Notre Dame Law Review

Volume 49 | Issue 4 Article 11

4-1-1974

Contractual Waiver by Labor Unions of Employees' Solicitation-Distribution Rights: Time for a Resolution

Timothy G. Westman

CONTRACTUAL WAIVER BY LABOR UNIONS OF EMPLOYEES' SOLICITATION-DISTRIBUTION RIGHTS: TIME FOR A RESOLUTION†

Implicit in the right of self-organization granted to employees by Section 7 of the National Labor Relations Act[1] are the rights to solicit membership in a labor union and to distribute literature in furtherance of that solicitation.[2] These rights are indispensable to a national labor policy which has established the procedure of collective bargaining as the most effective means of promoting its basic purpose: the stabilization of industrial relations.[3] Thus, when an employer interferes with organizational solicitation and distribution on the part of his employees, he engages in an unfair labor practice in violation of Section 8(a)(1)[4] of the Act.

Employees, however, cannot wield these organizational instruments without limit. Solicitation and distribution rights granted under Section 7 of the Act must be balanced against employers' fifth amendment property rights.[5] Thus, when employees engage in organizational activity on an employer's property,

---

† During the time between the completion of this article and its publication, the Supreme Court heard the *Magnavox* appeal and reversed the Sixth Circuit's denial of enforcement. NLRB v. Magnavox Co., 42 U.S.L.W. 4300 (U.S. Feb. 27, 1974). The Court's terse opinion merely adopted the Board's *Magnavox* position, holding that employees' Section 7 organizational rights are too fundamental to be contracted away. It also expressed the Board's fear that a ratification of the contractual waiver theory would induce incumbent unions to rely on it for their self-perpetuation. In so deciding the Court virtually ignored the argument that an emasculation of the contractual waiver privilege, while guaranteeing rights to individual employees, would in turn weaken the collective bargaining power of the bargaining representative and frustrate the basic purpose of the Act. In the author's opinion, this decision was superficial and against the weight of reason. The following article may, therefore, be taken as a criticism of it.

1 29 U.S.C. § 157 (1970):

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .

2 The implicit right of solicitation was recognized in Peyton Packing Co., 49 N.L.R.B. 828 (1943), *enforced,* 142 F.2d 1009 (5th Cir. 1944), *cert. denied,* 323 U.S. 730 (1944), and Le Tourneau Co. of Ga., 54 N.L.R.B. 1253, 1259-60 (1944), *aff'd sub nom.* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); that of distribution of literature was noted in Walton Mfg. Co., 126 N.L.R.B. 697 (1960), *enforced,* 289 F.2d 177 (5th Cir. 1961).

3 29 U.S.C. § 151 (1970). This section provides in part:

> [P]rotection by law of the right of employees to organize and bargain collectively . . . promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest. . . .
>
> . . . .
>
> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

4 29 U.S.C. § 158(a)(1) (1970):

> [8](a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] . . . .

5 "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

they often find that the employer can restrict their solicitation and distribution opportunities in favor of his ownership interests.

The National Labor Relations Board and the federal courts have scrutinized employer-promulgated no-solicitation and no-distribution provisions in a long line of cases[6] and have developed clear and workable guidelines for determining their validity or invalidity. A few critical questions remain, however. Can a union, as bargaining representative for employees, *waive* their rights to solicit members and distribute literature in its collective bargaining contract with management? If so, whom does the waiver bind—members of the incumbent union only or rival union members and anti-union employees as well? Does the waiver take too much of the bite from Section 7 of the Act and thereby endanger, if not destroy, the organizational right it guarantees? And if such a contract provision cannot stand, is there not a violation of the principles of collective bargaining and freedom of contract as well as a neglect of employer property rights?

To look to the Board or to the courts for unequivocal answers to these questions is to look in vain, for the former has changed its position on the matter twice, and the United States courts of appeal which have considered this type of waiver are in conflict over its validity. This article will review the history of the contractual relinquishment of solicitation and distribution rights and will discuss the merits and demerits of each side of the dispute as it presently stands in the law. The uncertainty in this area of labor relations has persisted for more than a decade; it is time for a resolution.

I. Solicitation-Distribution Rights: General Background

The National Labor Relations Board articulated its policy on solicitation rights in 1943 in its *Peyton Packing Company* decision.[7] That decision, the source of the oft-quoted statement, "Working time is for work,"[8] explained that an employer's prohibition of organizational solicitation on his property during working hours is presumptively valid unless adopted or enforced for a discriminatory purpose or unless no alternative means of communication are available to the employees.[9] Conversely, a presumption of invalidity attaches to a no-solicitation rule applicable to nonworking hours; the employer can rebut this presumption only by showing that "special circumstances" make the rule "necessary in order to maintain production or discipline."[10] Otherwise, the rule acts as an

6 See text accompanying notes 7-15 *infra.*

7 49 N.L.R.B. 828 (1943), *enforced,* 142 F.2d 1009 (5th Cir. 1944), *cert. denied,* 323 U.S. 730 (1944).

