

COMMENTS

PROTECTION AND ASSISTANCE FOR THE UNION ORGANIZER

IN EVERY campaign for union membership, a principal factor is the union organizer. Although employees occasionally play an important role in union recruitment, the organizer is usually a professional without whose efforts many workers would never be persuaded to join the labor movement.¹ As an individual citizen the organizer is entitled to the full benefit of state and national laws, with all the rights, privileges and immunities they provide. However, these laws serve merely as a foundation of equality upon which there has been constructed an additional network of legal safeguards for the organizer in his work. Under the original National Labor Relations Act,² which embodied a federal policy of encouraging unionism and collective bargaining, the organizer acquired derivatively a group of protective rights previously unknown in American law.³ Because his work contributed much to the furtherance of federal policy, the protection afforded his activities was accordingly extensive. The 1947 amendments⁴ to the Act represent a partial retreat from the previous governmental design to the extent that the present objective is to provide the individual laborer with as much freedom of choice as possible on the issue of unionization.⁵ Although this policy change, as manifested in the Labor Management Relations Act,⁶ has been in effect slightly more than ten years, it should prove productive to outline the sources and extent of the legal protection and

¹ Seidman, London, & Karsh, *Why Workers Join Unions*, 274 *Annals* 75 (1951).

² 49 STAT. 449 (1935).

³ Both professional and non-professional union organizers benefited by § 8(1) of the National Labor Relations Act, which made unlawful as "unfair labor practices" conduct by employers and others acting in their behalf which interfered with the exercise by employees of rights guaranteed to them by § 7 of that Act. 49 STAT. 449, 452 (1935).

⁴ Labor Management Relations Act (Taft-Hartley Act), 61 STAT. 136 (1947), 29 U.S.C. § 151 (1952).

⁵ See Taft, *The Taft-Hartley Act: A Favorable View*, 274 *Annals* 195 (1951); Taylor, *National Labor Policy*, 274 *Annals* 185 (1951).

An exception to this full freedom of choice is made where a "modified union shop" agreement is negotiated under the conditions imposed by § 8(a)(3) Labor Management Relations Act, which, in themselves, allow some freedom of choice. 49 STAT. 449, 452 (1935), as amended, 61 STAT. 136, 140 (1947), 29 U.S.C. § 158(a)(3).

⁶ 49 STAT. 449 (1935), as amended, 61 STAT. 136 (1947), 29 U.S.C. § 151 (1952).

assistance now available to the union organizer and to attempt an appraisal of the recent decisions in this area.

CONSTITUTIONAL PROTECTION

In *Thomas v. Collins*⁷ the United States Supreme Court ruled that a state law requiring registration by a union organizer as a prerequisite to the making of an address on the general merits of unionism, including as well a general appeal for union membership, to a group of assembled employees was an unconstitutional burden on the freedom of speech as protected by the first amendment. The activities of a union organizer usually are not limited to *pure* free speech, however, and thus are not fully protected by the constitutional umbrella.⁸ Direct personal solicitations seeking union membership, as distinguished from general public appeals, so much resemble ordinary business dealings that these functions are subject to regulation in the form of reasonable registration requirements.⁹ Nevertheless, when the regulation imposes serious practical burdens on the union organizer's operations, the obligation will be invalid. Unreasonable regulation has been found in inadequately controlled discretion vested in a licensing official,¹⁰ and very probably the charging of a fee larger than necessary to cover minor clerical expenses would also be fatal to an attempt at this type of regulation.¹¹

⁷ 323 U.S. 516 (1945). The Texas statute involved in this case did not vest discretion in the issuing officer, but required automatic issuance of the necessary permit upon proper filing of an application.

⁸ In the law of labor relations, the idea that some activities may be partly protected by the constitutional guarantee of free speech, but not fully protected when that same activity takes on different or additional characteristics is most familiar in the area of picketing. See *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

⁹ In *Thomas v. Collins*, 323 U.S. 516 (1945), the Court indicated in a dictum that when ". . . the speaker goes further . . . and engages in conduct which amounts to more than the right of free discussion comprehends, . . . he enters a realm where a reasonable registrar or identification requirement may be imposed." *Id.* at 540. In *A.F.L. v. Mann*, 188 S.W.2d 276 (Tex. Civ. App. 1945), the registration requirement involved in the *Thomas* case, *supra* note 9, was held valid as applied to labor organizers' solicitations made "otherwise than as part of a public speech to assembled employees." *Id.* at 279.

¹⁰ *Hill v. Florida*, 325 U.S. 538 (1945).

¹¹ *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Denton v. City of Carrollton*, 235 F.2d 481 (5th Cir. 1956). The statutes in these cases involved prohibitive fees, but the cases were decided on other grounds. There is little doubt, however, that such a fee would, without more, invalidate the licensing law. See Note, 70 HARV. L. REV. 1271, 1276 (1957).

