

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROUNDY'S, INC.

AND

CASE 30-CA-17185

MILWAUKEE BUILDING AND  
CONSTRUCTION TRADES COUNCIL, AFL-CIO

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BRIEF OF THE ACTING GENERAL COUNSEL IN RESPONSE TO  
THE BOARD'S NOTICE AND INVITATION TO FILE BRIEFS

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**BRIEF OF THE ACTING GENERAL COUNSEL IN RESPONSE TO  
THE BOARD'S NOTICE AND INVITATION TO FILE BRIEFS**

On November 12, 2010, the National Labor Relations Board issued a Notice and Invitation to File Briefs in the above captioned case. The Board asked the parties and interested amici to address the following issues:

(1) In cases alleging unlawful employer discrimination in nonemployee access, should the Board continue to apply the standard articulated in Sandusky Mall Co., 329 NLRB 618, 623 (1999), enf. denied 242 F.3d 682 (6th Cir. 2001)?

(2) If not, what standard should the Board adopt to define discrimination in this context?

(3) What bearing, if any, does Register Guard, (351 NLRB 1110 (2007), enf. denied in part 571 F.3d 53 (D.C. Cir. 2009), have on the Board's standard for finding unlawful discrimination in nonemployee access cases?

**STATEMENT OF THE CASE**

This case involves Roundy's, Inc. (the Respondent) prohibiting nonemployee agents of Milwaukee Building and

Construction Trades Council, AFL-CIO (the Council) from distributing area standards/do-not-patronize handbills at two of its Pick N Save stores, while permitting the widespread solicitation and distribution of other entities' literature. The case before the Board previously included 23 other stores at which the Board has already found a violation because the Respondent did not have an exclusionary property interest. Therefore, the Board found it unnecessary to also address the issue of discrimination at those stores.<sup>1</sup>

#### **STATEMENT OF THE FACTS**

From early April 2005 through late June 2005, Council representatives peacefully distributed informational handbills in front of the Respondent's stores. The handbills truthfully identified the Respondent or Pick N Save as using nonunion contractors who did not pay their employees prevailing wages and benefits to build or remodel its stores. The handbills accused the Respondent of saving money by using cheap labor to build and remodel its stores

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<sup>1</sup> 356 NLRB No. 27 (November 12, 2010), slip op. at 1. The Board severed the discrimination allegations related to the two stores at issue here. Id., slip op. at 1-2.

and not passing those savings on to consumers, and they asked consumers not to patronize the Respondent. Some of the handbills also said that consumers could achieve savings of their own by shopping at competitor stores, pointing out price differences favoring products sold by competitors. The handbills also urged consumers to contact the Respondent in support of the Council's efforts to protect the prevailing wage rates and benefits of its member union employees. 356 NLRB No. 27, slip op. at 4.

In every instance of Council handbilling, Respondent officials told the handbillers to leave the area in front of the store, and undertook to expel them by contacting police (or having the landlord contact police) to evict the handbillers, who generally left the area as a result.

Ibid.

While the Respondent maintains a facially broad no solicitation/no distribution policy, the parties stipulated at the hearing that the Respondent has permitted widespread solicitation and distribution of literature both inside and outside its stores. This has included solicitation and fund-raising by the Hunger Task Force, the Red Cross, and Second Harvest; fund-raising sales by Salvation Army

bellringers, Boy Scouts and Girl Scouts, Veterans of Foreign Wars, and Shriners; and solicitations by various other civic, political, and/or charitable groups. In addition, there was uncontradicted testimony at the hearing that the Respondent permitted: a state senator to set up a table inside of one of its stores in order to distribute campaign literature or otherwise meet with potential voters; an environmental group to solicit support and contributions outside its stores; a judicial candidate to hand out campaign literature; and an anti-Wal-Mart citizens group to distribute handbills urging customers to contact zoning officials. The Respondent also maintains bulletin boards inside an unspecified number of its stores on which the public may advertise items for sale or advertise community and organizational events. Ibid; Transcript at 115-16.

#### **LEGAL FRAMEWORK**

In NLRB v. Babcock & Wilcox, 351 U.S. 105, 112 (1956), the Supreme Court distinguished between the rights of employees to engage in union activity on an employer's premises and the rights of nonemployees to do so, establishing a general rule that an employer may prohibit

nonemployee distribution of literature on the employer's property. The Court, however, recognized two exceptions to this general rule. The first exception, referred to as the "inaccessibility exception," holds that an employer violates Section 8(a)(1) of the Act by denying a union access to its property where the union has no other reasonable means of communicating its organizational message. The second exception, referred to as the "discrimination exception," holds that an employer violates Section 8(a)(1) of the Act by prohibiting nonemployee distribution of union literature if its actions "discriminate against the union by allowing other distribution." Id., at 112.

