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NLRB Orders Granting Unions Access To Company Property

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NOTES

NLRB ORDERS GRANTING UNIONS ACCESS TO COMPANY PROPERTY

Section 10(c)[1] of the National Labor Relations Act[2] ("Act" or "NLRA") grants the National Labor Relations Board ("Board" or "NLRB") authority to issue orders as remedies for violations of the Act. The Act's language, however, offers little guidance regarding the scope of potential remedial orders. The Board recently expanded its class of available remedial orders to include, in the case of recidivist violators, the extraordinary remedy of nonemployee access to private company property. This remedy permits union representatives to enter company premises to communicate with employees. This Note evaluates the utility of the access remedy by examining the Board's general remedial powers, by analyzing applicable principles in an organizational setting, and by summarizing arguments for and against the remedy's use. Finally, guidelines are suggested to aid courts in resolving future cases in this area.

I
BACKGROUND PRINCIPLES

Section 10(c) of the Act[3] grants the NLRB authority to issue orders remedying unfair labor practices. In the past, the Board had limited itself to only a few types of remedial orders; ordinarily the remedies specifically suggested by the language of section 10(c).[4] Under a narrow

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1 29 U.S.C. § 160(c) (1976).

2 National Labor Relations Act of 1947, 29 U.S.C. §§ 151-87 (1976).

3 Section 10(c) provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall . . . issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act] . . . .

National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1976).

4 The most common type of order is reinstatement of a discriminatorily discharged employee with a back pay award. *See* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 138 (1976) (asserting that upon finding of discriminatory discharge ordinary order is reinstatement with back pay); D. MCDOWELL & K. HUHN, NLRB REMEDIES FOR UNFAIR LABOR PRACTICES 104 (1976) ("[R]einstatement rights . . . are usually automatic."); *see also* Stephens & Chaney, *A Study of the Reinstatement Remedy Under The National Labor Relations Act,* 25 LAB. L.J. 31, 33 (1974) (presenting study in which 217 of 229 discriminatorily discharged employees were ordered reinstated).

Discriminatory discharge of an employee on the basis of the employee's union activity is

view of its remedial powers, the Board usually issued orders requiring a party both to cease and desist from the unfair practice and to take appropriate action to ensure that the injured employee was made whole.

Over time, however, the Board experimented with new remedies to provide relief for atypical unfair practices. Unions had often requested the Board to grant some form of extraordinary relief against recidivist violators. The Board had generally been willing to take such action. For example, the Board had ordered employers to mail notices of the unfair labor practice ruling to the employees' homes[5] or had ordered the company leaders or NLRB officials to read the Board's order to an assembly of workers. This Note focuses specifically upon one type of extraordinary relief: granting union representatives access to company property.[6]

The Board and the courts have long recognized that stronger meas-

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proscribed by § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1976), which provides: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

5 *See, e.g.,* Florida Steel Corp. v. NLRB, 620 F.2d 79, 82 (5th Cir. 1980); NLRB v. H.W. Elson Bottling Co., 379 F.2d 223, 226 (6th Cir. 1967); Marlene Indus. Corp., 255 N.L.R.B. 1446, 1450 (1981); Betra Mfg. Co., 233 N.L.R.B. 1126, 1127, 1137 (1977), *enforced,* 624 F.2d 192 (9th Cir. 1980); Scott's, Inc., 159 N.L.R.B. 1795, 1807 (1966).

6 *See, e.g.,* Florida Steel Corp. v. NLRB, 620 F.2d 79, 82 (5th Cir. 1980); Textile Workers Union v. NLRB, 388 F.2d 896, 903-04 (2d Cir. 1967), *cert. denied,* 393 U.S. 836 (1968); J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 304-05 (2d Cir.), *cert. denied,* 389 U.S. 1005 (1967); Marlene Indus. Corp., 255 N.L.R.B. 1446, 1449 (1981). In other cases, the Board has issued orders directing the company to bargain with the union. *See, e.g.,* NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969); NLRB v. Clinton Packing Co., 468 F.2d 953, 954 (8th Cir. 1972).

ures are required to handle an employer who flagrantly[7] or repeatedly[8] violates the NLRA. Such measures are necessary to ensure that the Board "carr[ies] out the mandates of § 10(c) of the Act . . . which obligates it to order a proven violator 'to take such affirmative action . . . as will effectuate the policies of [the NLRA].' "[9]

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7 Unfair labor practices resulting in extraordinary remedial orders include: enforcing discriminatory no-solicitation rules; discharging employees for engaging in union activity; threatening and harassing employees (including threatening employees' personal safety, job security, and the quality of working conditions); interrogating employees; spying on union adherents; organizing employees into antiunion groups; and giving employees benefits before certification elections. *See, e.g.,* NLRB v. Crown Laundry & Dry Cleaners, Inc., 437 F.2d 290, 297 (5th Cir. 1971) ("aggravated circumstances" warrant extraordinary relief); F.W.I.L. Lundy Bros. Restaurants, Inc., 248 N.L.R.B. 415, 416 (1980) (company activities characterized as exceptional case marked by "outrageous" and "pervasive" unfair labor practices); United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1029 (1979) ("Respondent's unfair labor practices are . . . so 'outrageous' and 'pervasive' that these conventional remedies will not suffice to dissipate them and are inadequate to give Respondent's employees sufficiently explicit reassurances and understanding of their rights under the Act."); John Singer, Inc., 197 N.L.R.B. 88, 90 (1972) (company's acts were "patently frivolous"). J.P. Stevens & Co. has received many extraordinary remedial orders from the NLRB in response to repeatedly flagrant and egregious actions. *See, e.g.,* J.P. Stevens & Co. v. NLRB, 623 F.2d 322 (4th Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981); J.P. Stevens & Co. v. NLRB, 612 F.2d 881 (4th Cir. 1980); J.P. Stevens & Co. v. NLRB, 406 F.2d 1017 (4th Cir. 1968); Textile Workers Union v. NLRB, 388 F.2d 896 (2d Cir. 1967), *cert. denied,* 393 U.S. 836 (1968); J.P. Stevens & Co. v. NLRB, 380 F.2d 292 (2d Cir.), *cert. denied,* 389 U.S. 1005 (1967).

Since the beginning of the union campaign in 1963, J.P. Stevens & Co. and the NLRB have waged a continuous legal battle. The courts have employed innovative remedies in these cases. For commentary on this line of cases, see Figueroa, *Development of the Remedial Power of the National Labor Relations Board in Unfair Labor Practice Cases,* 23 MERCER L. REV. 453, 463-66 (1972); Kovach, *J. P. Stevens and the Struggle for Union Organization,* 29 LAB. L.J. 300 (1978); Note, *Labor Law—J. P. Stevens: Searching for a Remedy to Fit the Wrong,* 55 N.C.L. REV. 696 (1977) [hereinafter cited as Note, *Labor Law*]; Note, J.P. Stevens & Co., *163 NLRB No. 24,* 46 TEX. L. REV. 397 (1968).

