Some Are More Equal Than Others: The Relative Status of Employers, Unions and Employees in the Law of Union Organizing

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The steady decline of union success in employee representation elections may be in part a product of a deferral to employers' interest in well-established NLRA doctrines which define the status and rights of the parties in the industrial relations system. Previous research into the reasons for this decline has often emphasized factors external to the NLRA itself such as employer misconduct, administrative delay, and remedial inadequacy. This Article focuses instead on the development of three doctrines under the NLRA which have vitally affected the law of union organizing: employee solicitation rights, union access to the employer's property, and employer campaign rights. These doctrines have combined to reduce the role and status of employees and unions vis-a-vis employers in the election process, and therefore have also reduced the probability of union election victories. Until the union is elected, and unless it is operating within its representative capacity, the courts have been unwilling to legitimize union intrusion on employer property rights. Employers thereby enjoy the electoral advantages of superior access to voting employees and control over most of the information necessary to make an informed vote. If unions are to reverse their current decline, there must be fundamental doctrinal change.

INTRODUCTION

The 1970s was a period of renewed research interest in the National
Organizing Rights of Unions

Labor Relations Act ("NLRA" or "Act."). This was due in substantial part to the persistent drop in the rate of collective bargaining coverage among private sector workers in the United States and the coincident continuing decline in the percentage of National Labor Relations Board ("NLRB" or "Board") representation elections in which employees selected union representation. Since the NLRA is the symbol of the United States' commitment to collective bargaining and provides the primary mechanism through which private sector unionization occurs, scholars began to examine the NLRA and NLRB as potential contributors to declining union success. This research has, however, overlooked several problems inherent in traditional doctrinal labor law.

The labor law studies of the mid-1970s primarily addressed administrative and remedial characteristics of the NLRA and their impact on union organizing, often relying on quantitative analyses of NLRB election data. The logical extension of this research was examination of the costs and benefits associated with employer commission of unfair labor practices or other union resistance. Administration of the Act was said to work to the disadvantage of unions. Critics pointed in particular to delay in the processing of representation and unfair labor practice cases. Empirical evidence has overwhelmingly demonstrated that increased time between the petition and the election works to the advantage of the employer. Delay in processing unfair labor practice cases was presumed to work to the benefit of the employer also by permitting the election to be delayed, thus negatively affecting employee perception of the utility of NLRA protections and unionism. In addition, delay in processing unfair


3. See supra note 1.


labor practice cases also was viewed as rewarding the employer for its (allegedly) unlawful activities.

In a similar manner, NLRB and court interpretations of the remedial provisions of the Act were seen as working to the benefit of the employer, and therefore, to the detriment of unions. Critics argued that the limitation of remedies in discriminatory discharge cases to back pay less interim earnings minimized the employer cost of discharging union activists. If the discharge accomplished its purpose, namely the discouragement of employee support for unionization, it was reasonable to believe that the cost to the employer of the backpay liability would be far less than the cost of a collective bargaining agreement had the union been selected as the employees' collective bargaining representative.6

This view implicitly points to antiunion employers as the major determinants of the decline in union success in NLRB elections. Employers were viewed as the primary source of the problem because they resisted unionization of their employees and were unwilling to accept collective bargaining as a means of determining the terms and conditions of employment of their employees. This unwillingness was expressed in an increased propensity both to commit unfair labor practices and to misuse the procedural characteristics of the Board's case processing rules.

Congressional indifference in the face of this employer behavior contributed to the problem. Congress failed to change the Board's procedural rules and to provide a disincentive for employers to commit unfair labor practices by altering the current benefit-cost structure. Based on these diagnoses, the prescribed remedies were to expedite elections and increase the costs to employers of unlawful activity. This view was embodied in the Labor Law Reform Act of 1977-78.7 That legislation, which was not enacted because its supporters were unable to break a Senate filibuster, would have strengthened remedies under the Act and reduced delay in holding NLRB elections and the processing of unfair labor practice charges involving discriminatory discharge.8

A more radical proposal by Paul Weiler is that the United States adopt the Canadian system of employer recognition of unions based on a fifty-five percent authorization card majority with an immediate representation election without a campaign.9 Underlying this proposal is the view that the election process with a protracted campaign is inherently flawed as it provides too great an incentive for employers to interfere

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8. R. Freeman & J. Medoff, supra note 6, at 202-04.
9. See Weiler, supra note 5, at 1803-22.
unlawfully even in the presence of more severe monetary sanctions and injunctive relief. Weiler argues that it is not clear that the employer ought to have a right to be involved in a choice that is solely that of the employees, or that nonunion employees, who have always had their terms and conditions of employment determined by individual bargaining, need employer involvement in the campaign to inform them of the advantages of individual bargaining vis-a-vis collective bargaining.10

Although other writers have touched upon the legal rights of employers in the election campaign,11 none have systematically analyzed these rights or their impact on the employers’ position in relation to that of unions and employees in organizing drives. Such an analysis is important because the vast majority of representation elections are not characterized by administrative delay,12 suggesting that even legal campaign practices favor employers. It is the contention of this Article that at least three traditional labor law doctrines—employee solicitation rights, union access to the workplace, and employer campaign rights—have combined to reduce the role and status of employees and unions vis-a-vis employers in the election process and, in turn, have reduced the probability that employees will select union representation in NLRB elections. This Article will systematically examine the evolution of and rationale for these three doctrines to show that the contribution of these doctrines to the decline of unionization in the United States may be at least as great as that of the administrative and remedial factors generally cited.

