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Labor Law--Nonemployee Union Organizers Granted Access to Company Property for Solicitation Purposes--*Solo Cup Company and United Papermakers and Paperworkers, AFL-CIO*

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RECENT DEVELOPMENTS

LABOR LAW—Nonemployee Union Organizers Granted Access to Company Property for Solicitation Purposes—*Solo Cup Company and United Papermakers and Paperworkers, AFL-CIO*.*

Solo Cup Company¹ is one of several businesses located in the Calumet Industrial District (CID), a privately owned industrial park in south Chicago.² Over ninety-five per cent of Solo's employees commute to the park by automobile from a large, heavily populated metropolitan area.³ A private road which intersects a heavily traveled public highway is the only automobile entrance to the plant.⁴ A dispute arose when the CID, pursuant to its rule prohibiting nonemployee solicitation and distribution of literature on the park's premises, ejected certain nonemployee union organizers who were soliciting along the private road and in the parking areas of Solo's plant.⁵ In the hearing before the NLRB's trial examiner the company argued that since the union had alternative means by which it could reach the employees, enforcement of a no-solicitation rule was justified under the Supreme Court's decision in *NLRB v. Babcock & Wilcox Co.*⁶ The union argued that the company's no-solicitation rule violated section 8(a)(1) of the National Labor Rela-

* 172 N.L.R.B. No. 110, 5 CCH 1968 LAB. L. REP. ¶ 20,056. (July 10, 1968) [hereinafter principal case].

1. Solo employs approximately 280 workers and is engaged in the manufacture and sale of paper containers and related products.

2. The Calumet Industrial District Company (CID) owns the park, which is laid out to look like any other industrial area of the city. The trial examiner found that the park was a "de facto municipal district." TXD—330—67, at 5 n.3 (June 15, 1967). Improvements include block-long parallel streets, street signs, fire hydrants, and water lines. There are no fences or signs denoting the area as private. CID leases roughly one-half block of the tract to Solo, including a street and a small parking lot. Other employers are located in adjacent blocks. A total of 1,700 employees work in the park. *Id.* at 4-6.

3. The NLRB found that employee's homes were scattered over an area around the plant with a radius of twenty miles, including (in addition to Chicago) the towns of Hobart and Whiting, Indiana; and Dalton, Calumet City, and Lansing, Illinois. Over 4,000,000 people live in this geographical area. Fewer than five % of Solo's employees walk or take public transportation to work. Principal case at 3.

4. The private road is Dorchester Avenue, part of the "common area" in the park. It intersects 95th Street, a public road carrying over 12,000 cars per day from other plants in the vicinity past this intersection. Principal case at 3 n.1.

5. The trial examiner found that the CID acted as Solo's agent in enforcing these rules. Solo's executives did not personally expel the organizers, but they had agreed with officers of the other companies in the park that organizational activity by non-employees was not to be allowed in the park. TXD—330—67, at 12 (June 15, 1967).

6. 351 U.S. 105 (1956).

7. 29 U.S.C. § 158(a) (1964), which reads in part: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7"

tions Act (NLRA)⁷ and that it should be allowed to solicit on the plant premises because there were no effective alternatives by which it could communicate with Solo's employees. To support this contention, the union claimed that it was unable to contact employees at home, either personally or by mail, since Solo had refused to furnish a list of the names and addresses of its employees.⁸ Traffic conditions made distribution of literature at the park entrance a dangerous alternative.⁹ Moreover, the union contended that a media advertising campaign would be ineffective because the heavily populated metropolitan area in which Solo's employees lived would make resort to any one of a large number of potential media outlets impractical.¹⁰ The trial examiner, finding that the union had no effective alternatives for communicating with employees, held that Solo's no-solicitation rule violated section 8(a)(1). He therefore ordered Solo to allow union organizers to solicit in the plant parking areas and along the private entrance road. On appeal to the NLRB, *held*, affirmed; a company may not completely exclude nonemployee union organizers from its property if there is no effective alternative means of communication with the employees.¹¹

The principal case emphasizes the general conflict between an employee's right of self-organization under section 7 of the NLRA¹²

8. Principal case at 3. A union has no statutory right to an employee list (during an organizational drive) although the Board has previously held in *Excelsior Underwear*, 156 N.L.R.B. 1236 (1966), that an employer must make available to the union the names and addresses of all employees within seven days after a representation election is ordered. See generally Note, *The Judicial Role in the Enforcement of the "Excelsior Rule"*, 66 MICH. L. REV. 1292 (1968); note 59 *infra*.

9. Although there is a stop sign for Dorchester Avenue traffic at the intersection, the fact that cars turn both left and right onto 95th Street, coupled with the large volume of traffic, make it a dangerous point at which to distribute literature. Principal case at 2-3. The trial examiner found that although there were three possible entrances to the park, over 95% of all employees entered by automobile at the Dorchester Avenue entrance. TXD-330-67, at 6 (June 15, 1967).

10. Principal case at 3. In a large urban area serviced by many radio and TV stations as well as several newspapers, it is almost impossible for a union trying to contact a small number of workers to decide on the most appropriate media to use. Another problem is that the cost of being certain that its message will reach the employees may be prohibitive. Even assuming that finances were available and that the union was able successfully to choose the proper media, one must question the effectiveness of this type of communication. See Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73, 102-03 (1964). See also notes 15-17 *infra* and accompanying text.

11. The NLRB's opinion stated: "[W]e find that [Solo's] exclusion of union organizers from the premises of the industrial park and its enforcement of a no-distribution rule was violative of Section 8(a)(1) of the Act, in view of the inaccessibility of employees to reasonable union efforts to communicate with them." Principal case at 5.

