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In the

Supreme Court of the United States

CENTRAL HARDWARE COMPANY,

Petitioner,

v. No. 70-223

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

RETAIL CLERKS UNION, LOCAL 725, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,

Intervenor.

Washington, D. C.
April 18, 1972

Pages 1 thru 69

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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CENTRAL HARDWARE COMPANY, Petitioner,	:	
v.	:	No. 70-223
NATIONAL LABOR RELATIONS BOARD, Respondent,	:	
and	:	
RETAIL CLERKS UNION, LOCAL 725, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, Intervenor.	:	

Washington, D. C.,

Tuesday, April 18, 1972.

The above-entitled matter came on for argument at 10:19 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

KEITH E. MATTERN, ESQ., and RONALD L. AYLWARD, ESQ., Ten Broadway, P. O. Box 7360, St. Louis, Missouri 63177; for the Petitioner.

APPEARANCES [Continued]:

NORTON J. COME, ESQ., Assistant General Counsel, National Labor Relations Board, Washington, D. C. 20570; for the Respondent.

BERNARD DUNAU, ESQ., 912 Dupont Circle Building, N. W., Washington, D. C. 20036; for the Intervenor.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 70-223, Central Hardware Company against the Labor Board.

Mr. Mattern, you may proceed whenever you're ready.

ORAL ARGUMENT OF KEITH E. MATTERN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MATTERN: Mr. Chief Justice, and may it please the Court:

We are reserving ten minutes of our forty minutes for rebuttal in this case.

This case involves Central Hardware, the petitioner, barring a union organizer from a single retail store's parking lot in Indianapolis back in 1968.

The National Labor Relations Board found a Section 8, unfair labor practice, violation for this act. We appealed that violation to the Eighth Circuit on the basis that because the employees were reasonably accessible to the union organizers in many places other than the store's parking lot, that this Court's rule of National Labor Relations Board vs. Babcock & Wilcox controlled and therefore the Board's decision should have been reversed.

However, the Eighth Circuit found that because Central had opened its parking lots to the public, that these lots had become quasi-public in nature, and consequently this

Court's rule in Logan Valley applied.

We feel that the question before this Court is basically: in the situation involving a union organizer coming on a single retail store's parking lot, do the rules of Babcock & Wilcox apply, or do the rules of Logan Valley apply? Especially in this situation where the organizer comes on that lot not to -- not to picket or do anything except solicit authorization cards.

We feel there are two main issues in this case. The first issue is: were these employees accessible to those union organizers some place else in Indianapolis besides our parking lots?

And I'll discuss that and how it applies to the Babcock situation.

We feel the second aspect of this case is: are our parking lots quasi-public in nature so that they have the right, under Logan Valley, to come on those lots?

Mr. Aylward, my co-counsel, will discuss the quasi-public aspect and why Logan Valley in this case does not apply.

Now, as you can probably see from the briefs, the facts are highly disputed as far as the briefs go. But it's our position that these facts are crystal-clear as far as this record goes. The facts that are in there.

We feel that not only the physical characteristics of these parking lots are critical in this case, but we feel

that the actual facts involving the union organizers' activity, both on the lots and their lack of activities away from the lots are very important.

There are two stores in Indianapolis. There's one on the east side of town and one on the west side of town; both on 38th Street. The store on the east side of town is on a five-acre tract. It's a store that sits on the back side of the tract, with all the parking lot out front. It faces on a main street here; a side street over here.

On one side of the East Store's parking lot there's a car wash that has a six-foot cyclone fence around it. On the other side of the East Store's parking lot there is what the trial examiner refers to as a truck service station, which is separated from the East Store's parking lot by a wide muddy strip -- we would like to refer to it as a ditch.

So, as you view the East Store parking lot, it's not possible to go from any other parking lot onto Central's lot or to go from Central's lot onto any other parking lot, except there is a one-man construction office down the access road.

Across town is the West Store. Now, the West Store looks almost exactly like the East Store; again it's on about a five-acre tract, it sits on the back part of the parking lot so that all the parking is out front. Again there's a busy street way out in front, and way over at the far end of that

parking lot there's a McDonald's hamburger stand. Off to the right there are two small commercial buildings that have their own parking lot between them. There are three or four small business in there that are generally, we describe as low-volume -- not low-volume, but they don't pull many customers or clients. It's such things as a small loan company and a carpet shop, things of that nature.

Q Does McDonald's have its own parking lot?

MR. MATTERN: Yes, sir.

Q Is there a fence between McDonald's parking lot and yours?

MR. MATTERN: No, sir. There is a curb, but there is access between the two.

Q But you wouldn't call McDonald's a low-access place, would you?

MR. MATTERN: There is no testimony in the record, Your Honor, but I would have to say I would, myself, probably not refer to it as a low-traffic place.

Q Is there any sign that says that this parking lot is restricted to people at this store?

MR. MATTERN: No, sir.

Q At either place?

MR. MATTERN: No, sir.

Q Then the public is free to park there?

MR. MATTERN: No, sir.

Q Well, what happens if they do park there?

MR. MATTERN: The record is replete with instances where there have been members of the public who came on the parking lot, who were not customers, and these people were uniformly, throughout the entire period of this organizational campaign, ejected. There is --

Q They were union people, weren't they?

MR. MATTERN: No, sir. There was a man who wanted to open his own photo-mat; there was somebody wanted to sell Christmas trees; there was somebody who wanted to have a petition about a soldier who was being court-martialed.

Q Well, I think that a man who wants to set up a business to sell Christmas trees is not what I was talking about. I mean somebody who just parks their automobile there, period. Say I'm driving down West 38th Street, and I want to go down in there and I drive in there and park; it's all right?

MR. MATTERN: No, sir, it's -- if you are coming as a customer, Your Honor, you're more than welcome. If you're --

Q Is there any sign that tells me that?

MR. MATTERN: No, sir.

Q So it's not open to the public?

MR. MATTERN: No, sir. It's open to our invited customers.

Q But there's no sign that says that?

MR. MATTERN: No, there isn't, Your Honor. But there is -- in this record there is not one instance of anybody coming on that parking lot who was not a customer, who was not ejected as soon as he was discovered, union or non-union.

Now, over at the West Store, even with these two commercial buildings off to the side, that have their own parking lot, the testimony in the record is that there are never more than five or six customers in that area at any one time.

Now, all of the tracts involved in this case, all of these tracts of ground, the car wash, the McDonald's, all of these have been built by different people at different times, each maintains his own lot, each repairs his own lot; there is no apparent concert of effort to attract people into this as a shopping center.

Now, the organizational campaign itself began on May 21st, 1968. Now, this Court's rule in Babcock states that the organizers can come on the parking lots only if the employees are otherwise so inaccessible that reasonable efforts to communicate with them through the usual channels of communication prove ineffective.

Now, "ineffective" in this situation doesn't mean that the organizers contact the people some place and just don't get the authorization cards signed, it means that it's

ineffective, that they can't even get to them, because of the location of their homes in relation to the factory or the place they work.

Now, with the background of Babcock in mind, I'd like to review how this organizational campaign was actually conducted.

The campaign started on May 21st, 1968, when nine or ten union organizers descended onto the West Store parking lot with what the Eighth Circuit refers to as a blitz campaign. Now, this campaign was obviously designed to get the maximum number of authorization cards signed in the shortest period of time.

There is no evidence in the record in this case that there was any other form of preparation for this campaign, other than the union organizers. However, a month before the campaign started, the union had gone to a shop steward at The Kroger Company, or he came to them, however they got together, and he took a leave of absence from The Kroger Company and came to -- falsified his job application -- came to Central Hardware and got one of the new jobs at our West Store.

During that whole period of the month he freely admits that he worked on getting names, addresses, telephone numbers, and even job descriptions.

Now, in this record there is no evidence of any other form of attempt to contact these employees. There is no phone

calls, no letters to their homes, no handbilling, no use of newspapers; they didn't even invite them down to the union hall.

Now, I've never heard of an organizational campaign that didn't involve at least inviting them down to the union hall or to some other meeting place.

Now, the director of organizing, himself, testified that home calling, that is visiting these people at home, is the most effective form of organizing. Yet, even though 57 percent of our employees live within five miles of this store, 74 percent live within ten miles, the Board presented not one instance of home calling by a union organizer.