8 *Id.* at 843.

9 For an example of invalidation where no reasonable, alternative means of communication were available to employees, see NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949), *rev'g* 165 F.2d 609 (4th Cir. 1947), *modifying* 70 N.L.R.B. 614 (1946) (pro-union employee in a company town denied permission to use an employer-owned auditorium for organizational solicitation).

10 49 N.L.R.B. at 844. Such special circumstances appeared in May Dep't Stores Co., 59 N.L.R.B. 976 (1944), *modified,* 154 F.2d 533 (8th Cir. 1946), *cert. denied,* 329 U.S. 725 (1946), where a nonworking hours no-solicitation rule was upheld as applied to the selling floor of a department store. Solicitation in that part of the building obviously interfered with sales efficiency. *See also* Marshall Field & Co., 98 N.L.R.B. 88 (1952), *modified,* 200 F.2d 375 (7th Cir. 1952), and Great Atlantic & Pacific Tea Co., 123 N.L.R.B. 747 (1959), *modified,* 277 F.2d 759 (5th Cir. 1960).

interference with Section 7 organizational rights and is thus a violation of Section 8(a)(1). Two years later the Supreme Court of the United States embraced the *Peyton Packing* rationale in *Republic Aviation Corp. v. NLRB*,[11] and the work-time/nonwork-time distinction has stood ever since.[12]

For nearly twenty years after *Peyton Packing* the Board subjected no-distribution rules to the same requirements it had formulated for no-solicitation rules. Its 1962 decisions in *Stoddard-Quirk Manufacturing Co.*[13] and *Young Spring and Wire Corp.*,[14] however, noted that distribution of literature differs from solicitation in that the material distributed is likely to be littered or to be kept and read during working hours *even though* the distribution permissibly occurred during nonworking hours. Finding that these differences could result in further interference with production, the Board expanded the validity of no-distribution rules: to give additional protection to his property rights and to his interest in a clean, efficient plant and uninterrupted production, the employer can ban the distribution of literature at all times in working areas.[15] The presumptive validity of such a promulgation can be rebutted by employee proof of special circumstances such as discriminatory enforcement or lack of alternative means of communication. The employees retain the right to distribute in nonworking areas during nonworking time; the presumption of invalidity of a rule denying them this right can only be overturned by proof of the rule's special necessity to promote production, discipline, or safety.[16]

In summary, employees have the statutory rights to engage in organizational solicitation in any areas during nonworking hours and to distribute organizational literature in nonworking areas during nonworking hours unless unusual circumstances intervene. It remains to be considered whether they can, consistent with Section 7 of the Act, contractually waive these rights through their union bargaining representative.

II. Early Decisions: Contractual Waiver Upheld

The first indication that the Board would uphold the validity of a waiver of solicitation rights came not by outright declaration but by implication in *North American Aviation, Inc.*[17] In that case the respondent corporation had an absolute no-solicitation rule that was the target of an unfair labor practice charge under Section 8(a)(1) of the Act. In defense the corporation offered a provision in its contract with the union that permitted solicitation except "on company time." It claimed that this clause superseded and rendered nugatory the presumptively-invalid no-solicitation rule. The Board had this to say about the respondent's contention:

11 324 U.S. 793 (1945). *See also* Walton Mfg. Co., 126 N.L.R.B. 697 (1960), *enforced*, 289 F.2d 177 (5th Cir. 1961), in which the Board clearly reaffirmed the work-time/nonwork-time distinction of *Peyton Packing* and *Republic Aviation*.

12 *See, e.g.*, Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 617 (1962); Standard Mfg. Co., 147 N.L.R.B. 1608, 1609 n.4 (1964); Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1241 n.10 (1966); J.L. Hudson Co., 198 N.L.R.B. No. 19 (July 12, 1972).

13 138 N.L.R.B. 615 (1962).

14 138 N.L.R.B. 643 (1962).

15 138 N.L.R.B. at 621.

16 *Id.*

17 56 N.L.R.B. 959 (1944).