12. 29 U.S.C. § 157 (1964): "Employees shall have the right to self-organization, to form, join, or assist labor organizations . . ." It has long been recognized that the § 7 rights include the "full freedom to receive aid, advice and information from others, concerning those rights and their enjoyment," *Harlan Fuel Co.*, 8 N.L.R.B. 25, 32 (1938), and that "others" includes union organizers as well as fellow employees. *Thomas v. Collins*, 323 U.S. 516 (1944). It has even been stated that the right of workers to organize freely is as important as the right of free speech. *Jefferson Elec. Co. v. NLRB*, 102 F.2d 949, 956 (7th Cir. 1939); *Staub v. City of Baxley*, 355 U.S. 313 (1958).

and the employer's right, as a property owner, to control access to his plant premises.¹³ Face-to-face contact¹⁴ between employees and trained union organizers¹⁵ at the workplace¹⁶ would undoubtedly be

13. See, e.g., *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-13 (1956). The traditional focus of this conflict has been to define the rights of the employer and the union. However, it should be noted that it is the *employee* who is the real party in interest; the decisions ultimately determine *his* rights—who may speak to him, what may be said, where it may be said, and how it may be communicated. The union's rights are therefore secondary because they derive in large part from the employee's primary right to organize.

14. It is generally agreed that face-to-face solicitation is the most desirable means of communication for organizational purposes. See generally Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73, 102-03 (1964). See *NLRB v. S. & H. Grossinger's, Inc.*, 372 F.2d 26, 29 (2d Cir. 1967), quoting *NLRB v. United Aircraft*, 324 F.2d 128, 130 (2d Cir. 1963), *cert. denied*, 376 U.S. 951 (1964):

[T]he predictable alternatives [to personal contacts] bear without exception the flaws of greater expense and effort, and a lower degree of effectiveness. Mailed material would be typically lost in the daily flood of printed matter which passes with little impact from mailbox to wastebasket. Television and radio appeals, where not precluded entirely by cost, would suffer from competition with the family's favorite program and at best would not compare with personal solicitation. Newspaper advertisements are subject to similar objections.

In *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1241 n.10 (1966), the NLRB noted: [A] union that does know the names or addresses of some of the voters may seek to communicate with them by distributing literature on sidewalks or street corners adjoining the employer's premises or by utilizing the mass media The likelihood that *all* employees will be reached by these methods is, however, problematical at best. [Emphasis in the original].

See also Note, *Labor Law—NLRB Regulation of Employer's Pre-Election Captive Audience Speeches*, 65 MICH. L. REV. 1236, 1245 (1967).

15. Although it is usually assumed by the courts that employees who are union adherents can adequately carry on organizational work, it is evident that only a limited amount of this type of work can be done in nonworking periods. In a large plant the physical problems involved in communicating with all the employees may be insuperable. While some organization work can be done by employees who are willing to solicit fellow employees, it is obvious that, lacking as they do the requisite special training and experience, they cannot convey the union's appeal with anything like the *effectiveness* of professional union organizers. *NLRB v. United Aircraft Corp.*, 324 F.2d 128, 130 (2d Cir. 1963).

For the proposition that employees need outside counsel in order adequately to exercise their rights of self-organization, see authority cited in Note, "*Not as a Stranger*": *Nonemployee Union Organizers Soliciting on Company Property*, 65 YALE L.J. 423, 427 n.32 (1956).

16. In *NLRB v. United Aircraft Corp.*, 324 F.2d 128, 130 (2d Cir. 1963), the court stated:

The chances are negligible that alternatives equivalent to solicitation in the plant itself would exist. In the plant the entire work force may be contacted by a relatively small number of employees with little expense. The solicitors have the opportunity for personal confrontation, so that they can present their message with maximum persuasiveness.

Although this case dealt with employee organizers, the point is applicable to non-employee organizers as well. As one commentator has described the situation:

I do not believe that one can seriously speak of adequate or effective communications where the union must go to the workers, through any means, who are spread out in the cities, suburbs, or rural areas. The union is put to a hollow gesture when it must compete over television in, for instance, the New York—New Jersey area, for the votes of a very small portion of that population.

Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73, 102-03 (1964). "The idea that personal contacts at home suffice for organizing employees . . . is totally unrealistic. . . . [I]t must be recognized that policies which relegate the union to ringing doorbells may cause irritating, though not usually tech-

the most effective way for the union to impart organizational information to the employees. But this assumption overlooks the legitimate interests of the employer; to permit organizational activities in all parts of the plant at any time would be unduly destructive of both plant production and discipline and could result in the employer's underwriting, at least to some extent, the union's organizational campaign.¹⁷ The courts, pursuant to their duty to balance these conflicting interests,¹⁸ have held that union organizers who are *employees* may orally solicit in any area of the plant during *nonworking* periods and may distribute literature in nonworking areas during nonworking hours.¹⁹ The Supreme Court's decision in *NLRB v. Babcock &*

nical, invasions of individual privacy." *Id.* at 99. In *May Dept. Stores Co.*, 136 N.L.R.B. 797, 802 (1962), *reversed*, 316 F.2d 797 (6th Cir. 1963), the NLRB noted:

The place of work is the one place where all employees involved are sure to be together. Thus it is the one place where they can all discuss with each other the advantages and disadvantages of the organization and lend each other support and encouragement. Such full discussion lies at the very heart of the organizational rights guaranteed by the Act, and is not to be restricted, except as the exigencies of production, discipline and order demand.

The Board in the *May* case concluded that by excluding union organizers from the workplace, the company had relegated the union "to relatively catch-as-catch-can methods of rebuttal, such as home visits, advertised meetings on the employees' own time, telephone calls, letters, and the various media . . ." See also *Plant City Welding & Tank Co.*, 119 N.L.R.B. 131 (1957); *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953); *NLRB v. United Aircraft Corp.*, 324 F.2d 128, 130 (2d Cir. 1963); *Gale Prods.*, 142 N.L.R.B. 1246, 1249 (1963).