TORTS AND CRIMES AS UNFAIR PRACTICES

Paradoxically, the Labor Management Relations Act, which is a major source of protection for a union organizer, nowhere guarantees or even states the rights of organizers as such. Section 7¹² of the Act, which establishes the freedom of employees either to engage in union activity or to refrain from it, makes no mention of the rights of the non-employee professional union organizer.¹³ Consequently, any rights to which a union organizer is entitled by virtue of the Act must be found by negative implication from the restrictions which administrative and judicial bodies have placed upon the conduct of employers and others which tends to interfere with the exercise by employees of their specifically granted rights. The right of employees "to self-organization, to form, join, or assist labor organizations" granted by section 7 of the Act, and protected from interference, restraint and coercion by employers in section 8(a)(1) of the Act,¹⁴ implicitly includes full freedom to receive aid, advice, and information from others concerning these rights, their practice, and enjoyment.¹⁵ The courts have recognized that

¹² "Section 7. 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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." Labor Management Relations Act § 7, 49 STAT. 149, 452 (1935), as amended, 61 STAT. 136, 140 (1947), 29 U.S.C. § 157 (1952).

¹³ As one court has stated, "the National Labor Relations Act was passed for the primary benefit of employees as distinguished from the primary benefit to labor unions and . . . was intended by Congress as a grant of rights to the *employees* rather than as a grant of power to the union." *NLRB v. Schwartz*, 146 F.2d 773, 774 (5th Cir. 1945).

¹⁴ "Section 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 157 of this title." Labor Management Relations Act § 8(a)(1), 49 STAT. 449, 452 (1935), as amended, 61 STAT. 136, 140 (1947), 29 U.S.C. § 158(a)(1) (1952).

¹⁵ The National Labor Relations Board so ruled in *Weyerhaeuser Timber Co.*, 31 N.L.R.B. 258 (1941). Furthermore, authorities in the field of labor relations and economics agree that in our complex industrial society, employees must have outside help in order effectively to participate in the processes of self-organization and collective bargaining. See, e.g., DAUGHERTY, *LABOR PROBLEMS IN AMERICAN INDUSTRY* 421-22, 444-50 (5th ed. 1941); testimony of Paul H. Douglas, *Hearings on S. 2926 Before the Senate Committee on Education and Labor*, 73rd Cong., 2nd Sess., pt. 1, at 208 (1934). This seems to have been the intent of Congress at the time of passage of the original Act. 79 CONG. REC., 7668-7681; H.R. REP. NO. 1147, 74th Cong., 1st Sess. 15-20 (1935).

the rights of non-employee organizers under the Act derive solely from the section 7 rights of employees, and exist only to the extent that the activities (might they be called, in this connection, "services"?) of these outside organizers are reasonably necessary to effectuate those employee rights.¹⁶

Obviously a union organizer, as an *individual*, is entitled to the full protection of the civil and criminal law of the locality in which he operates. More important to the setting of labor relations, however, criminal and tortious conduct directed at the union organizer is likely to have an intimidatory effect tending to cause a breakdown of organizer-employee contact, thereby resulting in interference with the organizational rights of employees. Thus viewed, such conduct, if attributable to an employer, becomes an unfair labor practice¹⁷ subject to remedy through orders issued by the National Labor Relations Board and enforced by the courts. Remedial orders designed to correct such a situation may require an employer (1) to cease and desist from conduct found to interfere with employees' rights; (2) to notify his employees that he will not permit such conduct in the future; (3) to instruct, in writing, any employees or agents who have committed acts of force or violence or intimidation to cease such activities.¹⁸ Although not so drastic, in the sense of punishment, as a criminal sanction would be, and although not

¹⁶ NLRB v. United Steelworkers, CIO, 357 U.S. 357 (1958); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); NLRB v. Monsanto Chemical Co., 225 F.2d 16 (9th Cir. 1955), *cert. denied*, 351 U.S. 923 (1956); NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948).

¹⁷ Examples of criminal and tortious conduct for which employers have been held responsible under the Act include beating up an organizer after decoying him from town, Brown Shoe Co., 1 N.L.R.B. 803 (1936); running organizers off the sidewalk outside the gates of the employer's plant where they were distributing literature, Mock-Judson-Voehringer Co., 8 N.L.R.B. 133 (1938); shooting at an organizer's house, Tennessee Products Co., 41 N.L.R.B. 326 (1942), *enforced*, 134 F.2d 486 (6th Cir. 1943); throwing a bomb into an organizer's home, Clover Fork Coal Co., 4 N.L.R.B. 202 (1937), *enforced*, 97 F.2d 331 (6th Cir. 1938). Less violent but equally illegal reprisals against union organizers have included a supervisor's following of two union organizers back to town after they had distributed literature to the workers at the plant entrance, E-Z Mills, Inc., 101 N.L.R.B. 979 (1952); an employer's obtaining, in bad faith, an injunction against union organizational activities in a company town, W. T. Carter, 90 N.L.R.B. 2020 (1950); procuring, in bad faith, the arrest of a union organizer, Ralph A. Freundlich, Inc., 2 N.L.R.B. 802 (1937); the reporting of a union leader to the immigration authorities in an attempt to secure his deportation, for the purpose of discouraging union activity, Ford Motor Co., 19 N.L.R.B. 732 (1940).