Although Lechmere, Inc. v. NLRB, 502 U.S. 527, 533-537 (1992), makes clear that Babcock's inaccessibility exception is narrow, the Court reiterated that an employer may not exclude non-employees engaged in protected activity where it is shown that "the employer's access rules discriminate against union solicitation." 502 U.S. at 535 (quoting Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 205 (1978)). That the Court recognized the continued viability of the discrimination exception is demonstrated by its observation

that the employer had consistently enforced its no solicitation/no distribution policy against, among others, the Salvation Army and the Girl Scouts. Such enforcement is significant only to determining whether the employer engaged in Babcock discrimination. Thus, as the Board noted in Sandusky Mall Co., 329 NLRB 618, 620 (1999), enf. denied 242 F.3d 682 (6th Cir. 2001), Lechmere "did not disturb the discrimination exception articulated in Babcock & Wilcox." Accordingly, even after Lechmere, "[a]n employer may not exercise its usual right to preclude union solicitation and distribution on its property if the employer permits similar activity by other nonemployee entities 'in similar, relevant circumstances.'" Lucile Salter Packard Children's Hospital v. NLRB, 97 F.3d 583, 587 (D.C. Cir. 1996) (quoting Jean Country, 291 NLRB 11, 12 n.3, (1988)).

**THE BOARD'S STANDARD FOR DETERMINING WHETHER AN EMPLOYER HAS UNLAWFULLY DISCRIMINATED IN PROHIBITING NONEMPLOYEE DISTRIBUTION OF UNION LITERATURE**

In cases subsequent to Lechmere, the Board has frequently found discrimination when an employer denies a union access to its property while permitting other individuals, groups, and organizations to use its premises

for various activities. These cases have included unions seeking access in order to disseminate a wide variety of protected messages, including area standards and boycott messages directed at consumers, and organizing messages directed at employees. See, e.g., Sandusky Mall, 329 NLRB at 620 (area standards/boycott handbilling); Be-Lo Stores, 318 NLRB 1, 10-12 (1995), enf. denied in relevant part 126 F.3d 268 (4th Cir. 1997) (unfair labor practice picketing); Lucile Salter Packard, 318 NLRB 433, 433 (1995), enfd. 97 F.3d 583 (D.C. Cir. 1996) (organizing); Price Chopper, 325 NLRB 186, 186-187 (1997), enfd. sub nom. Four B Corp. v. NLRB, 163 F.3d 1177 (10th Cir. 1998) (organizing off-duty employees).

To determine whether an employer has engaged in "disparate treatment" in denying nonemployee union agents access to engage in protected activity on its property (see Price Chopper, 325 NLRB at 186; Food Lion, Inc., 304 NLRB 602, 604 (1991)), the Board looks to whether the employer permits, "by rule or practice," similar activity by other outside organizations in similar circumstances. Food Lion, 304 NLRB at 604. The Board will not find discriminatory treatment if the only nonunion solicitations permitted are "a small number of isolated 'beneficent acts,'"

constituting "narrow exceptions" to the employer's otherwise absolute policy against outsider solicitation. Sandusky Mall, 329 NLRB at 621; Hammary Mfg. Corp., 265 NLRB 57, 57 n.4 (1982). But discrimination is established by evidence that an employer frequently permits civic, commercial, or charitable solicitation. Sandusky Mall, 329 NLRB at 618-19, 20-21.

Thus, Babcock discrimination will be found by the Board when the employer has treated like activity by different entities differently. That is, the Board looks to whether the employer distinguishes between solicitation and distribution by labor organizations and solicitation and distribution by other entities. For example, in Sandusky Mall, the Board rejected the mall owner's argument that it did not discriminate against union activity because it denied the union access pursuant to a broader policy of limiting access to those entities that, in the mall's judgment, might benefit the mall and its tenants. The Board characterized the policy as little more than permitting access for solicitation that it liked and forbidding solicitation that it disliked; in support of its conclusion it quoted the D.C. Circuit's opinion that "to allow such a subjective criterion to govern access would

eviscerate [S]ection 8(a)(1)'s purpose of preventing discriminatory treatment of unions by employers who permit other nonemployee entities to solicit on the employer's property." 329 NLRB at 621-22, quoting Lucile Salter Packard, 97 F.3d at 591.

