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ACCOMMODATING NONEMPLOYEES: NLRA PROTECTION OF CONCERTED UNION CONDUCT IN THE WAKE OF *SEARS*

In creating the National Labor Relations Board (NLRB), Congress intended to establish a uniform policy of labor-management relations.[1] Although the Board's authorizing statute, the National Labor Relations Act (NLRA),[2] does not expressly prohibit state courts from asserting jurisdiction over labor disputes,[3] the United States Supreme Court has long recognized that concurrent state and Board authority would result in conflicting standards of substantive law and differing remedial schemes.[4] In order to minimize the potential for conflict, the Court developed a preemption doctrine empowering the Board to exercise authority over a broad range of labor and management activities.[5] The scope of the Board's preemptive

1. *See* Findings and Declaration of Policy, 29 U.S.C. § 151 (1976).

2. 29 U.S.C. §§ 151-169 (1976). In 1935, the National Labor Relations (Wagner) Act was passed, empowering the newly created National Labor Relations Board to conduct elections for employee representation and to remedy unfair labor practices. In an effort to strike a balance more favorable to management interests, Congress passed the Labor Management Relations (Taft-Hartley) Act in 1947. 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-167, 171-190 (1976)). The most recent major piece of labor relations legislation, the Labor Management Reporting and Disclosure (Landrum-Griffin) Act, imposes a greater degree of regulation on union activity and modifies Taft-Hartley prohibitions on secondary boycotts and recognitional and organizational picketing. 73 Stat. 519 (1959) (current version at 29 U.S.C. §§ 401-531 (1976)). *See also* notes 12-16 and accompanying text *infra*.

3. In fact, § 14(c) expressly grants state courts jurisdiction in cases in which the effect of the labor dispute in commerce is not sufficiently substantial to warrant Board exercise of jurisdiction. 29 U.S.C. § 164(c) (1976). *See* note 43 *infra*.

4. *See, e.g.*, Hill v. Florida *ex rel.* Watson, 325 U.S. 538, 542 (1945); Allen-Bradley Local, United Elec. Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749 (1942). *See generally* Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1337-39 (1972).

5. The preemption doctrine is grounded on the principle of federal supremacy implicit in the United States Constitution, which provides that "[t]he Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land. . . ." U.S. CONST. art. VI, cl. 2. Since Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) held that "[t]he *concurrent* power of the states . . . is *subordinate* to the legislation of Congress," *id.* at 24 (emphasis in original), the Supreme Court has weighed congressional grants of substantive rights heavily in determining whether state action is preempted. *See, e.g.*, Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301, 305-14 (1949); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 771-72 (1947).

authority was set forth in *San Diego Building Trades Council v. Garmon* in which the Court held that the Board's primary jurisdiction extends to conduct arguably subject to the Act's protections or prohibitions.[6]

The *Garmon* decision removed location as a ground for a successful challenge by an employer to arguably trespassory union conduct. The Act itself provides the employer with no express authority to exclude a union from its premises. Alternatively, the employer may seek to restrict union entry under local trespass statutes. Under *Garmon*, however, states will refuse to assert jurisdiction over such disputes because the conduct challenged by the employer is either arguably protected or arguably prohibited under the Act. Before the state court, the conduct of the union obtains derivative protection by the section 7 rights granted employees by the Act[7] and, in some cases, may be prohibited by sections of the Act unrelated to location.[8] In effect, the *Garmon* doctrine has foreclosed any forum for the employer to challenge directly the location of union conduct.[9]

Addressing this dilemma, the Court provided the employer with a state trespass remedy in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*.[10] Considering the applicability of state trespass laws to peaceful picketing by nonemployees on private property, the Court held that a trespass action in a California court was not preempted by the Act. In so ruling, the Court redefined the scope of the *Garmon* doctrine and retarded the development of protections afforded nonemployees and off-duty employees[11] under the Act. This Note will examine the *Sears*

6. 359 U.S. 236, 244-45 (1959). *See* notes 29-33 and accompanying text *infra*.

7. *See* notes 14, 71-76 and accompanying text *infra*.

8. Section 8(b) of the Act enumerates types of union conduct that justify the filing of an unfair labor practice charge against a union by an employer. 29 U.S.C. § 158(b) (1976). An employer brings an action before the Board by the timely filing of such a charge.

9. An employer may raise the location issue before the Board indirectly, however, by inducing the union to file an unfair labor practice charge against it based on § 8(a) of the Act which contains prohibitions against employer conduct. *See id.* § 158(a). *See also* text accompanying note 49 *infra*.

10. 436 U.S. 180 (1978). In Meat Cutters Local 427 v. Fairlawn Meats, Inc., 353 U.S. 20 (1957), the Court expressly reserved judgment on the question of whether a state remedy was appropriate for trespassory activity. The Court stated that "[w]hether a state may frame and enforce an injunction aimed narrowly at trespass" was an issue that the Supreme Court was not free to rule on since the question had been raised by the state court on an erroneous assumption that it had power to reach the union conduct in its entirety. 353 U.S. at 24-25.

11. The term "off-duty employee" is used to describe employees who are not working at a given time on a shift for which they receive pay. In Diamond Shamrock Co. v. NLRB, 443 F.2d 52 (3d Cir. 1971), the Third Circuit found that the rights of off-duty employees are governed by the same considerations as those governing the rights of nonemployees and thus required the employer to apply nonemployee access rules to regulate communications by off-duty employees with those on-duty. *Accord*, GTE Lenkurt, Inc., 204 N.L.R.B. 921 (1973). *But see* Tri-County Medical Center, Inc., 222 N.L.R.B. 1089 (1976) (unless justified

decision against the background of the *Garmon* line of cases and identify questions raised by that decision concerning the protection of nonemployee activities under the new preemption principle.

I. Federal Labor Policy and the Preemption Doctrine

A. Garmon: The Doctrine of Primary Jurisdiction

Section 7 of the National Labor Relations Act grants to employees the rights to organize, bargain collectively, and engage in concerted activities for mutual aid or protection.[12] Although the Act does not expressly provide nonemployee union representatives with these rights,[13] the Supreme Court has extended some protection to nonemployees and off-duty employees by recognizing that full vindication of employees' rights necessarily depends upon organizational assistance by others.[14] Thus, the rights of nonemployees derive from the same section 7 protections afforded the employees whom their concerted conduct is to benefit.[15] The *Garmon* rule was intended to reserve for the NLRB, a specialized agency experienced in labor-management relations, initial rulings on both section 7 employee and nonemployee protections.[16]

By remedying unfair labor practices that encroach on section 7 guarantees, the Board effectuates the Act's policies nationally.[17] Pre-*Garmon* Supreme Court pronouncements on the role of state courts in labor disputes, however, did little to further the uniform exercise of jurisdiction

by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside working areas is presumably invalid).

12. 29 U.S.C. § 157 (1976). For a discussion of circumstances that constitute "concerted" conduct within the meaning of the Act, see F. Bartosic & R. Hartley, Labor Relations Law in the Private Sector 97-99 (1977).

13. Section 7 of the Act applies only to employees. 29 U.S.C. § 157 (1976). The Act defines employee under § 2(3) as "any individual whose work has ceased as a consequence of, or in connection with, any labor dispute or because of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular or substantially equivalent employment," subject to exclusions for individuals employed as agricultural laborers, domestic servants, independent contractors, supervisors, persons employed by a spouse or family member, or persons employed by an employer subject to the Railway Labor Act. 29 U.S.C. § 152(3) (1976).

14. In NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), the Court recognized that: "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." Consequently, if the location of a plant and living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. *Id.* at 113.

15. *See* notes 71-76 and accompanying text *infra*.

16. 359 U.S. at 245.

17. 29 U.S.C. § 153 (1976). *See also* note 1 *supra*.

Congress had envisioned for the Board. The question of uniformity, in fact, remained unresolved by the sparse litigation generated during the Act's early years.[18] When the Court did address the issue, its vacillation in interpreting congressional intent to displace state law [19] and its reluctance to articulate the circumstances that would justify preemption[20] contributed to nonuniform assertion of Board jurisdiction. Nonetheless, one principle arose undisputed: if certain activities were recognized by the Board as clearly protected by section 7, state courts were prohibited by the supremacy clause of the Constitution from adjudicating those activities.[21] For this reason, conduct concededly protected by the Act has seldom been the focus of preemption cases facing the Court.

Whether conduct subject to the Act's prohibitions would provide sufficient justification to preempt state court authority was addressed in *Garner v. Teamsters Local 776*.[22] In *Garner*, a union representing a majority of trucking employees picketed the docks of an interstate trucking company. The employer sought to enjoin the picketing in state court, alleging that the employees picketed in support of a union demand for recognition in violation of Pennsylvania law. The Court held that the Pennsylvania court was without authority because the Board has primary jurisdiction over conduct in violation of section 8 of the Act.[23] According to the Court's

18. Although the passage of "baby Wagner Acts" in the states of Massachusetts, New York, and Wisconsin presented potential conflicts between state and federal regulation, the risk of collision between these laws and the federal Act was minimized by the frequency of interagency agreements. *See* A. Cox & D. Bok, Cases on Labor Law 1048 (8th ed. 1977). Moreover, the earliest cases in which the Court could have invoked the preemption rationale were decided on first amendment grounds. *See* Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940).

19. *See, e.g.*, Street Employees v. Lockridge, 403 U.S. 274, 309 (1971) (White, J., dissenting); Taggart v. Weinacker's, Inc., 397 U.S. 223, 227 (1970) (Burger, J., concurring).