> [N]othing is said in the contract concerning the right of the employees to engage in such activities *on company property* on their own time, and, while such right may be said to be implicitly declared in the afore-mentioned provision, we do not believe that a matter so vital to the employees' exercise of their right to self-organization should be left open to construction.[18]

In other words, the Board felt that the contract provision was too vague to show conclusively the employer's intent to allow solicitation. This implied, however, that a clearly-worded clause recognizing such organizational right, *or denying it,* would have the effect of superseding any unilaterally-promulgated rule on the matter.[19]

While *North American Aviation* hinted that a union representative can surrender employees' organizational rights through the collective bargaining agreement, *May Department Stores Co.*[20] openly endorsed that position:

> Granted, then, that the Union did enter into such contracts with the owners of other department stores, . . . [we assume] that it could thus effectively bargain away the employees' right to engage in self-organizational activities on the employer's premises during nonworking hours. . . . Such an agreement by the Union, arising, as it does, out of the "give and take" of collective bargaining, may, for aught that appears here, represent a concession made by it in exchange for the employer's agreement on other vital terms of the contract.
>
> . . . [T]he employees embraced by these contracts, on the assumption that the latter were entered into by organizations which represented a majority of the employees in an appropriate unit, have thereby effectively bargained away their right to engage in union solicitation on the respondent's premises. Consequently, and so long as the contractual provisions in question remain in effect, the respondent's prohibition against union solicitation on the respondent's premises at all times by employees covered by such contracts, is not to be deemed improper.[21]

This policy statement did not have a direct bearing on the outcome of the case and only appeared in a note, but its language is unmistakable. The Board intimated that employees can lawfully exchange Section 7 solicitation rights for other important contractual concessions through the medium of collective bargaining—a medium which the Act expressly encourages.[22]

The Board relied on *May Department Stores* in deciding *W.T. Smith Lumber Co.*[23] The respondent lumber company had barred all employee solicitation on its premises even during nonworking hours. Although presumptively

18 *Id.* at 963.

19 *North Am. Aviation* thus helped to inspire a long line of cases holding that a contractual waiver of *any* right guaranteed by the Act must be in "clear and unmistakable" language. *See, e.g.,* Tide Water Associated Oil Co., 85 N.L.R.B. 1096, 1098 (1949); Hekman Furniture Co., 101 N.L.R.B. 631, 632 (1952), *enforced,* 207 F.2d 561 (6th Cir. 1953); NLRB v. J.H. Allison & Co., 165 F.2d 766, 768 (6th Cir. 1948), *cert. denied,* 335 U.S. 814 (1948); Timken Roller Bearing Co. v. NLRB, 325 F.2d 746, 751 (6th Cir. 1963); Texaco, Inc. v. NLRB, 462 F.2d 812, 815 (3d Cir. 1972), *cert. denied,* 409 U.S. 1008 (1972).

20 59 N.L.R.B. 976 (1944), *modified,* 154 F.2d 533 (8th Cir. 1946), *cert. denied,* 329 U.S. 725 (1946).

21 *Id.* at 981-82 n.17 (dictum).

22 29 U.S.C. § 151 (1970).

23 79 N.L.R.B. 606 (1948).

invalid, the rule was held by the Board to be enforceable because it was included in the union-management contract.[24] After this clear application of the contractual waiver principle, succeeding Board decisions treated it as a recognized rule. The *Bethlehem Steel Co.*[25] trial examiner's report, adopted by the Board, cited it approvingly;[26] and *Fruitvale Canning Co.*[27] used it exclusively to uphold an otherwise overbroad no-solicitation rule:

> [T]he then existing collective bargaining agreement privileged the Respondent to promulgate a rule prohibiting union solicitation on the Respondent's premises by nonsupervisory employees. . . . [T]his Board has previously given its sanction to bargaining contracts which prohibit union activities by nonsupervisory employees on an employer's premises during employees' nonworking hours.[28]

The Board's unqualified ratification of contractual waiver of solicitation rights by employees through their union bargaining representatives extended beyond *Fruitvale Canning* into the 1950's and early 1960's.[29] It was based on the belief that freedom of contract in a collective bargaining context is the most effective means for employers and employees to reach mutually satisfactory agreements. According to this theory, if the employees allow their union agent to bargain away their solicitation and distribution rights for, say, an increased pay rate, they are bound by his renunciation of those rights in the agreement with management. The end result of such a waiver is the promotion of industrial peace and harmony—a basic purpose of the Act.[30]

But as the contractual waiver policy first unveiled in *May Department Stores* moved into the 1960's, the Board expressed partial dissatisfaction with it by disapproving the enforcement of blanket bans on employees' organizational activities whether or not the prohibitions were part of a collective bargaining agreement.