I
THE SUPREME COURT’S INITIAL INTERPRETATION
OF THE ACT

The passage of the NLRA in 1935 was a legislative recognition that employee rights of self-organization were to be granted legal status. Upholding the constitutionality of the NLRA in 1937, the Supreme Court in NLRB v. Jones & Laughlin Steel Corp. noted:

10. This view was NLRB doctrine until 1941, when the Supreme Court found it inconsistent with the employer’s constitutional right of free speech. See infra notes 81-91 and accompanying text.


12. See Block & Wolkinson, supra note 2; Roomkin & Block, supra note 5, at 81-84.
[T]he statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the [corporation] has to organize its business and select its own officers and agents.13

Thus, the Court suggested comparability of status between the employees' rights of self-organization on the one hand, and an undefined bundle of corporate rights on the other. If subsequent interpretations of the Act had sustained this comparability, employees would have been granted substantial rights to organize.

II

ON-DUTY EMPLOYEE SOLICITATION

Early cases involving the rights of employees to engage in union activity while at the workplace compared the relative status of employees and employers. Because of the physical proximity of all employees, the workplace was a natural focal point for organizing. It was also, however, the location where the work was to be done. Organizing was, according to the Supreme Court in Jones & Laughlin, a fundamental employee right and a legitimate employee interest.4 The maintenance of discipline and order in the plant in order to assure production was, it could be assumed, a legitimate employer interest. Indeed, production was the reason the employees had been invited onto the premises.

The Board reconciled these conflicting legitimate interests in the early years of the Act, by balancing the rights of employees to self-organization with the rights of employers to maintain production.15 In 1945, in Republic Aviation Corp. v. NLRB,16 the Supreme Court approved this "balancing test." The Court upheld the Board's policy that a nondiscriminatorily applied employer rule prohibiting employee solicitation on nonworking time (i.e., lunch periods and breaks) was presumptively invalid when applied to union solicitation.17 The presumption could be overcome by an employer showing that the rule prohibiting solicitation on nonworking time was necessary to maintain discipline and production.18

13. 301 U.S. 1, 33 (1937).
14. Id.
17. Id. at 803-04.
18. Id. at 804.
Four principles that are basic to the balancing test can be drawn from the Court's decision in Republic Aviation. First, the Court affirmed the notion that an employee could act in a manner contrary to the employer's wishes and still maintain a presence on that property. In that sense, the property rights of the employer were not absolute. Some employee behavior on the employer's premises—in this case union solicitation on nonwork time—was outside of the employer's control.

Second, employer good faith (the absence of an intent to encourage or discourage union membership) and legitimate business justification would not in and of themselves serve to justify prohibition of union solicitation by employees on nonworking time. The Board possessed the authority to balance an employer's good faith justification against its employees' rights of self-organization and find against the employer, if appropriate.

Third, the Court affirmed the right of the Board to regulate labor relations within a firm even if it meant rejecting an employer's claim that the Board was substituting its judgment for the business judgment and expertise of the employer. The authority of the Board to regulate labor relations and its expertise in that area permitted it to exercise some control over the policies of the firm.

Fourth, the Board was willing to place the evidentiary burden on the employer rather than on the employees or the union. In other words, the Court was willing to permit the Board to infer that solicitation at the workplace was necessary for organizing. The Board need not require the employees to demonstrate that solicitation on the employer's property was necessary for organizing. Thus, an infringement on the employer's property right could occur based on nothing more than an implicit employee assertion that employee solicitation on nonworking time was necessary to effectuate the right of self-organization and a Board inference that the implicit employee assertion was valid. The employer, on the other hand, could be required to demonstrate that prohibiting solicitation was necessary to maintain discipline and order if its property rights were to be given priority over employee self-organizational interests.

19. Id. at 803-04.
20. Id.
21. Id. at 799.
22. Id. at 801 n.6, 803 n.10.
23. Republic Aviation was a case involving oral solicitation in a manufacturing facility. Outside of manufacturing, the Board has ruled that the employer could overcome the presumption of invalidity in retail trade, a business in which a pleasing appearance is important. Thus, the Board permitted employers in retailing to prohibit employees from soliciting for union membership in selling areas, although the prohibition could not extend to solicitation away from the selling area. See, e.g., May Dep't Stores Co., 136 N.L.R.B. 797 (1962).
III

THE RIGHT TO INFORMATION

Although Republic Aviation provided employees with the right to discuss unionization and solicit union membership on company property during nonwork time, it did not address the question of the subject matter of those discussions and the effectiveness and persuasiveness of the solicitation. What employees may discuss may be as important as the right to have a discussion. It is reasonable to believe that some knowledge of the current situation with respect to wages, hours, and working conditions would be relevant to an employee's decision as to whether the status quo should be changed and a vote cast in favor of union representation. Indeed where a union has been certified or legally recognized and a bargaining relationship has been established, these issues are mandatory subjects of bargaining about which the employer may be required to provide information upon request by the union.