I was the only one who presented any evidence of home calling. And the union organizer admitted on cross-examination that one afternoon he had gone out with a list of 50 or 60 people, two months after the campaign started, and even at that he must have gone like a greyhound to do all this in one afternoon, but even at that he was able to contact 20 percent of the people on that list.

Yet home calling wasn't even used for the first two months of the campaign, and then only in one instance in this record.

Now, as we have pointed out in the briefs, as this campaign progressed on the parking lot, the union's tactics became progressively so gross that the employees started

coming to us, not a few employees, 25, 30, 100, complaining about the tactics being used out there, the harassment, the threats;to the extent that we had no choice but to invoke a no solicitation rule by organizers on this parking lot.

It's our position that although Babcock was decided back in 1956, that it's still the law now. In the recent cases that we've cited in the brief, the Board's own Monogram Models case, Kutsher's Hotel and Tamiment, that involved resorts that were open to the public, that have just been decided by the Second and Third Circuits, that the Boards and the Courts of Appeal have rigidly been enforcing and utilizing Babcock in these same situations.

It's our contention that on this basis that the Eighth Circuit should be reversed on the basis that Babcock should have been the applicable rule.

Q In Babcock, was the parking lot open to the public?

MR. MATTERN: No, sir. I can't say it was, Your Honor.

Q As a matter of fact, you know it wasn't; if you read the opinion. Am I right?

MR. MATTERN: Well, it wasn't fenced. I can't say that it wasn't open to the public. I can't say it was closed to the public.

Thank you.

Q Mr. Mattern, would you complain had the solicitation been just outside the entrance door as to your East and West Stores? Rather than in the parking lot.

MR. MATTERN: Just outside the doors, Your Honor? It took place all -- it was outside, it was outside the doors, it was over there and it was over there, and there were nine or ten of them out there on the same lot.

Q You didn't have any sidewalk before the entrance, as such, I don't suppose?

MR. MATTERN: No, sir. There is a small -- in front of the door. But the cars park right up to the -- right up to the buildings.

MR. CHIEF JUSTICE BURGER: Mr. Aylward.

ORAL ARGUMENT OF RONALD L. AYLWARD, ESQ.,

ON BEHALF OF THE PETITIONER

MR. AYLWARD: Mr. Chief Justice, and may it please the Court:

It's my pleasure to address this Court this afternoon and tell the Court that they might just as well disregard everything that my co-counsel just said. Because, in presenting the issue before this Court, the Eighth Circuit has stated that accessibility is really not too important, that really the Board and the Eighth Circuit is under a mandate from this Court, in its Logan Valley decision, to find that our lots, our free-standing single store lots, are open to the public.

Now, this, they say, is the crucial issue here: is whether or not Logan Valley applies.

I'd like to direct the Court's attention to the decision where they say that the basis of their decision is: "Under the mandate of Logan Plaza, we hold the Company's" --

Q What page are you on?

MR. AYLWARD: On page 84 of the Appendix, Your Honor.

"Under the mandate of Logan Valley Plaza, we hold the Company's non-employee no-solicitation rule to be overly broad as applied to its parking lot."

Also in the brief of the NLRB before the Eighth Circuit Court of Appeals, quite candidly the Board says: "It should be noted at the outset to the contrary/to the company's assertion, neither the trial examiner nor the Board relied on the difficulty of access to the employees here as affording an independent basis for the finding that the Company's rule was unlawfully broad; rather, the examiner noted that while the question of whether the employees are otherwise within reasonable reach by the union has significance, it is not of paramount importance in this case, in the case of parking lots, if the parking lot is quasi-public in character."

So, again, the NLRB, in its brief in opposition to our appearance here, they say: "The only issue here, therefore, is whether the Board's finding that the Company's

parking lots were open to the public to such an extent to render the situation similar to that in Logan Valley is supported by the record."

Therefore, gentlemen, if we're able to prove that accessibility is important, and that there's an alternate means of communicating with these employees, then I think the Board is going to be hard put to say that they have proved inaccessibility, and therefore they're entitled to have their judgment affirmed.

It would be the Board's position, and it is the Board's position, that it makes no difference on alternate means of communication. It makes no difference of accessibility. That, as far as discriminatory application of this rule, it really makes no difference, either.

Yes, Your Honor?

Q Didn't the Board make a finding that there was no other feasible means?

MR. AYLWARD: The Board in its -- it spent four pages on analyzing a decision over in the Seventh Circuit, its own decision in the Solo Cup case; and in that case it relied on the quasi-public aspects of Logan Valley. It only gave one four-line conclusion in our case, when they arrived at the decision, and that was just a general statement that's unsupported by anything in the transcript of the record. But they're saying that --

Q But they did --

MR. AYLWARD: -- they held, and we maintain it's unsupported by the record, that these employees were inaccessible.

Now, it's very important, I think, for this Court to note that it's been the long-standing rule in labor relations, going back to the Republic Aviation case, that certainly employees themselves in certain -- in this situation, and even inside the store, when they're on nonworking time, they have a right to communicate with one another to find out what their rights are as far as whether or not they should join a union-organizing attempt, et cetera.

Now, as Mr. Mattern pointed out, even after our decision here in the Board case, the Board has gone back again to the Babcock & Wilcox case in situations that are open to the public. And, Your Honor, the Tamiment case and the Kutsher's Hotel case, those are open to the public, and there the Board has come back and said it's still Babcock and Wilcox, and not your Logan Valley.

Q Are those cases cited in the briefs?

MR. AYLWARD: Yes, they are.

Now, we would maintain that quite frankly if you're dealing with coming on private property, you probably have a lot better right doing it over under Section 7 than you have over getting into your First Amendment. Because, remember,

under Babcock & Wilcox you have that case; you have the case of a person that's unrelated to that business enterprise coming on your lot solely to solicit union membership, and there, in certain situations where you have the inaccessibility, you don't have another means of communicating, and in that case the Board says: In balancing the rights of the principals involved, the employer, on his Fifth Amendment, and the employee on his Section 7 and his First Amendment rights, in that situation we're going to balance it and say that the employer has to give way, and the union organizers have a right to come on, because these people are inaccessible elsewhere.

Q Well, in fact, Mr. Aylward, didn't the Board do that in this Footnote 2 on page A20 of the petition?

MR. AYLWARD: I don't have the petition readily at hand.

Q Well, I'm looking at the Board's opinion. They have a footnote, Footnote 2. Do you have the Board's opinion there? I have the petition.

MR. AYLWARD: In the petition.

Q Yes.

MR. AYLWARD: What page, Your Honor?

Q At page A20.

MR. AYLWARD: A20. Footnote 2, "In finding this rule is undvly broad"?

Q Yes.

MR. AYLWARD: "... took into consideration .. that there were no reasonable means." Yes, Your Honor, they commented on this, and what they're relying on --

Q What I'm really getting at is: didn't they find that this was really so within Babcock & Wilcox, in that footnote at least?

MR. AYLWARD: In this footnote, yes, Your Honor, I think that's true.

Q Then, why, in heaven's name, are they applying Logan Valley in this case?

MR. AYLWARD: Well, that's what we -- what we're here for, because we don't think that -- we think that really if they're going to rely on anything they should rely on Babcock & Wilcox. They don't have to go --

Q It's not whether they have to, but, as I understand -- well, I should ask them, I guess, when they get up.

MR. AYLWARD: Yes, Your Honor. I agree. I think the proper precedent here is the Babcock & Wilcox case, and certainly they should not be relying on your Logan Valley. I don't find anything wrong with Logan Valley situation, but I might --

Q Well, if this were presented only as a Babcock case, then what would your position be?

MR. AYLWARD: The position is, I think we want it. Because I think under Babcock & Wilcox these people have to come on, and they have the burden of proof; certainly we don't. We shouldn't be the ones to bring out in the argument: "Did you try house calls?" et cetera; I think the burden of proof is on them to show it.

And I think it's --

Q But you would be faced with that finding?

MR. AYLWARD: Yes, that's right. We would have --

Q Wouldn't that present a Universal Camera problem for you, in that --

MR. AYLWARD: I'm not familiar with that case, Your Honor.

Q Universal Camera? Surely you are.

MR. AYLWARD: Which is that one?