20. *Compare* Garner v. Teamsters Local 776, 346 U.S. 485 (1953) (state court jurisdiction preempted by the very enactment of federal legislation duplicating the local law) *with* UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949) (state court jurisdiction not preempted in the absence of affirmative congressional approval of federal regulation); Allen-Bradley Local, United Elec. Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942) (state court jurisdiction not preempted when Congress has expressly left an area of employee conduct open for state control).

21. Forms of economic pressure that the Court has found to be protected from employer interference include peaceful primary strikes and picketing on public property in support of normal collective bargaining objectives. UAW v. O'Brien, 339 U.S. 454, 456-59 (1950). The decision to preempt state court jurisdiction in such instances is grounded in substantive rights derived from the supremacy clause of the United States Constitution. *See, e.g.*, Street Employees v. Missouri, 374 U.S. 74 (1963); Street Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951); UAW v. O'Brien, 339 U.S. 454 (1950). *See also* note 5 *supra*.

22. 346 U.S. 485 (1953).

23. *Id.* at 501.

"primary jurisdiction" rationale, congressional intent to apply only federal law to activity the Board was empowered to regulate was implied in the very creation of the Board. Confining interpretation of the Act to a centralized expert authority was viewed as congressional recognition that a "multiplicity of tribunals and a diversity of procedures provide incompatible and conflicting adjudications."[24]

The more difficult question of appropriate jurisdiction for conduct which the NLRA neither protects nor prohibits was first considered in *Local 232, UAW v. Wisconsin Employment Relations Board (Briggs-Stratton)*.[25] The Court itself in *Briggs-Stratton* examined the challenged conduct, an intermittent work stoppage by employees, and concluded that none of the section 7 protections or section 8 prohibitions applied in that context.[26] Assuming that conduct not governed by federal law may be regulated by the states, the Court concluded that states may exercise jurisdiction in situations in which the Court has established that "the Board lack[s] authority to investigate, approve, or forbid the union conduct in question."[27] In *San Diego Building Trades Council v. Garmon*,[28] the Court was faced with the decision of whether to continue to engage in its own interpretation of the Act's preemptive effect or defer to the judgment of the Board in reliance on the primary jurisdiction rationale underlying *Garner*.

In *Garmon*, a minority union[29] engaged in peaceful picketing to induce customers and suppliers of the employer to stop dealing with it. The employer, contending that the purpose of this pressure was to gain union recognition, sought and obtained an injunction and damage award in a California court.[30] Reviewing the award for damages, the Supreme Court

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24. 346 U.S. at 490-91.

25. 336 U.S. 245 (1949), *overruled*, 427 U.S. 152 (1976).

26. Although the Board has since determined that such "quickie strikes" violate the § 8(b)(3) proscription of refusal by a union to engage in collective bargaining with an employer, the Board's order in that case was set aside. Insurance Agents' Int'l Union, 119 N.L.R.B. 768 (1957), *enforcement denied*, 260 F.2d 736 (D.C. Cir. 1958), *aff'd*, 361 U.S. 477 (1960).

27. 336 U.S. at 254.

28. 359 U.S. 236 (1959).

29. A minority union is one that does not represent the majority of the employees in an employee bargaining unit. Section 8(b)(4)(C) prohibits action, including picketing, by such a union whose objective is to force the employer to recognize it when another union has been certified as the bargaining representative of employees in the unit. 29 U.S.C. § 158(b)(4)(C) (1976).

30. At the time the employer filed the action in state court, the union had initiated a representation proceeding before the Board. The Regional Director declined jurisdiction, however, because the dispute lacked sufficient impact on interstate commerce. 359 U.S. at 238. *See* note 43 *infra*.

reversed.[31] In an opinion by Justice Frankfurter, the Court found that, when conduct is even arguably within the scope of section 7 protections of employee conduct or section 8 prohibitions against unfair labor practices, state jurisdiction must yield.[32] *Garner* was cited with approval for the proposition that the Board's specialized knowledge and experience qualified it to exercise primary jurisdiction over the disputed conduct and determine initially whether section 7 or section 8 applies.[33]

By way of exception, the *Garmon* Court recognized that overriding state interests may justify departure from the general rule, absent "compelling congressional direction" to the contrary.[34] Thus, two areas of regulation were specifically reserved for state jurisdiction although conduct so classified may be either arguably protected or arguably prohibited by the Act: (1) conduct that touches interests deeply rooted in local feeling and responsibility;[35] and (2) conduct that is "merely a peripheral concern" of the NLRA. In *Garmon*, the Court, in dicta, described the local interest exception as "violence and imminent threat to the public order"[36] and the peripheral concern exception as a union's violation of a contractual duty to its members.[37] Both of these exceptions have gradually expanded. In *Linn*

31. 359 U.S. 236. The case was first decided together with Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957), and Meat Cutters Local 427 v. Fairlawn Meats, Inc., 353 U.S. 20 (1957). In each of these cases, state judgments were reversed insofar as they granted equitable relief. In *Garmon*, however, the judgment for damages was vacated and remanded. When the California court sustained the damage award on remand, the union again petitioned for certiorari to the Supreme Court. 359 U.S. at 238-39.

32. *Id.* at 244.

33. *Id.* at 242-43. Justice Harlan concurred on the narrow grounds that the picketing was protected but stated that state courts should not yield to federal authority over disputedly prohibited conduct. *Id.* at 245 n.4 (Harlan, J., concurring). The *Garmon* Court's choice to adopt the *Garner* doctrine of primary jurisdiction rather than the approach taken in *Briggs-Stratton* was later affirmed in Lodge 76, IAM v. Wisconsin Employment Relations Comm'n (Kearney & Trecher), 427 U.S. 132 (1976). In *Kearney & Trecher*, certain conduct neither prohibited nor protected by the Act was reserved for state regulation on the theory that such conduct was intended by Congress to be "controlled by the free play of economic forces." *Id.* at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

34. 359 U.S. at 247-48.

35. *Cf.* UAW v. Russell, 356 U.S. 634 (1958) (employer's entrance obstructed by massed striking employees); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (pickets' use of language calculated to provoke violence); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (employer threatened by union representative with violent union shutdown).

36. 359 U.S. at 247.

37. The principal case under this *Garmon* exception is IAM v. Gonzales, 356 U.S. 617 (1958), which held that union members may bring suit against their unions in state court on the ground that the union violated its contractual duties to its members even though the union's conduct is arguably an unfair labor practice. *But see* United Ass'n of Journeymen v. Borden Local 100, 373 U.S. 690, 696-98 (1963) (state court jurisdiction over dispute over

v. Plant Guard Workers Local 114, the Court allowed an employer to bring an action for malicious libel against a union in state court under both the local interest and peripheral concern exceptions.[38] More recently, both exceptions were invoked in *Farmer v. United Brotherhood of Carpenters*.[39] In *Farmer*, a union member's spouse brought suit against her deceased husband's union, alleging that its officials had caused him severe emotional distress when it engaged in outrageous conduct, threats, and intimidation following a dispute over internal union policies. Holding that the state court had appropriately exercised jurisdiction, the Court stated that it would no longer apply the *Garmon* principles inflexibly. Specifically, the Court found that the question of whether state court jurisdiction is preempted should be decided in light of the reasons underlying the *Garmon* rationale;[40] namely, the likelihood that state authority would result in undue interference with federally protected conduct and the role of the state in protecting the interests of its citizens.[41]

Despite the reservations expressed in *Farmer* concerning how the *Garmon* rule should be applied, the Court emphasized that *Farmer* and other exceptions did not undermine the validity of *Garmon* as a basis for preempting state court authority in most instances.[42] To the contrary, the Court has consistently applied the *Garmon* doctrine since its inception, drawing exceptions to permit state authority over activity expressly excluded by *Garmon* or by statute.[43] In each case in which the Court drew a *Garmon* exception, the challenged conduct was arguably prohibited by

unlawful attempts by union to prevent members from obtaining work preempted because not "primarily internal matters").

38. 383 U.S. 53 (1966).

39. 430 U.S. 290 (1977).

40. *Id.* at 302-05.

41. *Id.*

42. *Id.*

43. The statutory exceptions include: (1) actions under § 303 of the Labor Management Relations Act for damages to business and property by union conduct violative of the § 8 (b)(4) proscriptions against secondary activity, 29 U.S.C. § 158 (1976); and (2) actions arising under § 707(a) of the Labor Management Reporting and Disclosure Act of 1959 for breach of collective bargaining agreements, 29 U.S.C. § 185 (1976). In addition, § 14(c) was introduced as part of the Labor Management Reporting and Disclosure Act in 1959 in order to abridge the hiatus in employer's civil remedies created by the Supreme Court's decision in Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957). In *Guss*, the Court held that states could not exercise jurisdiction over conduct proscribed by § 8 even when the NLRB has refused to assert jurisdiction on the failure of the employer's business to engage sufficiently in interstate commerce to meet the jurisdictional standards of the Board. The decision precluded such an employer from obtaining redress before any judicial forum. *See* Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 643 n.14 (1961). The subsequent incorporation of § 14(c) into the Act permitted state courts to assert jurisdiction over such conduct. 29 U.S.C. § 164(c)(2) (1976).

section 8 of the Act. No exception, however, risked interference with the federal interest involved in conduct arguably protected by section 7.[44] In fact, the Court in *Farmer* indicated that it would not permit state regulation of such arguably protected conduct.[45] Reaffirmation of *Garmon* by the Court's statement in *Farmer*[46] and apparent approval of the *Garmon* doctrine by Congress in 1974[47] seemed to confirm the belief that *Garmon* would continue to provide the framework for preemption cases actually or potentially involving sections 7 or 8 of the Act.