17. Employer "underwriting" of the organizational drive would occur only if the nonemployee organizers were allowed to speak to or distribute literature to the employees during work periods. Any work time so used would of course be paid for by the employer. In-plant solicitation by nonemployee union organizers during unpaid nonworking periods—lunch hours or other meal breaks—cannot really be regarded in the same way. However, if employees are paid for this time, or for other nonworking periods such as coffee breaks, permitting solicitation by nonemployees arguably amounts to a subsidy of the organizational campaign by the employer. On the other hand, it is possible to argue that such paid nonworking time is still the employees' own time, and that permitting solicitation during these periods is not an undue imposition on the employer. Cf. the recognized rights of those who are employees to conduct organizational activity, notes 18-20 *infra* and accompanying text. See *NLRB v. Babcock & Wilcox Co.*, 222 F.2d 316 (5th Cir. 1955) (NLRB cannot impose a "servitude" on an employer when no employee is directly involved in solicitation, *aff'd*, 351 U.S. 105 (1956), *NLRB v. Seampruffe, Inc.*, 222 F.2d 858, 861 (10th Cir. 1955) [nonemployee organizers are "strangers to the right of self-organization, absent a showing of non-accessibility amounting to a handicap to self-organization" (emphasis added)].

18. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *NLRB v. LeTourneau Co.*, 324 U.S. 793 (1944).

19. See *Textile Workers Union v. NLRB*, 388 F.2d 896 (2d Cir. 1967); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *NLRB v. Monsanto Chem. Co.*, 225 F.2d 16 (9th Cir. 1955); *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943), *enforced*, 142 F.2d 1009 (5th Cir. 1944), *cert. denied*, 323 U.S. 301 (1945). For the Board's current formulation of employee distribution and solicitation rules, see *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962). Cf. *Republic Aluminum Co. v. NLRB*, 374 F.2d 183 (5th Cir. 1967). See Note, *No-Solicitation and No-Distribution Rules: Presumptive Validity and Discrimination*, 112 U. PA. L. REV. 1049 (1964). Employees of department stores are treated somewhat differently because of the public nature of the business. See *Montgomery Ward & Co. v. NLRB*, 339 F.2d 889 (6th Cir. 1965); *Bonwit Teller, Inc. v.*

Wilcox Co.,²⁰ however, made it clear that nonemployee organizers do not enjoy the same rights.

In *Babcock* nonemployee organizers were prohibited from handing out literature at the workplace when the employer enforced a no-distribution rule that was nondiscriminatory in the sense that other kinds of solicitation by nonemployees were also banned on the premises. The union alleged that because of dangerous traffic conditions at the plant entrance and the company's failure to provide a list of employees' names and addresses, there were no satisfactory alternative means of reaching the employees. Therefore, the union argued, nonemployee organizers should be granted access to the plant. The Supreme Court rejected this argument; it found that the plant was located near a small community of 21,000 people, that all the employees lived within a thirty-mile radius of the workplace, and that the employees were known by the organizers. The Court decided that such proximity would make normal means of publicity²¹ adequate and concluded that the union's nonemployee organizers should not be allowed access to the plant.

In reaching this decision, the Court enunciated the rule that an employer can deny nonemployee organizers access to his property so long as reasonable alternative channels of communication with the employees are available, and so long as the employer's no-distribution or no-solicitation rule is enforced in a nondiscriminatory manner.²² The Court emphasized the fundamental distinction between employee and nonemployee organizers.²³ While an employer cannot restrict his employees' right to discuss self-organization at the workplace unless such limitations are necessary to maintain production or plant discipline, a nonemployee is a stranger to the plant and has

NLRB, 197 F.2d 640 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953); *May Dept. Stores Co.*, 136 N.L.R.B. 797 (1962), *enf. denied*, 316 F.2d 797 (6th Cir. 1963); *Great Atl. & Pac. Tea Co.*, 123 N.L.R.B. 747 (1959); *Marshall Field & Co.*, 98 N.L.R.B. 88 (1952).

20. 351 U.S. 105 (1956).

21. In this case the Court used the words "normal means" to mean the local newspaper, personal visits, handbills sent to individual employees, and use of the local radio stations. In contrast, the NLRB had held that the plant was so much more effective a place for communication of organizational information that it had allowed the union access to the parking lot and sidewalk in its decision in the *Babcock* case. 109 N.L.R.B. 485, 486 (1954).

22. 351 U.S. at 112:

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

23. 351 U.S. at 113 (emphasis added):

The distinction is one of substance. No restriction may be placed on the employees' right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *But no such obligation is owed to non-employee organizers. Their access to company property is governed by a different consideration.*

no right to be on the property. For this reason, he is *prima facie* excluded from the premises. However, since the employees' "right to self-organization depends in some measure on their ability to learn the advantages of self-organization from others," this exclusionary presumption is not conclusive.²⁴ A nonemployee's right to come onto the employer's premises for organizational purposes is directly related to the impact on the employees of the organizer's exclusion.²⁵ By this rationale, the *Babcock* rule allows the nonemployee organizer to solicit on company property only in those situations in which it is unreasonably difficult for him to communicate with the employees in other ways.²⁶

Although the literal language of *Babcock* states that the alternatives available to the nonemployee organizers must be "effective,"²⁷ the courts have interpreted the word "effective" to mean only that an alternative exists;²⁸ "effectiveness" in the practical sense of the word has not been a consideration.²⁹ Thus, nonemployee organizers

24. 351 U.S. at 113.

25. See note 27 *infra*.

26. 351 U.S. at 113 (emphasis added): "*Consequently, if the location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable efforts to communicate with them, the employer must allow the union to approach the employees on his property.*" See also *Textile Workers v. NLRB*, 388 F.2d 896 (2d Cir. 1967).