Of course, without regard to evidence of disparate treatment, an employer may also be found to violate the Act if the evidence demonstrates that the employer was motivated by anti-union animus or that its asserted justification was a pretext. See, e.g., Salmon Run Shopping Center, LLC, 348 NLRB 658, 659 (2006), enf. denied 534 F.3d 108 (2d Cir. 2008) (finding a violation under Babcock because "the Respondent's decision to deny the Union access to its property was based not on a determination that the Union's intended activity would negatively affect [it], but solely on the Union's status as a labor organization and its desire to engage in labor-related speech"). See also Four B Corp. v. NLRB, 163 F.3d 1177, 1184 (10th Cir. 1988) (court enforced Section 8(a)(1) Babcock discrimination violation, because "[s]ubstantial evidence supports the Board's finding that this ban was motivated by an anti-union animus"; employer presented no evidence of any neutral, non-discriminatory reason for

adopting a new no-solicitation policy, and presented no evidence that the union activity caused any disruption).

**THE BOARD SHOULD RETAIN ITS BABCOCK DISCRIMINATION STANDARD, NOTWITHSTANDING ADVERSE CIRCUIT COURT DECISIONS, AS IT PROTECTS SECTION 7 RIGHTS AND PREVENTS DISCRIMINATION AGAINST PROTECTED CONDUCT**

As the Board has recognized, the essence of discrimination is the failure to treat like things alike. See, e.g., Hamilton Plastics, 291 NLRB 529, 532 (1988) (“[d]iscrimination consists in treating like cases differently,” quoting Frosty Morn Meats, 296 F.2d 617, 621 (5th Cir. 1961)). The Board’s Sandusky Mall standard considers precisely this question -- it looks to whether the employer has treated like activity, i.e., solicitation and distribution, alike, and it finds a violation where disparate treatment against the like activity protected by the Act is shown. See Sandusky Mall, 329 NLRB at 622 (finding a violation because the employer “prohibits the dissemination of a message protected by the Act while at the same time permitting the dissemination of a wide range of other messages”).

Some circuit courts have recognized this, and have enforced Board decisions finding Babcock discrimination.

Thus, in Lucille Salter Packard, 97 F.3d at 588-592, the D.C. Circuit enforced the Board's finding that a hospital discriminatorily prohibited a nonemployee union agent from distributing organizing literature outside hospital's cafeteria, where the employer permitted insurance companies, child services organizations, credit unions, and several vendors to solicit employees on hospital property. In Four B Corp. v. NLRB, 163 F.3d 1177, 1184 (10th Cir. 1998), the Tenth Circuit enforced the Board's finding that an employer discriminated against a union by banning solicitation by union organizers, where the employer permitted various charitable groups to solicit customers periodically.

Four other circuit courts (the 6th, 2d, 4th and 9th), however, have refused to enforce Board findings of Babcock discrimination, holding that union solicitation or distribution is not comparable to nonunion solicitation or distribution. See Albertson's Inc. v. NLRB, 301 F.3d 441, 451 (6th Cir. 2002) ("an employer does not discriminate against a union where the employer allows charities to disseminate information on the employer's property while it bars unions from doing the same, without more"); Sandusky Mall Co. v. NLRB, 242 F.3d 682, 692 (6th Cir. 2001) ("the

conduct of the nonemployee union handbillers is not similar conduct to that of civil and charitable organizations" whose activity the mall considered beneficial); Salmon Run Shopping Center, LLC v. NLRB, 534 F.3d 108 (2d Cir. 2008) (charitable solicitations or distribution of educational materials are not valid comparisons to union distribution of literature promoting its apprenticeship programs or protesting the failure to pay area standards wages); Be-Lo Stores v. NLRB, 126 F.3d 268, 284 (4th Cir. 1997) (in dictum, expressing doubt that, after Lechmere, Babcock discrimination applies to union "protest or economic activities as opposed to organizational activities"); Riesbeck Food Markets., Inc. v. NLRB, 91 F.3d 132 (4th Cir. 1996), 1996 WL 405224, at \*3 (4th Cir. July 19, 1996) (unpublished) (employer permitted civic and charitable solicitations "out of feelings of altruism or civic duty; such motivations . . . would not allow for the union's do-not-patronize distribution"); NLRB v. Pay Less Drug Stores Northwest, Inc., 1995 WL 323832, at \*1 (9th Cir. 1995) (unpublished) ("[a] business should be free to allow local charitable and community organizations to use its premises, whether for purely altruistic reasons or as a means of cultivating good will, without thereby being compelled to

allow the use of those same premises by an organization that seeks to harm that business.”).