Q It's on the scope of review of a Board finding in appeals.

MR. AYLWARD: Oh, yes, Your Honor, I think that that would be a problem. I think that's a problem here, if they would rely on that doctrine --

Q That isn't the basis on which this order was upheld?

MR. AYLWARD: No. The order was upheld on the --

Q It was upheld on Logan Valley.

MR. AYLWARD: On Logan Valley; that's right, Your

Honor.

And we maintain that that's a misapplication on Logan Valley.

Q The significance of relying on Logan Valley, I take it, is that if it's public enough, if it takes -- if it's -- if you can fairly say that the facility is -- must be treated as part of the government, it's subject to the First Amendment?

MR. AYLWARD: Yes, Your Honor. It's kind of a stretch of the imagination. What the equation would be, the Court here relied on Marsh vs. Alabama, and which I think it clearly should have. And they said Chickasaw-Mobile suburb was equivalent to a town. And where else could you find the people in the town but on the public sidewalks out in front of the store?

They then drew that equation to the Logan Valley situation, and then they compared all the physical attributes --

Q Let's assume this case had arisen in the parking lot of the shopping center involved in Logan Valley.

MR. AYLWARD: Yes, Your Honor.

Q There wouldn't be any question about -- you wouldn't even reach a Babcock & Wilcox situation, would you?

MR. AYLWARD: Well, I think it's a --

Q The union would be there exercising free speech rights like anybody else.

MR. AYLWARD: Well, I think really it doesn't really matter what we call it, whether we call it First Amendment rights or we call it Section 7 rights, I think what you're going to wind up in both situations is what you wound up in in Logan Valley, is whether or not those pickets could reasonably communicate their message elsewhere and to the persons to whom they were directing it. And in that case you said, Well, they were directing it to the patrons of Weis Market, and where else could you find the patrons of Weis Market than right in front of the marketplace?

And the Court -- Justice Marshall went to the extent then, after he had found that, and said: Now, let's take where else could they be; could they go out onto the berms of the highway and he ably pointed out that holding up the sign as the cars were going by at 35 miles an hour, certainly that's not a reasonable alternative means of communication. So he found the only thing he could find, and that is the proper place and the only place where that message could be communicated is right in front of Weis Market.

Now, you take our situation, where you have the union organizers coming on and soliciting membership in the union, well, it's my opinion that we've proven that they don't have the right to come on our lot because they don't have to. They have other ways of communicating it.

So, too, as you looked at the berms in Logan Valley,

look at the house calls, the meeting halls, the telephone; the fact that these people had a list of our employees 80 percent complete, with names, addresses, telephone numbers, and job descriptions, found, really, through a paid organizer that we put on our payroll, that was getting $150 a week, also being paid by the union during this time.

Q Did they have that --

MR. AYLWARD: He went on our payroll specifically for that purpose.

Q Did they have that list when they first started?

MR. AYLWARD: I beg your pardon, Your Honor?

Q Did they have that list when they first started?

MR. AYLWARD: Yes, Your Honor, I think that these people, the paid insider was able to get other people to call in, and I think the testimony in the case is that this list had been built up so that at the time that these stores became open, they had the list.

Q My question was, when they first started talking to the employees in the parking lot, did they have this list?

MR. AYLWARD: There's no evidence one way or another in the transcript.

Q Well, how could they have made house calls without the list?

MR. AYLWARD: Well, that's the point, because they

had to have it. Their own testimony, brought out by Mr. Mattern, was that they did have the list in order to make the house calls.

Q I understood him to say that was way late in the game.

MR. AYLWARD: Two months later. There was no testimony in the record of when the list was -- the list was being formulated over this period of time.

Now, if we're going to look at Logan Valley, let's look to see what the Court distinguished in Logan Valley. Now, in Logan Valley, you had a large complex of Sears and 16 other stores on a single privately owned tract of land. Central's case, we own our own parking lot, and we're the only store on that parking lot.

The perimeter of Logan Valley was 1.1 miles. Now, there is no testimony in the record how many acres this is, but if we take the Lloyd vs. Tanner case that comes after ours here, in theirs it was 1.5 mile perimeter, and that was about 50 acres. So I would assume that Logan Valley must be about 40 acres. Ours is approximately five acres, on both lots.

There's a system of sidewalks in Logan Valley Plaza. In our case there are no sidewalks. There was a system of roadways. In our case there are no roadways.

The parking lots on Logan Valley are commonly shared by all the tenants; and I think, as Mr. Mattern pointed out,

ours are not commonly shared.

The public was unrestricted on Logan Valley. There's no testimony in there, as far as I can determine, that any one was excluded from those lots. And yet replete in our evidence is the fact that we have consistently controlled our parking lots for our customers.

Q Well, the --

MR. AYLWARD: Yes, sir?

Q -- the trouble is that the trial examiner found just the contrary.

MR. AYLWARD: Yes, but he found that, Your Honor, in our contention, not based upon any evidence in the record.

Q Beg pardon?

MR. AYLWARD: He found that on no evidence in the record, and that's our contention. Judge Gibson says that he also found that we discriminatorily applied this no-solicitation rule, and Judge Gibson in the Eighth Circuit said that this is taken from thin air and is devoid of fact.

Now, the other aspect that was found in Logan Valley, that I think is extremely important is that that was the regular shopping center of the community.

Q Yes. Was the parking lot here posted or --

MR. AYLWARD: No, Your Honor. In fact, in --

Q Did the public use it generally?

MR. AYLWARD: No, I think, as Mr. Mattern says, it

was supposed to be used strictly by our customers and by our employees.

Q I'm not saying what is supposed to be done, but whether it was actually in fact?

MR. AYLWARD: Yes. The only evidence in the record is the fact that we did control the lot, that no one came there -- there is no evidence of anybody else on those parking lots other than our customers and employees.

Q Did you put people off if they weren't?

MR. AYLWARD: Yes. The record is replete where we have everyone that's come on there for non-related business to our type of business, a customer, then we've excluded him, Your Honor.

Now, I think it's very important that the Logan Valley situation was one where it was classified as the regular shopping center for the community. Well, certainly our hardware store parking lot and our hardware store can't be classified as a regular shopping center of the community, where you have to go on these lots, otherwise where are you going to find the people.

The definition, I think, in Logan Valley, given so ably by Justice Marshall, was a suburban shopping center typically is a cluster of individual retail units on a single large privately owned tract.

Well, certainly, if Justice Black found difficulty

in equating the sidewalk in Marsh vs. Alabama with the regular shopping center aspects of Logan Valley, imagine his difficulty if he were here today trying to equate Marsh vs. Alabama with our single-store parking lot, hardware store.

MR. CHIEF JUSTICE BURGER: You're now coming into your rebuttal time.

Q But there are other stores in the center, are there not?

MR. AYLWARD: Not on our lot. And, Your Honor, we don't classify it as a center. As Mr. Mattern said, over in the East Store situation we had a fenced-in car wash. Certainly if they had a six-foot high fence, then they're not coming onto our parking lot; it separates it.

The one thing that Mr. Mattern did leave out is: in addition to the service station on the corner being separated by this six to eight-foot ditch, there's also a curbline that we put in there some six to eight inches high, separating them from it. So that's all you have on the East Store parking lot entirely.

I think Mr. Mattern also covered the physical aspects of the West Store.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Come.

ORAL ARGUMENT OF NORTON J. COMF, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. COMF: Mr. Chief Justice, and may it please the Court:

The prior decision --

Q If counsel is right in answer to my question, this is the first case in a long, long time from the Labor Board where there is no evidence at all to support its findings.

MR. COME: I think that counsel is in error, because the trial examiner,whose findings were adopted by the Board, found on the basis of the facts in the record, some of which I will allude to, that the situation is not exactly as my colleague has depicted it.

Q As to at least part of it, Judge Gibson in the Eighth Circuit thought there was an absence of evidence on some of the crucial points, didn't he?

MR. COME: Well, Judge Gibson thought that there was an absence of evidence to sustain the Board's finding that there were -- that you couldn't reach these people by alternative channels; that is, to satisfy the Babcock test.

There are really alternative bases for the Board's finding in this case. I think the trial examiner's report shows that more clearly than the Board's decision does, because the Board largely just summarily affirmed the trial

examiner. But --

Q Well, am I right that in Footnote 2 at page 20 is based on a Babcock finding?