27. 351 U.S. at 112 (emphasis added):

[T]he union may not *always* insist that the employer aid organization. . . . [W]hen the inaccessibility of employees make *ineffective* the *reasonable attempts* by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

28. See note 31 *infra*. See also *NLRB v. Rockwell Mfg. Co.*, 271 F.2d 109 (3d Cir. 1959), where the court upheld a broad, *employee* no-distribution rule because the employer had valid reasons and because the union had alternative methods of communication (burden on employer to justify rule is less if union has other means available); *Republic Aluminum Co. v. NLRB*, 374 F.2d 183 (5th Cir. 1967) (employee attempted to distribute literature on his off-shift to another shift of employees; held, company can enforce no-distribution rule against him unless union proves no alternative means of communication are available); *NLRB v. Cranston Print Works Co.*, 258 F.2d 206 (4th Cir. 1958) (employee, injured and on extended leave, attempted to distribute literature in parking lot with non-employee organizers; held, one who aids the commission of trespass is also guilty; employee on leave has lesser rights than do current employees); *NLRB v. Great Atl. & Pac. Tea Co.*, 277 F.2d 759 (5th Cir. 1960) (employees of multi-store bargaining unit may not solicit in nonwork areas of stores other than their own).

29. For the NLRB's prior exposition of the *Babcock* rule, see *Walton Mfg. Co.*, 126 N.L.R.B. 697, 698 (1960):

[R]ules which prohibit union solicitation or distribution of union literature by non-employee union organizers at any time on the employer's property are presumptively valid, in the absence of a showing that the union cannot reasonably reach the employees with its message in any other way, or a showing that the employer's notice discriminates against the union by allowing other solicitation or distribution.

See *G. C. Murphy Co.*, 171 N.L.R.B. No. 45 (1968); *Bonnie Foods, Inc.*, 172 N.L.R.B. No. 27 (1968). Cf. *NLRB v. United Steelworkers [Nutone]*, 357 U.S. 357, 363 (1958), where the Court stated that in determining whether access was to be granted, the employer's no-solicitation and no-distribution rules should be analyzed to see if they

typically have been given access to company property only in those extreme situations in which contact with the employees outside the plant area was virtually impossible.³⁰ For instance, access has been granted when the facts revealed that the workplace was a "company town" or an isolated lumber camp.³¹ In short, *Babcock* has been very narrowly construed to operate as a conclusive presumption that the union has a "reasonable" alternative so long as there is any opportunity, however limited, for contact with the employees.

Given this interpretation of *Babcock*, the *Solo Cup* decision represents a significant attempt by the NLRB to expand the rights of unions to conduct organizational campaigns with nonemployees. It seems that the Board intended such an expansion since it could have disposed of the case on several narrower grounds without reaching the issue of the effectiveness of the alternative means of communication open to the union. First, the evidence was clear that the no-distribution rule in effect at the time of the organizers' expulsion was applied only to union organizational activity and was therefore discriminatory.³² Previous NLRB decisions in similar cases have granted organizers access to an employer's property as a remedy for such a violation;³³ indeed, this was the alternative holding in the

"truly diminished the ability of the labor unions involved to carry their message to the employees." See generally Hanley, *Union Organization on Company Property—A Discussion of Property Rights*, 47 GEO. L.J. 266 (1958); Note, *No-Solicitation and No-Distribution Rules: Presumptive Validity and Discrimination*, 112 U. PA. L. REV. 1049, 1058-65 (1964); Note, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243, 1258-64 (1963); Note, "Not As a Stranger": *Non-Employee Union Organizers Soliciting on Company Property*, 65 YALE L.J. 423 (1956).

30. *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147, 150 (6th Cir. 1948) (organization would be "seriously handicapped").

31. See *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206 (1940); *Harlan Fuel Co.*, 8 N.L.R.B. 25 (1938); *West Kentucky Coal Co.*, 10 N.L.R.B. 88 (1938); *Weyerhaeuser Timber Co.*, 31 N.L.R.B. 258 (1941); *Ozan Lumber Co.*, 42 N.L.R.B. 1073 (1942); *W. T. Carter*, 90 N.L.R.B. 2020 (1950). A recent decision allowing non-employee organizers access to the premises of an isolated resort hotel to contact employees is *NLRB v. S. & H. Grossinger's, Inc.*, 372 F.2d 26 (2d Cir. 1967). Compare these cases with *Associated Dry Goods Corp.*, 103 N.L.R.B. 271 (1953), and *Mooresville Mills*, 99 N.L.R.B. 572 (1952), where organizers were not allowed access because it was found they could solicit at or near a plant entrance. See also *Marshall Field & Co.*, 98 N.L.R.B. 88 (1952), *enf. denied*, 200 F.2d 375 (5th Cir. 1952). For a discussion of these early cases (and union organization on company property generally), see Hanley, *Union Organization on Company Property—A Discussion of Property Rights*, 47 GEO. L.J. 266 (1958).

32. The NLRB found that various vendors, solicitors for charities, and employee groups were allowed on the premises. Principal case at 4. Even while expelling the organizers, CID made no mention of a general rule, but said only that union activity was not permitted. After several other union attempts to distribute literature, CID filed criminal trespass charges against one organizer who was subsequently arrested. TXD-330-67, at 12 (June 15, 1967).

33. See, e.g., *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949); *NLRB v. Walton Mfg. Co.*, 289 F.2d 177 (5th Cir. 1961); *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1952); *Bonwit Teller*,

Solo Cup case.³⁴ Second, in determining that *Solo Cup's* no-distribution and no-solicitation rules were applied discriminatorily, the NLRB found that the CID was a "quasi-public" area.³⁵ It based this finding on the fact that the CID was indistinguishable from other industrial areas of Chicago; there were no fences, signs, or guards to indicate that it was private. Moreover, no one except union organizers had ever been excluded from the park. In light of these facts, the NLRB concluded that Solo could not "deny access to the premises to union representatives, whether it be for picketing or handbilling."³⁶ This finding could also have been dispositive of the case. Third, under the authority of *J. P. Stevens and Co.*,³⁷ the Board could have disposed of the case merely by requiring Solo to furnish the union with a list of employee names and addresses.³⁸ Under the usual interpretation of *Babcock*, such a list would have provided the union with a reasonable alternative and no inquiry as to the effectiveness of personal visits to the employees' homes or of a mailing or telephone campaign would have been required.³⁹ However, the NLRB did not fully rely on any of these three potential grounds for decision in its opinion.⁴⁰ Instead, it chose to em-

Inc. v. NLRB, 197 F.2d 640 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953); *People v. Goduto*, 21 Ill. 2d 605, 174 N.E.2d 385, *cert. denied*, 368 U.S. 927 (1961). *Cf. Serv-Air, Inc. v. NLRB*, 57 CCH Lab. Cas. ¶ 12,425 (10th Cir. 1968). See Note, *No-Solicitation and No-Distribution Rules: Presumptive Validity and Discrimination*, 112 U. PA. L. REV. 1049, 1058-65 (1964).