III. The *Gale Products* Precedent: Rival Unions, Dissident Employees, and Conflict in the Courts

Gale Products, Division of Outboard Marine Corp.[31] was the first case to express the Board's dissatisfaction with its contractual waiver policy. The decisions preceding it involved violations of no-solicitation contract clauses by employees representing incumbent unions only; in *Gale Products* a *rival* union attempting to oust the official bargaining representative distributed membership application cards on the employer's premises. Since this activity breached the

24 *Id.* at 616.
25 89 N.L.R.B. 341 (1950).
26 *Id.* at 363.
27 90 N.L.R.B. 884 (1950).
28 *Id.* at 885.
29 *See, e.g.,* the Board's adoption of the trial examiners' reports in Procter & Gamble Mfg. Co., 106 N.L.R.B. 2, 12 (1953); Clinton Foods, Inc., 112 N.L.R.B. 239, 263-64 (1955); Publishers' Ass'n of New York City, 139 N.L.R.B. 1092, 1112 n.14 (1962), *aff'd,* 327 F.2d 292 (2d Cir. 1964).
30 *See* note 3 *supra.*
31 142 N.L.R.B. 1246 (1963), *enforcement denied,* 337 F.2d 390 (7th Cir. 1964).

clause prohibiting *all* solicitation and distribution, the employer enforced his rule by discharging several members of the challenging union. The trial examiner relied on *May Department Stores* to uphold both the validity and enforcement of the clause; but the Board, obviously disturbed with this result, refused to accept it, deciding that a contractual waiver of organizational rights cannot bind those employees belonging to a union other than the contracting union:

> [I]n the circumstances of this case, an unlimited contractual prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act.
>
> . . . .
>
> . . . Needless to say, neither an employer nor an incumbent union is entitled, absent special circumstances which do not appear here, to freeze out another union by trenching on statutory rights of employees to engage in protected activities. . . .
>
> We find, therefore, that the contract clause is invalid insofar as it prohibits any distribution of literature during nonwork times in nonwork areas and any solicitation of membership on nonwork time on behalf of a labor organization *other than the contracting union,* because it interferes with the employees' right freely to select their representatives as guaranteed by Section 7 of the Act.[32]

Simply stated, the Board's holding was that Section 7 on-premises organizational rights are so fundamental that they cannot be contracted away so as to prevent their exercise by employees desiring to express their dissatisfaction with, or replace, the bargaining representative. The decision thus expanded the scope of Section 7 rights by curbing the baser tendencies of incumbent unions to self-perpetuation through contract agreements.[33] It was a noble attempt, but it failed to convince the Court of Appeals for the Seventh Circuit, which denied enforcement.[34] That court reiterated the *May Department Stores* view: the solicitation-distribution rights granted by the Act are not so fundamental that they cannot be bargained away "in favor of the available alternatives thereto."[35] Such a waiver binds even a rival union; that the Board does not consider this a desirable result is not to be controlling:

> The "desirability" of collective bargaining contract provisions from the standpoint of either the employees or the employer is not the measure of their validity. Moreover, the arrangement here involved is conducive to the stabilization of labor relations during the contract period and thus in harmony with a prime objective of the Act.[36]

32 *Id.* at 1249-50 (emphasis added).
33 *See also* Chevrolet Motor Div., Gen. Motors Corp., 144 N.L.R.B. 862 (1963), and Aladdin Indus., Inc., 147 N.L.R.B. 1392, 1405-06 (1964), both of which follow the *Gale Products* rule.
34 NLRB v. Gale Products, Div. of Outboard Marine Corp., 337 F.2d 390 (7th Cir. 1964).
35 *Id.* at 392.
36 *Id.*

Undaunted by this setback, the Board reaffirmed its *Gale Products* rule in *Armco Steel Corp.*[37] in which another rival union had distributed literature in contravention of the collective bargaining agreement. This time it was the Court of Appeals for the Sixth Circuit which set aside the Board's order.[38]

In the first place, the court felt that the Section 7 distribution right is *not* so fundamental that it cannot be waived so as to prevent all employees from exercising it. The court then cited other rights "of equal or greater significance"[39] the waiver of which has been upheld: among them the strike,[40] management functions,[41] ballot and recognition,[42] union security,[43] and hiring by union foremen.[44] It stressed the importance of freedom of contract to both unions and employers, cautioning the Board that it may invalidate a union-management contract clause only when it "violates a specific statute and is illegal,"[45] which was not the case here.

The court further criticized the Board for the inconsistency of its *Gale Products* decision: by allowing employees of rival unions to escape the embrace of the no-distribution clause while binding to its provisions those employees loyal to the incumbent union, the Board was using an unfair double standard that *threatens* industrial peace rather than promotes it in accordance with the policy of the Act.

