

Final Brief

ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1027

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 400

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

KROGER LIMITED PARTNERSHIP I

Intervenor

**ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF OF INTERVENOR FOR RESPONDENT
KROGER LIMITED PARTNERSHIP I**

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UNITED FOOD AND COMMERCIAL)	
WORKERS UNION, LOCAL 400,)	
)	
Petitioner,)	Case No. 20-1027
)	
V.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	
Respondent,)	
)	
<u>KROGER LIMITED PARTNERSHIP I,</u>)	
)	
Intervenor.)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Intervenor, Kroger Limited Partnership I (“Kroger”), certify the following:

A. Parties and Amici

The Petitioner in this case, United Food and Commercial Workers Union, Local 400 (the “Union”) was the Charging Party before the National Labor Relations Board (the “Board”) in the proceeding below (Board Case No. 05-CA-155160, 368 NLRB No. 64 (2019)). Kroger was the Respondent in that proceeding, and the Board’s General Counsel was a party.

For purposes of the disclosure statement required by Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Kroger Limited Partnership I is an

Ohio limited partnership. Its general partner is KRGP Inc. and its limited partner is The Kroger Co. KRGP Inc. is wholly owned by The Kroger Co. The Kroger Co. is a publicly-traded corporation and owns 10% or more of the stock of Kroger Limited Partnership I.

B. Rulings Under Review

The matter under review is a September 6, 2019 Decision and Order of the Board, reported at 368 NLRB No. 64, in which the Board dismissed an unfair labor practice complaint against Kroger. The complaint had alleged, based on a charge filed by the Union, that Kroger unlawfully denied property access to a nonemployee union agent.

C. Related Cases

The Decision and Order under review has not previously been before this Court, or any other Court.

Dated: September 2, 2020

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GLOSSARY

Act	National Labor Relations Act (29 U.S.C. § 151, et seq.)
Board	National Labor Relations Board
Br.	Opening brief of Petitioner United Food and Commercial Workers Union, Local 400
Exh.	Exhibit
GC	General Counsel of the Board
JA	Joint Appendix
Kroger	Kroger Limited Partnership I
Tr.	Transcript
Union	United Food and Commercial Workers Union, Local 400

Statutes and Regulations

All applicable statutes are contained in the Brief for Respondent.

ARGUMENT SUMMARY

Intervenor Kroger hereby adopts the Jurisdictional Statement, Statement of the Issue, Statement of the Case and Standard of Review contained in Respondent's Brief. Pursuant to Circuit Rule 28(d)(2), this Brief of Intervenor for Respondent will supplement the arguments in Respondent's Brief by focusing on points not made or elaborated upon therein.

According to the U. S. Supreme Court precedent in *Babcock*, nonemployee union representatives must be granted access to an employer's property only in limited circumstances. Under the so-called non-discrimination exception, an employer may not "discriminate against the union" by exercising its general right to exclude nonemployee union agents while "allowing other distribution." In *Sandusky Mall* and similar cases prior to the Board's instant decision, the Board had interpreted the non-discrimination exception so broadly that employers who allowed more than sporadic civic or charitable activities to take place on their property were deemed to have waived any right to exclude nonemployee union agents.

The clear purpose of the *Babcock* non-discrimination exception is to prevent an employer from singling out a union for disparate treatment. Accordingly, the Board's new test, which requires an employer to grant access to union representatives in instances where it has previously granted access for activities similar nature, correctly limits the exception to employer activity that is truly

discriminatory. Applying that standard to this case, the Board reasonably determined that Kroger did not commit an unfair labor practice when it excluded nonemployee union agents seeking to enlist support for a boycott of Kroger's store, since Kroger had previously allowed only periodic access to civic and charitable organizations.

While the Union now seeks to argue that Kroger harbored antiunion animus in excluding the Union's representatives, that argument is statutorily barred, for the reasons explained in Respondent's Brief. Moreover, even if the Court were to consider the Union's new claims concerning purported circumstantial evidence that was ignored by the Board, such claims fall apart upon the slightest scrutiny. In particular, the Union's allegation that antiunion animus can be inferred from a letter to Kroger from its landlord in March, 2014, is without any factual or legal merit, given that the letter was not written by Kroger, did not single out union activity, and was flatly ignored by the union representatives on the day in question. In sum, the Union has chosen not to engage with the Board's new standard for interpreting the scope of the non-discrimination exception under *Babcock*, and has put forward no basis for this Court to upset the Board's dismissal of the complaint.