Thus, the extent to which information concerning these issues is available to employees could be an important determinant of employee interest in and support for unionization. Since this information for all employees is normally possessed by the employer and is under the employer's nominal control, and since the employer is not obligated to provide the employees this information absent a bargaining relationship, a question that arises is under what circumstances may the employer discipline an employee who obtains and/or disseminates such information even if such acquisition or dissemination is in furtherance of the right of self-organization?

24. There has been a great deal of legal and scholarly attention given to the potential impact of false or misleading campaign statements and campaign propaganda on NLRB elections. See, e.g., J. Getman, S. Goldberg & J. Herman, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976); Bok, The Regulation of Campaign Tactics Under the National Labor Relations Act, 78 Harv. L. Rev. 38 (1964); Dickens, supra note 6; Getman, Goldberg & Brett: Union Representation Elections: Law and Reality: The Authors Respond to the Critics, 79 Mich. L. Rev. 564 (1981); see also Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982); General Knit of Cal., Inc., 239 N.L.R.B. 619 (1978); Shopping Kart Food Mkt., Inc. 228 N.L.R.B. 1311 (1977). No attention seems to have been paid to the nature of the information to which the employees interested in self-organization have access.

25. For example, Farber and Saks found that employees whose pay was relatively low on the intrafirm wage distribution were significantly more likely to vote in favor of representation in an NLRB election than employees whose pay was relatively high on the distribution. Farber & Saks, Why Workers Want Unions: The Role of Relative Wages and Job Characteristics, 88 J. Pol. Econ. 349 (1980). Thus, knowing the wage rates of other employees may be as important as knowing one's own wage rate.


27. Upon the filing of a valid representation petition by a union, the employer is obligated to provide to the Board the names and addresses of all employees in the bargaining unit. See NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966).
In *Clearwater Finishing Co.*, the earliest case under modern labor law principles in which this issue was squarely addressed, the Board did not find a violation of the Act when an employer, during an organizing campaign, discharged an employee who had disclosed to another employee active in attempting to organize the facility some information about the performance of maintenance work. The Board reasoned that the information was the property of the employer, that the employer did not know why the employee had divulged the information (and therefore there was no evidence of antiunion animus), and that the discharged employee was not a union official, but the custodian of the employer's information.

The Board, however, found that the discharge of the employee/union activist who had received the information was a violation of the Act, since the employer knew that the employee wanted the information for purposes related to self-organization. The Board rejected the employer's argument that the information was confidential, noting that the information had been posted on the plant bulletin board from time to time. In addition, the Board noted that there was no evidence or contention that the employer could have been prejudiced in any way by the release of the information.

The Fourth Circuit, however, denied enforcement. The court noted that the employee "was discharged because he had been engaged in improperly extracting information from the company's private files to use against it," pointing out that this was "conduct which any employer would have resented whether connected with union activity or not."

Some basic themes can be derived from *Clearwater Finishing*. In contrast to *Republic Aviation*, the court and the Board believed that the employer's claim of good faith in discharging the employee who disseminated the information against the employer's wishes was a valid employer defense. The possibility that the information might be useful to the union or that it was to be used by an employee pursuant to the right of self-organization was not considered.

Although the Board found relevant the receiving employee's status as a union official and the employer's knowledge of the employee use of

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28. 100 N.L.R.B. 1473 (1952), enf. denied, 203 F.2d 938 (4th Cir. 1953).
29. In *Hoover Co.*, 12 N.L.R.B. 902 (1939), the Board refused to find a violation of the Act where an employer, without hostile motive, discharged an employee who had obtained fifty completed time cards from the employer's files. But this decision predated the development of the balancing doctrine and the Supreme Court's decision in *Republic Aviation*.
30. *Clearwater*, 100 N.L.R.B. at 1474.
31. Id. at 1474-75.
32. Id. at 1475.
33. Id.
34. NLRB v. *Clearwater Finishing Co.*, 203 F.2d 938 (4th Cir. 1953).
35. Id. at 939.
the information, the court did not consider these facts of consequence. From the point of view of the court, the fact that the information belonged to the employer was sufficient to remove the activity from the protection of the NLRA.37

Cases decided after Clearwater Finishing established that for purposes of self-organization, employees are protected only in distributing information which is not classified by the company as confidential.38 Employees may not be disciplined for discussing wage rates among each other, for verbally or informally exchanging other nonconfidential information that they happen to learn in the course of their jobs or for copying employees' names and other information from time cards.40 But employees may be disciplined for distributing information, other than personal wage rates, that the employer has classified as confidential or that it may be reasonably presumed that the employer does not want distributed.41 Employees may also be disciplined for distributing even nonconfidential information in a manner that would be inconsistent with their explicit job description.42