34. Principal case at 5, 5 CCH 1968 LAB. L. REP. at 25,145.

35. Principal case at 4, 5 CCH 1968 LAB. L. REP. at 25,144. The NLRB analogized the situation to that present in *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), where nonemployee union men were allowed access to a private shopping center to picket a single supermarket. See notes 48-56 *infra* and accompanying text.

36. Principal case at 4, 5 CCH 1968 LAB. L. REP. at 25,144. *Cf. Cranston Print Works Co.*, 117 N.L.R.B. 1834 (1957), and *General Dynamics Telecommunications*, 137 N.L.R.B. 1725 (1962), where the plants were fenced off and rules prohibiting solicitation and distribution of literature by nonemployees were impartially enforced. *General Dynamics* involved a private road open to general public use; however, the union was denied use of it for distribution because it was not "public" enough. Note that picketing has a qualified first amendment status, *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940).

37. 167 N.L.R.B. No. 38, 5 CCH 1968 LAB. L. REP. ¶ 21,740, *enforced in part*, 59 CCH Lab. Cas. ¶ 13,172 (4th Cir. 1968).

38. Enforcement of a similar remedy was refused in another case involving *J. P. Stevens & Co.* [*Textile Workers Union v. NLRB*, 388 F.2d 896 (1967), *cert. denied*, 37 U.S.L.W. 3134 (Oct. 15, 1968)], but this case, like the others involving the Stevens company, involved massive unfair labor practices by the employer, and the Board has adhered to its position [*J. P. Stevens & Co.*, 171 N.L.R.B. No. 163, 5 CCH 1968 LAB. L. REP. ¶ 22,565 (1968)] on the basis of the Fourth Circuit decision *supra*. In the principal case the Board did order Solo to give the union an address list, but the list was only part of the remedy.

39. See *Phillips Mfg. Co.*, 148 N.L.R.B. 1420 (1964); *Walton Mfg. Co.*, 126 N.L.R.B. 697, 698 (1960).

40. These possible alternative grounds, however, provide a reviewing court of appeals with several rationales for upholding the result in *Solo Cup* without passing on the merits of the NLRB's renewed interest in the actual effectiveness of the means of

phasize the physical conditions of metropolitan Chicago as they related to the effectiveness of the nonemployee organizers' campaign.⁴¹

The NLRB apparently has recognized that the phrase "reasonable alternatives" includes not only a simple "is communication possible" analysis, but also an examination of particular alternative means of contact to see if they are effective in a practical sense. In addition to physical accessibility, this appraisal of alternatives would include consideration of such factors as the financial feasibility of organizational activity and the safety with which it can be carried on. Thus, in *Solo Cup*, hazardous traffic conditions made solicitation at the park entrance impossible. But even if traffic conditions had not been dangerous, the inability of organizers to distinguish Solo employees from the 1,700 other workers in the CID would have made solicitation at the park entrance impractical. A media advertising campaign, though possible, would also have been impractical because of the dispersal of employees throughout a large metropolitan area with many potential media outlets. Also, the fact that the union had no employee list was considered relevant. Thus the fact that the NLRB granted access in spite of the possibility of contact implies that a more expansive view of the reasonableness of alternatives will replace the older "impossibility" test.⁴²

The implication that the Board is attempting to modify the rule is reinforced by the fact that periodically over the past twenty years it has tried to incorporate an analysis of the practical effectiveness of alleged alternatives into the tests of nonemployee organizational rights.⁴³ On several occasions, the NLRB has even attempted to equate the rights of nonemployee and employee organizers.⁴⁴ The courts have considered these attempts unresponsive both to legitimate distinctions between employees and nonemployees and to the

communication left open to the union if its nonemployee organizers are excluded from the employer's property. For example, it would be possible for the court of appeals to enforce the NLRB's order in *Solo Cup* by adopting only the finding of discrimination in enforcement of the no-solicitation rule.

41. See notes 64-67 *infra* and accompanying text.

42. See notes 27, 30, 31 *supra*. It can be argued that since the Court in *Babcock* did talk in terms of effectiveness, the NLRB is merely following its mandate; under this interpretation, the real disagreement is between the NLRB and the courts of appeal about how to construe *Babcock*.

43. See, e.g., *Caldwell Furniture Co.*, 97 N.L.R.B. 1501 (1952); *F. W. Woolworth Co.*, 102 N.L.R.B. 581 (1953); *Seampruffe, Inc. (Holdenville Plant)*, 109 N.L.R.B. 24, *enf. denied*, 222 F.2d 858 (10th Cir. 1955), *aff'd*, 351 U.S. 105 (1956); *The Babcock & Wilcox Co.*, 109 N.L.R.B. 485 (1954), *enf. denied*, 222 F.2d 316 (5th Cir. 1955), *aff'd*, 351 U.S. 105 (1956); *Ranco, Inc.*, 109 N.L.R.B. 998 (1954); *The May Dept. Stores Co.*, 136 N.L.R.B. 797 (1962), *enf. denied*, 316 F.2d 797 (6th Cir. 1963).

