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EXPANDING THE RIGHT OF NONEMPLOYEE UNION ORGANIZERS TO SOLICIT ON COMPANY PROPERTY: INDUSTRIAL PARKS AND RETAIL STORES

INTRODUCTION

Whenever nonemployee union organizers attempt to solicit on or near company property and the employer attempts to prevent this solicitation, a problem of competing rights arises. The union has the right to disseminate ideas about union membership,¹ the employees have the right to know of the organizational alternatives available to them,² and the employer has the right to protect his property interests.³ Where the property is clearly private, the rights of the owner⁴ usually predominate.⁵ The nonemployee union solicitors must be allowed to come onto company property to solicit only if other channels for employee-union communication are beyond the reasonable reach of union efforts or if the employer is discriminatorily enforcing a no-solicitation rule solely against the union.⁶ Where the property is clearly public, e.g., a public street or sidewalk that passes near or through land owned by the employer, the first amendment and statutory rights of the union normally predominate.⁷ However, quite often property is neither purely private nor purely public. Land which is privately held is often made freely accessible to members of the public.⁸ In dealing with organizational activities on such land the

1. See Thomas v. Collins, 323 U.S. 516 (1945): The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly. Id. at 532. See also 29 U.S.C. § 157 (1970).
   The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Id. at 113.
4. As used herein the word “owner” includes the holder of a lease as well as the holder of the title.
6. Id. [hereinafter referred to as the Babcock test].
8. Consider such properties as privately owned parks, shopping centers, etc., which have been opened to use by the general public.
courts have often balanced the competing rights of the parties involved. They have generally held that the more an owner, for his own advantage, opens up his property for use by the public, the more do his ownership rights become circumscribed by the constitutional and statutory rights of the users. This reasoning has led many courts to allow nonemployees to solicit for the union on privately owned property where that property was generally open to members of the public. Such property has often been labeled quasi-public and the solicitation has often been called a constitutionally protected exercise of free speech.

Until quite recently the National Labor Relations Board has been hesitant to apply the quasi-public reasoning to nonemployee activities on company property. It has preferred to rely on the accommodation of competing interests supplied by the Babcock test. In relying on this test, it has usually refused to

9. See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968); Central Hardware Co. v. NLRB, 439 F.2d 1321 (8th Cir. 1971); NLRB v. Solo Cup Co., 422 F.2d 1149 (7th Cir. 1970); NLRB v. Monogram Models, Inc., 420 F.2d 1263 (7th Cir. 1969).

10. See generally cases cited in supra note 9.

11. A number of state and federal courts have allowed organizers to engage in picketing on such property. See generally Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968); In re Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969); Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers' Union, Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964); Maryland v. Williams, 44 L.R.R.M. 2357 (Baltimore Crim. Ct. 1959); New Jersey v. Green, 56 L.R.R.M. 2661 (N.J., Bergen County Ct. 1964); Lada v. Barbers Local 149, 71 L.R.R.M. 3179 (Pa., Erie County C.P. 1969); Moreland Corp. v. Retail Store Employees Union, Local 444, 16 Wis. 2d 498, 114 N.W.2d 876 (1962). Contra, Weis Markets, Inc. v. Meat Cutters, 56 L.R.R.M. 2402 (Pa., Lancaster County C.P. 1964); Hood v. Stafford, 213 Tenn. 684, 378 S.W.2d 768 (1964). The picketing in these cases was primarily informational in character. See discussion note 19, infra. Only Central Hardware Co. v. NLRB, 439 F.2d 1321 (8th Cir. 1971), has used this reasoning to protect primarily organizational activity conducted on such property. State courts could not protect such activity without running a substantial risk of invading a jurisdiction reserved exclusively for the NLRB. See San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

12. See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 325 (1968); Central Hardware Co. v. NLRB, 439 F.2d 1321 (8th Cir. 1971).

[Union organizers in soliciting support through peaceful picketing exercise First Amendment rights. . . . The Board here found Central Hardware's parking lots to be generally open to the public, to have a quasi-public status. The record . . . furnishes adequate support for this finding . . . .

Id. at 1328.

13. Hereinafter referred to as NLRB or Board.

14. Prior to 1969, only one Board decision allowed organizers to use the property of the employer because of the quasi-public nature of the property. See Marshall Field & Co., 98 NLRB 88 (1952), where a private court-way had by its nature assumed the appearance of a city street.

15. See text at supra note 6.
allow nonemployees to distribute union information under circumstances where state courts, applying the quasi-public holdings, probably would have allowed the distribution. Indeed, it has sometimes refused to allow distribution under circumstances where the Supreme Court would have been expected to have held otherwise.

The 1968 Supreme Court decision of Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza has apparently changed the disposition of the Board toward such cases. Logan involved the picketing of a supermarket, located in a large shopping center, by nonemployee union representatives. The picketing was more informational than organizational. The Court, limiting its decision to whether nonemployees had a right to picket on this type of private property, found that a constitutionally-protected right to picket existed. The Court cited Marsh v. Alabama where the business block of a company owned town was held to be of such a nature as to make the prohibition of the exercise of constitutional freedoms on the block unconstitutional. The Logan Court pointed out that the shopping center was the functional equivalent of a community business block.

16. The Board's treatment of solicitation at resort areas is particularly interesting. Clearly such areas have been opened up by their owners for use by members of the public. Yet the Board has consistently refused to require the employers to allow such activity on the parking lots or other areas of such resorts where the case did not fit into the Babcock exceptions. It is quite possible that state and federal courts would have held otherwise where the exercise of free speech was involved. For a case dealing with resort activity, see NLRB v. S & H Grossinger's, Inc., 372 F.2d 26 (2d Cir. 1967).

It should be noted that these resort cases involved primarily organizational activity. The informational aspects were not prominent. Thus it is possible that such cases could not have come before state or federal courts initially because of the probable preemption of the area by the Board. See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

17. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), allowed picketing which was both informational and organizational on the parking lots of a large shopping center. The factor of opening the property to the public was largely responsible for this result. Cf. Marsh v. Alabama, 326 U.S. 501 (1946) where the distribution of religious literature on the sidewalk of a privately owned town was allowed over the protests of the owner.


19. Types of picketing have been identified. Informational picketing is addressed to the public. Organizational is addressed to employees. See 29 U.S.C. §§ 158 (b) (7), (c) (1970).


21. The distribution of religious literature was attempted on the premises.

22. 391 U.S. at 325.
and therefore an absolute ban of picketing or handbilling on the premises was unconstitutional.\textsuperscript{23}

The nature of the picketing, the shopping center, the audience of the picketing and numerous policy considerations may have influenced the Court in the \textit{Logan} decision. This comment will focus on many of these factors and will attempt to identify the various determinants that have led the Board to attempt to expand the \textit{Logan} holding to organizational picketing conducted in areas quite unlike shopping centers. The major Board decisions to be discussed will be \textit{Solo Cup Co.},\textsuperscript{24} in which the Board unsuccessfuously attempted to extend the \textit{Logan} reasoning to protect organizational activity in an industrial park, and \textit{Central Hardware Co.},\textsuperscript{25} in which the Board extended \textit{Logan} to protect organizational picketing on the parking lot of a large self-service hardware store. This comment will compare these cases and analyze them in light of the history of Board and court decisions which have attempted to accommodate the conflicting interests involved.

