within the jurisdiction of the Ninth Circuit, and the Court's decision in this case will not affect Bi-Mart's operations.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that judgment enter enforcing the Board's order as it pertains to the activities engaged in by Local 555.

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