MR. COME: That is with respect to one leg of the holding in the case. There are really two legs.

Q Well, may I ask this, then, Mr. Come?

MR. COME: Yes, sir.

Q Since you have an enforcement order --

MR. COME: Yes, sir.

Q -- if this is sustainable under Babcock, are you entitled to affirmance without reference to Logan Valley?

MR. COME: Yes. The problem with that is, however, that the Eighth Circuit didn't reach the Babcock end of it, as I read their opinion. They sustained this under Logan Valley grounds.

Q So that if we agreed with them on the Logan Valley ground, it ought to go back for them to reconsider it on the Babcock ground?

MR. COME: Unless the Court is persuaded that the facts are so clear, and they are simple enough, so that a remand would not be necessary.

Q Well, in other words, unless we were to settle it?

MR. COME: Yes. Yes, Your Honor.

Q Without waiting -- well, can we do that under

Universal Camera?

MR. COME: Well, a better practice would probably be to remand, if you find it necessary.

Q Well, doesn't Universal Camera actually require us to make a remand?

MR. COME: Well, ordinarily the Court does that. We had a case called Insurance Agents, on the independent contractor issue, where the Court, after finding that the Seventh Circuit had applied an erroneous standard, proceeded to evaluate the evidence and enforce the Board's order.

But -- so that you don't have to reach the Babcock access test if we are right on our first premise that the circumstances here are, in every relevant respect, similar to those in Logan Valley. If they are, we submit, you have an appropriate place for the exercise of the union's organizational activity, and under principles that go back as far as Schneider v. Town of Irvington, the exercise of free expression on an appropriate place cannot be abridged just because it could be carried on elsewhere.

So I'd like to deal with the Logan Valley aspect of the case --

Q Before you go on with that, --

MR. COME: Yes, Your Honor.

Q -- how large a parking lot is this? How many cars approximately?

MR. COME: Right.

Q How many would you say?

MR. COME: Each of the stores is a supermarket type structure, which is about 70,000 square feet, situated on a large expanse of land, the West Store, according to the evidence in the record, is about five acres. The store buildings are located at the rear of the property, and between the store and the street is a large open parking area, about 350 feet wide and 200 to 375 feet deep, with space for 350 cars.

It also has space in here for the employees to park in certain sections of this parking area, and each store has 125 employees; and the evidence shows that the overwhelming majority of them drive to work or car-pool to work. So you've got an awful lot of employee cars that are parked on this parking lot.

The record also shows that the employees, in many cases, eat their lunches on the parking lot during lunch hour, and of course they are at the store during their entire working day.

Now, the property --

Q Mr. Come.

MR. COME: Yes, Your Honor?

Q Did Schneider vs. Irvington deal with private property?

MR. COME: No. That dealt with a municipality, Your Honor. However, I intend to make the jump from that to this situation based upon Logan Valley in a moment.

The property -- the record is perfectly clear on this -- is not enclosed by fences or other physical barriers, nor are the parking lots marked with signs restricting entry. The entrances to both lots are on heavily traveled highways with speed limits of 35 to 40 miles an hour, and the highways do not have sidewalks. There are, however, according to the record, grassy islands or berms in front of the entrance --

Q Well, Mr.Come, --

MR. COME: -- to the East Store.

Q -- isn't the whole purpose of your going into these facts -- or is it? -- to demonstrate that this: because the parking lot is open to the public and because of the facts about the parking lot, the owner of the parking lot must be treated as an official?

MR. COME: No, Your Honor. I think --

Q Well, you're going to have to subject him to the First Amendment; right?

MR. COME: No, Your Honor. I think that --

Q Well, Logan Valley was a First Amendment case, wasn't it?

MR. COME: Logan Valley was a First Amendment case.

Q Does the First Amendment apply to just any

private person?

MR. COME: No. But in the problem under the National Labor Relations Act, with regard to equating, interpreting Section 7, which gives employees the right to organize through their representatives, where that comes into collision with private property, the decisions of this Court have made it clear that what you have to do is to balance --

Q Sure.

MR. COME: -- the property right against the organizational right --

Q This sounds like -- this sounds like the other leg of your argument, the Babcock right.

MR. COME: No, Your Honor, because I submit that Babcock makes it clear that this accommodation must be done with as little dislocation of the one as the other, and that in making the accommodation the facts of the particular use of the property make a difference.

Now, Babcock involved a situation of a parking lot that was not open to the public. It was not fenced, although there was a fenced lot in one --

Q Well, let's assume --

MR. COME: -- of the companion cases --

Q -- let's assume that the parking lot is open to the public. Then what follows?

In terms of Logan Valley and the First Amendment.

Does the First Amendment come into play every time you run into a public -- a parking lot that is so-called open to the public in front of a retail establishment?

Does that retail operator subject himself to the First Amendment?

MR. COME: I don't think that you need to reach the First Amendment problem with respect to the National Labor Relations Act. You might conceivably find that in a parking lot situation, such as we have here, that this accommodation of property rights might not be mandated by the First Amendment --

Q Well, let's --

MR. COME: -- but that, nonetheless, Congress could, in the exercise of its power to regulate commerce --

Q Well, why isn't that Babcock?

Q Of course it is.

MR. COME: It is not Babcock, because, as we read Babcock, Your Honor, --

Q I mean the principle of Babcock is the very balancing test you're talking about.

MR. COME: Yes. However, --

Q Between Section 7 and property rights.

MR. COME: However, --

Q And we don't ever have to get to the First Amendment. Isn't that right?

MR. COME: That is correct.

Q But that isn't what the Eighth Circuit did here, is it?

MR. COME: I think that the Eighth Circuit applied, by analogy, Logan Valley --

Q And the First Amendment.

MR. COME: I don't think so, Your Honor, because they sustained the Board's finding that this was a violation of Section 7. The problem is that Babcock didn't, as we read it, lay down the holding that is to govern every conceivable property organizational right situation; you did not have a case of open property. And the difference, that the openness of the property makes is that, as we read the Court's opinion in Logan Valley, we believe it makes this clear is that when the employer has opened up his property to members of the public, albeit for the purpose of only patronizing the store, and to --

Q Well, it's more than that, because the people who are working there are the people who are involved in this controversy.

MR. COME: That is correct, and that's the point that I'm coming to. That to close it to those members of the public, i.e., the union and its representatives who had a message germane to that store, about its labor conditions and appealing to the employees to join the union, is to create an

invidious discrimination that makes the openness of the property turn upon whether or not the employer agrees with the message that this segment of the public is putting upon it.

Q Well, that's a very statutory Babcock & Wilcox kind of argument, Mr. Come, but is it -- I'll just ask you again: Is the First Amendment relevant to this case or not? Are you relying on the First Amendment to any extent or not?

MR. COME: I am not relying on it directly, Your Honor, no.

Q Well, to any extent, I said. Indirectly, or any other way?

MR. COME: Well, I think that it's indirectly in this picture, in the sense that --

Q How can it be unless the retail establishment operator is equated to a public body?

MR. COME: Well, it is only in this -- to the extent that the right to self-organization and the right to have --

Q Statutory rights.

MR. COME: The statutory right, going back to Thomas v. Collins, it is clear that this comes not only from Section 7 but it also comes from the First Amendment.

Q But that's not vis-a-vis the government, that's vis-a-vis the State; that's Thomas v. Collins, as my brother White says. The First and Fourteenth Amendments don't come into play unless or until there's governmental action that

suppresses free speech.

Q Well, there's governmental action here because somebody has stopped the picketing. Or has refused to stop the picketing.

MR. COME: But I think that for purposes of our position in this case, I do not have to establish that the right of the union organizers to get on this property is mandated by the First Amendment.

Q But to the extent that you rely on Logan Valley, you rely on the First Amendment, do you not?

Do you not?

MR. COME: No. I'm using the principle that Logan Valley established for purposes of the First Amendment by analogy for making a reasonable balance of organizational rights and property rights for purposes of the National Labor Relations Act. This isn't the first time that this Court has done that in a Labor Board context. It did it in Linn v. Plant Guard Workers, involving the question of defamation in a labor dispute.