\section{I. Solo Cup and Central Hardware: Two Attempts to Apply the Logan Holding}

\textbf{A. Solo Cup—An Early Application of the Logan Holding}

The Solo Cup Company was located in the Calumet Industrial District,\textsuperscript{26} which was privately owned and managed and contained the plants of eight companies. The owners had laid out streets in the CID and had provided street signs, speed zone signs and water lines.\textsuperscript{27} In 1966 union representatives sought access to the CID to distribute union literature to employees of Solo Cup. The company and the owners of the CID made efforts to prevent this distribution by enforcing a standing rule against the distribution of union literature.\textsuperscript{28} The NLRB was asked to decide

\begin{itemize}
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} 172 N.L.R.B. No. 110 (1968).
\item \textsuperscript{25} 181 N.L.R.B. No. 74 (1970).
\item \textsuperscript{26} Hereinafter referred to as CID.
\item \textsuperscript{27} 172 N.L.R.B. No. 110 (1968).
\item \textsuperscript{28} \textit{Id.}
\end{itemize}

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whether this enforcement violated section 8 (a) (1) of the National Labor Relations Act.\(^{29}\)

After balancing the competing rights of the various parties involved, the Board found the enforcement to be violative of section 8 (a) (1) of the N.L.R.A. This balancing was commenced by a restatement of the rights possessed by each of the parties to the dispute. Relying on Babcock, the Board pointed out that ordinarily an employer may validly post his property against non-employee distribution of union literature. This general right may be forced to yield to the organizational rights of the union and the employees, however, if the union is unable to reach the employees by reasonable efforts, through other channels of communication or if the employer is discriminatorily enforcing an otherwise valid no-solicitation rule solely against union organizers. This accommodation recognizes that the statutory right to self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.\(^{30}\)

About 99% of Solo Cup's employees entered the CID by automobile. The nature of the entrance to the District made handbilling at that location dangerous, difficult and ineffective.\(^{31}\) Additionally, the employees lived in the Chicago area, within a radius of from 15 to 20 miles from the plant.\(^{32}\) The union did not have a list of employee names and addresses,\(^{33}\) and absent such a list the sole alternative channel of communication between the union and the employees was the mass media. Use of the mass media, however, would have been costly and of dubious value because of the large number and variety of newspapers and radio and T.V. stations in the area.\(^{34}\) The Board was of the opinion

\(^{29}\) Hereinafter referred to as N.L.R.A. or the Act. 29 U.S.C. § 158 (a). (1) (1970) provides:

> 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.

Section 157 guarantees to employees the right to self-organization.


\(^{31}\) The area was heavily traveled and was often congested.

\(^{32}\) Babcock had implied that employee residential dispersion is a factor to be considered in determining the availability of alternative channels. See NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956).

\(^{33}\) The lack of such a list was further evidence of the lack of available alternatives.

\(^{34}\) See 172 N.L.R.B. No. 110 (1968). This is an interesting point. The channels of communication were so numerous that their value and effectiveness was doubted.
that all of these factors placed the employees beyond the reasonable reach of union efforts. Therefore the employer's refusal to allow the distribution on the premises was a section 8 (a) (1) violation.

The Board went beyond the above reasons in holding the refusal to be a violation under the Act. It noted that the employer's enforcement was also discriminatory because there was no evidence that members of the public, other than union organizers, were ever barred from the CID. In support of its contention that the property was generally open, the Board noted that ice cream and sandwich vendors had been granted ready access to the CID. It also mentioned the lack of fences, gates, guards or signs barring trespassers or distributors. These factors led to the conclusion that the area, although not fully public, had acquired the nature of quasi-public property.\textsuperscript{35} \textit{Logan} was cited to support the proposition that free expression of ideas on quasi-public property is protected by the first amendment. The Board found the CID to be clearly analogous to the privately owned shopping center and the normal municipal business district which have been held to be quasi-public for first amendment purposes.\textsuperscript{36} For this additional reason the Board found a violation of section 8 (a) (1).

The NLRB petitioned the Seventh Circuit for enforcement of the decision.\textsuperscript{37} The court considered the evidence and held that it did not support the order. It did not find the CID to be a quasi-public place and, additionally, it did not believe that a lack of alternative channels of communication or discriminatory enforcement of the rule had been shown.\textsuperscript{38}

In response to the quasi-public characterization, the court indicated that the CID was clearly not analogous to a shopping center or business block. The CID did not hold itself open to the public, the public had no reason to be there,\textsuperscript{39} and it was not the functional equivalent of a shopping center or a business

\textsuperscript{35} Apparently property acquires the quasi-public label when it can be treated as public property for a particular purpose. In \textit{Marsh v. Alabama}, 326 U.S. 501 (1946), the business block of a company owned town was treated as public property for first amendment purposes.


\textsuperscript{37} \textit{NLRB v. Solo Cup Co.}, 422 F.2d 1149 (7th Cir. 1970).

\textsuperscript{38} \textit{Id.} at 1151.

\textsuperscript{39} \textit{Id.}
Furthermore, the admittance of contract caterers did not compromise the private nature of the property. Thus the Logan reasoning could not be used to protect these organizers. In applying the Babcock test to the Solo Cup situation, the court began by cautioning against the expansion of the exceptions that it permits, and noted that courts have been reluctant to find a lack of alternative channels and have upheld the right of access only when a substantial number of the employees reside on company property. Here it was clear that employees did not reside on company owned property, and at least one channel of communication—handbilling at the entrance to the CID—was open to the union. Thus an expansion of Babcock was not warranted.

The Board clearly wanted to protect the organizational right of the employees and union members involved. It was apparent that the facts of the case placed it within the general rule of Babcock—which normally allows the posting of employer property—and outside of the protection of Logan. Yet the Board saw a threat to the organizational right and did not feel that such right should be subservient to the property rights of the owners of the CID. In its attempt to shield the union's organizational rights, the Board may have failed to realize that the right being protected, i.e., to organize employees, does not require a greater measure of constitutional protection than does an appeal or address to the public. An appeal made solely to employees, on public property, would normally warrant first amendment protection. When that appeal begins to encroach upon the property rights of the employer, however, a certain amount of the constitutional protection may be lost. The nature of the property may

40. Id.
42. 422 F.2d 1149, 1151 (7th Cir. 1970).
43. Thomas v. Collins, 323 U.S. 516 (1945) makes it clear that constitutional protection for organizational activity exists.

But . . . espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause.

Id. at 537-38.
44. Id.
45. See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).

[Peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment.

Id. at 319.
determine the point where the constitutional protection vanishes entirely and the speaker is compelled to rely solely on statutory or other protections to justify his activity on company property. Babcock and Logan are both aimed at this type of balancing, and in Solo Cup the balance on either scale favored the employer.