8 It is well established that "[e]vidence of prior unfair labor practices is relevant in determining the Company's motivation in its subsequent conduct." NLRB v. Clinton Packing Co., 468 F.2d 953, 954 (8th Cir. 1972); *see* cases cited *supra* note 7; *see also* United Steelworkers v. NLRB, 646 F.2d 616, 631 (D.C. Cir. 1981) ("Without doubt the Board has a duty in a litigated case to employ broader and more stringent remedies against a recidivist than those usually invoked against a first offender, particularly where normal remedies have proved to be ineffective after earlier proceedings.") (quoting Containair Sys. Corp. v. NLRB, 521 F.2d 1166, 1171 (2d Cir. 1975)); Textile Workers Union v. NLRB, 475 F.2d 973, 976 (D.C. Cir. 1973) (Board may consider J.P. Stevens & Co.'s "history of recalcitrance"); Maphis Chapman Corp. v. NLRB, 368 F.2d 298, 303 (4th Cir. 1966) ("Evidence of prior unfair labor practices is relevant . . . ."); Beyerl Chevrolet, Inc., 221 N.L.R.B. 710, 724 (1975) (continued violation of the Act led to imposition of "stronger medicine"); Note, *Survey of Labor Remedies,* 54 VA. L. REV. 696 (1968).

9 Containair Sys. Corp. v. NLRB, 521 F.2d 1166, 1171 (2d Cir. 1975). Decaturville Sportswear Co. v. NLRB, 406 F.2d 886 (6th Cir. 1969), *enforcing* Marlene Indus. Corp., 166 N.L.R.B. 703 (1967), is an example of this principle. The defendant employer had committed more than 20 flagrant violations of the Act. The violations listed by the Board in its order included: discharging employees for engaging in union activity, encouraging employees to act violently against union supporters, damaging automobiles and other property of persons supporting the union, granting employees benefits to interfere with employees' self-organizational efforts, engaging in surveillance and creating an impression of surveillance of union activities, interrogating employees, enforcing rules prohibiting employees from distributing

II
ACCESS AS AN ORGANIZATIONAL DEVICE

The Supreme Court has never addressed the lawfulness of using nonemployee access to employer property as a *remedial* device. The Court, however, has developed principles for evaluating the propriety of nonemployee access to employer property for *organizational* purposes. Although these types of access differ, the principles underlying organizational access can be applied in the remedial setting.

A union's organizational access is initially determined by the individual employer's policy. Some employers, for instance, post rules prohibiting nonemployee solicitation on their property. These rules make a union organizational drive difficult because they prevent union representatives from contacting the employees in common areas where communication can be facilitated. Unions have alleged that such rules violate the employees' section 7 rights.[10] Thus, the question presented to the courts is whether denying access to company property for the purpose of distributing union literature constitutes an unfair labor practice in violation of section 8(a)(1) of the Act.[11] The remedial access issue, in contrast, arises only *after* an unfair labor practice has occurred. The Board's section 10(c) powers enable it to fashion orders to remedy violations of the Act. The question courts face in this latter context is whether reasonable access to company property for a limited time is an appropriate remedial measure.

The organizational access question requires a balancing of two underlying, yet competing principles of American labor law. Section 7 of the Act guarantees employees the freedom to organize and form unions. Access can be used as an extremely valuable organizational tool. The employees' section 7 rights, however, conflict with the employer's pri-

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literature and soliciting union support during nonworking time, enforcing in a discriminatory manner rules prohibiting solicitation, threatening employees with closing or moving the plant, and altering working conditions to interfere with the employees' self-organizational efforts. 406 F.2d at 888; Marlene Indus. Corp., 166 N.L.R.B. at 706. The Board cited the employer's history of violent hostility to unionization as justification for imposing the access remedy. 166 N.L.R.B. at 705.

10 The statute provides:

> 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.

National Labor Relations Act § 7, 29 U.S.C. § 157 (1976); *see also infra* note 23.

11 29 U.S.C. § 158(a)(1) (1976) provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]."

vate property interests and right to maintain production and discipline standards.[12] In *NLRB v. Babcock & Wilcox Co.*,[13] the Court addressed these competing interests and formulated two principles to guide the Board in determining nonemployee access to employer property for organizational purposes.

A. The *Babcock* Decision

The *Babcock* decision involved the distribution of union literature by nonemployee union representatives on company property.[14] Babcock & Wilcox Company operated a plant near a community with a population of 21,000 people. Many of the community's residents worked for the company.[15] A company rule prohibited nonemployee organizers from distributing union literature on the plant premises. Union representatives attempted to distribute campaign literature to employees at the plant entrance as they drove to and from work because the company rule and the plant's rural setting made this the only location in which they could distribute such material effectively. Distribution at that location, however, was hazardous and the organizational strategy ultimately failed.[16]

The union brought suit, alleging that the employer's no-distribution rule violated the employees' section 8(a)(1) self-organization rights.[17] Relying principally upon the Supreme Court's decision in *Republic Aviation v. NLRB*,[18] the Board held that the employer's broad rule violated the Act. In *Republic Aviation*, the Court held that a rule prohibiting *employee* distribution of union literature on plant premises was "an unreasonable impediment" on the freedom of communication essential

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12 *See infra* note 24.

13 351 U.S. 105 (1956).

14 The *Babcock* decision consolidated three separate cases whose facts were not materially different. *See* Babcock & Wilcox Co., 109 N.L.R.B. 485 (1954), *enforcement denied*, 222 F.2d 316 (5th Cir. 1955), *aff'd*, 351 U.S. 105 (1956); Seamprufe, Inc., 109 N.L.R.B. 24 (1954), *enforcement denied*, 222 F.2d 858 (10th Cir. 1955), *aff'd sub nom.* NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Ranco, Inc., 109 N.L.R.B. 998 (1954), *enforced per curiam*, 222 F.2d 543 (6th Cir. 1955), *rev'd sub nom.* NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

15 Forty percent of the company's employees lived in town and approximately 80% lived within a 12-mile radius of the plant. *Babcock & Wilcox Co.*, 109 N.L.R.B. at 491.

16 *See* 109 N.L.R.B. 485, 485 n.3, 492 (1954) (police instructed union to cease distribution of leaflets at company gate because it was dangerous); Seamprufe, Inc., 109 N.L.R.B. 24, 29 (1954) (distribution virtually impossible because employees did not stop at gate); Ranco, Inc., 109 N.L.R.B. 998, 1005 (1954) (hazardous conditions hampered distribution and cars sometimes failed to stop at gate).