The Court said that although the First Amendment wasn't controlling here, nonetheless the principles under the First Amendment are relevant by way of analogy, and it's only --

Q Are we to read the Eighth Circuit decision as resting on the argument that you're now making to us?

MR. COME: That is the way I read the Eighth Circuit

opinion, Your Honor, but --

Q Whether I label that Babcock or not, the point is that your insistence is that just balance is what the Eighth Circuit did in enforcing the Board's order and is entitled to affirmance on that ground?

MR. COME: Yes, Your Honor, and I think that --

Q We can forget all about the First Amendment in this case?

MR. COME: I think that -- that you can do so, because all we have to establish here is not a violation of First Amendment but a violation of Section --

Q But, Mr. Come, you've got to establish, at least for me you've got to persuade me; that's what the Eighth Circuit did.

MR. COME: Well, I think -- well. The Eighth Circuit had before it a Board order which was premised on the ground that there was an invasion, a violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer to restrain or interfere with employees in the exercise of their organizational rights.

The Board found that there was -- in promulgating a ban which completely prohibited union organizers from using the parking lot. The company, in imposing that kind of a blanket ban, had violated Section 8(a)(1) of the National Labor Relations Act.

Now, in arriving at that conclusion, the Board, and the trial examiner even more specifically, balanced the detriment to the employees' organizational rights from being deprived from using this parking lot facility as against the impairment of the employer's property interests, and it found, at least on one way of its findings, that since, as in Logan Valley and unlike in Babcock, these were premises that were open to the public. The employer had depreciated his property right, unlike in Babcock, where he had no justifiable claim to a right of privacy because he had opened up the parking lot, a parking lot by its nature is full of commotion and movement, and that there was no showing that the presence of the organizers there was disrupting the normal operation of the employer's business.

If there were instances of such disruption, the way to check that is to check the individual instances, not to completely ban the activity and the company did file a charge with respect to that conduct with the Board's General Counsel, who found insufficient evidence to issue -- to warrant the issuance of a complaint on it. You have a situation then of property that had been opened up, where the conduct of the union organization did not disrupt the normal operation of the business.

Balancing that against the inconvenience to the union of being forced to conduct this activity elsewhere, because, as

Mr. Justice Marshall pointed out, until they got the names and home addresses they could not really effectively organize, and the only way they could get that was by access to the parking lot;once they were denied access to that --

Q Well, they had a spy on the payroll of the company, didn't they?

MR. COME: They had an employee who was also a union organizer.

Q Getting full-time pay from the union and getting full-time pay from the company, and the company didn't know that he was a union employee. Now, maybe "spy" is an overworked word, but they did have an agent, a union, a paid union agent in the employ of the company?

MR. COME: That is correct. However, the testimony of the union organizer, which was credited by the examiner, was that the bulk of the names and addresses came from contacts on the parking lot.

Q Mr. Come, --

MR. COME: Yes, sir.

Q -- you said that the parking lot, by its very nature, was a place of commotion and Movement.

MR. COME: Yes.

Q But you also seem to suggest that having nine or ten union organizers on the parking lot was not an interference with the owner's use of his private property. Then

you suggested that you should just stop the individual cases of interference. Now, what do you mean? Hire a couple of security officers to go out and monitor the business agents of the union?

MR. COME: Well, I suppose that that could be one way of doing it.

Q How else would he do it? It couldn't -- he wouldn't --

MR. COME: Well, he could -- he could -- he could go to a State Court and get, attempt to get an injunction if he found that there was activity there that was interfering with his operation. The point is that he wasn't able to make --

Q Why should he have to do that on a tract of private property that's maintained for his customers?

MR. COME: Well, the question is whether or not, by opening it up to the public he is not narrowing his property interest to the point where he cannot, at least, impose a blanket ban --

Q And you make that -- you raise that question under Logan Valley or under Babcock?

I'm still not sure, in your colloquy with Mr. Justice White and Mr. Justice Brennan, whether you do or do not rely on the First Amendment. At one time I thought you did, and then later it seemed that you had abandoned the First Amendment.

MR. COME: Well, I'm relying on Section 7 of the National Labor Relations Act, becuase I think that that is what we have in this case. I think that whether Logan Valley would have required this result in a First Amendment, on these premises, is another question, which you may have to reach in the next case. I don't think that you have it here.

Q But, Mr. Come, just to make clear what the Board's position is with respect to parking lots, I take it from what the trial examiner said and whatever he said was adopted by the --

MR. COME: Board.

Q -- by the Board, he says in Footnote 15 on page 23 of the record: "However, whether or not respondent's stores are in shopping centers is immaterial, inasmuch as the Board, in Price-Less Discount Foods, Inc., equated a single store parking lot to a shopping center parking lot."

So the Board's position in this case and others is that whenever you have a parking lot that is serving a retail store, even though it's just a single store, single parking lot, that this -- that the Babcock rule does not apply?

Q For the purpose of a labor dispute.

Q Yes.

MR. COME: Yes, Your Honor.

Q That is the Board's position?

MR. COME: At least where --

Q In that parking lot, then you have a different situation than Babcock?

MR. COME: That is correct. At least where the dimensions of the parking lot are such that it creates a substantial buffer zone between the store and the nearest, closest public place where you could appeal to the audience that you're appealing to.

Q Yes. Well, of course --

MR. COME: Now, some of these retail stores in the downtown part of town may front on a public sidewalk, and the employees may come through that --

Q Right.

MR. COME: -- door; in that case it may be possible to reach them adequately without the necessity for getting onto the parking lot. So I don't want to state my rule boardly --

Q Yes.

MR. COME: -- that I'm foreclosing what the Board would do in that kind of a case.

Q Well, you just simply have a different factor to put in the balance when you have a public parking lot than when you had just isolated parking lots at a plant?

MR. COME: That is correct.

Q And it makes a different balance between inaccessibility and --

MR. COME: Well, it all --

Q -- and burden on the property owner?

MR. COME: That is correct. And it also raises the question as to whether you have to really bear down so strongly on inaccessibility.

Q That's right.

MR. COME: Yes, sir.

Q Well, I suppose no one would object if the employee crossed the parking lot in order to go to work?

MR. COME: No. He does that. He does that. He even parks his car on the parking lot.

Q If he comes reverently and obediently and submissively, but if he comes in protest then he can't do it?

MR. COME: What is it, Your Honor. I think that sums it up --

Q Are these employees who were trying to come on this parking lot, or are they strangers?

MR. COME: These are outside organizers.

Q Yes. So that the employees crossing that lot are using the lot for the precise purpose that the employer put it there, is he not?

MR. COME: The employee is using it to go to work --

Q You told us that about, more or less, 100 parking spaces were set aside by the employer for the use of the employees.

MR. COME: That is correct. And the question is, however, that on one leg of the company's argument here, as I understand it, it would have been all right here had the union put up a picket line that appealed to the consuming public and urged them not to patronize this store because of its non-union condition. This is one of the points that they say distinguished this case from Logan Valley.

Well, I submit that that just turns upside-down the priorities in this area, because, first of all, the employees are no second-class citizens to this store, they have more substantial contacts with the store than the --

Q Well, if these had been employees, you'd have Republic Aviation, and you wouldn't even be here.

Q That's right.

MR. COME: No. But, in Logan Valley, Your Honor, --

Q These are non-employees, are they not?

MR. COME: In Logan Valley you didn't have employees, either. You had stranger organizers, and they were on the parking lot and they were appealing to members of the public.

Q And that was a constitutional decision, and it had to rest upon a finding that the people who suppressed that demonstration was the equivalent of government, or else it could not have been a constitutional decision?

MR. COME: No, Your Honor, I do not --

Q Well, have you read the First and Fourteenth

Amendments here?

MR. COME: Yes, and I know that that requires State --

Q Well, so far as Section 7 goes, it wouldn't make any difference whether it was an employee or employees' representative, would it?

MR. COME: Babcock does make a distinction with respect to closed premises. In Republic --

Q Republic got away from Babcock and Logan Plaza, didn't it?

MR. COME: Well, I so read Logan Plaza, but that of course is the problem that we have here.

Q Although I must say that Babcock was not mentioned in any one of these four or five opinions that was written.

MR. COME: However, it was certainly called to this Court's attention, and it was distinguished on the very grounds that I am now urging, by the prevailing parties in Logan Valley.