ARGUMENT

THE BOARD RATIONALLY DISMISSED THE COMPLAINT ALLEGING THAT KROGER VIOLATED THE NATIONAL LABOR RELATIONS ACT

A. The Board's Interpretation of Employer Property Rights is Legally Sound

Under the precedents of the United States Supreme Court, an employer generally "cannot be compelled to allow distribution of union literature by non-employee organizers on the employer's property." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992); *see also Babcock & Wilcox*, 351 U.S. 105, 112 (1956) (noting that prior Board holdings to the contrary "failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees"). In *Babcock*, the Court established that this general rule -- that an employer has the right to exclude such non-employees -- applies: (1) if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message; and (2) the employer's "notice or order" prohibiting such distribution "does not discriminate against the union by allowing other distribution." *Babcock*, 351 U.S. at 112; *see also Lucile Salter Packard Children's Hosp. at Stanford v. NLRB*, 97 F.3d 583,587 (1996) (noting that this latter "non-discrimination" exception applies if an employer "denies union access to its premises while allowing similar distribution or solicitation by nonemployee entities other than the union").

In *Lechmere*, the Supreme Court also explained that it had previously admonished the Board for its overly expansive reading of the two exceptions to the general *Babcock* rule permitting exclusion of non-employee union organizers. *Lechmere*, 502 U.S. at 535. The Court noted that it had held, in a case following *Babcock*, that "trespasses of nonemployees are 'far more likely to be unprotected than protected'" by Section 7 of the Act. *Id.* (quoting *Sears Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978)). The Court then recited this portion of its *Sears* decision:

While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity." 436 U.S. at 205 (emphasis added; footnotes omitted).

Lechmere, 502 U.S. at 535 (emphasis added).

As described more fully in Respondent's Brief, the Board's Decision and Order in this case, recognized that its then-existing precedent, *Sandusky Mall Co.*, 329 NLRB 618 (1999), had failed to capture the essence of the *Babcock* discrimination exception. (JA 13-15.)¹ Specifically, the Board rejected the principle of *Sandusky Mall Co.* and similar cases to the effect that granting permission to any

¹ Record references in this final brief are to the Joint Appendix ("JA") filed on August 19, 2020.

substantial civic, charitable or commercial activity deprived the employer of the ability to enforce its property rights as to any type of union activity. Noting that no reviewing court had ever adopted such a broad reading of *Babcock*, the Board announced a new standard under which an employer does not violate the Act unless it denies nonemployee union representatives access to its property for activities similar in nature to those it permits by others. (JA 14-15.)

This interpretation of *Babcock*'s non-discrimination exception is reasonable in light of its purpose. *Babcock* itself offered little guidance, and subsequent Supreme Court cases have not directly engaged with the non-discrimination exception. Nevertheless, given that the purpose of the *Babcock* non-discrimination exception is to prevent an employer from singling out a union for disparate treatment -- the employer's notice or order may not "discriminate against the union," *Babcock*, 351, U.S. at 112 -- the Board's new test correctly forbids employer activity that is truly discriminatory. See e.g., *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 249 (1981) (noting that, in a case involving unlawful sex discrimination under Title VII of the Civil Rights Act of 1964, "[i]t is the plaintiff's task to demonstrate that similarly situated employees were not treated equally").

As the Board noted, despite the terse language in *Babcock*, the Supreme Court's decision in an access-related First Amendment challenge brought by a union is enlightening. (JA 13-14, n.18 (citing *Perry Education Assoc. v. Perry Local*

Educators' Assn., 460 U.S. 37, 48 (1983).) The Court in *Perry* noted that, even if the defendant public school had created an open forum with respect to its internal mail system (by granting access to the Cub Scouts, the YMCA and parochial schools), the right of access would extend only to “other entities of a similar character.” *Id.*

In addition, this Circuit described the non-discrimination exception as follows:

An 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 Slater, 97 F.3d 583, 587 (citing *Jean Country*, 291 N.L.R.B. 11, 12 n. 3 (1988)).

In sum, the Board’s decision to adopt the more narrow position of the numerous Circuit Courts of Appeal on the scope of the *Babcock* exception (and, indeed, to be more favorable to nonemployee access by union representatives than the Sixth or Second Circuits (JA 14)), is legally sound.²

B. The Board’s Finding that Kroger Did Not Discriminate Against the Nonemployee Union Representatives with Regard to Property Access Is Supported By Substantial Evidence

² As Respondent’s Brief notes, the Union has also failed to mention the Board’s new standard, much less properly preserve an argument that it is inappropriate. (Respondent’s Brief 22.)