17 The union charged that the employer's no-distribution rule impeded the employees' self-organization rights in violation of § 8(a)(1) of the National Labor Relations Act. 29 U.S.C. § 158(a)(1) (1976). "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . ." *Id.; see supra* note 10.

18 *See* LeTourneau Co., 54 N.L.R.B. 1253, *enforcement denied*, 143 F.2d 67 (5th Cir. 1944), *rev'd sub nom.* Republic Aviation Co. v. NLRB, 324 U.S. 793 (1945).

to the exercise of employees' rights of self-organization.[19]

The Supreme Court in *Babcock* denied enforcement of the Board orders.[20] The Court distinguished between the rights of employees and the rights of nonemployees to distribute literature on company property[21] and concluded that *Republic Aviation* applied only to employees.[22] The *Babcock* Court addressed the basic conflict between the organizational interests of the employees[23] and the property rights of the employer.[24] The Court required an accommodation between these

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19 324 U.S. at 804 n.10.

20 The courts of appeals had denied enforcement of the respective Board orders for two of the three cases decided in the *Babcock* decision. These courts concluded that nonemployees have a right of access to the employer's property only if prohibiting access will handicap their organizing effort. NLRB v. Babcock & Wilcox Co., 222 F.2d 316, 319 (5th Cir. 1955); NLRB v. Seamprufe, Inc., 222 F.2d 858, 861 (10th Cir. 1955). Both decisions distinguished *Republic Aviation,* because it dealt only with employees' rights to campaign on company property and *nonemployees* did not have these rights. 222 F.2d at 319; 222 F.2d at 860.

In the third case, the court of appeals in a per curiam opinion had enforced the Board's order, deferring to the Board's findings of fact. NLRB v. Ranco, Inc., 222 F.2d 543 (6th Cir. 1955). The Supreme Court affirmed *Babcock* and *Seamprufe* and reversed *Ranco.* NLRB v. Babcock & Wilcox Co., 351 U.S. at 114.

21 The Court stated:

> The distinction is one of substance. No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *Republic Aviation Corp. v. Labor Board,* 324 U.S. 793, 803. But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration.

351 U.S. at 113.

22 *Id.* at 111.

23 Unions derive their rights during an organizational campaign solely from the employees' § 7 rights, which include the "full freedom to receive aid, advice, and information from *others,* concerning those rights and their enjoyment." Harlan Fuel Co., 8 N.L.R.B. 25, 32 (1937) (emphasis added) (footnote omitted). The term "others" includes union organizers as well as fellow employees. *See* Thomas v. Collins, 323 U.S. 516, 533-34 (1944); *see also* Central Hardware Co. v. NLRB, 407 U.S. 539, 542-43 (1971).

Courts have recognized that employees learn principally from union representatives. *See* NLRB v. S & H Grossinger's Inc., 372 F.2d 26, 29 (1967) ("[L]acking as [employees] do the requisite special training and experience, they cannot convey the Union's appeal with anything like the effectiveness of professional union organizers."); *see also Hearings Before the Comm. on Education and Labor of the Senate to Create a National Labor Board,* 73d Cong., 2d Sess pt. 1, at 208 (1934); C. DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY 421-22 (5th ed. 1941).

The help of nonemployees is beneficial because individual employees are naturally reluctant to take the initiative in actions that may place them in disfavor with their employer. The employee cannot act with the independence of an outsider. *See* Note, *"Not as a Stranger:" Non-Employee Union Organizers Soliciting on Company Property,* 65 YALE L.J. 423, 427 (1956).

24 The employer's private property rights are based on the fifth amendment to the United States Constitution. As an owner of property, the employer has the right to control the use of his property. The employer also has the economic interests of managing his business, preserving plant discipline, and maintaining production. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945); News-Texan, Inc. v. NLRB, 422 F.2d 381 (5th Cir. 1970); United Steelworkers v. NLRB, 243 F.2d 593, 596 (D.C. Cir. 1956), *rev'd on other grounds,* 357 U.S. 357 (1958); *see also* Bok, *Regulation of Campaign Tactics in Representation Elections Under the NLRA,* 78 HARV. L. REV. 38, 57 (1964). Employers maintain that outside organizers have no

conflicting interests so that the protection of one would not effectively destroy the other.[25] The Court held that an employer may promulgate a rule prohibiting nonemployees from coming onto the employer's property if the rule is nondiscriminatory[26] and if alternative channels of communication enable the union to contact the employees.[27] The Court concluded that the employers' no-distribution rules did not constitute unfair labor practices because the union had made some contact with the employees outside company property. The rule merely forced the union to rely on alternative methods of publicity.[28]

B. Organizational Access since *Babcock*

The courts since *Babcock*[29] have interpreted these principles strictly, requiring only that alternative, nontrespassory means of communication

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inherent right to conduct activities on the employer's property. They argue that union organizers will be unfamiliar to the company supervisory personnel, "and may create problems of identification, discipline, injury, and security . . . ." R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 185 (1976).

25 The Court required that "[a]ccommodation between [these two interests] 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. at 112.

26 A no-distribution or no-solicitation rule is nondiscriminatory where it prohibits distribution of literature or solicitation by all nonemployees. In each of the three cases consolidated in *Babcock* the Board had held the employer's rule to be nondiscriminatory. *See* Babcock & Wilcox Co., 109 N.L.R.B. 485, 492 (1954); Seamprufe, Inc., 209 N.L.R.B. 24, 31, 32 (1954); Ranco, Inc., 109 N.L.R.B. 998, 1007 (1954); *see also* Walton Mfg. Co., 126 N.L.R.B. 697, *enforced,* 289 F.2d 177 (5th Cir. 1962).

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

351 U.S. at 112. The Court stated, however, that "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property." *Id.* at 113.

28 The Court emphasized that the union had contacted many employees using other means of communication such as mailing literature, talking on the street, visiting employees at their homes, and telephoning employees. *Id.* at 107 n.1. The Court also noted the town's small size and the large percentage of employees living close to the plant. *Id.* at 113.

29 In other factual settings, the Supreme Court has construed *Babcock* narrowly by holding that it may be conclusively presumed that the union has a "reasonable" alternative channel of communication if there is any opportunity, however limited, for contact with employees. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 205 (1978); *see also* Hudgens v. NLRB, 424 U.S. 507 (1976).

exist,[30] regardless of their effectiveness.[31] Unions have had difficulty proving the nonexistence of alternative means of communication. The union must show that it has made a substantial effort to contact the employees,[32] but almost any degree of contact establishes the existence of alternative means of access. The Court has recently admitted that "the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity."[33]

In the few cases where the Board granted nonemployees access under the *Babcock* rule, the employees generally lived on the employers' properties, making conventional nontrespassory means of communication virtually impossible.[34] These cases involved resort hotels,[35] an is-

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30 For example, in Monogram Models, Inc., 192 N.L.R.B. 705, 706 (1971), the union requested that the Board modify its application of *Babcock* in "big city" situations. The employer was located in the greater Chicago area. The union cited its inability to use conventional methods of communication, such as mail and mass media, because the employees lived in such a large area. The NLRB denied unions access to company property citing the existence of other available, conventional methods of communication. The Board cited the union's ability to contact employees, albeit with "some difficulty," as they drove into the plant during rush hour traffic. The Board noted that, "while the plant location unquestionably presented some obstacles to easy contact with employees on their way to and from work, such contact was by no means foreclosed. Indeed, it [was] clear that such union efforts . . . did reach many employees at these times." *Id.* at 706.