But I think the short answer to it is the reason why it wasn't mentioned, was the one that Justice White, at least, propounded, that a different balance is called for where you have open property than when you have the kind of closed property here.

Q Can you really spell this out in what either the trial examiner or the Board said?

MR. COME: I think you can from the --

Q Well, it isn't quite articulated in this way?

MR. COME: I think that the Trial Examiner comes very, very close to articulating it the way I do.

Q But then he keeps floating over into Logan Valley.

MR. COME: Well, I think he has two sections of his report, one in which he deals with the Babcock point and the other with the second ground.

Q Mr. Come, --

MR. COME: Yes, Your Honor?

Q -- go ahead with Justice Blackmun.

Q What is the -- if you prevail here, what is the practical result? Are you going to drive Central Hardware to putting a big fence up around a part of its lot and saying to its employees: This is where you park?

Isn't this the pragmatic aspect of your case?

MR. COME: I don't think so, because I think that if they were to do that the union organizers would still have the right to appear, try to reach the employees on the public portions of the property, because I think that you would still be faced with the problem of the employer who has opened up his property to those members of the public that he prefers and has closed it to another segment of the public which has a message that is equally as germane to the purpose of the business.

I don't think --

Q But they wouldn't have the right to go into the closed portion, would they?

MR. COME: They would not have the right to go into the closed portion, but if he does not permit them into the closed portion, I submit that the result would be that he would have to be subjected to the activity on the open portion.

Q Mr. Come, --

MR. COME: He could minimize the amount of disruption -- I don't want to use that word; but dislocation, by how close he would permit the union to reach the employees. We have that problem in the secondary boycott areas.

Q Mr. Come, after Justice Blackmun's fence is up around the parking lot for the employees, with appropriate signs, suppose then the owner builds a fence around the entire parking area and puts up signs, "For customers only; non-customers and others will be towed away at the expense of the owner of the car. Parking lot exclusively for customers of this store."

Now, what kind of a case do you have then?

Do you think union organizers specifically can go in in the face of that, and disrupt, as you put it, or dislocate the parking lot?

MR. COME: Well, I think that the word "disruption" is not applicable to what you're saying.

Q Well, let's say we have nine or ten of them circulating around; whatever that produces.

MR. COME: I might point out, Your Honor, that there were six to thirteen in Logan Valley, and there is no showing in the record here that these nine who were only there for part of the time were ever present all at the same time on the parking lot. I mean there were nine in the area, but the record does not show that they were all present there at the same time.

Q Well, what would these signs do? What do the signs and the fence do to the Logan Valley aspect of the case? Or the Babcock?

MR. COME: Well, I think in terms of the argument that I have been making, I don't think that that would alter the fundamental balance. However, that is not this case, and I don't want to speak for the Board on that, because it has not had such a situation.

But I think that the logic of at least the argument that I have been making, that would not alter the situation because you would still have the same disparity in treatment as to what members of the public you are going -- with a purpose related to the functioning of the store. And I emphasize that, because we don't have here something that is unrelated to the operation.

Q Well, are you suggesting that the owner of the

store can't discriminate between customers and non-customers?

MR. COME: Not where the non-customers have a purpose germane to the operation of the store, as we have here.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Come.

Mr. Dunau.

We've invaded your time a little bit, and so we'll allow you the full amount that you had reserved, and enlarge your friend's time accordingly.

ORAL ARGUMENT OF BERNARD DUNAU, ESQ.,

ON BEHALF OF THE INTERVENOR

MR. DUNAU: Thank you, sir.

Mr. Chief Justice, and may it please the Court:

I think it is necessary to be blunt; and to be blunt, the only way the Court of Appeals can be reversed in this case is for this Court to repudiate Logan Valley.

What do we have here? Instead of having, as we had in Logan Valley, employees picketing -- non-employees picketing at the entrance to the store, here we had them on the parking lot asking, talking to employees, seeking to get them to join the union.

Suppose these non-employee union representatives in this case had done exactly what the union representatives had done in Logan Valley? Namely, they had picketed at the entrance to the store, with a sign saying, "Central Hardware is non-union. These employees are not receiving union wages

or other benefits. Retail Clerks Union, Local 727."

That would be exactly Logan Valley. In Logan Valley the distances from the entrance to the parking lot to the store were 350 feet to four to five hundred feet. Here the distances from the entrance to the parking lot to the entrance to the store is 425 feet to 475 feet at one store; 260 feet to 1,000 feet at another store.

Now, what are we to make of this? The blunting of the right to communicate is identical. You can't get any closer to that entrance, whether it's a single store parking lot or a shopping center parking lot.

Are we to say, therefore, that if a single store owner circles himself with a parking lot, that's okay; but if that single store man should share premises in a shopping center and a group of them encircle themselves within a parking lot they cannot bar communication?

Q Well, you say, then, that it is the First Amendment that requires the permission of this union activity here?

MR. DUNAU: Sir, there are two answers to that. The First Amendment is incorporated in Section 7. Everything that the First Amendment protects is protected by Section 7, with this enhanced and important addition: The First Amendment can reach only State action; Section 7 reaches employer action. But the substance of what Section 7 protects is identical with

what the First Amendment protects.

Q Well, it's no co-extensive. Even apart from governmental and private action, it doesn't, Section 7 doesn't get into the area of purported obscenity, for example, or --

MR. DUNAU: But every area where free speech is relative to a labor dispute --

Q Yes.

MR. DUNAU: -- is co-extensive; and that's all we have to have.

Q But, with the very big difference you've already mentioned, that the First and Fourteenth Amendment protect against governmental action, and Section 7 is a statutory right as against an employer.

MR. DUNAU: Right. But if Section 7 does, as we maintain, incorporate the First Amendment with respect to what an employer may or may not do, then Section 7 reaches private action by virtue of Congress saying, in Section 7, we adopt the First Amendment rights insofar as they relate to labor disputes.

Secondly, it would be totally artificial to divide this case based on what Section 7 allows and disregard what the First Amendment requires. In this case, suppose this happens: instead of the union representative walking off the parking lot, he says, "I'm going to stay here; drag me off", and he gets dragged off by the police. And in this case there

was at least one instance where police action was required to remove the man. Here you have State action.

Suppose, instead of coming to the Labor Board with its complaint, suppose this storekeeper had sought an injunction on the same grounds: "These people are invading my parking lot"; got a conviction, the First Amendment would be in this case.

Now, what are we to have? A rule which says --

Q Am I getting messed up with semantics? You keep saying First Amendment rights, do you mean freedom of speech?

MR. DUNAU: That's exactly what I mean.

Q Well, why don't you say freedom of speech?

MR. DUNAU: I'm sorry, sir; that's what I should say because the element of what Section 7 protects here is self-organization which means speaking, talking to people, and that's what Section 7 protects. That's what the First Amendment protects. You cannot have one rule on what's going to happen if you're in a State court defending against a conviction or defending against an injunction action, and have another rule when the case is before the Labor Board.

Q Mr. Dunau, --

MR. DUNAU: Yes, sir.

Q -- to go back to your illustration about introducing State action by virtue of having the police eject

the man. Suppose the owner of the store goes out and personally ejects him? Then you haven't any State action, I suppose you would agree?

MR. DUNAU: That's correct.

Q Then what do you have?

MR. DUNAU: Then you have Section 7, which incorporates the free speech protections of the First Amendment. It is basic to Section 7. What the Congress was doing in Section 7 was to say to employers: You cannot abridge the right to self-organization. What is self-organization? It's talking, it's speaking, it's assembling.

So we have Congress saying that you, Mr. Private Employer, will not abridge free speech when it is exercised by union representatives, and we declare this to be the national rule.

Q But if you rest that on free speech, you know, --

MR. DUNAU: Yes, sir.

Q -- you then could have the nine or thirteen union organizers enter the store and move all around, couldn't you?

MR. DUNAU: No, sir.

Q Well, is the First Amendment only an outdoor activity?

MR. DUNAU: Sir?

Q Or is it inside, too?