B. The Sears Trespass Remedy

Although the *Garmon* principles have governed questions of labor preemption throughout the doctrine's twenty-year history, members of the Court have questioned the application of these principles in situations involving nonemployee access to private property.[48] Section 8(b) of the Act, which enumerates types of union conduct justifying an unfair labor practice charge by an employer, does not prohibit a union's concerted activity simply because it is conducted on private property. Unable to appeal directly to the Board, the employer may attempt to induce the union to file

44. *See* Address by Roger C. Hartley, before the Building Trades Lawyers Ass'n, The Search for an Integrated Policy Regulating Construction Industry Picketing at 4, in Chicago, Ill. (Oct. 30, 1978) (unpublished address in Catholic University Law School Library).

45. Farmer v. United Bhd. of Carpenters, 430 U.S. at 305.

46. *See id.* at 297.

47. The extension of coverage of the Act to benefit employees of health care institutions has been interpreted by the General Counsel of the NLRB as tacit acceptance of the *Garmon* preemption doctrine by Congress. Specifically, an amendment offered by Congressman Quie that would exempt state laws governing health care institutions, such as that of Minnesota, from preemption under the NLRA was rejected by the House of Representatives. 120 CONG. REC. 16,910 (1974). *See* Guidelines Issued by the General Counsel of the NLRB for Use of Board Regional Offices in Unfair Labor Practice Cases Arising Under the 1974 Nonprofit Hospital Amendments to the Taft-Hartley Act, General Counsel Memorandum 74-49 (Aug. 20, 1974), *reprinted in* 1974 LAB. REL. YEARBOOK (BNA) 359.

48. In one such case, Taggart v. Weinacker's, Inc., 397 U.S. 223, 227 (1970), owners of a grocery store sought to enjoin peaceful union picketing which had begun on public property and later moved to a private walkway adjacent to the store entrance. A state court injunction against the pickets for trespass was upheld by the Alabama Supreme Court. 283 Ala. 171, 214 So. 2d 913 (1968). The United States Supreme Court first agreed to consider the issue but later dismissed the writ of certiorari as improvidently granted. 397 U.S. at 223. Two members of the Court issued separate opinions expressing opposite views on the preemption issue. Justice Harlan considered the picketing "within the range of protections afforded by the Act" and, therefore, subject to *Garmon* preemption. *Id.* at 230 (Harlan, J., concurring). Chief Justice Burger, however, would have excepted the picketing from the *Garmon* rule because of the state interest in protecting the property rights of its citizens. He reasoned that the "local interest" exception was appropriate because an employer would probably resort to self-help remedies to remove trespassers if remedies under state law were foreclosed. *Id.* at 228 (Burger, C.J., concurring).

an 8(a)(1) charge against the employer by ordering the union off its property or threatening it with state trespass charges. Under *Garmon*, however, the union may continue its activity without filing an 8(a)(1) charge with the assurance that any trespass action brought by the employer challenging the union conduct will be preempted if there is some arguable basis for finding that the same aspect of the union conduct is protected or prohibited by the Act.[49] The question of whether the Court would require the states to defer to the Board when no unfair labor practice charge triggered a Board determination on the protected status of the union conduct was the issue the Court addressed in *Sears, Roebuck & Co. v. San Diego County District Counsel of Carpenters.*

In *Sears*, the Court narrowed the scope of application of both the arguably protected and arguably prohibited branches of the *Garmon* rule. Sears, at variance with the terms of a master labor agreement prevailing in the area, assigned work to carpenters who had not been dispatched by the hiring hall of the local carpenters' union. Union agents requested that Sears either hire a contractor who used dispatched carpenters or agree in writing to comply with the terms of the master agreement. Receiving no response from Sears, the union established peaceful picket lines on the privately owned walkways and parking area surrounding the Sears building.[50] After an unsuccessful demand that the pickets leave, Sears filed a complaint in the Superior Court of California seeking an injunction against the union for continued trespass and obtained a temporary restraining order enjoining the picketing. The union complied and the pickets never returned. Thereafter, the court entered a preliminary injunction which was affirmed by the California Court of Appeals.[51] The appellate court reasoned that the value of real property to the employer and his right to peaceful possession were concerns so deeply rooted in local responsibility as to fall within

49. An employer's demand that union members leave the premises constitutes unlawful interference with employees' § 7 rights and is proscribed by § (8)(a)(1) even when the demand is not accompanied by threat of violence or state action to remove the trespassors. Giant Food Markets, Inc., 241 N.L.R.B. No. 105, 100 L.R.R.M. 1598 (1979), *application for enforcement granted*, No. 79-1248 (6th Cir. June 15, 1979). Alternatively, an employer may resort to self-help remedies and forcibly remove the trespassers from the premises. *See* Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 HARV. L. REV. 552, 568 (1970).

50. At first, the union removed its pickets to public sidewalks adjacent to the Sears building and parking lot, but, according to the testimony of union representatives, such picketing was totally ineffective in communicating with the public. 17 Cal. 3d 893, 896, 553 P.2d 603, 606, 132 Cal. Rptr. 443, 446 (1976).

51. 52 Cal. App. 3d 690, 125 Cal. Rptr. 245 (1975).

the local interest exception to *Garmon*.[52] The Supreme Court of California reversed, applying the *Garmon* principles to find that, since the union picketing was both arguably protected and arguably prohibited under the Act, the Board had primary jurisdiction over the dispute.[53]

The United States Supreme Court refused to affirm the California Supreme Court's "mechanical" application of the *Garmon* rule, insisting instead that it would focus on the reasons underlying the rule.[54] The Court found that the only reason prohibited or arguably prohibited conduct is afforded exclusive Board jurisdiction is to eliminate the threat of state interference with the Board's primary jurisdiction to enforce section 8 prohibitions.[55] The Court reasoned that such a threat exists only when identical controversies could be presented independently to both the Board and the state court. If the same aspect of the challenged conduct is at issue before each forum, state jurisdiction over the controversy is preempted.[56] In *Sears*, however, the aspect of union conduct arguably prohibited by section 8 of the Act was not identical to the aspect of the conduct brought before the state court. The Court noted that the only type of unfair labor practice charges that Sears could have presented concerned whether the picketing union had filed a petition for recognition by the employer[57] or had forced Sears to assign work to the carpenters' union members.[58] Thus, in either case, the Board would have questioned only the purpose of the pickets' conduct. The state court in the trespass action, however, was unconcerned with the purpose of the picketing; it considered only the location. The controversies were, therefore, not sufficiently similar to trigger

52. 52 Cal. App. at 697, 125 Cal. Rptr. at 249. *See* notes 35-36 and accompanying text *supra*.

53. 17 Cal. 3d 893, 553 P.2d 613, 132 Cal. Rptr. 443 (1976).

54. 436 U.S. at 188. The Court remanded the case to the California Supreme Court for a resolution of whether the union's activity violated state law and whether under state law the state was empowered to enjoin the activity. *Id.* at 185. On remand, the California Supreme Court found the picketing to be lawful activity under a California statute that declared lawful any picketing "not involving fraud, violence or breach of the peace where any person or persons may lawfully be." CAL. CIV. PROC. CODE § 527.3(b)(1) (West 1979). *See* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, No. 347511, slip op. at 6-17 (Cal. Sept. 14, 1979).

55. 436 U.S. at 197.

56. This argument was advanced by Sears in its brief to the Court. Reply Brief for Petitioner at 9, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978).

57. *Id.* at 198. *See also* note 130 *infra*.

58. 436 U.S. at 198. Section 8(b)(4)(D) of the Act proscribes strikes and economic boycotts whose object is to require an employer to assign work to employees of a certain labor organization rather than others unless the employer has failed to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. 29 U.S.C. § 158(b)(4)(D) (1976).

the primary jurisdiction rationale based upon the arguably prohibited branch of *Garmon*.[59]

According to the *Sears* Court, the primary jurisdiction of the Board also justifies preemption when the union activity is actually or arguably protected by federal law.[60] Significantly, the Court specified that the risk of state interference with federally protected rights would justify preemption of state court authority only when an employer is unable to invoke Board jurisdiction or induce its adversary to do so to determine whether the union conduct is in fact protected.[61] Since the carpenters' union did not file an unfair labor practice charge upon instruction to leave the premises and no section of the Act authorized Sears to do so, the *Sears* Court found that preemption by primary jurisdiction was inappropriate on the premise and that the picketing was protected by federal law.

The Court declared that protected or arguably protected conduct is subject to the *Garmon* principles for a second reason: the risk of state court interference with section 7 rights.[62] Accordingly, state courts, using the *Babcock* accommodation principle, are to determine whether this risk is sufficiently great to mandate preemption. The state courts must also balance the risk of an erroneous adjudication involving section 7 rights against the "anomolous" consequence of denying the employer a forum in which to litigate the trespass issue.[63]

The *Sears* decision does not specify the precise event that ousts state court jurisdiction. In Justice Blackmun's view, federal preemption is triggered the moment a union files an unfair labor practice charge against the employer upon a company instruction to depart.[64] Justice Powell disagreed with this conclusion in a separate concurrence suggesting that state courts may interpret the majority's silence on this critical issue as approval of an expanded state court role. As a prerequisite to preemption, Justice Powell would require that the Board have actually asserted jurisdiction

59. *Id.*

60. The term "primary jurisdiction" is used in the Court's opinion to signify the general concept of Board preemption of state court jurisdiction over conduct subject to the general unfair labor practice jurisdiction of the Board. 436 U.S. at 199.