In Falk Corp., 192 N.L.R.B. 716, 720 (1972), the Board again required the union to resort to nontrespassory means of contacting the employees such as the mail, home visits, telephone, mass media, and handbilling in the vicinity of the plant. The Board cited the union's ability to obtain the employees' identities by observing employees' license plates and matching them with state records.

31 This point was directly at issue in May Dep't Stores Co., 136 N.L.R.B. 797 (1962), *enforcement denied,* 316 F.2d 797 (6th Cir. 1963). The employer addressed employees on company property and company time while enforcing a broad rule against union solicitation on company property. The Board held that the employer's antiunion speech violated § 8(a)(1), and found that alternative means of union communication were inadequate without an access remedy. Thus the Board granted the union access to company property. 136 N.L.R.B. at 801-02. The court of appeals reversed the Board's decision holding that the Board should only consider the existence of the alternative means of communication and not attempt to determine their adequacy. The court stated that "[t]he determination of whether or not the . . . employer['s] conduct produced an imbalance in opportunities for organizational communications is dependent upon the existence or non-existence of alternative methods of communication open to the Union." 316 F.2d at 799.

32 *See* Monogram Models, Inc., 192 N.L.R.B. 705, 706 (1971) ("modest efforts" to contact employees are not sufficient); *see also supra* note 30.

33 Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 205 (1978) (footnote omitted).

34 The *Babcock* Court cited with approval NLRB v. Lake Superior Co., 167 F.2d 147, 152 (6th Cir. 1948) (Board granted unions right of access to contact employees living in temporary lumbering camps and confined by their regular work schedule).

35 *See* NLRB v. S & H Grossinger's Inc., 372 F.2d 26 (1967) (no effective alternative means of communication available where 60% of employees lived on employer's premises); *see also* H & G Operating Corp., 191 N.L.R.B. 719 (1971) (no effective contact where two-thirds of resort work force lived on premises).

land mining camp,[36] and ships.[37] In other cases involving similarly isolated employees, courts have denied access by placing a heavy burden of proof on the union to show that alternative means of access do not exist.[38] The *Babcock* principles have been extended into other labor contexts as well.[39]

III
ACCESS AS A REMEDIAL DEVICE

Although courts have established strict rules governing union access to company property as an *organizational* device, they have granted unions such access more readily as a *remedial* measure for employer violations of the NLRA. It is unclear, however, whether different principles should govern organizational and remedial access.

A. Arguments Against the Use of Access As a Remedial Tool

1. Babcock *Principles Should Be Strictly Applied in the Remedial Setting*

Some courts have strictly applied the *Babcock* principles by granting

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36 *See* Alaska Barite Co., 197 N.L.R.B. 1023 (1972).

37 *See* Belcher Towing Co., 238 N.L.R.B. 446 (1978), *enforcement denied,* 614 F.2d 446 (5th Cir. 1980); Sabine Towing & Transp. Co., 205 N.L.R.B. 423 (1973), *enforcement denied,* 599 F.2d 663 (5th Cir. 1979); Sioux City & New Orleans Barge Lines, Inc., 193 N.L.R.B. 382 (1971), *enforcement denied,* 472 F.2d 753 (8th Cir. 1973).

38 *See, e.g., Sioux City,* 472 F.2d at 756 (requiring union to "make a very strong showing of its inability to contact the employees" and holding that access would have resulted in substantial interference with employer's shipping operation); *see also* NLRB v. Tamiment Corp., 451 F.2d 794 (3d Cir. 1971) (union access to resort hotel denied); NLRB v. Kutsher's Hotel and Country Club, Inc., 427 F.2d 200 (2d Cir. 1970) (union access to isolated resort hotel denied).

39 *See, e.g.,* NLRB v. United Steelworkers, 357 U.S. 357 (1958) (Court consolidated two cases: NuTone, Inc., 112 N.L.R.B. 1153 (1955), *modified sub nom.* United Steelworkers v. NLRB, 243 F.2d 593 (D.C. Cir. 1956), *rev'd,* 357 U.S. 357 (1958) and Avondale Mills, 115 N.L.R.B. 840 (1956), *enforcement denied in relevant part,* 242 F.2d 669 (5th Cir. 1975), *aff'd sub nom.* NLRB v. United Steelworkers, 357 U.S. 357 (1958)). In both cases employers enforced a rule prohibiting employee distribution of campaign literature on company property and union solicitation during working time. The rules were justified as necessary to maintain plant discipline and production. At the same time, each employer engaged in an antiunion campaign. The Board found that NuTone's actions were noncoercive. The Board, however, found the Avondale Mills campaign coercive because the employer designed no-solicitation rules to defeat the employees' organizational efforts and not simply to maintain plant discipline. The Court refused to invalidate the employers' rules, holding that antiunion tactics, whether coercive or noncoercive, did not make a no-distribution rule unlawful. It upheld the rules as necessary to serve production, order, and discipline. 357 U.S. at 361. In dicta, the Court stated that the vital concern was whether "the no-solicitation rules truly diminished the ability of the labor organizations involved to carry their messages to the employees." *Id.* at 363 (citing Babcock & Wilcox Co., 351 U.S. 105, 112 (1956); Republic Aviation Corp., 324 U.S. 793, 797-98 (1945)). The Court stated that the Board must consider the physical characteristics of the area, specifically, the location of the plant and the resources available to the union. The Court required the Board to examine alternative means of communication before finding that the employer's rule constituted an unfair labor practice.

access remedies only if no alternative means of communication are available to the union. Under this strict approach the courts are reluctant to compromise the employer's property rights in favor of the employees' self-organizational rights.[40]

In *Greenfield Manufacturing Co.*,[41] the employer unlawfully interrogated employees, harassed employees distributing handbills, and gave coercive speeches during working hours. The Board, applying the *Babcock* principles, refused to grant access to nonemployees, stating that

> [t]he purpose of the remedy extended in limited access cases has not been . . . to provide for a union every facility inside the plant, which an employer has and pays for, and to make both sides "equal." It is to provide the union with such opportunity as it would otherwise have to communicate with employees but for the unavailability of access outside the plant. . . . [W]here as here it has not been shown that physical conditions or the employer itself has prevented access, there is no warrant for directing that employer to remedy a condition for which it is neither responsible nor liable.[42]

Similarly, *Winn-Dixie Stores, Inc.*[43] involved an employer hostile to its employees' organizational activities. The employer had enforced unlawful no-solicitation rules, instructed employees to stop engaging in union activity, and made several unlawful pre-election promises. After the conflict between the union and management had persisted for a number of years,[44] the Board granted the union's request for access to company bulletin boards but denied its request to send organizers onto the employer's property because alternative means of communication existed.[45]

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40 *See supra* notes 32-38 and accompanying text.