The ability of the employer to prevent distribution of relevant information was illustrated in 1981 and 1982 in the First Circuit's decision in Texas Instruments, Inc. v. NLRB44 and the Board's decision in International Business Machines Corp.45 In Texas Instruments, the court denied enforcement of a Board order in which the Board found a violation of section 8(a)(1) of the Act when Texas Instruments discharged five employees who distributed confidential wage information during an organizing campaign. The court's decision was based on the fact that the employees had no right to the information and had not obtained access to the information in the normal course of their employment. Equally important, however, was the mere fact that the information had been declared confidential by Texas Instruments.48 The court did not dispute,

36. Clearwater, 100 N.L.R.B. at 1474.
37. NLRB v. Clearwater, 203 F.2d at 939.
41. Steele Apparel Co., 172 N.L.R.B. 903 (1968), enf'd in relevant part, 437 F.2d 933 (8th Cir. 1971).
44. 637 F.2d 822 (1st Cir. 1981).
45. 265 N.L.R.B. 638 (1982).
46. The information distributed contained data comparing wage rates at the Texas Instruments plant at which the activity took place with wage rates at plants in the area operated by other companies. Texas Instruments, 637 F.2d at 826.
47. Id. at 830-31.
48. Id. at 830.
but simply did not view as relevant, the Board’s conclusion that the disclosure had caused no commercial harm to Texas Instruments. Indeed, the court noted that Texas Instruments “clearly had a proprietary interest” in the wage information.49

In *International Business Machines Corp.*, the Board adopted an Administrative Law Judge’s recommendation rendered one month after the court decision in *Texas Instruments*, and refused to find a violation where the employer had discharged an employee for distributing confidential wage information.50 The ALJ found that IBM’s policy was promulgated for legitimate business objectives, but did not require IBM to present evidence that the confidentiality policy was necessary for attaining these objectives or that the dissemination of the information compromised these objectives.51

These information cases represent a retreat from the principles contained in *Republic Aviation*. Whereas in *Republic Aviation* the Court was willing to compromise the employer’s property interest, no such willingness was present in the information cases. The information was viewed as the property of the employer which the employer had the right to dispose of as it saw fit. In these instances an employer declaration of confidentiality was consistent with its property rights in the information. The courts and the Board were unwilling to infringe upon this property right for the benefit of employee self-organization without some proof presented by the employees that such infringement was necessary to effectuate the right of self-organization.52

Second, whereas employer good faith was not an absolute defense in *Republic Aviation*, it was a defense in the information cases. The Board was unwilling to balance the employer’s asserted good faith against the asserted need of the employees for the information in order to pursue self-organization.

Third, although the Court in *Republic Aviation* granted the Board the right to regulate labor relations even if it meant substituting its judgment for the judgment of the employer, the Board, at least in *IBM*, refused to exercise that right. Indeed, this was explicit in the reasoning by the ALJ in that case.53

Fourth, unlike the Board in *Republic Aviation*, which inferred that

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49. *Id.*
50. *International Business Machs.*, 265 N.L.R.B. at 634.
51. *Id.* at 644.
52. Although employers have been permitted to deny a bargaining representative employee-related information it has declared confidential, this has been limited to matters that are the personal business of the employee (i.e., health, test scores) rather than terms or conditions of employment. The union may obtain the personal information with the employee’s permission. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *New Jersey Bell Tel. Co. v. NLRB*, 720 F.2d 789 (3d Cir. 1983); *Jones Marelle Sales Corp.*, 252 N.L.R.B. 368 (1980).
solicitation was relevant to the right of self-organization and therefore placed the burden on the employer to demonstrate harm if solicitation was permitted, the Board in the information cases inferred harm to the employer and required the union to demonstrate that the information was necessary for organizing.

More generally, what has occurred in the information cases is a judicial and administrative abandonment of the balancing test. In its place, the Board and the courts have substituted what might be called an “employer good faith/employee necessity” test. If an employer asserts its interests in good faith terms, the law will defer to the employer’s interests unless it can be demonstrated that the infringement on the employer’s property right is absolutely necessary for effectuating the right of self-organization.

IV
THE RIGHTS OF THE UNION

Although the Supreme Court’s decision in Jones & Laughlin appeared to grant employees an equality of status with the employer while exercising the right of self-organization, Jones & Laughlin did not address the legal status of the union as an organization and as an entity distinct from the employees. This is not surprising, given the fact that section 7 provides protection only to employees, granting them the right to “self-organization.” The only mention of unions—labor organizations—is as an object of employee activity: employees have the right to “form, join, or assist” them. Thus, the status of the union as an organization was legally ambiguous at the passage of the NLRA, and remained so even after the Jones & Laughlin decision.