61. *Id.* at 201-02.

62. A third reason noted by the Court that protected conduct may invoke preemption principles is a constitutional one applying to actually protected activity. *See* note 5 *supra*.

63. 436 U.S. at 206. Justice Blackmun noted in a concurring opinion that "[d]elay in remedy is desired by neither party in a labor dispute." Although the Board may seek dissolution of a state court order enjoining protected conduct under NLRB v. Nash-Finch Co., 404 U.S. 138 (1971), such action would also entail delay. 436 U.S. at 210 & n.* (Blackmun, J., concurring). *See* notes 71-76 and accompanying text *infra*.

64. *Id.* at 208-12.

over the dispute by issuing a complaint against the employer.[65] The majority stated that the union's failure to file an 8(a)(1) charge was critical to its holding but did not commit itself on the effect of the union's filing its charge on state jurisdiction.[66] Justice Brennan in his dissent pointed out that the Court's members are divided in their interpretation of the consequence of filing.[67]

The Court's failure to resolve the question of when state court jurisdiction is preempted is significant because the timing of state court action will critically affect a union's ability to influence the outcome of a labor dispute. Picketing and handbilling, common forms of concerted conduct, seek to redress union grievances by appealing to employers, employees, or consumers patronizing employers. This is generally accomplished by protesting grievances at times when conditions at the employer's place of business are such that the union can reasonably expect to attain its objectives. Thus, if a state court enjoins protected union activity before the issuance of a complaint against the employer by the Board's General Counsel, according to Justice Powell's interpretation, the union will be temporarily denied the use of an economic, organizational, or informational tool. Despite a favorable subsequent ruling by the Board, such a temporary restriction would likely be fatal to the effectiveness of the union's activities. The Powell interpretation may, therefore, work to the union's detriment, but the union may not be without its own tactical devices for forestalling such a restraint. Under Justice Blackmun's interpretation, a state must yield its authority immediately upon the filing of a charge with the General Counsel's regional office. Thus, the union could simply file such a charge claiming section 7 protection when it anticipated a state court trespass suit by its employer, irrespective of the merits of the union's claim. Even if the claim was frivolous, the employer would be compelled to endure the union's activity at least until the General Counsel declines to issue a complaint.[68] The union could thus prevent the immediate termination of its concerted activities and thereby raise the probability that its conduct would produce the desired pressure on the employer.

By either view, it is inevitable that, in some instances, one party to an access dispute will be unable to make effective use of its state or Board

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65. *Id.* at 212-14 (Powell, J., concurring).
66. *Id.* at 207 (Powell, J., concurring).
67. *Id.* at 233 n.44 (Brennan, J., dissenting).
68. As Justice Powell observed, the Board is not empowered to issue or obtain from a federal court a temporary restraining order enjoining the picketing under § 10(j) of the Act until the General Counsel determines whether to issue a complaint. *Id.* at 214 (Powell, J., concurring). *See* 29 U.S.C. § 160(j) (1976).

remedy. An employer's effort to invoke its trespass remedy may be frustrated if a state court permits a union engaged in unprotected trespassory activity to insulate itself from state court jurisdiction until the General Counsel refuses to issue a complaint on the union's 8(a)(1) unfair labor practice charge against the employer.[69] Other state courts, however, may bar a union from making effective use of its federal statutory remedy against employer interference with concerted conduct by ordering the union to vacate the premises of an employer, at least until the Board's General Counsel issues a complaint against the employer. Thus, by granting the employer a remedy in state court without deciding whether the court's jurisdiction would endure union efforts to invoke Board authority, the *Sears* Court grants the state court the discretion to exercise significant control over the remedial opportunities of the employers and unions involved in labor disputes. In fact, *Sears* creates the risk that the pro-management or pro-union inclinations of each state court judge will be outcome determinative.

II. NONEMPLOYEE ACCESS: TRACING THE LOCUS OF ACCOMMODATION

The majority's reluctance in *Sears* to adopt Justice Blackmun's standard for limiting state authority may be explained by Court dicta. The Court suggested in *Sears* that the likelihood of protected nonemployee access to private property was minimal, especially when the union's purpose was

69. In 1978, the median period from the date of filing of a charge to the issuance of a complaint was 47 days. NLRB ANN. REP. 11 (Fiscal Year Ending Sept. 30, 1978) [hereinafter cited as ANNUAL REPORT]. The time within which the region will decline to issue a complaint upon the filing of a nonmeritorious charge is somewhat shorter. For example, it is estimated that 30 days out of every 45-day period from the filing of a charge to complaint issuance were attributable to investigation. Complaint preparation and voluntary adjustment conferences accounted for the remaining 15 days. *See* E. MILLER, AN ADMINISTRATIVE APPRAISAL OF THE NLRB, LAB. REL. & PUB. POLICY SERIES NO. 16, at 41 (1978). The General Counsel engages in efforts to promote a settlement before and after the determination of whether a given case presents a merit charge. Forty-eight percent of merit charges during 1978 resulted in precomplaint settlements and adjustments. ANNUAL REPORT, *supra* at 10. Furthermore, within limits, either party may prolong the settlement process. Delay in complaint issuance in nonemployee access cases is further protracted by the placement of cases relating to *Hudgens, Giant Food*, and *Hutzler Brothers* on the list of issues that are mandatorily submitted to the Board's Regional Advice Branch. *See* GENERAL COUNSEL MEMORANDUM (June 26, 1979). In addition, cases pertaining to preemption under *Sears* have been designated by the General Counsel among those involving "novel, complex or doubtful issues, or other policy considerations" which require the Regional Director to "be especially careful in its research" and submit the case to the Advice Branch at its discretion. GENERAL COUNSEL MEMORANDUM 78-79 (Dec. 13, 1978). It is from the Advice Branch that the Board's Director for each geographic region seeks counsel on whether a complaint should issue in cases involving unsettled areas of Board law and policy.

nonorganizational.[70] It is arguable that, in declining to establish which circumstances trigger preemptive Board authority, the Court assumed that the Board would not protect conduct that state courts would prohibit as trespassory.

A. *The Babcock Accommodation*

The argument that a union's conduct on private property is protected is based on the limited right of nonemployee access implied in *NLRB v. Babcock & Wilcox*.[71] In *Babcock*, nonemployee organizers were denied access to an employer's privately owned parking lot for the purpose of distributing union literature.[72] The Court held that the union's conduct was not protected because the union's accessibility to employees through other channels was not sufficiently restricted to make organizational efforts away from the employer's premises ineffective.[73] Conversely, "[w]hen inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through reasonable channels," nonemployees are justified under *Babcock* in engaging in organizational activity on the employer's private property to the extent necessary to convey the organizational message.[74] By permitting limited access to nonemployees, the Court sought to achieve an "accommodation" between the organizational rights of the workers and the private property rights of the employer.[75] With due consideration for this accommodation of competing interests, the Board was to determine whether an employer had violated

70. *See* text accompanying note 99 *infra*.

71. 351 U.S. 105 (1956). In each of the three cases consolidated for Court review, the Board held that the employer had unreasonably interfered with employees' right to self-organization in violation of § 8(a)(1) by denying the organizers access to company property. The Board found that it would be unreasonably difficult for union representatives to reach employees outside company property. *Id.* at 106. In issuing its order, the Board relied on the Supreme Court decision in Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), which held that nonemployee union members enjoyed a first amendment right to engage in peaceful picketing on a privately owned shopping center. The United States Courts of Appeals for the Fifth and Tenth Circuits disagreed with the Board's decision in *Babcock* and denied enforcement. NLRB v. Babcock & Wilcox Co., 222 F.2d 316 (5th Cir. 1955); NLRB v. Seamprufe, Inc., 222 F.2d 858 (10th Cir. 1955). The United States Court of Appeals for the Sixth Circuit enforced the Board's order. NLRB v. Ranco, Inc., 222 F.2d 543 (6th Cir. 1955). The unions in *Babcock* and *Seamprufe* and the employer in *Ranco* petitioned for certiorari.

72. 351 U.S. at 114.

73. The Court observed that the plants were located near small, well-settled communities where "the usual methods of imparting information" were available. *Id.*

74. *Id.* For an illustration of a plant community's demographic characteristics clearly requiring a Board accommodation contrary to that of *Babcock*, see Broomfield, *supra* note 49, at 562 n.65.

75. 351 U.S. at 113-14.

section 8(a)(1) by denying the union access. After *Babcock*, the Court delineated the Board's role in access cases as that of fixing the locus of the accommodation, which falls in each case "at differing points along the spectrum depending on the strength of the respective section 7 rights and property rights asserted in any given context."[76]

Since *Babcock*, the Board has been cautious in permitting private access by organizers.[77] In such cases, the Board has inquired into the reasonableness of requiring unions to resort to alternative channels of communication and, in most instances, the adequacy of union efforts to utilize those channels. In addition to locating an organizational drive on public property, these channels include: telephoning employees; mailing them union literature; visiting them at their homes; and attracting their attention to the organizational drive by organizational meetings, newspaper, television and radio advertising, bumper stickers, placards, and loud-speakers.[78] In determining whether any one or combination of these alternatives is reasonable and adequately utilized, the Board has varied its standards of accommodation according to the nature of the employment context.