¹⁸ Ford Motor Co., 26 N.L.R.B. 322 (1940), *enforced*, 119 F.2d 326 (5th Cir. 1941).

involving the payment of damages as in the case of a tort action, it would appear that, upon enforcement, the affirmative portions of the typical Board order would not only nullify whatever anti-union effect the employer had hoped to accomplish by his illegal activities, but could sometimes operate as a positive aid to the organizer's campaign.¹⁹

In communities where an anti-union sentiment prevails, a labor organizer frequently becomes a special target for abuse. For this reason it is worthwhile to note that an employer can, in certain circumstances, be held responsible under the Act for the conduct of persons outside his plant or business if they are found to be acting as his agents.²⁰ If an employer, through economic domination of a community, exercises control over local officials such as the mayor and the police, he may be held responsible for their anti-union conduct.²¹ Economic influence alone, however, will not make an employer responsible for all the anti-

¹⁹ In order to effectuate the fundamental policies of the Act, the orders issued by the Board when an unfair labor practice is found will be broad enough to remedy the entire pattern of illegal conduct, *Cleff and Spear*, 104 N.L.R.B. 1048 (1953); *West Bros.*, 104 N.L.R.B. 332 (1953); *W. T. Grant Co.*, 104 N.L.R.B. 338 (1953), and, if a court decree enforcing the order is secured, will place an employer in the position of having to conduct his labor relations under the constant peril of a summons for contempt should he again be found to have committed an unfair labor practice within the terms of the court's order. A great amount of freedom is allowed the Board in framing its orders where the attitude of the employer indicates that he is militantly opposed to union activities among his employees or that he is determined to find a way to evade the order. *May Department Stores Co. v. NLRB*, 326 U.S. 376 (1945); *American Enka Corp. v. NLRB*, 119 F.2d 60 (4th Cir. 1941). However, the power of the Board to issue cease and desist orders is no greater than that of a court empowered to issue injunctions in any other litigation. *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941). The test for the proper scope of such an order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer from engaging in any unfair labor practices affecting commerce. *NLRB v. Cheney California Lumber Co.*, 327 U.S. 385 (1946).

²⁰ The original Act included in the definition of "employer," "any person acting in the interest of an employer." 49 STAT. 449, 450 (1935). Under this language, employers were frequently held responsible for the conduct of others which they did not authorize and had tried to prevent. *American Steel Scraper Co.*, 29 N.L.R.B. 939 (1941); *Schult Trailers, Inc.*, 28 N.L.R.B. 975 (1941); *Frost Rubber Works*, 23 N.L.R.B. 1071 (1940). The amended Act, by defining the scope of employer responsibility in terms of *agency*, makes employers responsible for what people do or say only when it is within the actual or apparent scope of their authority. 49 STAT. 449, 450 (1935), as amended, 61 STAT. 136, 137 (1947), 29 U.S.C. § 152 (1952); H.R. REP. No. 245, 80th Cong., 1st Sess. 11 (1947); H.R. CONF. REP. No. 510, 80th Cong., 1st Sess., 31-32 (1947).

²¹ *Dorsey Trailers, Inc.*, 80 N.L.R.B. 478, 486, 503 (1948), *enforced*, 179 F.2d 589 (5th Cir. 1950); *NLRB v. American Furnace Co.*, 158 F.2d 376 (7th Cir. 1946).

union activities in his locality. Where the connection between the employer and the person who actually causes the interference, restraint, or coercion is normally very remote, a rebuttable presumption of no agency relationship prevails, requiring clear proof of direction or control in order to fix the employer with responsibility.²²

Even where there is no actual employer supervision or sponsorship of the anti-union behavior, an unfair labor practice may be found if there can be made out a ratification of, or acquiescence in, the acts in question.²³ Consequently, when anti-union conduct has occurred under circumstances tending to indicate employer endorsement, affirmative disavowals of responsibility and declarations of continued neutrality may be necessary to avoid an unfair labor practice charge.²⁴ The net effect of such an exchange could conceivably result in benefit to the organizer's purpose. Thus, the rules of imputed employer liability are an important source of protection for the labor organizer since they block an obvious avenue of evading responsibility for unfair practices and shield the organizer's activities from much interference which would not otherwise be illegal under the Act.

THE RIGHT TO USE COMPANY PROPERTY

The largest body of law concerning the legal status of the union organizer has evolved from attempts to use the time and property of employers for union organizational purposes. The convenient daily assemblage of employees in a setting traditionally devoted to business matters makes the plant premises, from the organizer's viewpoint, the ideal place to contact employees.²⁵ Employers, naturally enough, are likely to have a contrary viewpoint. In as much as organizational

²² Where a local banker was known by the employees to be a member of the company's board of directors, the employer was held responsible for his anti-union conduct in effecting a strike settlement, *Eastman Cotton Mills*, 90 N.L.R.B. 31 (1950). In the special circumstances of another case, an employer was held responsible for anti-union speeches made by prominent citizens which the employer failed to repudiate, *Colonial Shirt Corp.*, 96 N.L.R.B. 711 (1951). But before the Board will find an employer responsible for the anti-union acts of municipal and police officials, there must be clear and convincing proof to overcome the presumption that such officials are acting in the public interest. *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825 (5th Cir. 1951).