44. See, e.g., *Le Tourneau Co. of Georgia*, 54 N.L.R.B. 1253, *enf. denied*, 143 F.2d 67 (5th Cir.), *rev'd*, 324 U.S. 793 (1944); *Seampruffe, Inc. (Holdenville plant)*, 109 N.L.R.B. 24, *enf. denied*, 222 F.2d 858 (10th Cir. 1958), *aff'd*, 351 U.S. 105 (1956).

owner's right to control access to his property.⁴⁵ However, in deciding *Solo Cup*, the Board chose a case which fits the literal language of *Babcock* and is similar to that case except with regard to the facts bearing on the effectiveness of the alternative means of communication open to the union.⁴⁶ If affirmed on the ground that the union's alternatives were not "effective," *Solo Cup* will be a key precedent permitting the NLRB to examine more closely the practical problems connected with this phase of union organizational campaigns.⁴⁷

45. In the early 1950's the NLRB relied on *NLRB v. LeTourneau Co.*, 324 U.S. 793 (1944), to narrow the gap between employees and nonemployees. In that case the Supreme Court had overruled a court of appeals' holding that there was "no provision, express or implied, in the National Labor Relations Act which requires an employer to permit organization efforts on his premises. . . ." 143 F.2d 67, 68 (5th Cir. 1944). Although *LeTourneau* dealt only with employees, it was widely believed to apply to nonemployees also. See *Caldwell Furniture Co.*, 97 N.L.R.B. 1501, enforced, 199 F.2d 267 (4th Cir. 1952), cert. denied, 345 U.S. 907 (1953) (rule prohibiting nonemployee distribution invalid in absence of special circumstances since it would "constitute an unreasonable impediment to the freedom of communication essential to the exercise of its employees rights to self-organization"); *Carolina Mills*, 92 N.L.R.B. 1141, 1168-69 (1951); *F. W. Woolworth Co.*, 102 N.L.R.B. 581 (1953). In 1952 the NLRB introduced its "equality" theory (employees have the "right to hear both sides of the story under circumstances which reasonably approximate equality") in *Bonwit Teller*, 96 N.L.R.B. 608, 612 (1951), enf. denied, 197 F.2d 640 (2d Cir. 1952), cert. denied, 345 U.S. 905 (1953). See also *Biltmore Mfg.*, 97 N.L.R.B. 905 (1951), where this doctrine was extended to industrial situations.

This trend culminated in *Seampruffe, Inc. (Holdenville Plant)*, 109 N.L.R.B. 24, 32 (1954), enf. denied, 222 F.2d 858 (10th Cir. 1955), aff'd, 351 U.S. 105 (1956), where the Board stated that distinguishing between employees and nonemployees "would be a differentiation not only without substance but in clear defiance of the rationale given by the Board and the courts for permitting solicitation." This case was overruled by the Supreme Court at the same time it decided *Babcock*.

In 1962, the NLRB seemed to be using almost a presumption that methods other than at-the-site contact were ineffective. The *May Dept. Stores Co.*, 136 N.L.R.B. 797 (1962), enf. denied, 316 F.2d 797 (6th Cir. 1963). In that case the store had a broad, privileged no-solicitation rule, but made anti-union speeches on company time and property without allowing the union a chance to reply. The NLRB found a "glaring imbalance" in opportunity, but was criticized by the court of appeals for not making findings as to other methods of communication open to the union instead of summarily treating "all methods of communication other than a working-time speech to employees as 'catch-as-catch-can,' ineffective methods." 316 F.2d at 800. However, the court passed over the fact that the traditional rule assumes conclusively that the alternatives are effective. Cf. *NLRB v. Schwartz*, 146 F.2d 773 (5th Cir. 1945); *NLRB v. Cities Service Oil Co.*, 122 F.2d 149 (2d Cir. 1941); *Richfield Oil Co. v. NLRB*, 143 F.2d 860 (9th Cir. 1944), all of which contain the suggestion that nonemployee rights should not be confused with employee rights.

46. That is, the size of the metropolitan area in which the plant was located, the dangerous traffic conditions, and the refusal to supply an employee list.

47. Although *Babcock* has been construed by the courts to include only the first concept of effectiveness discussed above (focusing on whether communication is possible), its language leaves open the possibility of analyzing the relative effectiveness of alleged alternative channels of communication. See note 27 *supra*; Note, "Not as a Stranger": *Non-Employee Union Organizers Soliciting on Company Property*, 65 YALE L.J. 423, 426-27 (1956). Also, the Supreme Court in *Babcock* left "[t]he determination of the proper adjustments" of organizational and property rights to the NLRB. "Its rulings, when reached on findings of fact supported by substantial evidence on the record as a whole, should be sustained by the courts unless its conclusions rest on erroneous legal foundations." 351 U.S. at 112. The NLRB in *Solo Cup* would appear to have satisfied these conditions.

Another aspect of the Board's decision which may have important implications is its discussion of the industrial park as a "quasi-public" area.⁴⁸ Industrial parks are increasingly popular with plant owners in all parts of the country; as the NLRB noted, their development poses some of the same problems of access with which the courts have already dealt in cases involving picketing in shopping centers. The Board analogized the CID, which it termed a "de facto municipal district," to these shopping center cases, citing the recent Supreme Court decision in *Food Employee's Local 590 v. Logan Valley Plaza*.⁴⁹ In *Logan Valley*, the Court held that, since the area was "quasi-public," nonemployee union members could not be barred from picketing a supermarket located in a privately owned shopping center. The Court based its decision on the finding that the roads and sidewalks of the plaza were the "functional equivalents" of those in a normal municipal business district. Moreover, they were "freely accessible and open to the people in the area and those passing through." Therefore, those members of the public wishing to exercise first amendment rights "in a manner and for a purpose generally consonant with the use to which the property is actually put" could not be wholly excluded.⁵⁰

It is significant that in *Logan Valley*, the Court quoted *Marsh v. Alabama*⁵¹ to the effect that "the more an owner, for his own advantage, opens up his property for use by the public in general, the more do his [ownership] rights become circumscribed by the statutory and constitutional rights of those who use it."⁵² Because of the use of this language, *Logan Valley* cannot be distinguished from *Solo Cup* on the grounds that the former case involved picketing that was protected activity under the first amendment. Quite apart from any arguments that the distribution of organizational literature should also be protected under the first amendment,⁵³ the nonemployee organizers in *Solo Cup* were on the employer's property in order to provide information to the employees about their statutory right of self-organization.⁵⁴

In *Logan Valley* the Court was concerned with the possibility that the rights of the picketers could turn on the fortuity of the physical location of the property. Thus, the mere fact that a store is located in a shopping center instead of on a street corner where

48. See notes 35 & 36 *supra* and accompanying text.

49. 391 U.S. 308 (1968).