1. Live-In Employee Facilities

The Board has frequently granted unions access to private premises when the employees to be organized live on the employer's business property. In company towns and resort hotels, for example, a union may not have a reasonable opportunity to communicate with employees who do not leave the premises or do so at unpredictable intervals.[79] Organization drives are often further impaired when the employees' telephone and room numbers are unavailable to the union for mail and telephone messages and when staggered work shifts prevent mass media appeals from reaching the employees at any one time during the day. The Board has generally approved union access under these or similar circumstances even though the use of alternative channels of communication may have been incomplete.[80] Employers, however, have often successfully challenged enforce-

76. NLRB v. Hudgens, 414 U.S. at 522.

77. *See* notes 93-100 and accompanying text *infra*.

78. *See* Rochester Gen. Hosp., 234 N.L.R.B. No. 44, 97 L.R.R.M. 1410 (1978).

79. Prior to *Babcock*, the Board recognized that, for an organizational drive on a lumber camp to be successful, organizers must have access to the living quarters of employees. *See* NLRB. v. Lake Superior Lumber Corp., 70 N.L.R.B. 178 (1946), *enforced*, 167 F.2d 147 (6th Cir. 1948).

80. *See, e.g.*, New Pines, Inc., 191 N.L.R.B. 944 (1971), *enforcement denied*, 468 F.2d 427 (2d Cir. 1972); Tamiment, Inc., 180 N.L.R.B. 1074 (1970), *enforcement denied*, 451 F.2d 794 (3d Cir. 1971), *cert. denied*, 409 U.S. 1012 (1972); Kutsher's Hotel & Club, 175 N.L.R.B. 1114, *enforcement denied*, 427 F.2d 200 (2d Cir. 1970); S. & H. Grossinger, Inc., 156

ment of these Board orders in federal circuit courts[81] on the ground that the record evidence does not substantially support the Board's conclusion that union efforts to reach employees through alternative channels were sufficient.[82]

In contrast to cases involving company towns, the Board has been more explicit in establishing the burden a union must sustain to board water vessels lawfully for organizational purposes. Such cases present at least two circumstances unique to that employment setting. First, the permanent residences of employees housed on ships are frequently dispersed throughout a wide geographic area.[83] Second, union agents have difficulty in timing their visits to docks to coincide with crew changes when seamen normally board and disembark.[84] Thus, the accommodation the Board has struck for organizing ship employees has seldom resulted in their exclusion from private vessels.[85] In one such case, *Sabine Towing & Trans-*

N.L.R.B. 233 (1956), *enforced as modified*, 372 F.2d 26 (2d Cir. 1967); Joseph Bancroft & Sons, Co., 140 N.L.R.B. 1288 (1953).

81. Because orders by the Board are not self-enforcing, a union is required to seek enforcement of an order in the appropriate federal court of appeals if an employer found to have violated § 8(a) refuses to comply with the order. The employer in such an instance may also appeal to a federal court of appeals by filing an application for review of the order in that court.

82. In a § 8(a)(1) action, a reviewing court may deny enforcement of a Board order if, on the record as a whole, the finding that the employer interfered with union § 7 rights is not supported by substantial evidence. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). *Compare* NLRB v. S. & H. Grossinger, Inc., 372 F.2d 26 (2d Cir. 1967) (union effort adequate when employer resistance to union's use of alternative channels is part of a general pattern of employer hostility) *with* NLRB v. New Pines, Inc., 468 F.2d 427 (2d Cir. 1972) (union effort inadequate when union did not take advantage of times when employer had not barred organizers from visiting employees in their living quarters); NLRB v. Tamiment, Inc., 451 F.2d 794 (3d Cir. 1971) (union effort inadequate when limited to an unsuccessful canvassing campaign at plant gate and nearby tavern); NLRB v. Kutsher's Hotel & Club, 427 F.2d 200 (2d Cir. 1970) (union effort inadequate when union failed to solicit live-in employees who crossed a public road to and from meals and work stations).

83. *See, e.g.*, Belcher Towing Co., 238 N.L.R.B. No. 63, 99 L.R.R.M. 1566 (1973), *application for enforcement granted*, No. 78-3343 (5th Cir. Dec. 26, 1978) (employees' residences dispersed throughout the state of Florida); Sabine Towing & Transp. Co., 205 N.L.R.B. 423 (1973), *enforced as modified*, 599 F.2d 663 (5th Cir. 1979) (207 employees' residences dispersed throughout the state of Texas and 61 employees having mailing addresses in eight other states); NLRB v. Sioux City & New Orleans Barge Lines, Inc., 472 F.2d 753, 754 (8th Cir. 1973) (employees' residences in 15 different states).

84. *See* Sabine Towing & Transp. Co., 205 N.L.R.B. 423 (1973), *enforced as modified*, 599 F.2d 663 (5th Cir. 1979).

85. *See, e.g.*, Belcher Towing Co., 238 N.L.R.B. No. 63, 99 L.R.R.M. 1566 (1973), *application for enforcement granted*, No. 78-3343 (5th Cir. Dec. 26, 1978); Sabine Towing & Transp. Co., 205 N.L.R.B. 423 (1973), *enforced as modified*, 599 F.2d 663 (5th Cir. 1979); Sioux City & New Orleans Barge Lines, Inc., 193 N.L.R.B. 382 (1971), *enforcement denied*, 472 F.2d 753 (8th Cir. 1973); Alaska Barite Co., 197 N.L.R.B. 1023 (1972) (ore processing plant employees who live and work on a remote island deemed "isolated from normal con-

portation Co.,[86] the Board noted that the employer bears the burden of proving that union efforts are inadequate.[87] The Fifth Circuit, however, rejected the Board's allocation of the burden and denied enforcement to the pertinent portion of the Board's order.[88] Under a different rationale, the Eighth Circuit, in *NLRB v. Sioux City & New Orleans Barge Lines, Inc.*, denied enforcement to an earlier boat-access Board order. [89] In *Sioux City*, the court considered the right of the employer to conduct its operations free from interference with ship discipline and production.[90] The court found that implementation of the Board's order would require substantial expenditure of time and energy by the employer to direct union representatives through the boat's boarding and disembarking procedures.[91] In both *Sioux City* and *Sabine Towing*, the circuit courts criticized the Board's approval of union access by rejecting Board findings that the unions had made a sufficient showing of the ineffectiveness of alternative channels of communication with employees.[92]

2. Other Single-Employer Facilities

In the common business environment of a single industrial plant, retail store, or hospital, the Board has applied a more rigid standard of evaluating the adequacy and effectiveness of alternative union efforts. A union may reasonably be expected to organize employees of such a facility in public accessways to the company grounds and by mass media appeals. In a large urban area, however, the latter channel may be foreclosed. The number of newspapers or radio and television broadcasts employees are exposed to during off-duty times may be so numerous that the union cannot expect to reach more than a small fraction of the employees with a reasonable investment in these media. The Board has, nonetheless, refused to approve union access to an employer's plant solely on the basis of the expense and inconvenience the union would incur in resorting to the

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tact"). *But see* Bludworth Constr. Co., 123 N.L.R.B. 385, 387 (1959) (other channels by which tugboat employees may be reached unspecified).

86. 205 N.L.R.B. 423 (1973), *enforced as modified*, 599 F.2d 663 (5th Cir. 1979).

87. Sabine Towing & Transp. Co., 205 N.L.R.B. at 424.

88. 599 F.2d 663 (5th Cir. 1979).

89. 472 F.2d 753 (8th Cir. 1973).

90. *Id.* at 755-56. Restrictions on employees' right to discuss self-organization may be based only upon a showing by the employer that the restriction is necessary to maintain production and discipline. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803-04 n.10 (1945).

91. 472 F.2d at 756.

92. Sabine Towing & Transp. Co. v. NLRB, 599 F.2d at 665; NLRB v. Sioux City & New Orleans Barge Lines, Inc., 472 F.2d at 756.

mass media.[93]

The responsibility of a union for contacting employees by telephone, mail, and home visits is also substantial in most single-employer settings. To meet the Board's standards of adequacy, a union may be required to solicit actively the employer's cooperation in obtaining a list of employees,[94] compile a list of its own through a check of employee license plates,[95] and ensure that its list is comprehensive and up-to-date.[96] The Board has required no less adequate an effort by the union when traffic hazards at company entrances deter organizers from safely conducting license plate checks.[97] On the other hand, if the union is successful in obtaining the employee list and pursues a significant number of employees through the mail or at home, its effort may be sufficient, in the Board's view, to constitute effective use of alternatives and thus result in the Board's denial of access.[98]

Supported by Board precedent governing union access to traditional employer establishments, the Court in *Sears* made this observation: "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."[99] The Court's conclusion from Board cases involving traditional single-employer facilities that the accommodation struck in favor of such employers' property rights is the general rule[100] inaccurately represents

93. *See* Monogram Models, Inc., 192 N.L.R.B. 705, 707 n.7 (1971). *See also* Falk Corp., 192 N.L.R.B. 716, 721 (1971); Farah Mfg. Corp., 187 N.L.R.B. 601, 617 (1970), *enforced*, 450 F.2d 942 (1971) ("One would think that the best way to determine the efficacy of such an effort would be to make it."); General Dynamics/Telecommunications, Inc., 137 N.L.R.B. 1725, 1728 (1962).

94. *See* Monogram Models, Inc., 192 N.L.R.B. 705 (1971) (organizers' unsuccessful effort to secure employee list significant to union's ability to hold organizational meetings).