²³ See 16 NLRB ANN. REP. 152 (1951)

²⁴ *Craddock-Terry Shoe Corp.*, 82 N.L.R.B. 161 (1949).

²⁵ Other psychological factors might also aid the organizer who is able to contact employees at the plant, e.g., unenthusiastic employees probably would listen more readily to the organizer's "pitch" on company time, and group pressures could be more easily employed to induce reluctant workers to accept the union. See, Seidman, London, & Karsh, *Why Workers Join Unions*, 274 *Annals* 75 (1951).

activities often involve heated discussions and sometimes violence, it is understandable that, even though he is not intrinsically opposed to the unionization of his workers, an employer might want to prohibit all union activity at his plant in order to avoid interference with efficient production. Relying on the right of exclusive use and control inherent in the ownership of property, many employers refuse voluntarily to allow the use of company premises for organizational purposes. An employer's right to prohibit such activity on his property is subject to severe limitations, however. The national policy supporting the right of employees to self-organization has in some cases taken precedence over historic property rights where these two conflicting legitimate interests cannot be reconciled.²⁶ By contrast, neither the interest of the employer in maintaining production, which is the *raison d'être* of the employment relationship, nor his closely related interests in orderly conduct and cleanliness at his plant has been subordinated to the employees' interest in self-organization.²⁷ In the process of adjusting these basic competing interests, the right of a non-employee union organizer to have access to company property has emerged.²⁸

Although an employee engaged in organizational activities²⁹ on company property has considerably more freedom of protected action than does an outsider,³⁰ an employer will not be found to have placed an undue restriction on employees' rights of self-organization if he prohibits

²⁶ Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948). In a case not actually requiring subordination of property rights, the Supreme Court said, "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." NLRB v. Babcock & Wilcox, Co., 351 U.S. 105, 112 (1956). While this case arose in a setting of unfair labor practices under the Labor Management Relations Act, and ostensibly does not rest upon a constitutional basis, the discussion actually goes to that depth and deals with the fundamental adjustment of rights of speech and rights of private property.

²⁷ During working time, the common-law rights of the employer are superior to the statutory rights of the employees. Republic Aviation Corp. v. NLRB, *supra* note 26.

²⁸ Prior to NLRB v. Babcock & Wilcox, Co., 351 U.S. 105 (1956), there had been no clear distinction between the rights of employees and non-employees in this regard. The most recent Supreme Court decision in this general area, NLRB v. United Steelworkers, CIO, 357 U.S. 357 (1958), discussed *infra*, notes 35, 36, 41, 48, 51-53, deals with discrimination against employees, but language used by the Court appears to lay down rules of general application to non-employees as well.

²⁹ These may include such activities as distributing union literature, Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); wearing union buttons and insignia, Boeing Airplane Co. v. NLRB, 217 F.2d 369 (9th Cir. 1954); soliciting membership, NLRB v. Denver Tent & Awning Co., 138 F.2d 410 (10th Cir. 1943).

³⁰ NLRB v. Babcock & Wilcox, Co., 351 U.S. 105 (1956).

all organizational activity during *working hours*, a term which does not encompass rest periods, lunch periods, or any other time allotted to the employees' own use.³¹ Moreover, where there are special circumstances related to a legitimate business interest of the employer which would make solicitation of union membership among employees particularly undesirable, prohibition of solicitation on the premises during non-working hours as well will be lawful.³² In general, the Supreme Court has given its approval to the Board's statement of the general rules under which an employer is allowed to restrict union activity among his employees.³³

The Right To Exclude Non-employee Organizers

The Supreme Court first made a distinction between the rights of employee and non-employee organizers to have access to company property in the leading case of *NLRB v. Babcock & Wilcox Co.*³⁴ There it was held that an employer could exclude non-employee organizers attempting to distribute union literature in the company parking

³¹ *NLRB v. May Dept. Stores, Co.*, 154 F.2d 533 (8th Cir. 1946), *cert. denied*, 329 U.S. 725 (1946); *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 229 F.2d 816 (5th Cir. 1956); *Armstrong Tire & Rubber Co., Test Fleet Branch*, 119 N.L.R.B. No. 52 (1957).

³² *NLRB v. Aintree Corp.*, 135 F.2d 395 (7th Cir. 1943), where, in a situation of intense rivalry between two employee factions, distribution of inflammatory literature prior to working hours was forbidden; *Maryland Drydock Co. v. NLRB*, 183 F.2d 538 (4th Cir. 1950), where the literature forbidden to be distributed contained defamatory matter directed at the company president and others; *NLRB v. Kentucky Utilities Co.*, 191 F.2d 858 (6th Cir. 1951), where solicitation was prohibited at all times near dangerous machinery; *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1952), where a retail department store employer prohibited union activity at all times in the selling areas where employees were in contact with customers. *Cf. NLRB v. May Dept. Stores, Co.*, *supra* note 31, where a similar blanket prohibition was held invalid insofar as it applied to non-selling areas in the store.