50. 391 U.S. at 319-20 (emphasis added).

51. 326 U.S. 501 (1946).

52. 391 U.S. at 325, quoting 326 U.S. at 506.

53. See *Marsh v. Alabama*, 326 U.S. 501 (1946); *Thomas v. Collins*, 323 U.S. 516 (1945); *American Fedn. of State, County, & Municipal Employees v. Woodward*, 37 U.S.L.W. 2421 (8th Cir. Jan. 17, 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Jefferson Elec. Co. v. NLRB*, 102 F.2d. 949 (7th Cir. 1939). *But cf.* *Breard v. City of Alexandria*, 341 U.S. 662 (1951).

54. See note 12 *supra* and accompanying text.

picketing would otherwise be permissible should not insulate the store owner from those wishing to exercise first amendment rights.⁵⁵ The same analysis applies to an industrial park. Union handbilling or picketing activity, which would be permissible on public property immediately adjacent to a plant located on a single lot, could be effectively prohibited if that same plant were located in an industrial park which strictly enforces nondiscriminatory no-distribution and no-solicitation rules. If the traffic situation at the park entrance or entrances is hazardous, as was the case in *Solo Cup*, the union might be prevented from carrying on organizational activity altogether.

However, despite this similarity between industrial parks—at least, parks that are set up in the same manner as the CID—and shopping centers, it is submitted that the NLRB would be unwise to extend its quasi-public-property analysis to the more typical industrial park. The key consideration in deciding whether an area is “quasi-public” in nature is whether an element of wholesale invitation—that is, unlimited accessibility—is extended to the public at large.⁵⁶ In the case of a shopping center, such a broad invitation to the public exists by definition. On the other hand, most industrial parks are not only fenced off, but are expected to be used *only* by employees and related business personnel; no element of unlimited accessibility is intended. Even the CID, which was unusual in the sense that it was not fenced off and gave the appearance of being a common area, was not intended for use by the public at large. For this reason, the *Logan Valley* concept of quasi-public property, as interpreted in *Solo Cup*, should not be read to create a separate test for the appropriateness of granting access to nonemployee organizers. Rather, the finding that an area is quasi-public should be considered merely as a corollary to the question of whether there has been discriminatory enforcement of the no-distribution and no-solicitation rules.⁵⁷ Read in this manner, the NLRB’s holding in the principal case would be consistent with existing authority since the normal remedy when the Board finds that a no-solicitation rule has been enforced discriminatorily is to allow access to the employer’s property.⁵⁸

55. 391 U.S. at 324-25.

56. See generally Gould, *Union Organizational Rights and the Concept of Quasi-Public Property*, 49 MINN. L. REV. 505 (1965). One court has suggested a test to decide when a piece of property may validly be described as quasi-public. See *Freeman v. Retail Clerk’s Union*, 58 Wash. 2d 426, 432, 363 P.2d 803, 806 (1961) (the “trespasser” must be allowed access where the alternatives would be “unrealistic or impractical to the point where there exists a serious restriction upon the trespasser’s ability to communicate as effectively as would naturally and normally be expected, were legal title to reside in the public.”)

57. See notes 35 and 36 *supra* and accompanying text.

58. See notes 22, 29, 33 *supra* and accompanying text.

This, however, does not mean that because a plant is located in an industrial park instead of on a street corner its owner will be able to bar union organizers at will. On the contrary, location of a plant in an industrial park is a factor to be analyzed in determining whether "effective" communication alternatives are available to the union. If hazardous traffic conditions surrounding an industrial park make solicitation unsafe or if organizers are unable to distinguish among workers leaving the park, the Board should find that solicitation at the park entrance is an ineffective alternative. If an analysis of other alternatives, such as an advertising campaign, shows that no other effective channel of communication exists, access to some part of the park would be justified.⁵⁹ The question remains how much