41 199 N.L.R.B. 756 (1972).

42 *Id.* at 767.

43 224 N.L.R.B. 1418 (1976), *enforced in relevant part,* 567 F.2d 1343 (5th Cir.), *cert. denied,* 439 U.S. 985 (1978).

44 224 N.L.R.B. at 1426.

45 The administrative law judge explicitly refused to balance the effectiveness of the means of communication available to the union and management:

> I would find that an imbalance has been created by Respondent's unfair labor practices, which would tend to critically impair the Union's opportunities for effective communication among all but the most militant employee supporters of the Union . . . . Yet as illogical as the law may appear in this regard, under the precedent no weight is accorded to a lack of access attributed to unfair labor practices; instead, only imbalances attributable to physical factors are regarded as relevant to the inquiry.

Id. at 1459 n.17; *see also* Heck's, Inc., 191 N.L.R.B. 886, 887 (1971) (Board denied union access, but ordered employer to mail notices to employees' homes), *enforced in relevant part,* Food Store Employees Local 347 v. NLRB, 476 F.2d 546 (D.C. Cir. 1973), *rev'd in part on other grounds,* 417 U.S. 1 (1974); J.P. Stevens & Co., 167 N.L.R.B. 266 (1967), *enforced in relevant part,* 406 F.2d 1017 (4th Cir. 1968).

2. *Sanctions in the Form of Union Access Are at Odds with the Remedial Focus of the Board's Authority*

The Board has authority to grant remedial orders but not punitive ones. The power of the Board "is to be exercised . . . as a means of removing or avoiding the consequences of violation[s] . . . ."[46] The Board "may not justify an order solely on the ground that it will deter future violations of the Act."[47] Thus, for an access order to be valid the Board must show that it will have the effect of rectifying a current imbalance created by flagrant employer violations of the NLRA. The Board may not grant access as a remedy where other appropriate remedies have already been imposed. Granting an access order in such circumstances constitutes continuing punishment for past occurrences. Such punishment is beyond the Board's authority. The Board does not have "virtually unlimited discretion to devise punitive measures . . . which [it] may think would effectuate the policies of the Act."[48]

3. *Courts Should Scrutinize Board Orders More Closely*

Courts generally give extreme deference to the Board's administrative expertise. With respect to Board remedial orders, however, courts have been more willing to substitute their own judgment. These courts reason that they should not necessarily extend the presumption of validity applied to Board findings of fact to Board remedial orders.[49] Arguably, courts should scrutinize Board remedial orders more closely, especially ones which the Board itself classifies as "unconventional."[50]

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46 Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 655 (1961) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938)).

47 Bell & Howell Co. v. NLRB, 598 F.2d 136, 147 n.36 (D.C. Cir.) (citations omitted), *cert. denied,* 442 U.S. 942 (1979).

48 Republic Steel Corp. v. NLRB, 311 U.S. 7, 11 (1940) (Board order requiring employer to pay unlawfully dismissed employees' wages to governmental agencies held punitive).

49 J.P. Stevens & Co. v. NLRB, 406 F.2d 1017, 1028 (4th Cir. 1968) (Boreman, J., concurring in part).

50 *See* 29 U.S.C. § 160(e) (1976) (suggesting that court itself should weigh and appraise Board's remedial orders and deal with them as court sees fit).

Some courts have refused to defer to Board findings in a similar context and have granted a bargaining order as an extraordinary remedy. *See* Note, *Representative Bargaining Orders: A Time for Change,* 67 CORNELL L. REV. 950, 960-61 (1982); *see, e.g.,* NLRB v. Arrow Molded Plastics, Inc., 653 F.2d 280, 284 (6th Cir. 1981) ("It is equally inappropriate to enforce bargaining orders where the Board's rationale for the order was conclusory . . . ."); Tipton Elec. Co. v. NLRB, 621 F.2d 890, 899 (8th Cir. 1980) (Gibson, J., dissenting) (rejecting Board's order because "[Board fell] into the trap of using an easy, mechanical application of general rules in a manner that impairs the free choice of the employees"); Rapid Mfg. Co. v. NLRB, 612 F.2d 144, 151-52 (3d Cir. 1979) (order unenforceable when record lacked substantial evidence that unfair labor practices were serious enough to undermine majority strength and impede election process); *see also* NLRB v. Ely's Foods Inc., 656 F.2d 290, 294 (8th Cir. 1981) (McManus, C.J., concurring) ("I am aware of and approve the legal standard of review that requires us to give deference to the Board on these matters. But I suggest that

As the Court stated in *Burlington Truck Lines, Inc. v. United States:*[51] "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.' "[52]

B. Arguments in Favor of the Use of Access As a Remedial Tool

1. *Organizational Access May Be Distinguished from Remedial Access*

In some instances, employer violations of the Act have led the Board to grant unions remedial access to company property.[53] In these cases the Board and the courts have generally found the *Babcock* principles inapplicable.[54] For example, in *Decaturville Sportswear Co. v. NLRB,*[55] the employer "committed massive unfair labor practices which were, in substantial part, of a kind deliberately calculated to thwart the Union's attempts to communicate with employees through the usual channels."[56] The court approved the Board's access remedy as a tool to directly counteract the employer's actions. The court explained why *Babcock* was not inconsistent with a decision to grant the union access to company property:

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such deference is not warranted where the Board has merely set forth a litany, reciting conclusions by rote without any factual explication.").

51 371 U.S. 156 (1962) (Court rejected ICC findings that cease-and-desist order against union-induced boycott would have been ineffective because of failure to indicate basis on which it exercised expert discretion).

52 *Id.* at 167 (quoting New York v. United States, 342 U.S. 882, 884 (1951) (Douglas, J., dissenting) (emphasis in original); *see also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951) ("Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds.").