³³ "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803, n. 10 (1945), quoting from *Peyton Packing Co.*, 49 N.L.R.B. 828, 843-44 (1943).

³⁴ 351 U.S. 105 (1956).

lot since reasonable efforts by the union through other available channels of communication would enable it to reach the employees with its message.³⁵ Whether a particular case involves that degree of inaccessibility which is required before it becomes unlawful to exclude outside organizers will always require an *ad hoc* evaluation.³⁶ However, the cases which have come before the courts present a fair cross section for analysis. An isolated lumber camp where employees live as well as work on company property would present the clearest case for imposing an obligation on the employer to allow non-employee organizers to come onto his premises in order to contact the employees. Furthermore, the fact that workers in these isolated areas may have relatively frequent time-off periods away from camp (two days each week, in one case) does not relieve the employer of the duty to let the organizer in.³⁷ In less extreme cases of inaccessibility, the factors of concentration and density of employees in the nearby residential areas become important. In the *Babcock & Wilcox Co.* case the plant was about one mile from a town of 21,000 where forty per cent of the 500 workers lived, the remaining sixty per cent living within a radius of thirty miles.³⁸ The Court mentioned, but gave no weight to the fact, that heavy traffic on the immediately adjacent highway made it unsafe to utilize the only small strip of public property near the plant entrance for distributing the

³⁵ Although the rights of employees and non-employees in this regard are not identical, the established criterion for testing (1) the basic validity of a rule restricting organizational activity by either group, and (2) fairness in the application to either group of an "otherwise valid" rule is the same: the practical difficulty of reaching employees with a pro-union message by means not requiring use of the employer's premises. *NLRB v. United Steelworkers, CIO*, 357 U.S. 357 (1958), dealing with employee organizers; *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), dealing with non-employee organizers.

³⁶ Failure to introduce evidence on the subject of relative difficulty of using other channels of communication was deemed a fatal defect in the companion cases, *NLRB v. United Steelworkers, CIO*, and *NLRB v. Avondale Mills*, 357 U.S. 357 (1958).

³⁷ *Lake Superior Lumber Corp. v. NLRB*, 167 F.2d 147 (6th Cir. 1948); *Weyerhaeuser Timber Co.*, 31 N.L.R.B. 258 (1941).

The crew of a ship would be in a comparable situation—isolated most of the time, but with occasional free time ashore. In a case of this type the court required operators of ocean-going vessels to allow union representatives to come aboard for the limited purpose of ascertaining whether the union members of the crew had any grievances, but the court made a specific reservation that the employer not be required to issue the passes for organizational activities because *no showing was made that organizational activities could not be carried on just as well ashore*. *NLRB v. Cities Service Oil Co.*, 122 F.2d 149 (2d Cir. 1941).

³⁸ In *NLRB v. Monsanto Chemical Co.*, 225 F.2d 16 (9th Cir. 1955), *cert. denied*, 351 U.S. 923 (1956), a case in which a similar result was reached, the conditions were even more favorable. 67% of the employees lived in a town about a mile from the plant and 85% lived in a radius of 12 miles.

literature.³⁹ The Court noted, instead, the employees could be contacted personally on the streets of the nearby town, by telephone, by letter, and at advertised meetings.⁴⁰ Obviously, the peculiar circumstances of each case will need to be evaluated in terms of practical convenience for contact.⁴¹

There may be times when, for the purposes of having access to company property, an organizer's status as an employee or non-employee is in doubt. The Board has ruled that an employee retains his status as such even though he is on extended leave of absence.⁴² Without reaching this issue, however, the Court of Appeals for the Fourth Circuit denied the Board's petition for enforcement of its order, holding that, in any event the employee involved had forfeited his protected status by entering the premises accompanied by two non-employee union representatives.⁴³ Instead of the employee raising the non-employee organizer to the former's protected status, the result is just the reverse. Thus, although not directly concerned with the point, the case may have

³⁹ A convenient public place to contact the employees in the vicinity of the place of employment was a determining factor in upholding the validity of a no-solicitation rule in a retail store in a metropolitan area. There were five entrances to the store used exclusively by 95% of the employees at periods when these entrances were not used by the public generally. Because of the ease with which employees might be contacted near these entrances for organizational purposes, the court allowed the employer to prohibit union activity on the premises at all times. *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1952). *Accord*, where literature could easily be distributed at plant gate, *Newport News Children's Dress Co.*, 91 N.L.R.B. 1521 (1950). An employer will be guilty of an unfair labor practice if he interferes with an organizer on public property outside the plant gate, *H.&H. Mfg. Co.*, 87 N.L.R.B. 1373 (1949); but not if he calls police who merely instruct the organizer not to block the plant gates, *E.A. Laboratories, Inc.* 88 N.L.R.B. 673 (1950).