MR. DUNAU: The First Amendment applies wherever it is appropriate to exercise the right of free speech. In Logan Valley it would not have been appropriate to enter into the inside of the store and picket, and when this Court decided Logan Valley, it wasn't deciding that you could enter the store and handbill it and picket; what it said was, given the exterior of the store and the consonance of that exterior of the store with picketing and handbilling, you cannot prohibit it under the First Amendment. If you cannot prohibit it under the First Amendment, with respect to State action, you cannot prohibit it under Section 7 with respect to employer action.

Sometimes it seems to me we need to get right back to the basics, the basics of this statute, as we've quoted on page 23 of our brief, and this was the Report of the Senate preceding the enactment of the Wagner Act:

"The right of self-organization ... is a complex whole, embracing the various elements of meetings, speeches, peaceful picketing, the printing and distribution of pamphlets, news and argument, all of which, however, are traceable to the fundamental rights of expression and assembly. So compounded, the right of self-organization and collective bargaining is fundamental, being one phase of the process of free association essential to the democratic way of life."

That is what Section 7 did. That is why the First Amendment is relevant, because Congress said: We are adopting

the First Amendment standard in Section 7 and the advance we make is to say that under the First Amendment it protects against State action, under Section 7, which adopts the substance of the First Amendment, we protect against private employer action.

Now, --

Q So you're saying that the employer may do no more to restrict speech than might the government, and that whatever the government --

MR. DUNAU: Yes, sir.

Q -- can't do, the employer can't do?

MR. DUNAU: Exactly, sir, yes, sir. That by virtue of Section 7 we are saying that what a policeman is forbidden to do in throwing a union representative off a parking lot, an employer is forbidden to do. What a State is forbidden to do by way of enjoining free speech on a parking lot, an employer is forbidden to do via Section 7. That is precisely the position we take.

Q Then this should lead you to say that Babcock was wrong.

MR. DUNAU: No, sir. It should not lead me to say that Babcock is wrong, because Logan Valley rests -- the premise of Logan Valley is the openness of the property. In Babcock & Wilcox you were not dealing with open property. There is that vital distinction between whether the property is

open to the public and therefore an appropriate place in which to express First Amendment rights, to talk, as against where the property is closed and therefore may not be an appropriate place.

Q If you rely on Section 7, I don't see what difference it makes whether it's open or closed, from the point of view of your argument under Section 7.

MR. DUNAU: Well, if I may say so, Your Honor, there has been a suggestion in this case, and it stems quite properly from Babcock and Wilcox, that there are somehow less rights under Section 7 when they're exercised by non-employees than where they're exercised by employees. That, too, is fundamentally in conflict with what Section 7 and the National Labor Relations Act are about.

Q Well, the difficulty is the Board made that contention in Babcock and Wilcox --

Q And lost.

Q -- and lost. Unanimously.

MR. DUNAU: But it made it in a case in which the property was closed. It did not make it in a case in which the property was open.

Q Well, according to Section 7, what difference does it make, if your argument is correct?

MR. DUNAU: All right, sir.

Q The employer has no more right than government

has to --

MR. DUNAU: Suppose we take the Babcock and Wilcox standard and ignore the distinction between openness and closed. If you have open property, Babcock and Wilcox says that part of what you may not do, you may not discriminate. Now, if you have open property and admit every element of that public which has a message, wants to patronize that store, which wants to make that store make a profit, shoppers, deliverymen, everybody under the sun can come in; but you close that open property to the union representative who's got a message which the employer doesn't like. That is discrimination, that is inherent discrimination.

Q Well, is the store any less open than the parking lot?

MR. DUNAU: The inside of the store?

Q Yes. Yes.

MR. DUNAU: The inside of the store --

Q Don't you invite the same people in?

MR. DUNAU: Sir? There is a functional difference between what you can do inside a store and what you can do outside a store. It's based on the use to which the property is put.

Q Well, who says? Does the Constitution or some statute say that there's a functional difference between the parking lot and the store?

MR. DUNAU: I think this Court will say it whenever it gets a First Amendment case in which an employee tries to picket inside the store, because the First Amendment doesn't speak except as this Court speaks for it.

Now, it has been perfectly clear under Section 7 that there is a distinction between inside and outside the store, a distinction which applies with respect to employees themselves. Because it is a store. The Board says that nobody, no employee -- this has nothing to do with non-employees -- no employee can engage in union solicitation on the selling area of the floor, because it conduces to disruption.

Now --

Q Didn't we have a library case that dealt with First Amendment rights inside a library?

MR. DUNAU: You did, Your Honor, but --

Q Wasn't that based on what could be done?

MR. DUNAU: All it does is bring back a spark as to whether you could or could not eject someone from the library, but I just don't remember it well enough.

Q No, but I thought we made a distinction there between exercising First Amendment rights inside, which would be parallel to what you're talking about, wouldn't it? Someone inside the store.

MR. DUNAU: Inside is certainly not the same thing as outside. A New Jersey Court had no problem making a

distinction with respect to the activities of students and teachers, saying what you can do on the outside is not the same thing as what you can do on the inside; because of the difference to which the property is put.

And it seems to us in this case what you get down to saying is that solicition on that parking lot inconsistent with the operation of a parking lot. Well, it is not. No one is suggesting you can inundate that parking lot with fifty organizers. That's congesting it. No one is saying you cannot require an identification of non-employees coming on that parking lot.

All we are saying is you cannot blanketly prohibit non-employees on a parking lot otherwise open. The only -- the two other elements which are relevant to property. Use is not being disrupted. A right of privacy. Well, I can't imagine anything less private than a parking lot.

I think we are capable of drawing distinctions between one's living room and a parking lot; and what you have left, therefore, is the man's title to his property, what he can do simply because he owns it, that gets back to naked title; I had thought that that was exactly what this Court said in Logan Valley was not sufficient on the part of the storekeeper when, on the other side, you had suppression of speech. And what you have here is suppression of speech.

MR. CHIEF JUSTICE BURGER: I think you are well over

your time now, Mr. Dunau.

MR. DUNAU: All right, sir.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Mattern? Mr. Aylward.

REBUTTAL ARGUMENT OF RONALD L. AYLWARD, ESQ.,

ON BEHALF OF THE PETITIONER

MR. AYLWARD: Mr. Chief Justice, and may it please the Court:

I think the crucial difference here, when you talk about First Amendment, and you talk about Section 7, I think when you look at Logan Valley and you look at Babcock and Wilcox, you've got the same issue, because what did Justice Marshall have to look to finally, and that is whether or not the message that could be given in Logan Valley by this picket could effectively be given elsewhere. And of course he said it couldn't be effectively given. So, therefore, these people had a First Amendment right.

And Justice White, I think you very correctly stated in the last paragraph of the Logan Valley decision that as far as you know the National Labor Relations policy does not require this free speech right, that they have it under Section 7 if they have it at all.

And we get over under Section 7, and we've got the Babcock and Wilcox case; and the same final issue has to be asked there, and that final question is: Can that message be

given elsewhere other than coming on this employer's property? And, gentlemen, I submit that Judge Gibson, on page 88, 89 and 90 of our Appendix, was the only one that found the facts. And he says there are no substantial evidence in the record showing that the employees were inaccessible or that reasonable attempts to communicate with them were ineffective.

And he goes on to say, the second element of Babcock and Wilcox, there is no evidence of any non-employee solicitation being permitted or sanctioned by the company. This finding is drawn from thin air, completely devoid of factual substantiation.

Now, gentlemen, I think the Court in Logan Valley went to great lengths to prove the governmental aspect of that Logan Valley Shopping Center. I think it's very important that you saw fit to devote quite a bit of your opinion to comparing the physical attributes of that shopping center. And the only thing you didn't find similar to the Marsh vs. Alabama, the suburb of Mobile, was the fact that there in Marsh the people that owned the town also owned the residences; whereas you didn't find it in Logan Valley.

So if we are to accept the premise that the Board would have us now find, you don't have to worry about these physical characteristics any more. All you have to find is something like a vague term for open, that you've invited the public to come on your lots. So you don't have to have all

these physical characteristics any longer.

Q I take it you don't fundamentally disagree with Mr. Dunau that Section 7 applies the First Amendment to the private employer?

MR. AYLWARD: No, I don't have any problem with that. I think that what the board does --

Q In which event Logan Valley is really rather irrelevant, isn't it?

MR. AYLWARD: Yes, it is, Your Honor.

Even though it's the same question you had to ask in both situations.