53 *See* Teamsters Local 115 v. NLRB, 640 F.2d 392, 400 (D.C. Cir.) (court upheld Board order granting union access to nonwork areas during nonwork periods to rectify imbalance caused by antiunion campaign), *cert. denied,* 454 U.S. 827, 837 (1981); United Steelworkers v. NLRB, 646 F.2d 616 (D.C. Cir. 1981) (court upheld access remedy but required Board to indicate such access was necessary to offset adverse effects of unlawful employer conduct); Decaturville Sportswear Co. v. NLRB, 406 F.2d 886 (6th Cir. 1969); F.W.I.L. Lundy Bros. Restaurants, Inc., 248 N.L.R.B. 415, 416 (1980) (Board granted union access to offset unfair labor practices which had lessened possibility of future fair election); United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1031 (1979) (Board granted union access to offset pervasive and flagrant unfair labor practices).

54 Other decisions have addressed the issue of union access to employer property without any reference to *Babcock.* Some of these cases have allowed union access, whereas others have denied access simply because lesser remedies seemed adequate. *Compare* International Union of Elec. Workers v. NLRB, 383 F.2d 230, 232 n.4 (D.C. Cir. 1967) (approving order requiring one hour of company time for union presentation), *cert. denied,* 390 U.S. 904 (1968) *with* C.W.F. Corp., 188 N.L.R.B. 554, 560 (1971) (employer's flagrant violations remedied without ordering access), *enforced,* Retail Store Employees Local 400 v. NLRB, 458 F.2d 792 (D.C. Cir. 1972).

55 406 F.2d 886 (6th Cir. 1969), *enforcing* Marlene Indus. Corp., 166 N.L.R.B. 703 (1967); *see supra* note 9 and accompanying text.

56 166 N.L.R.B. 703, 705.

> [In *Babcock,*] the question was whether denial of access to company property in order to distribute union literature constituted an unfair labor practice and the Supreme Court held it did not. Here, the question is whether reasonable access to company property for a limited time is an appropriate remedial measure after a finding of unfair labor practices.[57]

Courts confronted with prior violations have thus asserted that union access can be used to remedy imbalances caused by an employer's unfair labor practices.[58]

2. *Courts Should Defer to Board Remedial Decisions*

Decisions upholding extraordinary Board remedies frequently refer to Supreme Court pronouncements of the breadth of the Board's remedial powers. In *Fibreboard Paper Products Corp. v. NLRB,*[59] the Court stated that the Board's remedial power "is a broad discretionary one, subject to limited judicial review."[60] Furthermore, in *NLRB v. Gissell Packing Co.,*[61] the Court recognized that "the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts."[62] These statements, however, conflict with opinions admonishing courts for not examining Board remedial orders more closely.[63]

3. *Access Orders Are Remedial, Not Punitive*

Board orders must be remedial and not punitive. Courts granting remedial access have had difficulty articulating this distinction. In *United Steelworkers v. NLRB,*[64] the court stated that "[w]hile it is clear that Board remedies may not be punitive, the Supreme Court has also stated that Section 10(c) is a broad 'command' that the Board order such affirmative action as is necessary to effectuate the purposes of the

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57 406 F.2d at 889.

58 This approach is stated clearly by the Board in Scott's, Inc., 159 N.L.R.B. 1795, 1808 (1966) ("As Respondent violated the rights of those employees who had not yet had a chance to formulate their desires with regard to representation . . . we deem it appropriate that employees be afforded further opportunity to engage in organizational efforts.").

59 379 U.S. 203 (1964).

60 *Id.* at 216 (citation omitted).

61 395 U.S. 575 (1969).

62 *Id.* at 612 n.32 (citation omitted).

63 *See supra* notes 49-52 and accompanying text.

64 646 F.2d 616 (D.C. Cir. 1981). The *United Steelworkers* case involved the Florida Steel Corporation. Since 1974, the Board has found that Florida Steel violated the Act in 17 separate cases. In most of these cases the company was found guilty of several unfair labor practices. In the instant case, the employer committed a minor violation by unilaterally lowering two employees' wages by 30 cents an hour in violation of an existing collective bargaining agreement. *Id.* at 619. Notwithstanding the marginal impact of this one violation upon employee § 7 rights, the court granted union access to counter the substantial chilling effect of the employer's behavior over the last seven years.

Act."[65] The Supreme Court stated in *NLRB v. Seven-Up Bottling Co.*[66] that

> [i]t is the business of the Board to give coordinated effect to the policies of the Act. We prefer to deal with these realities and to avoid entering into the bog of logomachy, as we are invited to, by debate about what is "remedial" and what is "punitive." It seems more profitable to stick closely to the direction of the Act by considering what order does . . . and what order does not, bear appropriate relation to the policies of the Act.[67]

Courts dealing with recidivist violators of the Act are susceptible to charges of imposing access remedies to punish past unlawful behavior.[68] Those courts that have applied remedial measures have argued that in some situations repeated flagrant violations "may have a cumulative effect on employees that is greater than the combined effect of each violation viewed in isolation."[69] Employees may lose faith in the belief that a union can adequately contend with an employer overtly defying Board orders. In such cases, union access to employer property may be a necessary remedy.[70] Viewed in the context of an individual violation such an order may appear punitive. To the extent, however, that the order attempts to "restore the wronged to the position he would have occupied"[71] had the violation not occurred, it is remedial.

Some courts have expanded remedial measures beyond the actual locations at which unfair labor practices occurred[72] by applying access

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65 *Id.* at 630; *see also* NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 262 (1969).

66 344 U.S. 344 (1953) (Court affirmed Board's order reinstating 11 discriminatorily discharged employees and approved Board's method of computing back pay awards).

67 *Id.* at 348 (citation omitted).

68 *See supra* notes 46-48 and accompanying text.

69 *United Steelworkers v. NLRB,* 646 F.2d at 631.

70 Without more stringent Board remedial powers, many firms may find that the benefits of an unlawful campaign outweigh the costs. For example, at one time the Board ordered J.P. Stevens to pay $1.3 million in back wages. This sum of money is trivial when compared to J.P. Stevens's estimated savings of $18,400 per hour resulting from remaining a nonunion company. *See* Note, *Labor Law, supra* note 7, at 699 (citing *Oversight Hearings on the National Labor Relations Act Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor,* 94th Cong., 2d Sess. 181 (1976)).

Commentators have suggested broader use of the Board's § 10(c) powers. *See, e.g.,* Note, *The Need For Creative Orders Under Section 10(c) of the National Labor Relations Act,* 112 U. PA. L. REV. 69 (1963). Extensions of the Board's existing powers also have been proposed. *See, e.g.,* Note, *Coping with Persistent NLRA Violators: The Potential for Debarment Through Executive Order,* 66 IOWA L. REV. 425 (1981); Note, *Remedies for Employer Unfair Labor Practices During Organizing Campaigns,* 77 YALE L.J. 1574 (1968); Comment, *Employer Pre-Election Coercion: A Suggested Approach for Effective Remedial Action,* 115 U. PA. L. REV. 1112 (1967).