95. *See* Dexter Thread Mills, Inc., 199 N.L.R.B. 543, 545 (1972).

96. *See* Falk Corp, 192 N.L.R.B. 716, 720 (1971).

97. *See* Dexter Thread Mills, Inc., 199 N.L.R.B. 543 (1972). The question of organizers' safety at plant gates for any organizational purpose has been of limited persuasiveness in influencing the Board to accommodate the organizers' § 7 rights. *See* Farah Mfg. Corp., 187 N.L.R.B. 601 (1970), *enforced*, 450 F.2d 942 (1971). *But see* Schoelle Chem. Corp., 192 N.L.R.B. 724, 730 (1971), *enforced*, 82 L.R.R.M. 2410 (7th Cir. 1972), *cert. denied*, 414 U.S. 909 (1973) (safety factor combined with strong union effort to acquire nonemployee list sufficient to render use of alternative channels of communication ineffective).

98. *See* General Dynamics/Telecommunications, Inc., 137 N.L.R.B. 1725, 1728 (1962).

99. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. at 205.

100. *Id.* at 236 n.41.

this employment context as prototypical of the American workplace.

3. Multiple-Employer Facilities Open to the Public

The emergence of business settings distinct from traditional single-employer facilities has influenced the Board to modify its approach to balancing section 7 and private property interests.[101] When an employer locates its business on leased premises shared by other businesses and open to the general public, it may not be insulated from nonemployee organizational activity. A prime obstacle facing union organizers on this type of property is the difficulty they normally encounter in distinguishing target employees from employees, customers, and suppliers of other businesses on the premises. In contrast, the employer is faced with the similarity of its property's functional characteristics to those of a normal business district from which no property interest would justify the union's exclusion.[102]

In *Solo Cup Co.*,[103] the Board approved union access to solicit employees on a privately owned industrial park. The union sought access to this industrial complex only after organizational efforts at a public area proved futile and unsafe. The Board concluded that, although the union used no other alternative channels, it had made reasonable attempts at organizing outside the private grounds.[104] The fact that the general public was not excluded from the premises was a significant factor in the decision.[105]

101. As consumer-oriented industries adapted their marketing techniques to the needs of densely populated suburban areas, the public increased its reliance on privately owned shopping malls for retail purchases, recreational facilities, and even professional services. Between 1960 and 1977, the number of shopping centers in the United States increased from fewer than 4000 to over 18,000. Warner, *Suburbia's Gift to the Cities*, in 19 HORIZON 12 (Sept. 11, 1977). During 1973 alone, 1,600 centers were built. *See Why Shopping Centers Rode Out the Storm*, in 119 FORBES 35 (June 1, 1976). The commercial success of mall establishments has influenced urban developers to include shopping malls in their plans for revitalizing the downtown sections of major United States metropolitan areas. *See* Warner, *supra* at 12. Innovative developers have increased the consumer appeal of shopping centers by introducing "mixed use" centers with nonretailing attractions. Developers credit the success of the University Towne Center in San Diego, for example, to the 17% leasable space within the center devoted to attractions such as an ice skating rink, a preschool day-care center, a folk art museum, discotheques, community meeting rooms, classrooms for university extension courses, and facilities for YMCA exercise classes. *See A Spurt in Shopping Centers*, in BUSINESS WEEK 92 (Jan 15, 1979). Given the investment incentive to corporate and individual investors in this relatively new form of commercial property, it can be expected that, as the number of these complexes grows, the frequency of access disputes on leased premises will increase proportionately.

102. *See* Central Hardware, 181 N.L.R.B. 491, 500 (1970), *enforced as modified*, 439 F.2d 1321 (8th Cir. 1971), *vacated*, 407 U.S. 539 (1972).

103. 172 N.L.R.B. 1110, *enforcement denied*, 422 F.2d 1149 (7th Cir. 1970).

104. *Id.* at 1110-11.

105. *Id.* at 1111.

In *Central Hardware*, the Board extended the concept of quasi-public property implied in *Solo Cup* to organizational activity on the parking lot of a single retail store.[106] The Board considered the quasi-public nature of the property as a blanket protection to the union's conduct and did not weigh other factors to strike an accommodation. Although it recognized that the union could have pursued employees through other methods, the Board summarily dismissed these methods as ineffective.[107] The United States Supreme Court upheld an Eighth Circuit decision denying enforcement in that case. The Court found that by protecting the union's conduct without inquiry into variables other than the openness of the employer's premises, the Board had ruled inconsistently with the *Babcock* principle.[108]

More recently, in *Hutzler Brothers Co.*,[109] the Board again considered the concept of property openness. In that case, organizers distributed handbills to department store employees at a public entrance that employees were required to use as they came on and off duty before and after business hours. Eighty percent of the Hutzler Brothers' employees who drove to work arrived at the employee entrance through a four-lane accessway which the employer shared with an adjacent thirty-to-forty store shopping center. Although the union had not attempted alternative methods of conveying its message to employees, the Administrative Law Judge examined each of the possible alternatives and concluded that the employer had unlawfully interfered with the union's section 7 rights by demanding that it depart from its position at the store entrance. A major factor considered in the balance was the employer's voluntary dilution of its own private property interest by opening its property to the public.[110] In *Hutzler Brothers*, the points of ingress and egress for the employer's store were identical to those of the shopping center through which thousands of vehicles traveled daily.[111] Thus, the effectiveness of reasonable alternative channels of communication to reach employees could be

106. 181 N.L.R.B. 491 (1970), *enforced as modified*, 439 F.2d 1321 (8th Cir. 1971), *vacated*, 407 U.S. 539 (1972).

107. The Board found, for example, that it was impractical for the union to make use of its "fairly complete list" of employees' names and addresses when employees were more often than not away from their homes when union representatives called. *Id.* at 496.

108. 407 U.S. at 546-48. The court found on remand that the Board's finding that there were no reasonable alternative means of communicating with employees was not supported by substantial evidence on the record as a whole. Central Hardware v. NLRB, 468 F.2d 252, 256 (8th Cir. 1972).

109. 241 N.L.R.B. No. 141, 101 L.R.R.M. 1062, *application for enforcement granted*, No. 79-1252 (4th Cir. June 4, 1979).

110. 241 N.L.R.B. No. 141 at 9-10.

111. *Id.* at 7.

no greater than where an employer's store is located on the shopping mall itself. Unlike *Central Hardware*, in which the Board's grant of access turned on the quasi-public character of the employment setting, *Hutzler Brothers* represented an accommodation of competing rights in which the public nature of the business property was but one factor that was weighed.[112] Thus, the Board recognized in *Hutzler Brothers* that the design of business property for public use may be a physical obstacle to employee organization if an organizational drive is barred from the property. It can be expected that, in similar cases, the Board will more readily sanction nonemployee access than in traditional employment settings where an employer has acted affirmatively to ensure the privacy of its business.

B. Accommodating Strikers

The *Babcock* accommodation was first thought to apply only to organizational activity, but in 1976 the principle was extended to peaceful economic picketing in *Hudgens v. NLRB*.[113] In support of a lawful economic strike, striking employees who worked at a remote warehouse picketed in front of a store leased by their employer in Hudgens' shopping center. Threatened with arrest for criminal trespass by the shopping center's general manager, the pickets filed an 8(a)(1) unfair labor practice charge against Hudgens, the shopping center owner. The Board issued a preliminary cease-and-desist order against Hudgens, which it later affirmed. Adopting the findings and recommendations of an Administrative Law Judge, who held that Hudgens had unlawfully interfered with the pickets' protected conduct,[114] the Board concluded that, irrespective of the existence of alternative means for organizers to communicate with employees, the pickets' presence was within the scope of the owner's invitation to members of the general public to do business at the store.[115] The Court of Appeals for the Fifth Circuit enforced the Board's order, partly on first amendment grounds.[116] On certiorari, the United States Supreme Court

112. *Id.* at 10.

113. 424 U.S. 507 (1976).

114. *Id.* at 511. In issuing the order, the Board relied on the Supreme Court decision in Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), which held that nonemployee union members enjoy a first amendment right to engage in peaceful picketing on a privately owned shopping center.

115. Scott Hudgens, 205 N.L.R.B. 628, 631-32 (1973), *aff'd*, 501 F.2d 161 (5th Cir. 1974), *rev'd*, 424 U.S. 507 (1976).

116. The Fifth Circuit relied on the Supreme Court's decision in Lloyd Corp. v. Tanner, 409 U.S. 551 (1972), which required that, for a union to enter private property permissibly, organizational opportunities at locations less intrusive upon the owner's property must be

held that the pickets enjoyed no constitutional guarantee of freedom of expression but remanded the case to the Board for a determination consistent with the *Babcock* criteria.[117] The Court stated that the Board, in reaching an accommodation, must inquire into the nature of the challenged conduct and the business property on which it takes place. Only upon such inquiry would the Board act consistently with the "basic objective under the Act" of striking a balance between section 7 and private property rights "with as little destruction of one as is consistent with the maintenance of the other."[118] On remand, the Board applied the *Babcock* analysis and found that Hudgens' property interest must yield to the pickets' section 7 rights.[119]

To accommodate the union's picketing, the Board considered the type of picketing involved, the intended audience, and the identity of the pickets. Because lawful economic rather than organizational activity was involved, the Board noted that the pickets' intended audience comprised two groups: (1) consumers at the mall who might be influenced to purchase items from the target store after viewing the store's window display; and (2) employees of the target store. Additionally, the Board found the pickets were employees of the picketed store, though not of the property owner-lessor.[120] The Board further noted that to require pickets to communicate by media would be unreasonable, especially in view of Board and Court precedent recognizing and protecting economic picketing as the most effective means of dissuading those who would enter a struck employer's premises.[121] Finally, the Board found it inappropriate to require the pickets to resort to property which did not encroach on Hudgens' property interest since, in a complex of sixty stores, a picket line at the closest public area would be too remote to be meaningful.[122]

Since *Hudgens*, the Board has extended protection to pickets located on other types of private property open to the public such as industrial parks.[123] In a recent decision, *Seattle-First National Bank*,[124] it accommo-

either unavailable or insufficient. The Court found that the Board's General Counsel had met the burden of proof in that case. Hudgens v. NLRB, 501 F.2d 161, 169 (5th Cir. 1974).