⁴⁰ No mention was made of an employer's obligation to furnish the union with names, phone numbers, and addresses of employees. If required, this might be a heavy price to pay for being allowed to deny access. If not required, some of the Court's suggestions for easy contact become rather questionable.

⁴¹ A recent dictum of the Supreme Court might serve as a guide in this respect: "If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these 'otherwise valid' rules." *NLRB v. United Steelworkers, CIO*, 357 U.S. 357, 364 (1958).

⁴² *Cranston Print Works*, 117 N.L.R.B. 1834 (1957). The Board rejected the employer's contention that, since the employee in question was not on company property in connection with his employment, he should have no greater rights of access than a non-employee organizer, and rested its decision upon the "mutuality of employment interests of all employees of a single employer" irrespective of their then current working status. *Id.* at 1842.

⁴³ *NLRB v. Cranston Print Works*, CCH Lab. Cas. ¶ 71,746 (4th Cir. 1958).

the further significance of foreclosing any future argument that the non-employee organizer may acquire, through principles of agency or otherwise, the more extensive rights of the employee.

Forfeiture of the Right To Exclude Organizers and To Restrict
Organizational Activity on the Premises

Even where circumstances are such that an employer could lawfully prohibit union membership solicitation during non-working hours,⁴⁴ the privilege of a "no-solicitation" rule may be lost if the employer discriminates against the union by allowing, during those same hours, identical activities in behalf of some non-union cause⁴⁵ or if the employer uses means of communication denied to the union for his own anti-union purposes.⁴⁶ This rule cannot, however, be turned into a general mandate requiring employers to insure the union equal opportunity for contact with employees as a prerequisite to allowing civic groups to contact their employees, or as a condition to the lawful exercise of the employers' privilege of expressing non-coercive anti-union views⁴⁷ through normally available channels.⁴⁸ It is clear that enforcement of a rule restricting union organizational activity, together with non-enforcement or non-observance of the same rule by the employer in the case of non-union organizations does not, without more, amount to an unfair

⁴⁴ Non-employees may be so restricted at all times in the absence of a showing of unusual hardship, *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105 (1956); employees may be so restricted if the rule is necessary to protect a legitimate business interest of the employer, *Marshall Field & Co. v. NLRB* 200 F.2d 375 (7th Cir. 1952).

⁴⁵ An employer was found guilty of an unfair labor practice when he refused a request by a union organizer who sought permission to hold a meeting in the only available hall which was company-owned and to which several civic organizations were permitted access. *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949). Cf. *Richfield Oil Co. v. NLRB*, 143 F.2d 860 (9th Cir. 1944), where exceptions made to security regulations were considered, in the circumstances, illegally discriminatory.

⁴⁶ An unfair labor practice was found in the combination of (1) a no-solicitation rule which excluded union organizers from the premises at all times, (2) a non-coercive anti-union speech by the employer to employees on company time, and (3) denial of a request by the union for an opportunity to make a reply speech under equivalent circumstances. *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640 (2d Cir. 1952). Cf. *NLRB v. F.W. Woolworth Co.*, 214 F.2d 78 (6th Cir. 1954), where similar conduct was considered to be protected under the § 8(c) guarantee of the employer's right to free expression on non-coercive anti-union views.

⁴⁷ "Section 8. . . . (c) The expression of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provision of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 49 STAT. 449, 452 (1935), as amended, 61 STAT. 136, 142 (1947), 29 U.S.C. § 158(c) (1952).

⁴⁸ "[T]he Taft-Hartley Act does not command that labor organizations as a matter

labor practice.⁴⁹ An employer, because of his duty to refrain from giving aid to any union,⁵⁰ is not obligated to take the initiative by offering the use of his facilities and the time of his employees for pro-union solicitation.⁵¹ Consequently, a union organizer seeking, on the basis of discrimination, to avoid an otherwise valid no-solicitation or no-distribution rule must, as a prerequisite to the finding of an unfair labor practice, request the employer to suspend such rules and permit the particular type of communication desired.⁵² Furthermore, in order to establish that a rule restricting organizational activity is unlawful as written or, though apparently valid,⁵³ has been unfairly applied, there must be a showing that the restriction, as viewed "in the actualities of industrial relations," has substantially impaired the union's ability to reach employees with its message.⁵⁴

If existing rules have already been suspended in favor of one union, the employer will be guilty of an unfair labor practice if he enforces the

of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it." *NLRB v. United Steelworkers, CIO*, 357 U.S. 357, 364 (1958), citing with approval *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640, 646 (2d Cir. 1952) and *NLRB v. F.W. Woolworth Co.*, 214 F.2d 78, 84 (6th Cir. 1954) (concurring opinion).

⁴⁹ *NLRB v. United Steelworkers, CIO*, 357 U.S. 357 (1958).

⁵⁰ "Section 8. (a) It shall be an unfair labor practice for an employer . . . (2) to dominate or interfere with the formation . . . of any labor organization or contribute financial or other support of it. . . ." 49 STAT. 449, 452 (1935), as amended, 61 STAT. 136, 140 (1947), 29 U.S.C. § 158(a)(2) (1952).