B. Central Hardware—An Application of Logan to a More "Logan-Like" Site

Central Hardware operated two large self-service hardware stores on offstreet enclaves in outlying areas of Indianapolis. Each store employed approximately 125 people. Although the stores were not technically "shopping centers" they were set off from the main highway and were bordered on two sides by parking lots. Shortly after the stores opened, the union began an organizational campaign, the greater part of which was conducted on the parking lots of the stores. When the employer attempted to enforce a general rule prohibiting union organizational activities on its premises, unfair labor practice charges were filed. The Board, accepting the findings of fact of the trial examiner, applied the legal tests of Babcock and Logan and concluded that the no-solicitation rule was overly broad.

Babcock allows union organizers to solicit on company property if alternative channels of employee-union communication are beyond the reasonable reach of union efforts. The trial examiner believed that such channels did not exist. This was concluded notwithstanding the fact that the union had an 80% complete list of the names and addresses of the employees of the store. The trial examiner considered other factors as well in reaching the determination which the Board ultimately accepted. He pointed out that the complexes in which Central Hardware's

46. Central Hardware Co. v. NLRB, 439 F.2d 1321, 1323 (8th Cir. 1971).
47. Id. at 1324. "The company had a no-solicitation rule which it enforced against all solicitational operations in the stores and in the parking lots." Id.
48. 351 U.S. at 112.
49. 439 F.2d at 1324; see Broomfield, supra note 41. As Broomfield points out, the Board has normally required the employer to grant access to company property only if the employees lived on the property. Central Hardware's employees did not live on the property. Yet the Board found alternatives to be inadequate despite the list of names and addresses. Broomfield comments on the increased recognition of the fact that alternative methods such as the mails are not effective substitutes for personal contact. Additionally:

[R]ights of private property are more circumscribed today to accommodate important civil liberties than in 1956 when Babcock . . . was decided. Id. at 553-54. These factors help to explain the policy supporting the Central Hardware decision.

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stores were located contained other business enterprises. He also noted that the access of members of the general public to the parking lots was not barred by gates, guards, fences or signs. This led the examiner to conclude that the premises were open to the general public, and that the enforcement of the no-solicitation rule against union organizers was a discriminatory application of the overly broad rule.

The Eighth Circuit generally affirmed these portions of the decisions. It began by examining the Babcock and Logan tests and by distinguishing companies that hold themselves open to the general public, e.g., Logan Plaza and Central Hardware Company, from those that do not, e.g., Babcock & Wilcox Company and Solo Cup Company. Central Hardware's parking lots were generally open to the public and had a quasi-public status. Since peaceful picketing carried on in a location generally open to the public is normally protected by the first amendment, and since union organizers soliciting support through peaceful picketing exercise first amendment rights, the no-solicitation rule which interfered with the exercise of these rights on quasi-public property was overly broad and the enforcement of it violated section 8 (a) (1) of the N.L.R.A.

The court did not discuss the availability of other union-employee channels of communication. Apparently it believed that the facts of the case required the application of the Logan

50. The presence of such stores tends to weaken the owner's claim to security. Their presence gives the area the appearance of a shopping center. A shopping center is analogous to the business block of a community, and a business block is a proper place for the exercise of first amendment freedoms.

51. See p. 474 infra. It is important to mention here that the discrimination involved was not like the discrimination discussed in Babcock. The exception to Babcock dealt with a rule that was discriminatorily enforced primarily to disadvantage the organizational interest. Here the rule was uniformly enforced against all solicitors. However, the rule was found to be overly broad because it prohibited protected activity.

52. 439 F.2d at 1326-28.

'Overbreadth' is a term used to describe a situation where a statute [or, presumably, a restriction] proscribes not only what may constitutionally be proscribed, but also forbids conduct which is protected, e.g., by the First Amendment's safeguards of freedom of speech and press.

Id. at 851.
rather than the Babcock test. The nature of the use of the land rather than the availability of other channels was the key to determining whether enforcement of the rule was proper.

Both the Board and court considered the nature of the premises of Central Hardware to be the principal factor determining the propriety of the enforcement of the rule. Neither considered, in conjunction with the nature of the land, the nature of the union activity involved. Babcock, Solo Cup and Central Hardware involved organizational rather than informational picketing. Marsh, the case upon which Logan was largely based, involved informational activity. While organizational activity on public property has usually been protected, similar activity on private property has usually been unprotected. Babcock would require access to the property of the employer only if a lack of alternative channels or discriminatory enforcement of an otherwise valid no-solicitation rule could be shown. The Board and the court in Central Hardware apparently believed that Logan changed this accommodation of competing interests where privately owned property was made accessible to the general public.

In Central Hardware the Board found that although the union possessed a nearly complete list of employee names and addresses, alternative channels of communication were lacking. If the Board was indeed trying to fit Central Hardware into the Babcock exceptions, a certain expansion of those exceptions was a necessary prerequisite. Never before had the Board allowed access on the grounds of lack of alternative channels where such a list was possessed. Probably the Board and the court were aware of the inapplicability of Babcock to protect the union activity. Nevertheless, it is possible that a desire to bring the activity within the statutory protection existed. This may have led both to apply Logan in order to maintain the organizational rights in the face of competing private property interests. This application may have been based on misperceptions as to the extent of the protection afforded by Logan; for Logan might be seen as extending the first amendment protection only to primarily informational activity, addressed to the public, and conducted on prop-

56. 439 F.2d at 1328.
57. Id.
58. See supra note 19.
59. Id.
60. Id. See also supra note 21.
61. See discussion supra note 49.
property so opened to the public as to have taken on a primarily public appearance and nature. The facts of Central Hardware clearly indicate that the activity was neither primarily informational nor addressed to the public. They also tend to cast doubt upon the appropriateness of the quasi-public classification. This is due both to the nature of the store and to the fact that quasi-public property is quasi-public only for the purpose of conducting certain activities thereon. Thus it might be quasi-public for constitutional or statutory purposes. The Supreme Court has indicated that generally neither a constitutional nor a statutory right for nonemployees to engage in organizational activity on privately owned property exists. It is possible that property that is not public could not be classified quasi-public in order to allow the exercise of rights that would be statutorily protected if conducted on public property. It is, nevertheless, arguable that Logan changed this previous ruling where privately owned property is opened up for use by the general public. Such a change might have enabled the Board and the court to protect the organizational activities on the parking lots of Central Hardware.