117. 424 U.S. at 512-21.

118. *Id.* at 521 (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956)).

119. The Board observed that to hold otherwise would enable employers to insulate themselves from § 7 activity by simply fronting their business on leased premises on private malls. Scott Hudgens, 230 N.L.R.B. 414, 418 (1977). No appeal was taken in *Hudgens* on remand.

120. 230 N.L.R.B. at 416.

121. *Id.* at 416-17 (citing United Steelworkers of America v. NLRB (Carrier Corp.) 376 U.S. 492, 499 (1964)).

122. 230 N.L.R.B. at 417.

123. *See* Holland Rantos Co., 234 N.L.R.B. No.113,97 L.R.R.M. 1376, *enforced sub*

dated the statutory rights of employee pickets who had sought access to the foyer of a restaurant on the forty-sixth floor of a bank building. The bank, which was the owner of the building, leased space to the employer restaurant. Finding the factual setting analagous to that in *Hudgens*, the Board held that the owner's property rights must yield to the restaurant employees' section 7 rights.[125] In so holding, the Board has affirmed its position in *Hudgens* that the context of union concerted conduct may be a determinant of whether such conduct is protected.

III. "CONTENT AND CONTEXT" OF UNION CONCERTED CONDUCT: A MATRIX OF COMPETING INTERESTS

In contrast to the Court's pronouncement in *Sears* that access to private property is more likely to be unprotected than protected, the Board's accommodation of the competing interests in access cases has never been one of flat prohibitions. In *Hudgens*, the Court characterized the Board's role as one of "adapting the Act to changing patterns of industrial life."[126] In response to the *Hudgens* mandate that it reach an accommodation based on considerations of the "content and context" of the section 7 right being asserted,[127] the Court has evaluated property rights and nonemployee access rights in terms of a conceptual matrix whose axes comprise the form of union concerted conduct and the nature of the business property on which the activities take place.[128]

A. Area Standards Picketing

The *Sears* pickets argued that they were entitled to a Board determination that their picketing was protected activity because the purpose of their protest was to enforce area standards. Unions such as the *Sears* pickets participate in area standards picketing to protect the standards of wages and benefits they have successfully negotiated in a community from the unfair competitive advantage that an employer with lower labor costs enjoys when it opens for business in that community.[129] By appealing to

nom. Eisenberg v. Holland Rantos Co., 583 F.2d 100 (3d Cir. 1978). *Cf.* Peddie Bldgs., 203 N.L.R.B. 265 (1973), *enforcement denied sub nom.* NLRB v. Visceglia, 498 F.2d 43 (3d Cir. 1974) (pre-*Hudgens*).

124. 243 N.L.R.B. No. 145, 101 L.R.R.M. 1537, *application for enforcement granted,* No. 79-7509 (9th Cir. Oct. 3, 1979).

125. 101 L.R.R.M. at 1538.

126. 424 U.S. at 523 (quoting NLRB v. Weingarten, Inc., 420 U.S. 251, 266 (1975)).

127. 424 U.S. at 521.

128. *See* note 101 *supra.*

129. *See* Area Standards Picketing: The Union Stake in the Wage-Scale Game, [1978] 4 LAB. L. REP. (CCH) ¶ 9166.

potential customers of the employer to avoid doing business with it, the pickets attempt to bring pressure on the employer to meet the area's wage and benefit standards. Area standards picketing has recently been examined and approved in situations that would, but for an area standards object, be considered unlawful union attempts to seek recognition from an employer whose employees the union does not represent.[130]

It is certain that access to privately owned shopping malls by area standards pickets will be the target of employer trespass challenges. Unions may find it necessary to conduct their protests on the private accessways surrounding individual business locations in order to reach the customers to whom their message is directed. Since unions engage in this type of protest to protect interests of employees other than those of the target employer, the participants will normally be nonemployees. Under these circumstances the Board has determined in *Giant Food, Inc.*[131] that area standards picketing is both lawful and affirmatively protected under section 7.

In *Giant Food*, a retail employer occupying leased space in a two-store shopping center was found to have unlawfully interfered with area standard pickets' section 7 rights when it demanded that the pickets leave the property. In accommodating the interests of the employer and the pickets' union, the Board assessed the nature of the union activity and the employer's location. The factors the Board considered before concluding that access to the employer's location was reasonably necessary for the union to assert its rights were: (1) the presence at the shopping center of the employer with whom the union had its dispute; (2) the likelihood that conditions at the public roadway to the center would prevent a distracted driver from receiving the union message from outside the center; (3) in view of the number of stores the customers could patronize at the center, the ability of pickets to ascertain the identity of customers of the target store from the public roadway; (4) the likelihood that the union's position at the en-

130. Section 8(b)(7) of the Act proscribes picketing by a union not currently certified when a bar exists to the raising of a question concerning a union's representation of the employees in that bargaining unit, and when the union's object is to require the employer to recognize or bargain with that union (recognitional picketing) or to require employees to accept that union as their exclusive bargaining representative (organizational picketing). A question concerning representation cannot be raised when: (1) an employer has lawfully recognized another union; and (2) a valid election has been held within 12 months. 29 U.S.C. § 158(b)(7)(A-B) (1976). It is also unlawful under § 8(b)(7) to picket with an organizational or recognitional objective when no representation petition has been filed by the uncertified union within a reasonable time from the commencement of the picketing not to exceed 30 days. *Id.* § 158(b)(7)(C).

131. 241 N.L.R.B. No. 105, 101 L.R.R.M. 1598, *application for review granted*, No. 79-1248 (6th Cir. June 15, 1979).

trance to the complex would enmesh neutral shopping center employers in its dispute with the target store; and (5) the location of the union protest on property which was open to the public. The fact that the pickets were nonemployees was also considered significant to the Board's accommodation.[132]

Although the locus of the *Babcock* accommodation of section 7 and property interests differs in each case in which the principle is applied,[133] there is good reason to assume that the *Giant Food* analysis would apply with equal force to hold such picketing protected at most other shopping center locations. Unlike most other shopping complexes, the center to which the Giant Food pickets were allowed access contained only two stores. This minimized the difficulty pickets would have encountered in identifying employees of the target store from outside the center. Moreover, the Board struck a balance in favor of the Giant Food pickets' statutory rights despite the fact that the pickets had attempted no alternative means of attracting customers' attention such as by mass communications or the use of loudspeakers from public roadways. Although the *Giant Food* decision does not contain a detailed consideration of the distances between store entrances or from the stores to the public roadway, shopping centers are not so varied in their design of accessways and store proximity that picketing on other such property could be meaningfully distinguished from the facts in *Giant Food*. In holding union conduct protected in a context similar to those where unions have traditionally been denied company access,[134] the Board attributed special importance to the content of the area standards message as a factor favoring union access. If the Board's decision is upheld on review, the *Sears* dicta that area standards picketing on private property is more likely unprotected than protected will be in direct contradiction to Board precedent. Until the Court clarifies the position it took in *Sears*, state court reliance on the *Sears* dicta may result in erroneous state court prohibitions of protected conduct.

Even if state courts rely on *Giant Food* for guidance in accommodating the respective employer and union interests in area standards cases, it is doubtful that such courts, in deciding whether to issue an injunction,

132. 101 L.R.R.M. at 1600-01. The union began distributing handbills to customers the day Giant Food began operating its store in Knoxville, Tennessee. Although none of the pickets was a Giant Food employee, some had been employees of a store which formerly occupied the same space as Giant Food. Pickets' signs read: "Informational picketing — Giant Food Markets does not pay area standards wages and benefits. Please don't shop. Retail Clerks Union 1557, 203 North 11th Street, Nashville, Tennessee." *Id.* at 1598.

133. *See* NLRB v. Babcock & Wilcox Co., 351 U.S. at 112.

134. *See* notes 93-100 and accompanying text *supra*.

would inquire into all issues the Board would consider relevant in determining whether the conduct is protected. The Board has found, for example, that for a union to defend successfully its activity as area standards conduct against an employer's 8(b)(7) charge, the union must have made reasonable attempts to ascertain whether the employer actually pays employees substandard compensation.[135] Thus, whether a union has made such attempts is a relevant issue for a state court to consider. Equally relevant is the question whether the picketing union would require the employer to pay union scale wages in the future. Such an objective would be an unlawful recognitional attempt by the union to declare itself negotiator of wages.[136] In general, if the union message were not conveyed in full conformity with the consumer publicity proviso to the section 8(b)(7)(C) prohibitions against organizational and recognitional picketing, the object of the picketing would be unlawful.[137] Failure of state courts to consider such questions could result in their refusal to enjoin picketing even though the Board would subsequently decline to assert jurisdiction, finding the conduct unprotected. Although state court misapplications of Board law to protect picketing that the Board would prohibit pose no threat to the interests *Sears* identified as underlying the preemption doctrine, they would interfere with uniform administration of the Act.