In retrospect, the status of the union as an organization under the NLRA could have evolved in one of three ways. The courts could have judged the union to be a protected actor in its own right, with a legal status equal to that of the employer and the protected employees. Alter-

54. Judicial skepticism concerning the balancing test was also evident in cases involving employee solicitation in nonprofit health care institutions. In its decision in Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978), the Supreme Court affirmed a Board ruling applying the presumption of invalidity of such no-solicitation rules (as approved in Republic Aviation) and finding the hospital in violation of the Act by prohibiting employee solicitation in the hospital cafeteria. Four justices, however, concurred only in the result. They would not apply the Republic Aviation presumption of invalidity to health care institutions, believing it should be limited to manufacturing establishments. Given the hospital’s interest in patient care, the burden should be on the Board to establish that the elimination of a no-solicitation rule would not disrupt patient care. In the view of the concurrence, the impact of union solicitation on patients and visitors placed a heavy burden on the Board to justify overturning a decision of hospital management. Id. at 509 (Blackmun, J., concurring); id. at 510-14 (Powell, J., concurring). The four justices concurred in this case because they believed that the Board met its burden. Id. at 516-17 (Powell, J., concurring). See also NLRB v. Baptist Hospital, Inc., 442 U.S. 773 (1979).

natively, the courts could have accorded the union an intermediate status as the potential collective bargaining representative of the employees, with vicarious privileges derived from such an inherent attachment to the employees. The third choice, the weakest status, would obtain if the union was viewed as an actor separate and distinct from the employees, with no legitimacy in organizing under the NLRA. As either a protected actor in its own right or the employees' potential representative, the union would have had some legitimacy in organizing under the Act, while the third option did not assure the union any rights at all.

In *NLRB v. Cities Service Oil Co.*, the earliest case that squarely addresses the organizing status of the union, the law tilted toward the weakest union status. In that case, decided by the Second Circuit in 1941, three oil companies, Cities Service, Pure, and the Texas Company (the corporate ancestor of Texaco), had all signed collective bargaining agreements with the National Maritime Union as the representative of the unlicensed seamen employed on company operated oil tankers. All three companies had refused to issue passes to nonemployee union representatives to board their ships for the purpose of resolving grievances and meeting with the seamen. The Board ruled that the denial of the passes interfered with the rights of the employees to collective bargaining and to mutual aid and protection, given the impracticality of the union meeting with employees during the small amount of time they spent onshore and the difficulty of the union in investigating and resolving grievances in the absence of employer representation. The Board ordered the companies to negotiate with the union concerning the terms and conditions of the passes.

The court, although enforcing the Board's order, pointed out that the passes should be forfeited if the union attempted to organize new members. The court stated:

Such activities were not shown by the Board to have been required "for the purpose of collective bargaining or other mutual aid or protection" even if they are guaranteed under Section 7 under some circumstances. The rights guaranteed by Section 7 primarily concern bargaining as to terms and conditions of employment and not the perpetuation of the tenure of any particular agent.

Thus, by permitting the employees to receive the benefits of an existing collective agreement, the court was willing to permit some compromise of the employer's property rights for the purposes of effectuating the employees' rights of collective bargaining. However, the union, as distinct from the employees, was not permitted to use access to the tankers for the purpose of soliciting membership. The court viewed collective bar-

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56. 122 F.2d 149 (2d Cir. 1941).
58. *NLRB v. Cities Serv.*, 122 F.2d at 152.
gaining as a function distinct from organizing or solicitation of membership. Collective bargaining was seen as benefiting the protected employees. Solicitation of membership, on the other hand, was seen as benefiting the union as an organization distinct from the employees. The union's access was limited to those functions which grew out of its status as the legal, chosen representative of the company's employees. Since a collective bargaining agreement signed by both the union and the employer was in existence, the union had the right to fulfill its obligations under that agreement, and the employer had the obligation to compromise its property rights so that the union could perform its contractual obligations.

Thus, the court seemed unwilling to permit any infringement on the employer's property rights that was inconsistent with the contractual waivers to which the employer had agreed when it signed the collective agreement. The employer and the union, as the representative of the employees, were signatories to the agreement; thus, requiring the employer to permit union representatives onto the ship for the purpose of resolving grievances arising under the agreement was simply a waiver to which the employer had, at least implicitly, agreed. Significantly, the union had no independent right to pursue organizing and membership solicitation, because the court apparently viewed that as the union's own interest, and not the employees'. Although the union was a signatory to the agreement, its sole legal status was a derivative one, arising from the legal status of the employees it represented pursuant to the collective agreement, rather than from any right it acquired through the employees to engage in organizing activities. The scope of the union's infringement on the employer's property right was limited to that which would serve the employees under the agreement; it was further limited by the employer's implicit contractual waiver of its property right for the specific purpose of contract administration.

Consistent with the principle of the union's status being derived mainly from the employees it represented, two years later, in Richfield Oil Corp., the Board relied on Cities Service when it required the company to permit nonemployee union representatives access to its tankers, but did not require the employer to issue passes for solicitation of membership. In Richfield Oil, the collective agreement had expired, but the union still represented the employees on the vessels.