1. It is undisputed that there were no attempts to petition Kroger customers to boycott the store other than that by the Union's representatives

The Petitioner's Brief does not contain any argument against the Board's conception of the *Babcock* non-discrimination standard, and moreover, does not contend that there was evidence of any boycott activity that was permitted by Kroger before the Union's nonemployee representatives were asked to leave. Under the circumstances, the Board's application of the non-discrimination standard is, therefore, conceded to be supported by the evidence, and indeed there is substantial evidence in the record to establish that Kroger never granted permission to any nonemployee picketers or those engaging in boycott activity. (JA 15.) As such, the Board's decision rests upon substantial evidence and should be upheld.

2. The Union's Purported Evidence of Discriminatory Motive Does Not Exist

Instead of engaging with the disparate treatment analysis that was alleged and litigated by the parties, the Union now purports to advance circumstantial evidence that Kroger harbored antiunion animus against the Union. While Respondent's Brief covers the reasons this is procedurally improper, Kroger will demonstrate below that, even if such an argument could be raised at this point, the thin reed of circumstantial evidence pressed by the Union is utterly without support in the record.

First, the Union claims (without citation) that, "[i]n excluding the union representative from the shopping center parking lot, Kroger relied solely on the letter

from its landlord dated March 25, 2014.” (Petitioner’s Brief 14.) Although this allegation itself is only the first step in an attempted multi-step process of guilt by association, it is nevertheless flatly contradicted by the record evidence.³ Notably, the Union has never asserted in this matter that Kroger did not have a state law property right to exclude whomever it chose from the premises in question. Rather, the undisputed evidence shows that the March 2014 letter from Kroger’s landlord was (unsuccessfully) used as a means of showing the nonemployee Union representatives that they had no legal right to be there, as they claimed. (JA 6-8.) The idea that this letter – which was not authored by Kroger, was not limited to union activity, and was not used to any effect whatsoever on the instance in question – is now the lynchpin of a never-before-advanced union animus theory is perplexing to say the least.

The Union also asserts (again without any attribution) that Kroger “permitted every sort of soliciting, handbilling, and other communicative, activity other than the union activity at issue in this case.” This is simply false. The record clearly

³ Among other unsupported claims about the March, 2014, letter from Kroger’s landlord, the Union now asserts that it “singles out” union activity and “explicitly referred to ‘labor unions’ as a target.” (Petitioner’s Brief 16-17.) This is almost precisely the opposite of the truth. The letter is quite plainly and expressly inclusive of “any” protesting and picketing activity, “explicitly” mentioning labor unions as a means of saying that the rules apply “whether or not involving a labor union.” (JA 6.) In other words, unions were singled out only as an express example that they were not being singled out.

shows that, while Kroger permitted sporadic access to a few charitable and civic groups, other nonemployees of the type the Union mentions (including those attempting to engage commercial activity) were denied permission, or asked to leave if they entered without permission. (JA 11.)

Desperately trying to bring the March 2014 letter back into the picture, the Union baldly asserts that this letter was what “granted Kroger authority” to take the “unprecedented action” of calling police. (Petitioner’s Brief 16.) Yet, once again, the record is quite clear that the March 2014 letter was neither the authority for calling the police (which, again, the Union has never challenged), nor the reason the police were called. Rather, the police were called because, unlike any of the other unauthorized nonemployees discussed during the hearing, the Union representatives claimed they had a right to remain, refused to leave when asked, and stated that they “would only listen to the blue” (i.e., would not stop approaching customers with their “I will not shop” petition until the police told them to do so). (JA 8.) Perversely, the Union now wishes to leverage this trespass conduct to its benefit by characterizing Kroger as having “permitted” all manner of other activity simply because there was no need to present a letter or call the police to get other groups to leave.

In sum, the Union has completely failed to address the issue of the *Babcock* discrimination exception, and placed all of its argument on what it claims is a

smoking gun letter that should have been considered by the Board. This argument is unavailing for many reasons, not least of which is that the Union failed to preserve such a claim, as detailed in Respondent's Brief. Yet, even considering the Union's argument on its own terms, literally every aspect of the argument is unsupported by record evidence. In any event, there is no basis whatsoever for the Court to upset the Board's dismissal of the complaint in this case.

CONCLUSION

For all these reasons, Kroger respectfully requests that the Court enter a judgment denying the Union's petition for review.

Dated: September 2, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Circuit Rule 32(a)(7), excluding the parts of the motion exempted by Circuit Rule 32(e)(1), Kroger certifies that this document contains 2,246 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because:

This document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: September 2, 2020

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CERTIFICATE OF SERVICE

I certify that on September 2, 2020, I filed the foregoing Brief of Intervenor for Respondent with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

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