59. By implication, *Solo Cup* suggests that where employees are widely scattered or the plant employs a large number of workers, the NLRB will not find the mere giving of an employee list sufficient (see text accompanying notes 37-42 *supra*), especially in crowded, urban areas. But it is arguable that a list might suffice in smaller communities or where a very small number of employees was involved. The union has no statutory right to an employee list, although the NLRB does require a company to give the union a list within seven days after a representation election has been announced. See note 8 *supra*. See also *Gimbell Bros.*, 147 N.L.R.B. 500 (1964). In *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), the NLRB stated that an employer's refusal to disclose such a list, "regardless of the existence of alternative channels of communication, tends to interfere with a fair and free election." 156 N.L.R.B. at 1246. However, the Board specifically noted that this procedure would not be used for an initial organization effort, although admitting that an employer has "no significant interest" in the secrecy of employee names and addresses. 156 N.L.R.B. at 1243. The "Excelsior rule" was promulgated to provide a partial solution to the captive audience problem. In general industrial situations the NLRB has not allowed unions equal time to reply to employer captive audience speeches. *General Elec. Co.*, 156 N.L.R.B. 1247 (1966). A policy of allowing the union reasonable access to the plant parking lot for a short period prior to an election would also help alleviate many of the problems created by a captive audience speech. See Bok, *The Regulation of Campaign Tactics in Representative Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964). Compare *The May Dept. Stores Co.*, 136 N.L.R.B. 797 (1962), *enf. denied*, 316 F.2d 797 (6th Cir. 1963), with *Livingston Shirt Co.*, 107 N.L.R.B. 400 (1953). See also Comment, *Dilemma in Labor Law: The Right To Own Versus the Right To Know*, 5 DUQUESNE L. REV. 77 (1966); Note, *Labor Law—The Judicial Role in the Enforcement of the "Excelsior" Rule*, 66 MICH. L. REV. 1292 (1968). The NLRB can also order that the union be given a list as part of its powers under § 10(c) of the NLRA, 29 U.S.C. § 160(c) (1964), to remedy other unfair labor practices. See *J. P. Stevens Co.*, 167 N.L.R.B. No. 37, CCH 1968 NLRB Dec. ¶ 21,741 (Aug. 31, 1968); *Marlene Indus. Corp.*, 166 N.L.R.B. No. 58, CCH 1967 NLRB Dec. ¶ 21,629 (1967). In regard to § 10(c), see Recent Decision, *Labor Law—NLRB May Order Employees To Give Union Equal Time To Reply to "Captive Audience" Speeches Only If Employer Is Enforcing a No-solicitation Rule*, 35 GEO. WASH. L. REV. 1095 (1967); Note, *Remedies for Employer Unfair Labor Practices During Union Organizing Campaign*, 77 YALE L.J. 1574 (1968).

The *Solo Cup* decision does, however, appear to leave unanswered an important question: if an employer barred all nonemployees from his premises, thereby avoiding a finding of discrimination, and if he was willing to give the union an employee list, could he then prevent any access to his property? Pre-*Solo Cup* doctrine would answer this question in the affirmative; however, if *Solo Cup* truly means that the NLRB is willing to examine alternatives closely, perhaps it could find that merely supplying an employee list when the workers are dispersed over a large urban area is not an effective alternative.

access should be granted consistent with the employer's legitimate property interests.⁶⁰ It seems clear that nonemployees, if allowed on the property, should not be given the same privileges as regular employees.⁶¹ Because nonemployee organizers would be strangers to the plant, they would probably be unfamiliar with the location of working and nonworking areas; admitting them to the plant would involve problems of identification, discipline, general plant security, theft, and risk of injury to themselves and others. For these reasons an employer would seem to have a legitimate interest in denying them access to the working areas of the plant. However, the same considerations do not control such areas as parking lots and access roads. The most equitable solution in terms of all the interests involved would be to open these areas to nonemployee organizers, with reasonable regulation as to time of solicitation and number of organizers present, whenever there are no other effective channels of contact with the workers.⁶² If justified by plant production needs or by discipline problems, an employer would still have the right, as he has with regard to his own employees,⁶³ to enforce more stringent rules.

Solo Cup, if affirmed on the ground discussed above, could have far-reaching implications. Most plants in large metropolitan areas employ workers who commute to work from a wide area and cannot easily be reached in person or by mass media. Traffic conditions in a crowded industrial or commercial area often make it dangerous to distribute literature at a plant entrance.⁶⁴ And in any situation involving an industrial park, an organizer cannot readily distinguish among automobiles driven by employees whom he wishes to contact and those driven by other employees in the park. Moreover, the union has no statutory right to an employee list, thereby often precluding any contact at the employees' homes.⁶⁵ These considerations, coupled with the fact that most unions are located in urban areas, indicate that *Solo Cup* could potentially affect a great number of employees.⁶⁶

60. The Court in *Babcock* left "[t]he determination of the proper adjustment" of property rights and organizational rights to the NLRB. 351 U.S. at 112.

61. See note 19 *supra* and accompanying text.

62. The NLRB allowed the union access to this kind of plant area as part of the general remedy in *Solo Cup*.

63. See *NLRB v. United Aircraft Corp.*, 324 F.2d 128 (2d Cir. 1963), *cert. denied*, 376 U.S. 951 (1964); *Minneapolis-Honeywell Regulator Co.*, 139 N.L.R.B. 849 (1962); *Monarch Mach. Tool Co.*, 102 N.L.R.B. 1242, *enforced*, 210 F.2d 183 (6th Cir. 1953), *cert. denied*, 347 U.S. 967 (1954); *Peyton Packing Co., Inc.*, 49 N.L.R.B. 828, 843 (1945).

64. Certainly, even given ideal traffic conditions, any kind of a solicitation conversation is virtually impossible at a plant entrance where all the workers leave or enter in autos.

65. See notes 38 & 59 *supra* and accompanying text.

66. *Solo Cup* suggests that the NLRB must proceed on a case-by-case basis, at least until it obtains enough data on what is or is not effective communication; then, it

The employee has a right to hear both sides in an organizational campaign—perhaps not under strictly equal conditions, but as one court has phrased it, under conditions in which the union has “at least as great” a chance of *reaching* the employee with its presentation as does the employer with his “ability to promote the legally authorized expression of his anti-union views.”⁶⁷ Viewed in this light, the NLRB’s decision in *Solo Cup* to permit organizers *limited* access to company property in a situation in which it is unusually difficult for them otherwise to contact employees would appear to further the policies of the NLRA without significantly imposing on the legitimate interests of employers.

might be able to set forth some presumptions. For example, if it were found that the use of media advertising did not get the union message to employees in large metropolitan areas, that “alternative” might be presumed ineffective. Likewise, if an analysis of union organization in large urban centers disclosed that home visits are impractical and that mailed material does not effectively “reach” the employees, those channels might also be presumed ineffective in situations where the union possesses an employee list. At present, since we have no real data as to the relative effectiveness of the various means of communication, we are engaging in nothing more than speculation by automatically accepting or rejecting any of these methods.

67. NLRB v. United Steelworkers (Nutone), 357 U.S. 357, 364 (1958).