For these reasons the Sixth Circuit proposed a "special circumstances" test of its own: the contractual surrender of solicitation-distribution rights is presumptively valid unless special circumstances, such as discriminatory enforcement or inadequate alternate means of communication,[46] make it necessary to delete the applicable provision.[47] The court felt that this test can best maintain the delicate balance between the rights of labor and those of management.[48]

General Motors Corp.,[49] a Board ruling dealing with facts similar to those in *Armco Steel,* met the same fate at the hands of the Sixth Circuit. The Board decided that dissident employees as well as rival unions cannot be bound by the incumbent union's waiver of distribution rights in the agreement with manage-

37 148 N.L.R.B. 1179 (1964), *enforcement denied,* 344 F.2d 621 (6th Cir. 1965).
38 Armco Steel Corp. v. NLRB, 344 F.2d 621 (6th Cir. 1965).
39 *Id.* at 624.
40 Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).
41 NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).
42 NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).
43 Radio Officers' Union of Commercial Telegraphers Union v. NLRB, 347 U.S. 17 (1954).
44 NLRB v. News Syndicate Co., 365 U.S. 695 (1961). It should also be noted here that it is well-settled that solicitation and distribution rights can be waived uncategorically by contract if no Section 7 organizational activity is involved, and if the waiver is in clear and unmistakable language. *See* Mason & Hanger-Silas Mason Co., Inc. v. NLRB, 405 F.2d 1, 5 (5th Cir. 1968), and Texaco, Inc. v. NLRB, 462 F.2d 812, 815 (3d Cir. 1972), *cert. denied,* 409 U.S. 1008 (1972).
45 344 F.2d at 624.
46 Inadequate alternate means of communication were found in General Elec. Co., 169 N.L.R.B. 1101 (1968), *enforced,* 411 F.2d 750 (9th Cir. 1969), where off-premises solicitation would have required employees to obstruct fast-moving highway traffic entering the company's parking lots.
47 344 F.2d at 624-25.
48 In the connected case of NLRB v. E.W. Buschman Co., 380 F.2d 255 (6th Cir. 1967), *cert. denied,* 389 U.S. 1045 (1968), *rehearing denied,* 390 U.S. 975 (1968), the Sixth Circuit also held that the bargaining representative can waive employees' organizational rights by sending a letter to the employer approving his no-solicitation rule.
49 147 N.L.R.B. 509 (1964), *enforcement denied,* 345 F.2d 516 (6th Cir. 1965).

ment. It relied on the *Gale Products* rule in reaching this determination. The court, relying on its *Armco Steel* decision, set aside the Board's order.[50]

In the face of such adamance, the Board decided to acquiesce and dismissed the complaint when *Armco Steel* came before it again,[51] this time in a suit by the rival union against the incumbent.[52] It warned, however, that it would adhere to the *Gale Products* doctrine in future cases,[53] and did so in a number of decisions that were left unmolested by other United States courts of appeal.[54]

Mid-States Metal Products, Inc.[55] was the next significant case in this area. The Board again cited its *Gale Products* precedent as the basis for invalidating a no-solicitation, no-distribution contract clause to the extent that it forbade such activities "in behalf of any labor organization other than the contracting labor organization, or . . . against any labor organization. . . ."[56] Clearly, the Board now meant to preserve the Section 7 rights of both rival unions and anti-union employees. The Fifth Circuit enforced the Board's order,[57] taking a position contrary to that of the Sixth and Seventh Circuits. More importantly, it expressed its disapproval of the inconsistent *Gale Products* rule, maintaining that the contractual waiver of self-organizational rights is inherently invalid, absent unusual circumstances, as to *all* employees:

> The rights to distribute materials and solicit in organizing for collective bargaining are rights of individual employees, relating to their selecting (or choosing not to select) and constantly reevaluating their collective bargaining agent. They are to be distinguished from rights which employees acting in concert, through the collective bargaining agent, may exercise in attempts to achieve economic advantage.
>
> . . . [T]he rationale of allowing waiver by the union disappears where the subject matter waived goes to the heart of the right of employees to change their bargaining representative, or to have no bargaining representative, a right with respect to which the interests of the union and employees may be wholly adverse.[58]

According to the court, solicitation and distribution rights are so fundamental that the incumbent union can *never* bargain them away unless necessity of the employer (i.e., promotion of production, discipline, or safety) requires it.

---

50 Gen. Motors Corp. v. NLRB, 345 F.2d 516 (6th Cir. 1965).

51 Armco Employees Independent Fed'n, Inc., 155 N.L.R.B. 551 (1965), *aff'd*, 377 F.2d 140 (D.C. Cir. 1966).

52 29 U.S.C. § 158(b)(1) provides:

> [8](b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section [7] of this title . . . .

53 When it encountered *Armco Steel* for yet a third time (under a new contract containing the same provision), the Board still maintained that the contract clause violated the Act, 183 N.L.R.B. No. 26 (June 10, 1970). Upon reconsideration, the complaint was finally dismissed on procedural grounds, 184 N.L.R.B. No. 109 (Aug. 17, 1970).