II. THE HISTORICAL BACKDROP OF SOLO CUP AND CENTRAL HARDWARE

A. Early Developments

Two decisions in 1940 clearly indicated that the first amendment freedom of speech guarantee afforded protection to peaceful picketing carried on in a public place and designed to disseminate information concerning the facts of a labor dispute. In 1941 the Supreme Court noted that the lack of an employer-employee relationship would not be sufficient to preclude the protection of such picketing. Thus, as of 1941, it was well established that employees or nonemployees were protected by the first amendment when they engaged in peaceful informational picketing on public property. In 1945 the Supreme Court indicated that this

62. Remember that the Plaza in Logan was compared to a business block and was found to be the functional equivalent of the block. Certainly Central Hardware was not a business block, or part of the functional equivalent of such a block.
protection extended to organizational picketing as well.\textsuperscript{66} Picketing conducted on private property, against the wishes of the owner was \textit{not}, however, protected. Those engaged in such picketing were trespassers and their actions made them criminally and civilly liable.\textsuperscript{67}

In 1946 \textit{Marsh v. Alabama}\textsuperscript{68} was decided and a trend toward expansion of the first amendment protection began. The Supreme Court was called upon to determine the status of a business block in a company owned town. Clearly the block was not public; it was owned by a private corporation.\textsuperscript{69} Nevertheless the block had a public appearance and function and was found to be primarily public in nature.

A Jehovah's Witness attempted to distribute religious literature on the sidewalk in front of a post office located on the block. The managers of the town asked that she stop this distribution. When she refused she was arrested. In reviewing these facts the Court pointed out that:

\begin{quote}
[O]wnership does not always mean absolute dominion. The more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.\textsuperscript{70}
\end{quote}

Analogies were drawn to privately held ferries, bridges, turnpikes and railroads which are subject to state regulation because they serve a public function.\textsuperscript{71} The Court reasoned that since the "business block" was serving a public function and was freely accessible and open to people in the area and those passing through,\textsuperscript{72} the managers of the town could not curtail the exercise of constitutionally protected freedoms in the business section. Such curtailment violated the first amendment.\textsuperscript{73}

After \textit{Marsh} it was beyond doubt that where the constitutional rights of owners of land were balanced against the rights of the people to enjoy first amendment freedoms, the latter would

\begin{footnotes}
\item \textsuperscript{66} Thomas v. Collins, 323 U.S. 516, 532 (1945).
\item \textsuperscript{67} Martin v. Struthers, 319 U.S. 141, 147-48 (1943).
\item \textsuperscript{68} 326 U.S. 501 (1946).
\item \textsuperscript{69} \textit{Id.} at 502. The Gulf Shipbuilding Corporation owned the town.
\item \textsuperscript{70} \textit{Id.} at 506.
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textit{Id.} at 508.
\item \textsuperscript{73} \textit{Id.} at 509.
\end{footnotes}
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occupy a preferred position.\textsuperscript{74} Although first amendment rights could normally be exercised freely only in public areas, where a private area so closely resembled a public area as to have become its \textit{functional equivalent} the first amendment protection would be extended to safeguard the exercise of constitutional freedoms in the \textit{quasi-public area}.\textsuperscript{75}

In 1948 one of the first attempts to apply the \textit{Marsh} holding to labor picketing on privately owned property was made. \textit{People v. Barisi}\textsuperscript{76} involved orderly picketing against a news company which leased space in the Pennsylvania Railroad Station in New York City. After noting that the Railroad was the owner of the station, the court examined the use to which the property had been subjected. It pointed to the general accessibility, by the public, to the building. "In the station many stores [were] located where anything from a hamburger to a dress suit and silk hat might be purchased."\textsuperscript{77} The property had taken on a public character, and by opening up their property to the general public, the owners of the station made it a quasi-public place and circumscribed their property rights by the constitutional rights of the users of the premises.\textsuperscript{78} The picketing was orderly informational activity and could not be prohibited.

In the 1940's it became increasingly apparent that the constitutional protection of picketing on public property would not alone be sufficient to protect the statutory rights of employees who were isolated from organizational information. In lumber or mining camps, for example, employees who lived and worked on company property could be effectively isolated from such information if the owner of the camp refused to allow nonemployee union organizers to solicit on his property. Similarly, an employer might effectively prevent or impede organization by discriminatorily applying a nonemployee no-solicitation rule. He could allow anti-union solicitation and dissemination while prohibiting pro-union activities on his property.

\textsuperscript{74} Id. Logan so interpreted \textit{Marsh}. See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).
\textsuperscript{75} Cases beginning with \textit{People v. Barisi}, 23 L.R.R.M. 2190 (N.Y. Magis. Ct. 1948) and culminating with Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968) have so held.
\textsuperscript{76} 23 L.R.R.M. 2190 (N.Y. Magis. Ct. 1948).
\textsuperscript{77} Id. at 2191.
\textsuperscript{78} Id.
In *Lake Superior Lumber Corp.* the Board\textsuperscript{70} and later the Sixth Circuit\textsuperscript{80} found restrictions on nonemployee solicitation during non-work periods and in certain non-work areas to be violative of section 8 (a)(1) of the N.L.R.A. In *NLRB v. Stowe Spinning Co.*, the Supreme Court,\textsuperscript{81} overruling a determination by the Fourth Circuit,\textsuperscript{82} upheld a Board\textsuperscript{83} decision which required an employer to allow union organizers to use a company owned meeting hall for organizational purposes. The hall was the only suitable place for organizational meetings in the town and had been available for use by other groups in the community. The sole purpose of the discriminatory denial had been to discourage self-organization. The holdings of these cases were combined in 1956 when the Supreme Court decided *NLRB v. Babcock & Wilcox Co.*\textsuperscript{84} *Babcock* involved attempts by a union to solicit on property owned by the company. The Court pointed out that an owner may validly post his property against solicitation by nonemployee union organizers unless a lack of alternative channels of communication places employees beyond the reasonable reach of union efforts or the rule is being discriminatorily enforced.\textsuperscript{85}

*Babcock* could have been seen as a substantial encroachment on the traditional property rights of the company owner.\textsuperscript{86} Considering the nature of the situations in which this right could be asserted, however, it is clear that the encroachment was much less than substantial.\textsuperscript{87} Again, considering the limited number of situations in which the statutory right could be asserted, it is understandable that increasing attempts were made to apply the quasi-public doctrine of *Marsh* to premises where nonemployees sought to solicit. Unless discrimination or a lack of alternatives was clear, it was more likely than not that nonemployees

\begin{itemize}
\item \textsuperscript{79} 70 N.L.R.B. 178 (1946).
\item \textsuperscript{80} NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948).
\item \textsuperscript{81} NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949).
\item \textsuperscript{82} 165 F.2d 609 (4th Cir. 1947).
\item \textsuperscript{83} Stowe Spinning Co., 70 N.L.R.B. 614 (1946).
\item \textsuperscript{84} 351 U.S. 105 (1956).
\item \textsuperscript{85} Id. at 112.
\item \textsuperscript{86} It allowed nonemployees to enter onto property that had previously been closed to them. See Fairweather, *An Evaluation of the Changes in Taft-Hartley*, 54 NW. U.L. REV. 711, 725 (1960): "The need of the union has been used . . . to justify a trespass by a union solicitor or picket."
\item \textsuperscript{87} See Broomfield, *supra* notes 41, 49.
\end{itemize}
would fare better by pursuing first amendment protection in seeking to solicit on company owned property.\(^8\)

B. **Expanding the Marsh Holding: Logan Plaza**

In the years following *Marsh*, many state courts extended the quasi-public classification to permit informational union activities on the parking lots of large, multi-store shopping centers.\(^8\) Similarly, some state and federal courts, and even the NLRB, broadened the classification to protect nonemployee union activity in certain areas of multi-level or multi-divisional department stores.\(^9\) Beyond these two "business block" like areas, however, there was little consensus as to the circumstances under which private property could be considered quasi-public for first amendment or statutory purposes, and even within these two areas there was considerable uncertainty.\(^9\) In the 1960's a disconcerting number of inconsistent decisions in various jurisdictions\(^9\) resulted in the exertion of increased pressure on the Supreme Court for a final resolution of the issue of the proper status of shopping center picketing.

*Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza\(^9\)* was seen by many\(^4\) as a response to this pressure. *Logan* had come to the Court after both the Pennsylvania Court of Common Pleas\(^9\) and the Pennsylvania Supreme Court\(^9\) had found nonemployee union organizers to be trespassing when they

8. Id.


92. See, e.g., cases cited note 114, infra.


95. 61 L.R.R.M. 2425 (Pa., Blair County C.P. 1966).

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picketed on the parking lots of the Logan Valley Plaza. At that
time the Plaza contained only two stores but the addition of at
least fifteen others was contemplated. The Plaza had a perimeter
of just under 1.1 miles and was freely open to and used by mem-
bers of the general public. Weis Market, a tenant in the Plaza,
had posted a sign prohibiting trespassing or soliciting by all non-
employees on its porch or parking lot. Union representatives,
evertheless, commenced peaceful informational picketing in the
parcel pickup area and the portion of the parking lot adjacent
thereto. The Market and the owners of the Plaza instituted an
action to enjoin the trespassing. The Pennsylvania courts granted
the requested injunction.

The Supreme Court reviewed the Pennsylvania rulings and
concluded that the union organizers had a right to picket on the
premises. In reaching this decision the Court considered many
factors.

The picketing in Logan was within the first amendment pro-
tection, but the right of the union to engage in this activity
on privately owned property was unclear. The Court cited Marsh
v. Alabama to support the proposition that under certain cir-
cumstances, property that is privately owned may be treated as
though it were publicly held for first amendment purposes.

This case came to the state courts instead of the Board because state-protected
rights were being asserted by the landowner. The rights were not within the exclusive
236 (1959).

Id. at 317-18.

Id. at 311. The signs carried by the pickets indicated that the market was non-
union and that its employees were not receiving union wages or benefits. The message
was addressed to the public.

Competing rights and interests were involved. The union had a constitutionally
protected right to disseminate ideas about a labor dispute to the public on property
generally open to the public. This property, however, was privately owned, and the owner
was asserting his right to exclude trespassers.

Courts have recognized that picketing includes elements of both speech and
conduct, and the non-speech aspects are not protected by the first amendment free speech
clause. Due to this intermingling of the protected and unprotected, picketing is subject
to controls that could not be constitutionally imposed upon pure speech. See, e.g., Hughes
v. Superior Court, 339 U.S. 460 (1950). Limitations have been placed on the nature and
location of certain picketing. See, e.g., Hughes v. Superior Court, 339 U.S. 460 (1950);
NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58 (1964). This does not imply
that the absolute prohibition of peaceful picketing is allowed. 391 U.S. 308, 314 (1968).
Generally the non-speech aspects are not so pronounced as to make the first amendment
protection inapplicable.


391 U.S. at 316.
were numerous similarities between the business section involved in *Marsh* and Logan Valley Plaza, which served as the functional equivalent of a business block, and which was generally open to the public in the same sense as was the business block.\(^{104}\) Normally the owner of private property has the right to exclude from his land those members of the public who make use of the land in a way contrary to his wishes.\(^{105}\) However, the owner of a shopping center which functions as the community business block may not resort to traditional trespass laws to exclude members of the public wishing to exercise their first amendment rights on the premises where the purpose of that exercise is to apprise the public of the manner in which the center is actually being operated.\(^{108}\) The owners may regulate but may not prohibit the exercise of such first amendment freedoms.\(^{107}\)

The Court partly based the extension of the first amendment protection on the nature and the function of shopping centers in the United States. It noted the growth of shopping centers as a consequence of the exodus to suburbia. By the end of 1966, 37% of the total retail sales in the United States and Canada could be traced to shopping centers.\(^{108}\) If first amendment protection were not extended to peaceful informational picketing at shopping centers, store owners would be able to effectively insulate themselves from protests of unfair working conditions or shoddy, over-priced merchandise or discriminatory hiring of employees by creating a *cordon sanitaire* of parking lots around their stores. The owners of stores located in the inner city business sections of the community would be unable to similarly protect themselves. The goal of free expression could not be maintained if the shopping center stores had such protection. The incidence of private ownership should not require such a result.

104. *Id.* at 319.

105. *Id.* at 330 (Black, J., dissenting); *Martin v. Struthers*, 319 U.S. 141, 147 (1942).

106. 391 U.S. at 319-20. Notice that this holding, if limited to the facts of the case, is rather narrow.

107. *Id.* at 320-21. See *Cameron v. Johnson*, 390 U.S. 611 (1968), where the Court upheld a statute prohibiting picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any ... county ... courthouses ... . . ." *Id.* at 616.

The Court was not unanimous in deciding *Logan*. Three Justices dissented. The dissenting opinion of Justice White was particularly interesting because it raised some of the difficulties that would confront the Board or a court which was attempting to apply the *Logan* holding. Thus he noted that the Court had not made the basis for drawing a line between shopping centers and other businesses clear. Justice White was fearful that the majority decision would be a license for peaceful pickets to leave the public streets and to carry out their activities on private property. He did not believe that an owner forfeits his property rights by inviting the public to do business with him on his property, or that pickets thereby have a right to come onto his property against his wishes to exercise their first amendment freedoms. Cases following *Logan* demonstrated that the fears of Justice White were justified.

Prior to *Logan* a number of state courts had formulated a rule that enabled them to decide when to call property "quasi-public" for first amendment purposes. The essence of the rule was as follows:

The change from a single proprietorship to a multiple commercial area changes the very nature of the operation from private to public or quasi-public. While a single proprietor would be entitled to prevent an unauthorized intrusion upon his private property, the owner of a multiple commercial complex is divested of such right by the very nature of the property's physical appearance. The identity of private property attributed to a single commercial establishment is forfeited in a large, multipurpose shopping center.

This rule was difficult to apply and often its application led to apparently inconsistent results. After *Logan* some state courts

110. Id. at 339-40.
111. *See pp. 468-72 infra.*
modified this rule while others abandoned it. The overall result was a broadening of Logan to protect peaceful picketing, for example, at a supermarket, a barber shop and a restaurant. The supermarket was a single grocery store while the barber shop and the restaurant were part of tiny "shopping centers." The barber shop, for example, was located in a plaza that contained a laundromat, a restaurant and one other store which was vacant. The restaurant was part of a one story building which also housed a furniture store. These areas were unlike the Logan Valley Plaza. Nevertheless they were held to be quasi-public for first amendment purposes. The new rule that has apparently developed allows peaceful picketing in areas that are held open by the employer for use by members of the public.