71 Town & Country Mfg. Co., 136 N.L.R.B. 1022, 1029 (1962), *enforced,* 316 F.2d 846 (5th Cir. 1963).

72 *See* J.P. Stevens & Co., 623 F.2d 322, 327 (4th Cir.), *cert. denied,* 449 U.S. 1077 (1981); J.P. Stevens & Co. v. NLRB, 612 F.2d 881, 882 (4th Cir.), *cert. denied,* 449 U.S. 918 (1980); Gerry's Cash Mkts., Inc. v. NLRB, 602 F.2d 1021, 1025 (1st Cir. 1979); NLRB v. Jack LaLanne Management Corp., 539 F.2d 292, 295 (2d Cir. 1976); Texas Gulf Sulphur Co. v.

remedies on a company-wide basis.[73] Such orders are similarly susceptible to the charge that they are punitive in nature. For example, in *J.P. Stevens & Co. v. NLRB,*[74] the Court of Appeals for the Fourth Circuit enforced Board orders that granted the union broad access to all company plants.[75] The court declined to label the action punitive, stating that

> the Board's order is predicated on its finding that the company employed its unlawful . . . strategy to chill the union's organization of other plants. The . . . access order is designed to counteract the use the company has made at other plants of its [previously reported] unfair labor practices . . . .[76]

These decisions granting corporate-wide access generally do not discuss the possible relevance of the *Babcock* principles, particularly the property interests of the employer.[77]

IV
GUIDELINES FOR FUTURE BOARD DECISIONS

Courts evaluating Board decisions should consider two basic propositions. First, they should recognize that the Board needs a broader class of remedial orders to handle recidivist violators than is necessary to regulate one-time violators. Ordinary remedies often are inadequate to offset the harmful effects of an employer's unlawful antiunion campaign.[78] Second, when the Board applies an access remedy it must bal-

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NLRB, 463 F.2d 778, 779 (5th Cir. 1972); J.P. Stevens & Co. v. NLRB, 406 F.2d 1017, 1021-22 (4th Cir. 1968); J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 304 (2d Cir.), *cert. denied,* 389 U.S. 1005 (1967); Winn-Dixie Stores, Inc., 236 N.L.R.B. 1547, 1551 (1978); Albert's, Inc., 213 N.L.R.B. 686, 698 (1974), *petition for review denied,* 543 F.2d 417 (D.C. Cir. 1976). *But see* Wesselman's Enters., Inc., 248 N.L.R.B. 1017, 1017 n.2 (1980); Pacific Gas & Elec. Co., 234 N.L.R.B. 739, 739 n.2 (1978).

73 The Supreme Court has noted that activities at one corporation plant could effect the corporation's other plants. *See* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 275 (1965). In United Steelworkers v. NLRB, 646 F.2d 616, 638 (D.C. Cir. 1981), the court noted that corporate-wide remedies should extend to unorganized plants only if the Board thinks the employer's strategy has chilled the free exercise of employee rights at those plants.

74 623 F.2d 322 (4th Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981).

75 The court granted the union access, on a corporate-wide basis, to all nonwork areas of the plants for the purpose of communicating with employees.

In Florida Steel Corp. v. NLRB, 620 F.2d 79 (5th Cir. 1980), the court also ordered the employer to provide the union access to all of the recidivist violators' plants, whether or not specified unfair labor practices occurred at each plant.

76 623 F.2d at 327.

77 *See, e.g.,* United Steelworkers v. NLRB, 646 F.2d 616, 637 (D.C. Cir. 1981); J.P. Stevens & Co. v. NLRB, 623 F.2d 322 (4th Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981); J.P. Stevens & Co., 240 N.L.R.B. 33 (1979), *enforced,* 612 F.2d 881 (4th Cir. 1980), *cert. denied,* 449 U.S. 918 (1981).

78 *See* Hood, *Bargaining Orders: The Effect of* Gissel Packing Company, 32 LAB. L.J. 203, 204 (1981) ("Since 1969, the number of unfair labor practice cases filed with the [NLRB] has increased annually. The ineffectiveness of remedies available to the Board to deal with unfair labor practices may have encouraged campaign misconduct.") (footnote omitted).

ance not only the self-organizational interests of the employees, but also the property interests of the employer.[79] Any workable solution for determining appropriate remedies must accommodate these sometimes competing propositions. Furthermore, the Board must have guidelines to decide when an access remedy is appropriate.

To determine the appropriate remedy, the Board should first ascertain whether the employer can be classified as a recidivist and whether his conduct has substantial coercive effects that may chill the free exercise of employee rights.[80] If the Board finds this to be true, it has a duty to rectify the imbalance between the employer and its employees by enabling employees to learn about unionization in an atmosphere free of further restraint and coercion.[81] In addition, the Board must recognize that trained union organizers can play an effective role in equalizing the balance of power.[82] If the Board believes that increased communication between union representatives and employees will restore the employees' confidence in their section 7 rights,[83] the most appropriate remedy may be to issue a remedial order granting access. The Board also should consider the private property interests of the employer. The underlying principles supporting these interests—the fifth amendment and the owner's general property rights[84]—are unaffected by the employer's actions. Access remedies are inappropriate if they hinder the company's ability to maintain plant production and employee discipline. Thus, to protect these property interests, the Board should use the following guidelines when granting a right of access to remedy an employer's unfair labor practices. These guidelines reflect both the *Babcock* decision and the rules underlying the Board's remedial authority.

First, the Board should consider the suitability of traditional, nontrespassory orders,[85] including the class of remedies suggested by section

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79 *See* United Steelworkers v. NLRB, 646 F.2d at 637 ("Remedial orders granting a union access to company plants necessarily affect private property rights . . . .").

80 In United Steelworkers v. NLRB, 646 F.2d at 638, the court stated:

> The Act contains a broad command that the Board take such affirmative action as is necessary to safeguard employee rights and thus effectuate the policies of the Act. . . . [C]ertain employer conduct may be of such a nature that some form of union access is needed to dissipate an atmosphere of fear and helplessness that has been created and to assure employees that fundamental rights exist and will be protected.

81 The Board anticipated this goal in United Dairy Workers Coop. Ass'n, 242 N.L.R.B. at 1029.

82 *See supra* note 23.

83 Thus the Board should assess the adequacy of the union's available means of communication. This step contradicts the *Babcock* doctrine which considers only the existence and not the adequacy of alternatives. *See supra* note 29.

84 *See supra* note 24.