Both Cities Service and Richfield Oil were decided prior to the Supreme Court's decision in Republic Aviation. The latter might be interpreted as giving the employees the right to distribute and receive information concerning self-organization and unionism while on the employer's property, so long as the employer's interest in production and

59. 49 N.L.R.B. 593 (1943), enf'd, 143 F.2d 860 (9th Cir. 1944).
discipline were not unduly compromised. *Cities Service* and *Richfield Oil* might be considered to be inconsistent with *Republic Aviation* to the extent that they could be interpreted as failing to permit interference with the employer's property rights in order to effectuate the right of self-organization.

*Republic Aviation* was not subsequently used to justify granting the union, in its own right, some status under the Act. But the Board did use the *Republic Aviation* balancing test, in combination with the notion of the importance of the workplace as a locus of organizing, to permit union organizers onto the employer's premises where employees were not easily accessible near the work site after working hours. The employer's property interests would be weighed against the accessibility of the employees and the union to each other. The balance would be struck on a case-by-case basis. Thus, the Board did grant some status to the union as a potential bargaining representative of the employees, and the Board was willing to infringe upon the employer's property interest in order that the employees be reasonably accessible to the union and the union to the employees. Contrary to the employer's property right, the union had some right to reasonable access to those employees whom it might, but did not yet, represent.

The courts, however, were more deferential to employer property rights than was the Board. The courts did not view the union organizer as an implicit representative of prounion employees or a potential representative of all employees and therefore an actor in the industrial relations system with sufficient status such that the employer's property rights must, in some circumstances, yield. Rather, the courts seemed to view the union organizer as primarily a nonemployee with no status under the NLRA. For example, in *NLRB v. Seamprufe*, the Tenth Circuit denied a union the right to enter the employer's property for organizing. The court noted:


No right of an employee to solicit other employees on company property is involved here, but only the right of a non-employee to go upon company property in violation of a non-discriminatory no trespass rule.\textsuperscript{62}

The reference to nonemployee union organizers as analogous to a trespassers presaged the Supreme Court's decision in \textit{NLRB v. Babcock & Wilcox}\textsuperscript{63} and later Board and court decisions on this issue.\textsuperscript{64} In \textit{Babcock & Wilcox}, the Court denied enforcement of a Board order directing the employer to rescind a nondiscriminatory no-solicitation rule pursuant to which it prohibited nonemployee organizers from distributing union literature to its employees on its parking lot. Since most of the employees drove to and left work in private automobiles, the Board found it was impractical and unsafe for the union to reach employees on the public roadways and sidewalks near the place of work. Thus, the Board balanced the right of the employees to be reached by the union and the corollary interest of the union in reaching the employees.\textsuperscript{65}

The Supreme Court, however, refused to balance the interests of the employer on the one hand, and the union and the employees, on the other,\textsuperscript{66} noting that

\textit{[n]o 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. \textit{But no such obligation is owed non-employee organizers. Their access to company property is governed by a different consideration.} The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and 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. No such conditions are shown in these records.}\textsuperscript{67}

The distinction was subtle, but crucial. The Court was unwilling to recognize any union status under the NLRA to organize employees. While the employees had the right to receive the information, only if the employees were inaccessible would the union be permitted on the em-

\textsuperscript{62} 222 F.2d at 860.
\textsuperscript{64} See infra pp. 235-36.
\textsuperscript{67} Babcock & Wilcox, 351 U.S. at 113 (emphasis added).
employer's premises against the employer's will. Thus, the Supreme Court upheld the right of an employer to exclude union organizers solely on the basis of the employer's nondiscriminatory claim of property rights. Once the employer proclaimed its interest in protecting its property rights, nonemployee union organizers could be banned and employees could be denied access to relevant information from the union at the workplace without any reference to productivity concerns.68

The Court's decision in Babcock & Wilcox also represents a rejection of the notion of a linkage between the interests of employees and the interests of unions. The Board had viewed the presence of nonemployee union organizers as a means of promoting employee rights and the workplace as a particularly appropriate location for organizing. From the Supreme Court's perspective, however, that the union's presence at the work site might help promote employee self-organizational activity was irrelevant. To the Court, the union's interest in organizing was not of sufficient weight under the NLRA so as to require the yielding of the employer's property right.

Following Babcock & Wilcox, the courts, generally overruling the NLRB,69 developed a doctrine which viewed nonemployee organizers as essentially trespassers on the employer's property. Babcock & Wilcox stated that the nonemployee organizers could be granted access to the employer's property when the inaccessibility of the employees made ineffective reasonable union attempts to communicate with them. Yet the courts have placed a heavy burden on unions to demonstrate employee inaccessibility.