⁵¹ *NLRB v. United Steelworkers, CIO*, 357 U.S. 357, 363 (1958).

⁵² In the face of obviously anti-union sentiment and a context of unfair labor practices, the Court refused to conclude, as a matter of law, that such a request would have been futile, but did indicate that the Board, utilizing its administrative expertise, might properly so find as a matter of industrial experience, possibly thus obviating the need for a request in some situations. *NLRB v. United Steelworkers, CIO*, 357 U.S. 357, 363 (1958). Such a request was made in each of the following cases where unfair labor practices were found on the basis of discrimination: *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949); *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640 (2d Cir. 1952); *Richfield Oil Co. v. NLRB*, 143 F.2d 860 (9th Cir. 1944). Also, ejection of a representative from the premises was not an unfair labor practice where he had not requested permission to enter the premises and thus was an apparent trespasser, *McKinney Lumber Co.*, 82 N.L.R.B. 38 (1949).

⁵³ The no-solicitation and no-distribution rules involved in *NLRB v. United Steelworkers, CIO*, *supra* note 52, appear to be unlawful per se under the rules enunciated in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), but it was made clear that in as much as the basic validity of the rules was not challenged, they would be treated as valid for the purpose of considering the narrow question of illegal discrimination in application.

⁵⁴ It is presumed that the same factors relating to availability of alternate channels of communication which were considered relevant in *NLRB v. Babcock & Wilcox Co.*,

rules against a rival union.⁵⁵ Equally illegal is the extension of special favors to representatives of one union or employee group while denying them to a rival faction.⁵⁶ Also, a rule broadly prohibiting solicitation and distribution on company premises and carefully enforced without discrimination may be found to be unlawful as applied against union representatives merely because it was not adopted until the organization campaign began.⁵⁷

An employer's right to exclude non-employee organizers is apparently limited to the non-public areas of his plant or business, for attempts to deny union organizers⁵⁸ and others⁵⁹ access to semi-public property⁶⁰ which the employer owns have proved unsuccessful.⁶¹ Thus, union organizers probably cannot lawfully be excluded from the parking

351 U.S. 105 (1956), and *NLRB v. Monsanto Chemical Co.*, 225 F.2d 16 (9th Cir. 1955), *cert. denied*, 351 U.S. 923 (1956), would be determinative of the issue of substantial impairment through the discriminatory application of no-solicitation rules as well. Enforcement of the rule in question was tantamount to foreclosure of all other contact in *Richfield Oil Corp. v. NLRB*, 143 F.2d 860 (9th Cir. 1944), where the employees were aboard a ship. Substantial impairment clearly resulted in *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949), as the meeting hall sought was the only one in town. In *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640 (2d Cir. 1952), where some 900 employees lived in the greater New York City area, the court agreed with the Board that, in the circumstances, ". . . the practical advantage to the employer who was opposed to unionization would constitute a serious interference with the right of employees to organize." *Id.* at 645.

⁵⁵ *Sam'l Bingham's Son Mfg. Co.*, 80 N.L.R.B. 1612 (1948), where the employer enforced rules against solicitation during work time against representatives of C.I.O. while allowing a representative of A.F. of L. to make a speech during working time. But no unfair labor practice was found in the mere suspension of rules in favor of one union where there was no indication that the rules would be enforced against the complaining union. *Pure Oil Co.*, 75 N.L.R.B. 539 (1947).

⁵⁶ *Westinghouse Electric & Mfg. Co. v. NLRB*, 112 F.2d 657 (2d Cir. 1940), *aff'd per curiam*, 312 U.S. 660 (1940), where discrimination in the use of a company recreation room for electioneering purposes was in favor of a company dominated union. *NLRB v. Waterman Steamship Corp.*, 309 U.S. 206 (1940), where the employer favored one of two outside unions by discrimination in granting ship's passes.

⁵⁷ Such a rule was found to show a discriminatory motive in *American Book-Stratford Press, Inc.*, 80 NLRB 914 (1948). A Board finding that a no-distribution and no-solicitation rule was adopted merely for the purpose of impeding employees' organizational activities, and was, thus, unlawfully discriminatory, was recently affirmed in *NLRB v. Commercial Controls Corp.*, 34 CCH Lab. Cas. ¶ 74,477 (2d Cir. 1958).

⁵⁸ *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1952), decided under the Labor Management Relations Act.

⁵⁹ *Marsh v. Alabama*, 326 U.S. 501 (1946), involving Jehovah's Witnesses, decided on constitutional grounds.

⁶⁰ A company-owned alley-way between two portions of the building located in a metropolitan area, *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1952); a street in a town totally owned by the company, *Marsh v. Alabama*, *supra* note 59.

⁶¹ See cases cited in notes 58 and 59, *supra*.

lots of suburban shopping centers,⁶² a location likely to be utilized more frequently in the future by organizers in light of modern retail trends.