In the years following Logan, federal courts have had only limited exposure to cases involving nonemployee picketing on private property. Three cases, including Solo Cup and Central Hardware, have been brought to the courts on petitions for enforcement of orders of the NLRB. All of these cases focused on the right of nonemployee union organizers to engage in organizational picketing or handbilling on the private property of the employer or his lessor. In Solo Cup the property was an industrial park, in Central Hardware it was the parking lot of a large hardware store, and in the third case, NLRB v. Monogram Models, Inc., it was the shoulder of a private roadway which was used by employees for ingress to and egress from an industrial site.

See, e.g., In re Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969).
This would seem to include nearly every retail store, restaurant, etc. Many courts still require some similarity between the property to be picketed and a normal shopping center. Compare My's Restaurant, Inc. v. Hotel Local 571, 76 L.R.R.M. 2393 (Wis. Cir. Ct. 1970) with Lada v. Barbers Local 149, 71 L.R.R.M. 3179 (Pa., Erie County C.P. 1969) and In re Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969).
Remember that most courts do not distinguish the owner from the lessee for trespass purposes.
The store employed 125 and had employee parking lots which had a capacity of 350 cars.
420 F.2d 1263 (7th Cir. 1969) [hereinafter cited as Monogram].
Id. at 1265.
Monogram was the first of the three cases to come before the federal courts. The court's discussion of the facts was aimed at bringing the organizational handbilling under the first amendment protection. It pointed out that the shoulder area of the highway was subject to an easement owned by the state. Therefore it was public property in much the same way as a sidewalk is public property. The handbilling, even if organizational in character was protected activity, and attempts by the employer to prevent the distribution interfered with the section 7 rights of the employees and violated section 8 (a) (1) of the N.L.R.A. The Supreme Court denied certiorari of the case.

The facts of Solo Cup and Central Hardware were previously discussed. The activity on the property of the Solo Cup Company was not constitutionally protected because the property was not public or quasi-public. It was not statutorily protected because the situation was not within the Babcock exceptions. The union activity at the Central Hardware Company was protected by the first amendment and the statute because the property had assumed a quasi-public appearance and nature. It was also protected by the statute because it fell within the Babcock exceptions.

Two recent decisions of the NLRB which have not yet been reviewed by the federal courts have dealt with the organizational activities of employees on company property. The first of these, Monogram Models, came to the Board when the employer refused to allow nonemployee organizers to solicit on company parking lots. The union had attempted to distribute leaflets to employees and pedestrians as they entered the plant. This and other tactics met with little success, and the solicitors sought access

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127. Id.
Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for . . . mutual aid or protection, and shall also have the right to refrain from any or all such activities. . . .
130. See supra pp. 456-61.
131. See text at supra note 6.
132. Id.
133. 192 N.L.R.B. No. 99 (1971) [hereinafter cited as Monogram Models, Inc.]
134. The earlier Monogram case had involved solicitation on the shoulders of the highway. See NLRB v. Monogram Models, Inc., 420 F.2d 1263 (7th Cir. 1969).
to company owned parking lots. After considering the facts of the case, the Board concluded that a right to access did not exist. The accommodation of competing interests provided by Babcock favored the employer because other channels did exist and no discrimination had occurred. The "limited success" of other methods indicated that the lack of alternatives required by Babcock was not present. The fact that the employees lived in a large city did not, by itself, warrant the granting of access. Other channels existed and therefore the rights of the employer predominated. The question of quasi-public property was not raised.

The second case recently passed upon by the Board, Scholle Chemical Corp., and dealing with a factual situation much like Monogram, resulted more favorably for the union. The Board held the refusal of the employer to allow nonemployee organizers to solicit on company property to be violative of section 8 (a) (1) of the N.L.R.A. The only entrance to the manufacturing company was a road which was privately owned by innocent third parties to the dispute. Although the union had the names and addresses of 220 of the 350 employees of the company, these employees lived in the Chicago area and this made informal contact—such as could be achieved in a small town or rural community—between the employees and the union organizers, impossible. Other effective channels did not exist and therefore the Board found the refusal to allow access to be violative of section 8 (a) (1) of the N.L.R.A. Again, no question of quasi-public property arose.

The significance of these two decisions lies in their balance of competing rights. It is possible that these cases, when read in conjunction with the three prior cases indicate a belief on the part of the Board that employees are entitled to access to a specific channel of communication involving personal contact between employees and union organizers. Where the activities of the union, if restricted to public property, would be unable to provide this contact, the balancing of competing rights requires that the union representatives be granted access to the property of the employer. In the cases from Marsh to Logan, courts rec-

136. The road was owned by another manufacturing plant which was located in the same area as Scholle.
137. Monogram, Solo and Central.
ognized a right to engage in activity protected by the first amendment or by statutes on quasi-public as well as public property.\textsuperscript{138} Possibly the Board has taken these cases, in conjunction with Babcock, to imply that where nonemployees seek to engage in organizational activity, the statutory rights of the employees require the employer to make certain areas of his property available to nonemployee organizational efforts if, in the absence of such availability, the employees will be placed beyond the effective reach of reasonable union efforts.

III. Solo Cup and Central Hardware as Extensions of Statutory Protection of Organizational Activity

The N.L.R.A. was enacted to minimize industrial strife.\textsuperscript{130} The drafters of the Act were of the opinion that this could be accomplished "if employers, employees and labor organizations . . . [would] recognize under law one another's legitimate rights in their relations with each other . . . ."\textsuperscript{140} The Act was designed to prescribe the legitimate rights of the groups involved and to provide orderly procedures to protect the rights of each group from interference by the others.

The N.L.R.A. gave employees the right to self-organization,\textsuperscript{141} with which the employer could not lawfully interfere.\textsuperscript{142} This right was virtually meaningless, however, if employees were not given the opportunity to hear of the benefits of self-organization from outsiders.\textsuperscript{143} It was recognized, therefore, that nonemployee union organizers had to be allowed to provide organizational information to employees in order to safeguard the organizational rights of the employees.\textsuperscript{144} The protection for such organ-

\textsuperscript{138} In Marsh the handbilling was allowed despite the fact that a public roadway was located within thirty feet of the place from which the distribution was attempted. This leads to the conclusion that the exercise of first amendment rights cannot be barred in a quasi-public area simply because a public area is located nearby. Logan gives additional support to this conclusion.

\textsuperscript{139} 29 U.S.C. § 141 (b) (1970).

\textsuperscript{140} Id.


\textsuperscript{142} 29 U.S.C. § 158 (a) (1) (1970) provides:

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 . . . .

\textsuperscript{143} NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956).