Thus, in nearly all cases, the union has been required to exhaust all other channels of communication, no matter how unproductive or costly they may be.70 Additionally, the courts have decided that the dispersal of employee residences throughout a large, metropolitan area does not in and of itself make the employees inaccessible.71 Even employees of resorts and on ships and barges who reside on the premises of the employer and whose time spent off of the employer's premises is intermittent and of short duration have not been considered inaccessible to the union.72

69. See Block & Wolkinson, supra note 2.
70. See, e.g., NLRB v. Sabine Towing & Transp. Co., 599 F.2d 663 (5th Cir. 1979); NLRB v. Sioux City & New Orleans Barge Lines, 472 F.2d 753 (8th Cir. 1973); NLRB v. Tamiment, Inc., 451 F.2d 794 (9th Cir. 1971).
71. See, e.g., NLRB v. Hutzler Bros., 630 F.2d 1012 (4th Cir. 1980); Central Hardware Co. v. NLRB, 407 F.2d 212 (8th Cir. 1972).
Only in cases in which employees reside on geographically remote and isolated employer premises was access granted to the union. In these cases, all involving employer sites in the Alaskan wilderness, the Board and the courts held that personal contact was not possible because of the unavailability of normal means of transportation and written communications. Finally, in Sears Roebuck & Co. v. San Diego County District Council of Carpenters, the Supreme Court for the first time characterized union organizational activity on the employer's property as trespassory.

V
THE CAMPAIGN RIGHTS OF THE EMPLOYER

As early as 1941, in NLRB v. Virginia Electric & Power Co., the Supreme Court ruled that any attempt by the Board to find an unfair labor practice based solely on speeches and campaign statements made to the employees by a representative of the employer would violate the first amendment. Prior to Virginia Electric & Power, the Board had required the employer to remain neutral in election campaigns. The neutrality doctrine was based on two premises: (1) the matter of union representation was a question that was solely the concern of the employees; and (2) the nature of the employment relationship placed the employee in a dependent status vis-a-vis the employer such that any statement made by the employer about unionization would be viewed by the employees as coercive. Following the Virginia Electric & Power decision, the Board began distinguishing the employer's speech from other unfair labor practices the employer may have committed. The inclusion of section 8(c) in the Taft-Hartley Act appeared to give legislative confirmation to the right of the employer to participate in the choice operator, to be in violation of § 8(a)(1) when it denied the union access to its boats for the purpose of organizing its employees. But in this case, the employer had denied the union's request for the names and addresses of its employees, and the union had not demonstrated success in reaching its employees without the names and addresses.

74. 436 U.S. 180, 205 (1978) (state court may enjoin union pickets from "trespassing" on the employer's property).
75. As might be expected, the Board has afforded off-duty employees an "intermediate" status between on-duty employees and nonemployees. The current Board doctrine is that off-duty employees may be permitted on the employer's premises but may be prohibited from work areas. See, e.g., Campbell Chain Co., 237 N.L.R.B. 420 (1978); Tri-County Medical Center, Inc., 222 N.L.R.B. 1089 (1976).
76. 314 U.S. 469 (1941).
77. Id. at 477.
78. See H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 174-89 (1950).
79. Id.
A more difficult problem was encountered when an employer representative delivered a "captive audience" speech. In this situation, the employer combined an exercise of its right of free speech with an exercise of its property right, obtained pursuant to its purchase of the employees' time, and required the employees to assemble and listen to the employer's speech. The issue was first addressed in 1942 in *American Tube Bending Co.* 81 There, in finding unlawful an employer's captive audience speech (although the Board did not use that term), the Board noted that the method of delivery of the speech "brought heavily into play the economic dependence of the employees upon the respondent for their livelihood." 82 Although the Second Circuit denied enforcement of the Board's order in *American Tube Bending*, 83 the court based its decision on the speech aspect of the case rather than the case's assembly aspect.

Thus, in *Clark Bros.*, 84 the Board was not constrained by the court's decision in *American Tube Bending* and found the employer in independent violation of the Act when it compelled its employees to assemble on company time to listen to an employer speech one hour before the polls opened for a representation election. The Board noted that it had long recognized that "the rights guaranteed to employees by the Act include the full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment." Such freedom is meaningless, however, unless the employees are also free to determine whether or not to receive such aid, advice, and information. To force employees to receive such aid, advice, and information impairs that freedom; it is calculated to, and does, interfere with the selection of a representative of the employees' choice. And this is so, wholly apart from the fact that the speech itself may be privileged under the Constitution. 85

Thus, the Board was appreciative of the employer's first amendment right, later embodied in section 8(c) of the Act, to present its point of view in a union representation campaign. But the Board believed that the employer's actions in requiring the employees to listen to the speech were distinguishable from the speech itself, and were not part of the employer's first amendment protection. The Board noted that the employees had the right not to receive information, if that was their choice.

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80. Section 8(c) states: "(t)he expressing 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 of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c) (1982).
81. 44 N.L.R.B. 121 (1942), enf. denied, 134 F.2d 993 (2d Cir. 1943).
82. Id. at 133.
83. NLRB v. American Tube Bending Co., 134 F.2d 993 (2d Cir. 1943).
84. 70 N.L.R.B. 802 (1946), enf'd 163 F.2d 373 (2d Cir. 1947).
85. Id. at 805 (footnote omitted) (emphasis in original).
The Second Circuit, in enforcing the order,\(^8\) apparently did not wish to infringe on the employer's property rights by holding that it could not assemble its employees to present its views. Rather, the court held that if the employer chose to exercise its right to make a captive audience speech, it must give the union a "similar opportunity"\(^8\) to address the employees. Thus, the court seemed willing to grant the employees the right to receive information about unionization even if granting such a right entailed an infringement on the employer's property right to control access of nonemployees to its workplace.