85 A proper balance between the need for a meaningful remedial order and the employer's private property interest leads to the treatment of access as a remedy of last resort. The courts should not sustain the issuance of an access remedy for unfair labor practices having only a minor impact upon employees' § 7 rights. Arguably the access remedy will be

10(c) as well as the more accepted extraordinary remedies.[86] *Babcock* dictates that accommodation between the employer's property interests and the employees' organizational interests "must be obtained with as little destruction of one as is consistent with the maintenance of the other."[87] The Board should not grant the union a right of access if there are less intrusive ways to protect the employees' rights.[88]

Second, even where an access remedy is appropriate, the Board's orders must be remedial, not punitive.[89] Remedies granting nonemployees access to company property are extreme. Properly issued access orders should bear a close and direct relationship to the harmful effects of the employer's tactics. Thus, repeated minor unfair labor practices may call only for union access to company bulletin boards, whereas

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used most frequently in cases involving recidivist violators of the Act because no other alternatives are available for use against employers repeatedly violating traditional and extraordinary remedies. *See* Thompson & Pollitt, *Oversight Hearings of the NLRB: A Preliminary Report,* 27 LAB. L.J. 539, 540-42 (1976) (identifying some "rogue employers" who repeatedly have committed unfair labor practices and have been subject to numerous Board remedial orders).

86 The *United Steelworkers* court listed factors applicable in situations involving recidivist violators. If the access remedy is based on recurring violations, the remedy should be granted only if the Board evaluates "the seriousness of the violations involved, the amount of time between violations, and the extent to which employees know or may have reason to know of past incidents of unlawful conduct." 646 F.2d at 639 n.45. "It is not a history of unlawful conduct that justifies access as a remedial measure, but rather it is the effects that such a history may produce." *Id.* It must be "reasonably foreseeable that the employees at these other locations have suffered coercive effects from the employer's unlawful conduct and that an access remedy is necessary to cure those effects." *Id.* at 641. Other courts have suggested further relevant criteria in determining the applicability of this extraordinary remedy. For example, apologetic remarks by management may have eliminated any lasting effect of the employer's misconduct. *See, e.g.,* Peerless of Am., Inc. v. NLRB, 484 F.2d 1108, 1121 (7th Cir. 1973) (bargaining order unwarranted where employer's unfair labor practices were marginal). Moreover, termination of management personnel who committed unfair practices reduced the likelihood that past misconduct would continue. *See, e.g.,* NLRB v. Pilgrim Foods, Inc., 591 F.2d 110, 120 (1st Cir. 1978). Conversely, employer unfair labor practices occurring subsequent to the violation in question may demonstrate the employer's continued unlawful opposition to unionization. *See, e.g.,* Chromally Mining & Minerals Corp. v. NLRB, 620 F.2d 1120, 1131 n.8 (5th Cir. 1980); *see also supra* notes 4-6 and accompanying text.

For parallel considerations in the context of a Board decision granting a bargaining order, see Note, *supra* note 50, at 975 n.127.

87 NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

88 This was one of the underlying principles in the *United Steelworkers* court's decision to deny enforcement. 646 F.2d at 639. The administrative law judge had concluded that traditional cease-and-desist orders would remedy the violation. *See* 244 N.L.R.B. 395, 395 (1979), *rev'd,* 646 F.2d 616 (D.C. Cir. 1981).

89 *See supra* notes 46-48 and accompanying text.

The Board has also recognized some general limitations on its remedial power under § 10(c). For example, a remedy cannot be so broad as to punish a particular respondent or class of respondents nor can it defeat the Act's other purposes by causing irreparable harm or hampering meaningful collective bargaining. *See* Ex-Cell-O Corp., 185 N.L.R.B. 107, 108 (1970), *enforced,* 449 F.2d 1058 (D.C. Cir. 1971) (misrepresentations in union newsletter were not material enough to warrant overturning election); *see also* Teamsters Local 115, v. NLRB, 640 F.2d 392, 403 (D.C. Cir. 1981) (denying enforcement of Board order requiring company president to read notice to employees), *cert. denied,* 454 U.S. 827, 837 (1981).

more flagrant and persistent violations might justify union access for organizational campaign speeches. When the Board adheres to this remedial constraint, courts should defer to its expertise. The Board, because of its experience, is best qualified to assess the appropriateness of particular remedies.[90]

Third, the Board should carefully guard its neutrality.[91] It should strive to restore the status quo that existed at the outset of the organizing campaign.[92] In remedying violations of the Act, the Board must not unnecessarily change the natural balance of power between union and management. When necessary, the Board should issue access remedies to counteract the harmful effects of the employer's actions. Measuring these harmful effects, however, is difficult and there is large room for error.[93] The Board, therefore, must be careful not to inadvertently overcompensate the union. Because access remedies are severe, the Board runs a great risk of violating basic principles of neutrality when access remedies are improperly granted.

CONCLUSION

This Note has discussed the utility of Board remedial orders that grant unions access to employers' private property. The present class of remedial orders needs to be expanded to address the special problem of recidivist violators. Repeated employer violations of the Act lead to unnatural imbalances in the union-management relationship. Extraordinary remedies such as access to company property are useful in

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90 *See* United Steelworkers v. NLRB, 646 F.2d at 640. Courts also have deferred to the Board's expertise when granting bargaining orders as an extraordinary remedy. *See, e.g.,* Tipton Elec. Co. v. NLRB, 621 F.2d 890, 898 (8th Cir. 1980) ("It is for the Board and not the courts to make a determination based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity."); Amalgamated Clothing Workers v. NLRB, 527 F.2d 803, 807 (D.C. Cir. 1975) (employer refused to bargain with union claiming majority status). For an extended discussion, see Note, *supra* note 50, at 960-63.

The Board's broad power in this area is arguably derived from NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). In *Gissel* the Court stated:

> It is for the Board and not the courts, however, to make that determination [whether to issue a bargaining order], based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10(c) of the Act . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.

Id. at 612 n.32 (citation omitted).

91 *See* Malrite, Inc., 213 N.L.R.B. 830, 831 (1974) (Board must appear "scrupulously neutral").

92 *See* Decaturville Sportswear Co. v. NLRB, 406 F.2d 886, 889 (6th Cir. 1969).

93 The *United Steelworkers* court was sensitive to the practical problem the Board faces in establishing that "access is necessary to offset the consequences of unlawful employer conduct . . . . Coercive effects are difficult to prove . . . . We believe that the Board may rely on [its] expertise, and on the cumulative experience of past cases, to presume that certain employer conduct will inevitably produce certain effects on employees." 646 F.2d at 639.

rectifying this imbalance and returning the parties to their previolation status quo.

The courts have adopted varying approaches in evaluating the access remedy. The Board, and courts reviewing Board orders, should use the following guidelines when evaluating the appropriateness of an access remedy. The remedy should be used sparingly because of its extreme impact upon private property rights of the employer. This remedy's proper application requires a balancing of the employer's property interests and the employees' informational needs. An access remedy should be avoided where other nontrespassory orders are available or if the remedy is being applied in a punitive rather than a remedial fashion. Finally, the Board must be careful to remain neutral. The access remedy should not redefine the balance of power; it should restore the status quo as it existed before any violations of the Act occurred.

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