54 *E.g.*, American Int'l Aluminum Corp., 149 N.L.R.B. 1205 n.2 (1964) (contracting union must agree to the *terms* of the proposed no-solicitation rule, not just to the employer's right to post it); H. & F. Binch Co., 168 N.L.R.B. 929, 935 (1967).

55 156 N.L.R.B. 872 (1966), *enforced*, 403 F.2d 702 (5th Cir. 1968).

56 156 N.L.R.B. at 873.

57 NLRB v. Mid-States Metal Products, Inc., 403 F.2d 702 (5th Cir. 1968).

58 *Id.* at 705.

They are rights of individual employees that are not to be interfered with by unions.[59]

A year after *Mid-States Metal Products* the Eighth Circuit entered the controversy on the side of the Fifth Circuit in *International Association of Machinists and Aerospace Workers, District Number 9 v. NLRB.*[60] The Board had used the *Gale Products* principle yet again to strike down a no-distribution contract clause insofar as it applied to distribution "on behalf of a labor organization other than the contracting union or on behalf of no labor organization at all."[61] The Eighth Circuit, however, amended that order so as to invalidate the provision and allow distribution " 'on behalf of *any* labor organization or in opposition to *any* labor organization' ",[62] subject to the normal rules on the limitation of Section 7 organizational rights. To this court also these rights are fundamental, personal, and nonwaivable by union action:

> We recognize . . . the desirability of promoting stability in collective bargaining relationships, but we believe that [the contract provision] goes beyond that objective by prohibiting employees from exercising their right to attempt to change or support their current bargaining agent through the distribution of literature in nonwork areas during nonwork time. We believe such a prohibition to be contrary to the letter and spirit of the Act.[63]

IV. The *Magnavox* Decision: Consistency From the Board, Certiorari From the Supreme Court

Although there was disagreement among the circuits over the validity of contractual waivers of solicitation-distribution rights, they joined in attacking the Board's double-standard *Gale Products* rule. Obviously influenced by criticism from the two courts which had enforced its recent waiver decisions,[64] the Board reconsidered and finally jettisoned the inequitable aspect of that doctrine in *Magnavox Co. of Tennessee*:[65]

> [W]e have difficulty in accepting as valid the two-sided remedy fashioned in *Gale Products.* Certainly, we find nothing in the statute to suggest that

59 The Board had anticipated the position taken here by the Fifth Circuit in General Motors Corp., 158 N.L.R.B. 1723, 1727-28 (1966):

> [T]he union and the employees are and remain separate entities for many purposes, and the employees, by once selecting the union as their representative, do not forfeit their fundamental right to change their representative at appropriate times. When a union acts to abridge that right . . . it is essentially benefiting the union *qua* union, to the detriment of the employees it represents. . . . [T]o debar employees, in a significant way, from their legal right to encourage a change of union representative . . . infringes upon a right deeply rooted in the Act: the employees' freedom to change their bargaining agent.

Nevertheless, the Board applied the *Gale Products* rule to the particular facts of the case, holding the contract provision binding on employees belonging to the incumbent union, but invalidating it as to rival unions and those employees who wanted no labor organization at all.

60 415 F.2d 113 (8th Cir. 1969), *modifying* 171 N.L.R.B. 234 (1968).

61 Int'l Ass'n of Machinists, 171 N.L.R.B. 234, 236 (1968).

62 415 F.2d at 116 (emphasis added).

63 *Id.* at 115.

64 The Fifth Circuit in *Mid-States Metal Products* and the Eighth Circuit in *Int'l Ass'n of Machinists.*

65 195 N.L.R.B. 265 (1972), *enforcement denied,* 474 F.2d 1269 (6th Cir. 1973) (per curiam), *cert. granted,* 94 S. Ct. 53 (1973).

> employees who wish to exercise their Section 7 right to *reject* a union representative are entitled to more protection than employees who wish to exercise the same Section 7 right to *support* a union representative. . . .
>
> Upon due reflection, . . . we believe the course mapped out for us by the decision of the Eighth Circuit in *Machinists v. N.L.R.B.* . . . and earlier suggested by the Fifth Circuit in *Mid-States Metal Products* . . . best serves to effectuate the fundamental purposes of Section 7 of the Act and the rights it guarantees.[66]

By thus refusing to enforce the no-distribution clause in question against *any* employees, the Board turned full circle from a principle of presumptive validity of contractual waiver to presumptive invalidity. If nothing else, it had again adopted a consistent position.[67]

The Sixth Circuit, however, was equally consistent in denying enforcement of the Board's decision.[68] It adhered to its *Armco Steel* ruling, insisting that "the bargaining representative has authority to waive on-premises distribution rights of the employees at least in the absence of special circumstances not present here."[69] *Magnavox* has thus brought the contractual waiver controversy into sharp relief. The issue has been joined, with the Board, Fifth and Eighth Circuits refusing to ratify the surrender of solicitation-distribution rights, and the Sixth and Seventh Circuits maintaining that employees can collectively yield them. The Supreme Court, in a timely grant of certiorari,[70] has apparently undertaken to resolve the case. The stage is set; therefore an evaluation of the merits of the two conflicting positions is in order.