\textsuperscript{144} Id.
izers varied according to the circumstances. If they sought to apprise the general public of the nature of the conditions under which the employees were working, and this activity was conducted on public property, it was protected both by the Constitution and by the statute.145 Similarly, if they sought to organize the employees on public property and made no appeal to the public, the activity was protected by the Constitution and statute.146 Marsh and Logan implied that an appeal addressed to the public, including employees, on either public or quasi-public property would be both constitutionally and statutorily protected. Babcock indicated that under certain circumstances organizers would be granted access to the private property of the employer. Such access was required, however, only where the company was situated or operated so as to place the employees beyond the reach of reasonable union efforts.147 Solo Cup and Central Hardware, as decided by the Board, could be seen as having expanded Babcock where the employer holds his private property out to the public and where, in the absence of access, the employees would be placed beyond the effective reach of reasonable union efforts. The treatment received by these cases from the courts of appeals evidences a hesitance to accept this expansion. The courts do not wish to sacrifice the property interests of the employer to protect the statutory rights of the employees and organizers. They will do this, however, where either a clear threat to those rights exists or a certain weakening of the employer's claim to privacy and security is apparent due to a "dedication" of some of the property rights of the employer to the public.148

A. The Threat to Organizational Rights v. The Security Right

As was noted earlier, the NLRB has recognized the right of nonemployees to engage in organizational activity. The N.L.R.A. created this right and enables the Board to protect it from unlawful employer interference. Interference can be either active or passive. Therefore an employer may be held to be violating section 8 (a) (1) of the N.L.R.A. when he refuses to allow nonemployees to come onto his property to solicit for the union if

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145. See Thornhill v. Alabama, 310 U.S. 88, 102 (1940). If activity is protected by the Constitution, interference with that activity violates section 8 (a) (1) of the N.L.R.A.
147. See supra p. 457.
148. See supra p. 459.
the result of this is to stifle the organizational rights of the employees.

In both *Solo Cup* and *Central Hardware*, the threat to organization was unclear. The Board cited the ineffectiveness of handbilling at the plant entrances, broadcasting over the mass media, and attempting personal contacts at the homes of the employees as evidence of a lack of alternatives. In *Solo Cup*, it noted the lack of a list of employee names and addresses. In *Central Hardware* the Board found a threat to organization despite the fact that the union had a nearly completed list of employee names and addresses. Quite possibly these determinations were based on *ineffectiveness* rather than *unavailability*. The facts of both cases make it quite clear that the available alternatives were of dubious value. The Board may have concluded that they were so valueless as to make the organizational rights of the employees meaningless. This represents a substantial departure from prior applications of *Babcock*, which required access only if an almost total lack of alternatives could be shown.\(^{149}\)

The discrimination mentioned in *Babcock* was of a kind quite unlike that which may have existed in *Solo Cup* or *Central Hardware*. *Babcock* was concerned with discrimination that allows anti-union publicity while prohibiting pro-union dissemination. The discrimination found by the Board in the two problem cases, however, allowed persons having business with the employer to come onto the premises while excluding union organizers. *Logan* would not allow discrimination to prevent the exercise of constitutional rights on quasi-public property. Yet it was not clear that this precluded the uniform enforcement of a no-solicitation rule which blocked the exercise of statutory rights. *Marsh*, upon which *Logan* was largely based, had indicated that the opening of private property by the owner for use by the public in general causes the rights of the owner to become circumscribed by the constitutional and statutory rights of the users.\(^{150}\) This may have provided the basis for the Board’s contention that the owners’ opening of their property to the public prevented their enforcing a rule which, in effect, would prevent certain members of that public from exercising their statutory rights on the premises. The discrimination, while not sufficient to bring the organizers under

\(^{149}\) *See* Broomfield, *supra* notes 41, 49.

\(^{150}\) 326 U.S. at 506.

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the protection of the Babcock exceptions, was sufficient to bring the activity under the protection of statutory rights alluded to by Marsh and Logan.

B. The Relevance of the Character of the Land in Balancing Competing Rights.

The character of the land on which organizational picketing is conducted is highly relevant to a determination of the constitutional or statutory propriety of employer interference with such activity. In determining the constitutionality of the exclusion of union organizers from company property, the Board recognizes that organizational picketing is an exercise of free speech and when conducted on quasi-public property is protected by the first amendment. Therefore, if the property of the employer is quasi-public within the meaning of Logan, the employer cannot interfere with the exercise of the protected activity on his property. The activity is constitutionally and statutorily protected and employer interference would violate section 8(a)(1) of the N.L.R.A.

If the property is not quasi-public in the Logan sense, its character is still of interest to the Board. Although a constitutional right to entry might not exist, statutory protection could be found if a weakening of the employer's right to exclusion had occurred. The constitutional and the statutory protection can be distinct and the latter can be broader than the former. Thus it is not essential that the property be as generally open to the public as it was in Logan. A partial opening of the property by the employer may sufficiently weaken the employer's interest to enable the Board to provide statutory protection. The NLRB is free to fashion appropriate remedies to protect the organiz-

151. The Board has recognized factors which sufficiently diminish an employer's interest to allow access, which normally would not exist, to organizers. See, e.g., NLRB v. United Steelworkers of America and Nutone, Inc., 357 U.S. 357 (1958), where a normally valid "no-solicitation during working time" rule was enforced by an employer who himself used working time to promote anti-union information. The Board held that this rule would be unenforceable if a lack of equally effective channels of employee-union communication could be shown.

152. See discussion note 159 infra.

153. The "discrimination" exception to Babcock is aimed at allowing access due to such a weakening. See NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).
tional rights of employers and employees. The Board apparently believes that the requirement of access is appropriate where the employer has lost some measure of his right to exclusion and where the employees are beyond the effective reach of reasonable union efforts. This rule would not be applicable to the normal private property case, where the right to exclusion would not have been impaired. The fundamental difference between Babcock and Central Hardware rested in the use to which the land was put. This difference was sufficient to warrant contrasting results in the two cases. Both cases involved the balancing of competing rights. The nature of the land in Central Hardware, however, was of sufficient weight to tip the balance to favor the union.

The rights of employers and employees in a labor dispute are relative and depend on the nature of the situation. Certain factors tend to strengthen or weaken the relative position of the opposing parties. It is not unreasonable for the Board to consider the degree to which the employer has opened his land to public use as a factor which weakens the employer's position. Similarly, it is not unreasonable for the Board to conclude that this factor is sufficient to tip the balance in favor of access. As was noted earlier, the Board has been charged with the accommodation of competing interests. This accommodation requires an identification, examination and balancing of the rights of the parties to the dispute. The rights of employees can be strengthened by a showing of a lack of alternative channels of communication or discrimination. In much the same way, the rights of the employer can be strengthened where his use of the property will be seriously impaired or threatened if access is allowed. Apparently the Board has concluded that the rights of the employer can be weakened by an opening of his property which is something less than the opening which was involved in Logan. His right to exclusion is thereby diminished. It is this diminished right

154. See Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
155. That Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.
Id. at 798.
156. See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-98 (1945).
157. See generally Gould, Union Organizational Rights and the Concept of "Quasi-Public" Property, 49 Minn. L. Rev. 505 (1965).
which must be balanced against the organizational interest of the employees, and this diminution may be sufficient to tip the balance in favor of the employees.