Once it is determined that an organizer must be given access to company property, he nevertheless is expected to observe safety requirements and other rules applicable to business visitors generally.⁶³ The organizer may be required, for instance, to register upon entry on the premises,⁶⁴ may be denied access to certain areas of the employer's property where business considerations are shown to justify such a limitation,⁶⁵ and may have his pass revoked if the limitations are not observed.⁶⁶

WHAT ORGANIZERS ARE PROTECTED

Although the Act nowhere defines "organizer" as it does "employee" and "employer," the sources of the rights granted therein give some indication of the persons who may enjoy them. While the constitutional rights of free speech and assembly obviously have unlimited availability and uniform restrictions,⁶⁷ the organizer's "special rights," emanating from those of employees under the Act, would seem to extend to anyone whose activities facilitated the employees' full exercise of their section 7 rights⁶⁸ without contravening the basic policy of the Act. A fundamental element of that policy is the free choice by employees of their representatives. Therefore, it would seem that an employer with the knowledge or belief that an organizer was attempting to defraud his employees might be precluded from substituting his judgment for that of his workers regarding the

⁶² A case arising in intra-state commerce and decided under § 923 of the California Labor Code (which, the court stated, does not differ materially from corresponding sections of the Labor Management Relations Act) involved an employer who was, as to the parking lot and sidewalks around the shopping center, a tenant in common with owners of other business establishments located there, but who did not have such exclusive control of these areas that he was allowed to exclude union organizers and pickets on the grounds of trespass. *Nahas v. Local 905, R.C.I.A.*, 144 Cal. App.2d 808, 301 P.2d 932 (1956). It would seem that the principle of *Marshall Field & Co.*, 200 F.2d 375 (7th Cir. 1952), would produce a similar result under the federal act.

⁶³ *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948); *Weyerhaeuser Timber Co.*, 31 N.L.R.B. 258 (1941).

⁶⁴ *Merchant's Motor Freight, Inc.*, 57 N.L.R.B. 1340 (1944).

⁶⁵ *NLRB v. Kentucky Utilities Co.*, 191 F.2d 858 (6th Cir. 1951).

⁶⁶ *NLRB v. Cities Service Oil Co.*, 122 F.2d 149 (2d Cir. 1941).

⁶⁷ *Staub v. City of Baxley*, 335 U.S. 313 (1958); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Thomas v. Collins*, 323 U.S. 516 (1945).

⁶⁸ "Concerted activities for the purpose of mutual aid and protection" which are protected by § 7, Labor Management Relations Act, are not limited to *union* activities. *NLRB v. Phoenix Mutual Life Ins. Co.*, 167 F.2d 983 (7th Cir. 1948), where em-

outsider's qualifications as a representative of their collective interests,⁶⁹ and would be guilty of an unfair labor practice if he undertook to deny the organizer access to company property or otherwise attempted to foreclose normal organizer-employee contact. The organizer's protection is not quite so complete, however, and one employer faced with this dilemma was found not guilty of an unfair labor practice for discriminating against a communist-infiltrated union in allowing use of his premises for union activity.⁷⁰ It is, of course, clear that an employer with knowledge or belief in the fraudulent purposes of an organizer could divulge that fact to his employees without fear of violating the Act⁷¹ and could invoke, for the protection of his employees, state and federal criminal laws.⁷²

CONCLUSION

The 1947 amendments to the Labor Management Relations Act signaled a shift in federal policy from that of encouragement of labor unions to that of assurance to workers of the freedom of choice on the issue of unionization. In the past decade, judicial and administrative cases have reflected this transfer of emphasis. Although the decisions still are phrased in terms of balancing and adjusting the competing interests of the employer and the union, the polar star has been protection of employee freedom of choice, and the thread of these cases seems to indicate a perceptible dilution of the non-employee union organizer's position with the concomitant reinforcement of the employer's incidents of ownership, especially with regard to the use of company property and time.

ployees acted collectively under the protection of the Act for the purpose of securing the removal of an incompetent record keeper.

⁶⁹ In *Hill v. Florida*, 325 U.S. 538 (1945), a Florida law requiring registration of union business agents and vesting ultimate discretion for the issuance of licenses in a board of high state officials was held to be in basic conflict with § 7 of the Act, which guarantees employees full freedom of choice in designation of a bargaining representative, by substituting the judgment of the state officials for the judgment of the employees.

⁷⁰ *Stewart-Warner Corp. v. NLRB*, 194 F.2d 207 (4th Cir. 1952).

⁷¹ Such exposure would be protected under the § 8(c) privilege of expressing views that do not contain threats of force or reprisal or promises of benefit. *El Paso-Ysletta Bus Line, Inc.*, 85 N.L.R.B. 1149 (1949); *E.A. Laboratories, Inc.*, 88 N.L.R.B. 673 (1950).

⁷² *E.g.*, the Hobbs Anti-Racketeering Act, 18 U.S.C. § 420(a) (1952), and comparable state statutes. Many forms of objectionable union activities would violate state and federal anti-trust and restraint of trade laws. See Note, 37 COLUM. L. REV. 992, 999 (1937).