V. Collective Bargaining, Self-Organization and Industrial Peace: A Question of Priorities Under the Act

The basic argument against the contractual waiver of Section 7 organizational rights is that they are simply too fundamental to the purposes of the Act to be relinquished in any manner. They can be limited, of course, to accommodate the employer's interest in efficient, safe production, but can be discarded by neither union nor management; this is because Congress has granted them to *each individual employee,* not to the collective body of employees that makes up a union. The Act itself provides that *"Employees* shall have the right to self-

66 195 N.L.R.B. at 266.

67 The Board later fleshed out its *Magnavox* holding in Samsonite Corp., 206 N.L.R.B. No. 91, (Oct. 11, 1973). *Samsonite* stated that the *Magnavox* test for the validity of a waiver of distribution rights applies to *non*union as well as union distribution protected by Section 7 of the Act. It also enunciated, albeit implicitly, an additional criterion for determining validity by noting that the contracting union did not show that it *needed* the ban on distribution to make it a more effective bargaining agent. This raises some interesting questions: Can the incumbent union cite this "need to be a more effective bargaining agent" as a "special circumstance" that would uphold the otherwise impermissible waiver? If so, how much "need" must the union prove—and how can it prove it? This part of the *Samsonite* decision is vague, since all unions must strive to be better bargaining representatives. If it becomes necessary to clarify and develop this point after the *Magnavox* case reaches its final determination, the Board should do so as soon as possible.

68 Magnavox Co. of Tennessee v. NLRB, 474 F.2d 1269 (6th Cir. 1973) (per curiam), *cert. granted,* 94 S. Ct. 53 (1973).

69 474 F.2d at 1270.

70 94 S. Ct. 53 (1973).

organization, to form, join, or assist labor organizations. . . ."[71] They engage in collective bargaining through their union representative, but they enjoy the *personal* rights to solicit and to distribute literature for the purpose of changing that representative should they so desire. According to this point of view, if the employees are deprived of these rights, organizational efforts are critically hampered with the result that the individual workers must bend to the will of either the employer or the incumbent union—a result that the Act seeks to prevent.

The Board and the Fifth Circuit seem especially concerned about the possibility of the bargaining representative's use of the contractual waiver to eliminate competition and perpetuate itself. In the later *General Motors Corp.* case, the Board said:

> [T]o treat the clause as simply the result of an arms-length transaction, as if the Union were constrained to "assent" to a clause which so clearly advantages the Union (in its capacity as a union) at least as much as it serves the purposes of the Employer, seems somewhat unrealistic to us. . . . That this interdiction furthers the organizational interests of the incumbent union is unmistakably apparent.[72]

The Fifth Circuit spoke similarly in *Mid-States Metal Products*:

> Solicitation and distribution of literature on plant premises are important elements in giving full play to the right of employees to seek displacement of an incumbent union. We cannot presume that the union, in agreeing to bar such activities, does so as a bargain for securing other benefits for the employees and not from the self-interest it has in perpetuating itself as bargaining representative.[73]

Following this reasoning, waiver of organizational rights leaves employees without vital protection on two fronts; both union and management are in positions to exploit them.

The above argument, however, is parochial and overstates the case. It is parochial because it places too much emphasis on the self-organizational right and not enough on the most effective antidote that the Act provides to ward off industrial strife—collective bargaining. Congress has adopted this method as the most effective one for settling labor-management differences and preserving peace between the two.[74] To implement this policy, Congress has provided:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive* representatives of *all* the employees in such

71 29 U.S.C. § 157 (1970) (emphasis added).
72 158 N.L.R.B. 1723, 1727 (1966).
73 403 F.2d at 705.
74 *See* 29 U.S.C. § 171(a) (1970), a provision of the Labor-Management Relations Act: [S]ound and stable industrial peace and the advancement of the general welfare . . . of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees. . . .

> unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .[75]

Thus, the Act emphasizes collective bargaining and the exclusiveness of the bargaining representative as well as the vital principle of freedom of contract.[76] A strong argument can be made from this that the employer and the representative are empowered to exercise a wide range of bargaining options, the former to protect his property and production interests, the latter to obtain any number of concessions for the employees. Who is to say, for example, that the employees in an industrial unit would not be perfectly free to barter away their rights of solicitation and distribution in exchange for an increase in overtime pay rates?[77] If they are willing to do so, the waiver should be made; and collective bargaining will have served once again to provide a mutually satisfactory agreement, to strengthen the bargaining representative's clout with management, and to promote industrial harmony. If they are unwilling to waive these rights, they can make their feelings known to the union, even to the extent of rejecting the proposed contract.[78]

The anti-waiver theory also overstates its case because the practical effects of a contractual waiver are not so serious as the Board and its supporting courts make them out to be. As noted above, the employees can either accept or reject the waiver clause. If they accept it, they will have in most cases alternative means of communication available to them—organizational activity other than on company premises and on company time.[79] If these means are lacking, perhaps the clause should be stricken from the agreement. Finally, the waiver may be only short-term in duration; if the bargaining agreement is not renewed by the employees, they are free to solicit and distribute as they wish when it expires.

---

75 29 U.S.C. § 159(a)(1970) (emphasis added).

76 > Freedom to contract is perhaps one of the most important rights enjoyed by labor unions and employers. The Board has no power to interfere with the exercise of that right or to sit in judgment on the wisdom of substantive contractual provisions. It may interfere only when a clause in a contract violates a specific statute and is illegal.

Armco Steel Corp. v. NLRB, 344 F.2d 621, 624 (6th Cir. 1965).

77 *E.g.*, the Board Chairman's dissenting statement in Gale Products, 142 N.L.R.B. 1246, 1251 (1963):

> We cannot agree that giving up the right to distribute campaign literature on company premises involves a greater sacrifice than, for example, surrendering the right to strike, which the Board and the courts have recognized may lawfully be done.

See also text accompanying notes 39-44 *supra*.

78 *See* N. CHAMBERLAIN & J. KUHN, COLLECTIVE BARGAINING 195 (2d ed. 1965):

> The fact that the membership ultimately holds within its power the giving of union office means that at times it can force its leaders to conform to its wishes, even when the leaders are opposed in principle. . . .
>
> . . . [A]greements are usually not completed until the members approve them, and approval is by no means automatic. Disapproval can be seriously embarrassing to the negotiators and politically dangerous to the union leaders. In recent years rejection of negotiated agreements has ceased to be uncommon. The Federal Mediation and Conciliation Service estimates that in over 750 situations in 1962, rank-and-file union members rejected settlements negotiated and approved by their leaders.

79 *See, e.g.*, NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 107 (1956) (mail, telephones, and homes of the workers were available to the union).

These points demonstrate that contractual waiver only *restricts* organizational rights further than usual; it in no way *destroys* them.[80]

The anti-waiver position's final contention, as enunciated by the Board and the Fifth Circuit,[81] expresses the fear that incumbent unions may bargain for waiver of organizational rights to further their own interests instead of the employees'. Such a sweeping presumption shows little confidence in the overall integrity of labor unions but is grounded in reality to a certain extent. It is well-known that many incumbent unions have become strong organizations with vested interests in maintaining their influential positions as bargaining representatives and that many dissatisfied employees consequently are discouraged, sometimes by coercion or fear, from challenging them. Such unions might well be prone to take advantage of a contractual agreement that would stifle opposition and consolidate their positions.

Even if this is true, however, the fault lies not with the waiver of organizational rights, but with the underlying policy of our national labor legislation. If incumbent unions cannot be trusted on a large scale to act primarily for the interests of the individual employees they represent, perhaps it is necessary to re-evaluate the collective bargaining principle itself and adjust or even replace it if necessary to fully protect employee rights.

On the other hand, the opposite view, particularly as espoused by the Sixth Circuit in *Armco Steel,* has none of the liabilities that vex the anti-waiver doctrine. It insures adequate protection of employee rights through a more faithful adherence to the basic policy of the Act—the stabilization of industrial relations through collective bargaining. In short, the contractual waiver of solicitation and distribution rights by the bargaining representative should be presumptively valid unless the special circumstances of discriminatory enforcement or lack of alternate means of communication require invalidation.

> [B]asic collective bargaining principles are enhanced by allowing such contract provisions. The freedom of the parties to contract is not restricted. The exclusive representative concept is affirmed, thereby strengthening the bargaining power of the employees' representative. The net result is to stabilize the industrial relations between the employer and the union—an extremely desirable objective.[82]

It is not only an extremely desirable objective—it is the overriding objective of the National Labor Relations Act itself.

Timothy G. Westman

80 *See* Dereshinsky, *The Solicitation and Distribution Rules of the NLRB,* 40 U. CIN. L. REV. 417, 449 (1971).
81 See text accompanying notes 72-73 *supra.*
82 Dereshinsky, *supra* note 80, at 451.