The Board relied on the court's decision in *Clark Bros.* in *Bonwit Teller*,\(^8\) in which the Board found that the employer had violated the Act by making a captive audience speech to its employees without giving the Union a right to respond. The Second Circuit enforced the Board's order,\(^8\) but only insofar as it relied on the employer's promulgation of a privileged no-solicitation rule. It was the discriminatory application of the no-solicitation rule that was the concern of the court, namely the fact that the employer had used work time to solicit, but, in the interest of efficiency, had denied that right to employees.

In *Livingston Shirt Co.*,\(^9\) the Board clarified the confusion surrounding *Bonwit Teller* and ruled that an employer, in the absence of a privileged broad no-solicitation rule, did not violate the Act when it delivered a captive audience speech to its employees without giving the Union an opportunity to respond. In the opinion of the Board, such a requirement was too great an infringement on the employer's right of free speech. The Board did not believe that the Union was placed at a disadvantage by using the traditional means of contacting employees, i.e., in-plant employee solicitation, distribution of literature, house calls, and union meetings.\(^9\)

**CONCLUSION**

The discussion presented here demonstrates that in three pivotal areas of the law of union organizing, doctrines evolving under the National Labor Relations Act have deferred to employer property rights rather than employee self-organization rights or union interests. First, although the Board and the courts have applied the "balancing test" to grant em-

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8. NLRB v. Clark Bros., 163 F.2d 373 (2d Cir. 1947).
9. Id. at 376.
8. 96 N.L.R.B. 608 (1951), enf'd, 197 F.2d 640 (2d Cir. 1952).
9. An employer may not, however, deliver a "captive audience" speech within 24 hours of the election. See Pearless Plywood, Inc., 107 N.L.R.B. 427 (1953). The Law Reform Act, had it passed, would have obligated employers who delivered captive audience speeches to offer the union the right to respond. See R. Freeman & J. Medoff, supra note 6, at 202.
ployees the right to solicit contrary to the employer's wishes on the employer's premises on nonwork time, the balancing test has not been extended to cover cases involving the subject matter of that solicitation. Thus, the courts and the Board have permitted employers to nondiscriminatorily discharge organizing employees who distribute confidential employer information, even though that information may be relevant to the decision to vote for or against union representation and the disclosure may cause little harm to the employers. The courts have declined to require a balancing of the employer's interest in keeping the information confidential with the employees' interest in being aware of the information.

Second, the Board and the courts have been unwilling to grant employees workplace access to the union for the purposes of self-organization, thereby generally preventing the union from reaching the employees at the workplace. Thus, there has not been a development of a right of the union to organize or right of employees to self-organize that is comparable with the campaign rights of the employer, rights that are derived from the control of its property. Third, employers have been permitted to combine their rights of free speech, their rights of use of their employees' time, and their property rights to deliver captive audience speeches to their employees, without giving the union or pronion employees the opportunity to respond.

Overall, the law of union organizing in the election campaign has manifested a substantial deference to the employer's property interests over the employees' interests in self-organization and the unions' interests in organizing. While each of these doctrines may be individually justifiable under the language of the Act, together they have provided employers with a far greater access to voters than unions and pronion employees enjoy. Through this access advantage, employers have a much greater ability than unions and pronion employees to influence voting behavior. Conversely, by its right to declare relevant information confidential, employers may conceal information that employees need to make an informed choice concerning union representation. Indeed, the existing access advantages of the employer suggest that the election campaign may not be effectively fulfilling its purpose of providing information to the employee-voters.92

This long-term increase in the scope of legal employer organizing campaign activities, and the corresponding decrease in the scope of legal union organizing activities for unions and protected employee activity, coincides with the long-term decline in the percentage of NLRB elections in which the employees select representation. This percentage has stead-

92. Weiler, supra note 5, at 1811-16.
ily dropped from 86.3% in 1942 to 43% in 1983.\textsuperscript{93} This suggests the hypothesis that the inability of unions to effectively organize and increase their membership in the private sector is due in part to the broad range of legal activities in which employers may engage to resist unionization of their employees, and the associated decrease in the scope of protected employee and legal union organizing activities.

If unions are to reverse this trend, our analysis indicates that reforms which seek merely to reduce employer misconduct, or, by other means, make administration of the Act more efficient, may be inadequate to the task. Changes in the basic doctrine of the NLRA itself may be necessary to expand the organizational rights of unions and workers. While in so doing some employer property rights may be compromised, it may be that this is the only way to assure that unions can function and remain viable actors in our pluralistic industrial relations system.

\textsuperscript{93} Block & Wolkinson, \textit{supra} note 2; 7 NLRB ANN. REP. 40 (1942); 48 NLRB ANN. REP. 11 (1983).