Two of these circuits (the 6th and 2d) have interpreted the Babcock discrimination exception in a particularly extreme manner, limiting the activity they will compare to union solicitation or distribution only to other solicitation or distribution which involves the expression of a message on the same subject -- a standard that makes the Babcock discrimination exception inapplicable in virtually all cases in which a union seeks access for solicitation or distribution. See Cleveland Real Estate Partners v. NLRB, 95 F.3d 457, 465 (6th Cir. 1996) (“the term ‘discrimination’ as used in Babcock means favoring one union over another, or allowing employer-related information while barring similar union-related information”), which has been consistently followed in the Sixth Circuit (Sandusky Mall, 242 F.3d at 686; Albertson’s, 301 F.3d at 455 n.6), and approved by the Second Circuit (Salmon Run, 534 F.3d at 117 (concluding, in “substantial agreement” with the Sixth Circuit that “[t]o amount to Babcock-type discrimination, the private property owner must treat a nonemployee who seeks to communicate on a

subject protected by Section 7 less favorably than another person communicating on the same subject" ) ).

In essence, these courts would allow employers to distinguish among the outside solicitation and distribution they will permit or deny based on the nature of the message or its perceived impact on the employer's business. Such an approach ignores the legal protection that Section 7 accords union related messages and abandons any true inquiry into whether an employer's action discriminates based on Section 7 activity. In contrast, the Board's definition of discrimination is based on the recognition that when an employer permits outside charitable, civic and commercial solicitation and distribution but prohibits Section 7 protected solicitation and distribution, the basis for the differing treatment is the Section 7 nature of the activity. As the D.C. Circuit recognized, a contrary approach, as embraced in the above-cited cases, "would eviscerate [S]ection 8(a)(1)'s purpose of preventing discriminatory treatment of unions by employers who permit other nonemployee entities to solicit on the employer's property." Lucile Salter Packard, 97 F.3d at 591.

The approach reflected in the Board's analysis and that of the court in Lucile Salter Packard is the one adopted by the Supreme Court in NLRB v. Stowe Spinning Co., 336 U.S. 226, 233 (1949), cited with approval by the Court in its discussion of discrimination in Babcock, 351 U.S. at 112. In Stowe Spinning, 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. As the lower court and Board decisions 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) (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).

Nor does the Act permit a court or an employer to make distinctions based on the potential impact on the employer's property or business of a union's solicitation and distribution. All Section 7 activity, including peaceful handbilling, lawful picketing, and organizing, has

the potential to adversely impact an employer in some sense: activity that publicizes a labor dispute criticizes an employer and is intended to, at a minimum, cast it in a bad light or, in some cases, to inflict economic harm in the form of a boycott; even purely organizing activity such as solicitation of employees may be perceived to threaten an employer's economic interest in the sense that collective bargaining may raise an employer's labor costs. Yet, all are legally recognized actions protected by Section 7, and one of the very purposes of the Act is to prevent employer discrimination against such conduct.

In contrast to the adverse court precedent cited above, the Board's standard more effectively accomplishes this purpose. Thus, while the Board does not require preferential access for union solicitation or distribution, which would be improper under Babcock and Lechmere, it does treat all solicitation and distribution equally, thereby protecting Section 7 solicitation and distribution from being disparately excluded because of its disfavored content. The Board's standard is therefore entirely consistent with Babcock and Lechmere and furthers the purposes and policies of the Act, unlike the adverse court cases cited above.

Finally, we note that even some Board Members who have taken issue with the Board's Sandusky Mall standard have noted that it is appropriately more protective of Section 7 rights than the overly-restrictive Sixth Circuit standard. See Albertson's, Inc., 332 NLRB 1132, 1138 (2000) (Hurtgen, dissenting) ("it would appear that, in the Sixth Circuit, an employer would not violate the Act even if it allowed the NAACP to solicit for membership and denied a union the opportunity to do so. I need not go as far as the Sixth Circuit"); Price Chopper, 325 NLRB at 190 (Higgins, dissenting) (same). Accordingly, for all these reasons, we urge the Board to retain its Babcock discrimination standard, as articulated in Sandusky Mall.