Q And it's really just an excuse to -- it's really just sort of some background to make a different rule in this kind of a case than in the Babcock kind of a case.

MR. AYLWARD: Well, I think we've been unjustly put upon when they say we try to draw the difference of a picket having a superior right than a union organizer coming on. We don't draw that difference.

All we're saying is, if that guy wants to come on and sell membership in his union, and he can do it by other than coming in our lot, then he should do it, without violating what our rights are.

Q So it's just a time and place problem?

MR. AYLWARD: There's a time and place. And that's what Babcock says. Babcock says you look at the residences of

the employees and you look at the position of the employer. And as long as you can find alternate means and as long as you can find the no-solicitation rule was actively enforced --

Q Well, Section 7 -- so you apparently agree that Section 7 does give employees and organizers and unions some approach to a place like this that non-labor-related people wouldn't have, say there was picketing here by some other group?

MR. AYLWARD: Absolutely, because I think you have a statute. They come on hereunder a statutory right, and under the statute the Board has balance, and this Court, in looking over the broad shoulder, you say, All right, you've done right here, you interpreted the Act properly.

Q So this isn't a case of anybody claiming that this store owner is subject to the First Amendment. This is a case he's subject to Section 7?

MR. AYLWARD: Yes. That's what we're charged with. We're charged with not violating the First Amendment, we're charged with violating Section 7. And we say under that violation, whether it be to apply Logan Valley, or you apply Babcock and Wilcox, you've got to look and ask the question: Where could these people get the message? And what is the message? The message is: Come on and join my union.

Now, certainly if they could go to their homes and sell it, then the employees vnder all the rules can come on

the employer's property and talk among themselves and say, "We think it would be a good idea to join this union; what do you think about it?" And that's all that's to be accomplished under our labor laws, is for these employees to get the message.

And I submit that they can get this message without coming on our parking lots in this situation. I suggest that Judge Gibson says there is no evidence of our lots being the only place where these union organizers can come on and sell membership.

Now, I think you have a very important -- I think there's a lot of people looking at this case, as is obvious from all the amicus briefs that have been filed in it, because I think if you do find that our lots for some reason are open to the public, then you've got thousands and thousands of other free-standing stores that have, that provide parking in front of their stores for customers, you'll find that these lots are now going to be embarked on and deluged by all the union organizers and who else, because you will have indicated that these are open to the public.

Now, as far as a buffer zone being created, et cetera, I don't think that that's important, because I think that --

Q I thought Mr. Come indicated that if you did fence it in and put all these restricted signs up, the situation might be different.

MR. AYLWARD: I don't know why, because I don't see how he can overcome the question: Aren't these people available -- can't you get your message to them without coming on the lot, whether there be a fence there or what-have-you?

And also as far as Mr. Dunau's situation in saying that if you hold for us in this case, for Central, you have to reverse Logan Valley. I don't think that. I think Logan Valley stands for one proposition, and Justice Marshall said, All I am saying here in this case, in Logan Valley, that we've got physical characteristics similar to Marsh vs. Alabama. We've got the fact that it's open to the public, nobody is being restricted from this shopping center. We've got a message to be conveyed, and that is that Weis Market doesn't pay good union wages. And we've got whether or not there's alternate means available without coming in front of the store. And that's all he found in Logan Valley. And I think that's good law.

Now, I think that --

Q Well, one thing that's true in Logan Valley and that is that all of the opinions didn't -- none of them even mentioned Babcock.

MR. AYLWARD: Yes, and probably so, because I think the --

Q That's one thing in common; right?

MR. AYLWARD: Yes, that's right. I think, Judge, you

went to great lengths in your first footnote in Logan Valley, so we're not making any decision under the NLRA. Justice Black, in the same way in his dissent, he says: Neither the majority nor I reach any decision under the NLRA.

And Justice White -- I'm sorry he left, but I think he hit the thing right on the head when he said: There's no labor rights involved.

And why were you so concerned about labor rights if Babcock wasn't even mentioned? I submit because the Board submitted an amicus brief in your Logan Valley, and it might be worthwhile digging it out and looking at it.

Now, to what --

Q But we're not sure yet whether this is a Logan Valley case or a Babcock case, are we?

MR. AYLWARD: Well, I don't think it really makes any difference. I think the sole criteria in both cases is whether you can get the message across somewhere else.

Q Well, --

MR. AYLWARD: In fact, that just goes back to what --

Q Well, the whole point, of course, in Logan Valley, in showing the public characteristics and attributes of that shopping center, was to make it the equivalent of the company town in Marsh vs. Alabama, which in turn had decided that a company town, just like any conventional municipal town, therefore is a State within the Fourteenth Amendment; and

the Fourteenth Amendment in turn incorporates the free speech protections of the First Amendment. And since it was a constitutional decision, it was the basic key and foundation of the Logan Valley decision to show that it was the equivalent of the city itself.

MR. AYLWARD: Exactly, Your Honor.

Q And it has really nothing to do with Section 7.

MR. AYLWARD: Exactly, Your Honor, because --

Q So it does[illegible] make a difference whether or not this is Logan Valley.

MR. AYLWARD: -- where is it more appropriate than on the streets? And on the sidewalks. Now, certainly the streets and sidewalks in Logan Valley weren't any different than Marsh vs. Alabama. But they are a heck of a lot different than our free-standing parking lot.

Now, I think that gets to the issue of what Mr. Dunau says. They have a right of free speech where appropriate. And, gentlemen, I submit they do have a right of free speech where appropriate. It is appropriate, under the right of free speech in Logan Valley, to be right out there in front of that store entrance and say, this is the store, not the other 16 that are involved; but it's this store here that doesn't pay union wages. And that was the appropriate place.

But in our case, where is it appropriate? It's appropriate if you can find them elsewhere, to go to their

homes. Their own man has testified the best place to get across the union message is by house calls.

Q And this is what Babcock tells us?

MR. AYLWARD: And this is what Babcock tells us. Babcock says if you've got alternate means, then we balance the rights of the parties --

Q The very same kind of means that are present here, aren't they?

MR. AYLWARD: The very same kind. That's right. The house call, the advertising in the newspaper, the union meetings, all these. None of these -- they didn't even try them.

Q But the invasion, the burden on the employer is different here than in Babcock.

MR. AYLWARD: Why do you say that, sir?

Q Well, parking lots open to the public.

MR. AYLWARD: Oh -- under what rule?

Q Under what rule? It's just open, I mean it's just --

MR. AYLWARD: In our case it's not open to the public, because the record is replete and --

Q Well, I'll put it this way. A manufacturing establishment has a much more limited clientele coming to it.

MR. AYLWARD: Yes.

Q Than a retail establishment that will take anybody as a customer.

MR. AYLWARD: All right.

Q Well, that's all I'm saying.

MR. AYLWARD: All right. Let me give you the case of People vs. Garutou, and in fact the Chief Justice of the Illinois Supreme Court, Justice Barnhouse, who admitted me to the Illinois bar, he gave that decision. And what happened there? The same union, in fact the same attorney that represented the Retail Clerks in that case represented Garutou in that case, and in that case they said: under Babcock and Wilcox, we have a right to come on a Sears store parking lot under the Fifth Amendment -- I mean under the First Amendment. And there the Illinois Supreme Court says: Now, wait a minute, it's not First Amendment, if you guys have any rights, you're union organizers, you have to go back to Babcock and Wilcox.

And that case came up here and you gentlemen looked at it and you denied certiorari.

I feel like the old judge yesterday that said before you, and he said you could --

Q Well, don't you wish it did mean something here?

MR. AYLWARD: Yes, I think it might.

[Laughter.]

As far as the appropriateness of the place to give the right of free speech, I think this Court also in the Adderly case that we quoted in our brief, vs. Florida, there you did have, you had State property, you had a State peniten-

tiary, you had people coming on, and there you said this isn't the appropriate place.

Gentlemen, I submit that, really, our lots are not the appropriate place.

Q But that place in Adderly would go in one section of your parking lot.

MR. AYLWARD: I don't know how large that lot was, Your Honor. All I know is we have --

Q That's about as small as you could get.

MR. AYLWARD: Well, five acres is pretty small when you take a 70,000-square-foot storee off it.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Aylward.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:50 o'clock, a.m., the case was submitted.]

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