C. The Modification of Babcock and Logan

In deciding *Solo Cup* and *Central Hardware*, the Board applied *Babcock* in conjunction with *Logan*. If a constitutional right to engage in the activity on company property existed, the interference with that right by the employer would have violated section 8(a)(1) of the N.L.R.A. The nature of the land in the two cases, however, left some question as to the applicability of the first amendment protection: the pure *Logan* test applied only to the functional equivalent of a business block. Therefore, it was necessary for the Board to decide whether statutory protection existed. The *Babcock* test was applied, but it alone did not necessarily protect the organizers: the pure *Babcock* test had applied solely to traditional private property. Protection could be found within *Babcock* and *Logan* only if their holdings were combined and modified so as to favor the employees. Both of these cases had been based on the accommodation of competing rights, i.e., both had based the granting of access on the relative strength of the rights of the parties involved. *Solo Cup* and *Central Hardware* were based on this same kind of balancing, and if the employer had weakened his right to exclusion by a *partial opening* of his land to the public, and the union had a strengthened interest in access due to the *ineffectiveness* of alternative channels of communication, it would not be unreasonable for the balance of interests to favor the union. The rule that emerged from *Solo Cup* and *Central Hardware* modified *Babcock* and *Logan* and extended statutory protection to union solicitation on private company property if a limited opening by the owner and a lack of effective alternatives could be shown. One might argue that since the Seventh Circuit refused to allow the expansion in *Solo Cup*, and the facts of *Central Hardware* placed the union acti-

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159. Clearly a non-labor group would have no right to enter the property of Babcock to disseminate anti-war pamphlets or religious literature or to solicit members for their organizations. The statute has given to labor a right of entry which is not available to the general public. The statutory right can be broader than the constitutional protection of free speech or assembly.

160. Less than that involved in *Logan*.

161. Alternatives exist but are of dubious value.
vity within the constitutional protection described in *Logan*, neither *Babcock* nor *Logan* was expanded. *Monogram Models, Inc.*, and *Scholle Chemical Corp.* would lend some support to this conclusion because in each of these cases the Board applied only the *Babcock* test. However the Board may have believed that a proper balance in *Monogram* and *Scholle* could be reached through the application of *Babcock*. Additionally, the Board may have realized that although the facts of *Monogram* and *Scholle* closely resembled those of *Solo Cup*, *Solo Cup* had extended *Babcock* and *Logan* beyond the limits acceptable to the Seventh Circuit, and an application of the *Solo Cup* reasoning to protect the activity in *Monogram* or *Scholle* probably would have been overruled. The Seventh Circuit had overruled the Board in *Solo Cup*, but in *Solo Cup* the Board had made an attempt to modify and expand the holdings of *Babcock* and *Logan*. *Central Hardware* was a more "*Logan* like" site. However it was not the functional equivalent of a business block and it would have been beyond the narrow definition of quasi-public which was used in *Logan*. Nevertheless the Board successfully applied the modified *Babcock* and *Logan* holdings to protect the organizational activity of the union. These applications by the Board indicate a projection of the protection of union organizers and the recognition of two important factors in balancing the competing rights of the parties involved; the extent to which the employer has weakened his right to exclusion by the opening of his property to the public, and the effectiveness of alternative channels of employee-union communication.

D. The Propriety of These Decisions

There is some question as to the propriety of the *Solo Cup* and *Central Hardware* decisions. If the land had been opened to charities or other solicitors, but closed to union organizers, an intent to stifle organization would have been manifested.162 But where, as in the instant cases, the employer has uniformly enforced a rule that prohibits all nonemployee solicitation on his property, the anti-union motive is not clear. Additionally, it is difficult to

162. See NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949), where the employer's refusal to allow the union to use the meeting hall in a company owned town was found to be discriminatory because the hall had been available for use by other groups and members of the community. This manifested an intent to stifle the organizational efforts of the union.
argue that the owner has forfeited his right to exclusion. Certain property rights have been relinquished by the opening of the property to members of the public. These forfeited rights, however, are not necessarily intertwined with the right to exclude solicitors. Thus it is possible that the employer has retained the only rights he is seeking to assert and that the partial dedication of the property for the limited use of members of the public would not weaken his interest in the right retained.

One additional factor should also be mentioned. The facts of Central Hardware lead to the conclusion that the organizers were interfering with the right of employees to refrain from organizing.163 Such interference tends to weaken the right of the union and this weakening could tip the balance to favor the employer. It is possible that the Board did not consider or did not give sufficient weight to this very important factor. Consequently, it is possible that the balance struck by the Board was not proper.

IV. Conclusion

This comment has compared two recent Board decisions164 and has attempted to analyze them by first placing them into perspective, and second considering some of the issues that they posed. In both decisions the Board was attempting to modify existing case law to allow nonemployee union organizers to engage in organizational activity on the property of the employer. This involved a balancing of the competing interests and an interpretation of case law to allow the protection of the organizers and the employees who were favored by the balance. In both cases the property had been opened to the public to a limited extent. The Board modified the Babcock rule, which allows an employer to validly post his property against union solicitation if alternative channels of employee-union communication are within the reasonable reach of union efforts and if the rule is not discriminatorily enforced solely against the organizers, by applying it in conjunction with the Logan rule, which allows organizers to enter quasi-public property. It concluded that if alternative channels were not effective and if the employer had partially opened his property to use by the public, the employer could be required to allow

163. 439 F.2d at 1324.
164. Solo Cup Co., 172 N.L.R.B. No. 110 (1968), rev'd, 422 F.2d 1149 (7th Cir. 1970), and Central Hardware Co., 181 NLRB 74 (1970) modified, 439 F.2d 1321 (8th Cir. 1971).
access to the organizers. This represented a significant departure from prior Board holdings which had strictly adhered to the Babcock test. It recognized that in the same way as the right of employees may become stronger when alternative channels do not exist, the right of the employer may become weaker when he gives up part or all of his interest in excluding solicitors. Although the power of the Board to reach such a result is certainly within the N.L.R.A. authorization, it is at least arguable that the employers in the compared cases had not forfeited or weakened their right to exclude solicitors.

The balancing of competing interests has always been a major function of the Board in organizational picketing cases. As traditional property notions have become strained by the opening of property to the public, the Board has been asked to give increased weight to the nature of the property in arriving at a balance. While at times the nature of the property or the use to which it is put may favor the employer’s enforcement of a no-solicitation rule, occasionally the nature or use diminishes the force of the employer’s interest in exclusion. The Board believed that the use of the land in the problem cases had this latter effect.

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165. See May Department Stores Co., 136 N.L.R.B. No. 71 (1962), enforcement denied, 316 F.2d 797 (6th Cir. 1963), where the rule was favored because the nature of the store made solicitation by off-duty employees distracting or annoying to store customers.