**THE RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCRIMINATING AGAINST THE COUNCIL'S HANDBILLING ACTIVITY**

In the instant case, it is clear that Respondent discriminated against protected activity by permitting other entities access to engage in solicitation and distribution activity on its property, while prohibiting the Council's solicitation and distribution. As the Chief Administrative Law Judge stated in the instant case, "Sandusky Mall is controlling and the decision cannot be distinguished in any meaningful way." 356 NLRB No 27, slip

op. at 5. Here, as in Sandusky Mall, the Respondent excluded handbillers who publicized an area standards dispute and urged a boycott, while permitting widespread solicitation and distribution of literature by various civic, political, and charitable groups both inside and outside its stores. Here, as in Sandusky Mall, the discrimination is shown by the employer's tolerance of other nonunion solicitation on its property. And here, as in Sandusky Mall, the nonunion solicitation was more than the isolated conduct that would negate a finding of discrimination. Cf. Hammary Mfg. Corp., 265 NLRB at 57.

Indeed, the facts at issue here may well present a stronger case for a violation than Sandusky Mall because, in that case, the mall owner had a policy against permitting controversial or politically divisive solicitation on its property and it consistently applied that policy. Here, the Respondent permitted nonunion political solicitation on its property, clearly encompassing controversial topics, as well as solicitation by an environmental group, which might well have offended some of Respondent's customers who were not favorably disposed to the groups "green" message. Tolerance of such arguably controversial solicitation in this case offers

more support for a finding of disparate treatment here than existed in Sandusky Mall. Therefore, it is clear that the Respondent's conduct violated Section 8(a)(1) and, as in Sandusky Mall, the Board should find a violation here.

**REGISTER GUARD, WHICH ADDRESSED RULES APPLIED TO EMPLOYEES, HAS NO BEARING ON THE BOARD'S STANDARD FOR FINDING UNLAWFUL DISCRIMINATION IN NONEMPLOYEE ACCESS CASES**

Finally, we believe the Board's decision in Register Guard, 351 NLRB 1110 (2007), enf. denied in part 571 F.3d 53 (D.C. Cir. 2009), which addressed employer rules applied to employees, has no bearing on the Board's standard for finding unlawful discrimination in nonemployee access cases. Register Guard dealt with whether an employer unlawfully interfered with protected activity when it disciplined an employee for using its e-mail system for Section 7 purposes. Id., at 1114, 1117-19.

We continue to adhere to the positions set forth in our February 8, 2007 brief to the Board in Register Guard ("GC Brief"), at pp. 6-18, namely that: (1) employees' right to communicate with their co-workers on protected subjects through employer-owned e-mail systems is determined under the balancing of employees' Section 7

interests and employers' business interests mandated by Republic Aviation v. NLRB, 324 U.S. 793, 797-98 (1945) (GC Brief, at 6-9); (2) rules prohibiting employees' nonbusiness use of e-mail are presumptively overbroad to the extent they include the prohibition of Section 7 activity and are unlawful, absent a showing that special circumstances justify the ban (GC Brief, at 10-17); and (3) employees engaging in Section 7 activity must be granted e-mail access and usage commensurate with that granted to employees for other nonwork activities, including personal e-mail usage (GC Brief, at 18). However, the fundamental instruction of Republic Aviation to strike a particularized balance of employee and employer interests is inapplicable to nonemployee access cases. As the Court noted in Babcock (351 U.S. at 113), "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," but "no such obligation is owed nonemployee organizers". Hence, the Board's standards in employee and nonemployee cases must be determined independently of each other, and therefore the Board's discussion of discrimination in Register Guard should not govern the

Board's standard for finding unlawful discrimination in nonemployee access cases.

We continue to adhere to the positions we articulated in Register Guard. Thus, we believe that by refusing to apply Republic Aviation in Register Guard, the Board incorrectly treated employees as if they were nonemployees. For this reason, we submit that Register Guard adopted an inappropriate analysis and should be overruled.

In addition, any discrimination standard applied to employees should be more -- not less -- protective of Section 7 rights than a discrimination standard applied to nonemployees. But the standard articulated in Register Guard allows employers to maintain broad rules prohibiting employee use of e-mail for Section 7 activity, even when they permit employees to use e-mail for other non-business purposes. Such a discrimination standard is clearly less protective for employees than the non-employee standard

reflected in the Board's Sandusky Mall standard. We believe that the principles of Republic Aviation, Babcock, and Lechmere as to the relative rights of employees and non-employees therefore support overruling the Board's opinion in Register Guard as well.

Respectfully submitted,

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This 7th day of January, 2011

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CERTIFICATE OF SERVICE

This is to certify that the Acting General Counsel of the National Labor Relations Board served this BRIEF OF THE ACTING GENERAL COUNSEL IN RESPONSE TO THE BOARD'S NOTICE AND INVITATION TO FILE BRIEFS by electronic mail on all parties at the e-mail addresses listed below:

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Dated at Washington, D.C.  
this 7th day of January 2011