If, on the other hand, state courts rely on the *Sears* dicta to enjoin trespassory area standards picketing before a Board complaint is issued, the action may impact gravely on the success of the picketing effort. Area standards picketing is generally organized to coincide with the commencement of business operations by the employer whose compensation is substandard.[138] Whether the picketing effort succeeds depends largely on the

135. *See* Building and Constr. Trades Council (Pettinaro Constr. Co.), 230 N.L.R.B. 42 (1977), *enforced as modified*, 578 F.2d 55 (3d Cir. 1978) (union scale wages paid to only one employee); Carpenters Local 745 (James W. Glover Ltd.), 178 N.L.R.B. 684 (1969), *enforced*, 450 F.2d 1255 (9th Cir. 1971) (union base wages and fringes in excess of those required by law paid to employees).

136. Centralia Bldg. Trades Council v. NLRB, 155 N.L.R.B. 803 (1965), *enforced*, 363 F.2d 699 (D.C. Cir. 1966).

137. As a proviso to § 8(b)(7)(C) prohibitions against organizational and recognitional picketing, the Act states:

> Nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment not to pick up, deliver or transport any goods or not to perform any services.

29 U.S.C. § 158(b)(7)(C) (1976). *See generally* F. BARTOSIC & R. HARTLEY, *supra* note 12, at 120-21.

138. *See* note 132 *supra*.

union's ability to convey its message to customers before the employer has built up a body of loyal customers. If an employer can promptly appeal to a state court to enjoin protected picketing at the outset of the union's protest, the strength of the pickets' ability to influence the public and thus defend area wage scales is substantially diminished.

B. Organizational Solicitation

According to the *Sears* majority, whatever protection the Board would extend to area standards picketing is likely to be less than that accorded nonemployee union organizers at the same location.[139] Moreover, organizational pickets are saddled with a heavy burden of proving that their efforts at using alternative channels of communication were ineffective before lawfully obtaining access to the private grounds.[140] However, the Court's reliance on *Babcock* to support these assertions is unjustified. *Babcock* required only that a union make "reasonable" efforts to communicate by other means before it may lawfully enter the private premises.[141] Moreover, the Board itself was entrusted with the responsibility of striking the accommodation.[142] Contrary to the Court's dicta in *Sears*, the union's burden in satisfying the *Babcock* requirement of reasonableness has not always been a rigorous one under Board law. Rather, as the *Babcock* principle has been applied to different employment settings, different standards have emerged. In the past, the Board has imposed a substantial burden on unions seeking to organize employees of employers situated in traditional industrial plant settings. As the nature of business property has changed, however, the Board has recognized new restrictions on a union's ability to reasonably utilize alternative channels of communicating its message to employees.

In *Hutzler Brothers*, the Board squarely faced the onerous burden a union undertakes when it attempts to organize employees at consumer shopping malls and related property. In striking its balance in favor of the nonemployee organizers, the Board recognized the relatively minor encroachment union organizers pose to an employer's property interest when the same organizers would be welcome on the property for most nonorganizational purposes. The conflict between the approach taken by the Board in cases such as *Hutzler Brothers* and the Court's statement on adequate use of alternative channels of communication in *Sears* is more than

139. 436 U.S. at 205 n.42.
140. *Id.* at 205 n.41.
141. *See* text accompanying note 74 *supra*.
142. NLRB v. Babcock & Wilcox Co., 351 U.S. at 112.

academic. The Fifth Circuit, in denying enforcement in *Sabine Towing*, has already relied heavily on the language in *Sears* to deny nonemployee organizers access to ships, thereby undercutting a well-established Board standard for that unique employment setting.[143] It is reasonable to assume that, unless clarification of the *Sears* pronouncement is forthcoming, the Board's accommodations in *Hutzler Brothers* and future cases involving locations open to the public will also be denied enforcement.

The Court's exaggerated view of restrictions imposed on nonemployee organization efforts may also be adopted by state courts. As with area standards activity, the consequences to unions of erroneous decisions to exclude them in their efforts to organize are severe. If organizational efforts are judicially terminated after an organizational campaign has gained momentum, an employer may take advantage of the interval following the injunction to undermine what support the union has generated up to that time.[144] If the employer is successful in this endeavor, it might eliminate the union threat altogether, irrespective of whether it is later found in violation of section 8(a).

C. Economic Picketing

The timing of the state court injunction is of equal or greater significance if the erroneously enjoined conduct is picketing in support of a lawful economic objective. A major purpose of the Act is to entrust the Board with power to balance the resources available to labor and management in bringing economic pressure against each other to accomplish their respective objectives.[145] In an economic strike, the Board meets the congressional mandate of striking this balance by granting protection to employees in their use of certain economic sanctions under section 7, while prohibiting both labor and management from using others under section 8.[146] If protected economic picketing by nonemployees is enjoined pursu-

143. *See* text accompanying notes 83-88 *supra*.

144. One means by which an employer accomplishes this is by assembling employees on company time to make antiunion speeches. Under the Board's rule in Livingston Shirt Co., 107 N.L.R.B. 400 (1953), an employer may not lawfully conduct such a speech when it has promulgated an unlawful no-solicitation rule. *Id.* at 409. If an employer unlawfully excludes organizers from its premises and such organizers are erroneously enjoined by a state court, the employer may be twice in violation of § 8(a)(1) when it conducts its antiunion speech. Nonetheless, the employer would have accomplished the intended diminution of union support, and, in such circumstances, the Board would be reluctant to issue a bargaining order forcing the employer to recognize and bargain with the defeated union. *See* United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. No. 179, 101 L.R.R.M. 1278 (1979).

145. *See* F. BARTOSIC & R. HARTLEY, *supra* note 12, at 95-149.

146. Pressure may be brought by employees in the form of strikes, picketing, and boy-

ant to a trespass action, a union may be prohibited from exercising its section 7 rights for the duration of a strike and be forced to make economic concessions it would not have otherwise made in collective bargaining. Correspondingly, if the injunction does not issue until the Board declines to issue a complaint, a similar disadvantage is suffered by an employer when a union is permitted to continue unprotected picketing perhaps for the entire duration of the strike. Since the *Sears* decision does not guide the state courts' choices of when the injunction should issue, it is within the discretion of those courts to determine which of these drastically different circumstances characterizes the outcome of a strike.

Because economic pickets engaged in strikes on private property open to the public are sometimes employees of lessees rather than owners of such property, owners of the property may seek state injunctions against pickets who continue their protest upon instruction to leave. Although this type of activity may not fall within the category of nonemployee conduct the *Sears* majority found likely to be unprotected, it is conceivable that state courts will prohibit it as such. Board decisions, however, do not support the inference that such activity is unprotected. In *Giant Food*, the Board found the significant question in such cases to be not whether the pickets are employees of the picketed employer but whether they are employees of an employer located at the situs of the picketing.[147] Similarly, in *Scott Hudgens*, the Board considered the fact that the pickets were employees of an employer located where the picketing took place in finding that the employer had unlawfully interfered with the pickets' section 7 rights.[148] In cases such as these, the Board has found that employees are governed by more lenient standards than those applied to individuals who have no immediate relationship to the target employer, such as nonemployee union organizers and area standards pickets. Accordingly, the accommodation principle should invariably apply to hold picketing by employees at these locations protected.

IV. Conclusion

In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, the Supreme Court has removed a judicial hiatus in employer civil remedies. State courts are now supplied with a framework for determining when their jurisdiction must yield to that of the Board in applying

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cotts. Employers may bring such pressure by replacing strikers, lockouts, and, under *Sears*, state trespass injunctions. *See id.* at 95-96.

147. Giant Food Mkts. Inc., 241 N.L.R.B. No. 105, 101 L.R.R.M. 1598, 1599, *application for review granted*, No. 79-1248 (6th Cir. June 15, 1979).

148. Scott Hudgens, 230 N.L.R.B. 416 (1977).

their trespass laws to union conduct arguably protected by section 7. The *Sears* Court has also related to state courts in dicta that it expects the Board to grant nonemployees little deference in applying the *Babcock* principle to forms of concerted conduct that may be challenged in state trespass actions. In contrast, the Board has recognized that private property is an interest of lessening importance for industries establishing businesses on private complexes open to the public. Accordingly, the Board has demonstrated a willingness to accommodate the activity of nonemployees engaged in area standards picketing and organizational activity, as well as that of striking employees picketing on leased property.

The conflict of Court dicta and Board standards has serious implications for the preservation of the *Babcock* accommodation principle as it is expanded by the Board to meet the special problems facing unions in new types of business environments. In *Babcock*, the Court has entrusted the accommodation of nonemployee access rights to the Board. The *Sears* Court, as it inaccurately characterizes the Board's standard for accommodating unions, purports to represent the weight of Board precedent on which state courts may depend in deciding whether to assert jurisdiction over access disputes. The consequences of reliance by these courts on the *Sears* dicta is substantial in light of the Court's failure to fix the point in time at which state court jurisdiction is preempted. Without a resolution of this issue, state courts have substantial discretion in determining whether and when the trespass remedy should be administered. A Supreme Court clarification of its position in *Sears* is necessary to forestall the detrimental effects on union concerted conduct that inevitably will result from inconsistent state court and Board holdings in access cases.

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