In the

Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs

THE MAGNAVOX COMPANY OF TENNESSEE, et al.,

Respondents.

No. 72-1637

Washington, D. C.
January 14, 1974

Pages 1 thru 52

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

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v.	:	No. 72-1637
THE MAGNAVOX COMPANY OF TENNESSEE, et al., Respondents.	:	

Washington, D. C.,

Monday, January 14, 1974.

The above-entitled matter came on for argument at 2:22 o'clock, p.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:

PETER G. NASH, ESQ., General Counsel, National Labor Relations Board, Washington, D. C. 20570; for the Petitioner.

GEORGE K. McPHERSON, JR., ESQ., 1400 Fulton National Bank Building, Atlanta, Georgia 30303; for the Respondents.

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 72-1637, Labor Board against Magnavox.

Mr. Nash.

ORAL ARGUMENT OF PETER G. NASH, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is before you on certiorari to the Sixth Circuit, which denied enforcement of an NLRB order, finding that the respondent company had violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing a rule found in this case to have been agreed upon by the incumbent union, representing the employees of this employer; which rule prohibited the distribution by employees of literature for or against union representation during non-working hours in non-working areas of the company's plant.

This case, then, deals with the basic right of employees, themselves, to campaign for or against union representation by distributing literature arguing positions on that subject.

QUESTION: Well, does it deal just with that or where they may do it?

MR. NASH: No, I think all parts --

QUESTION: Not whether they may do it, but where?

MR. NASH: No, I believe that all parties to this proceeding agree that but for the issue in this case, which arises because of the agreement between the union and the employer, the employees would be privileged to distribute this literature in non-working areas on non-work time but on company premises.

The gut issue in this case, then, is whether the fact that the union and the employer agreed to a, quote, "waiver" of that right of employees makes any difference.

QUESTION: Right. It still goes to where it may be distributed, though.

MR. NASH: Yes.

QUESTION: In the last analysis.

MR. NASH: Yes. If, in fact, the union and the company can waive this right of employees, obviously, then, those employees would not be able to use company premises, even non-working areas, or on non-work time.

QUESTION: You start from the premise that there is a First Amendment right to distribute it in the abstract, in the company premises?

MR. NASH: I believe that is a statutory right recognized by this Court in Republic Aviation.

QUESTION: Yes, but I was asking whether you were describing that as a First Amendment right, independent of the

statute.

MR. NASH: I don't believe that the Board specifically has dealt with this as a First Amendment right, although --

QUESTION: But you have in your opening statement, and that's why I wondered whether you were --.

MR. NASH: Although this Court, in Republic Aviation, in weighing the rights of employees to distribute literature and thus engage in free speech against the property rights of employees, treated this right akin to a constitutional right; but I think dealt with it specifically as a statutory right, protected by Section 7 of the Act and by Section 8(a)(1) of the Act.

QUESTION: Well, I gather that's the way the question's been presented, hasn't it?

MR. NASH: That --

QUESTION: An abridgement of Section 7 rights.

MR. NASH: Yes. And, not as the way the Board has decided this, but the way in which I'm arguing it here today, Your Honor.

The facts in this case --

QUESTION: Excuse me, may I ask just one other question?

MR. NASH: Yes, sir.

QUESTION: Is there any definition of the area

where distribution under the collective bargaining agreement is excluded, is prohibited?

MR. NASH: I beg your pardon?

QUESTION: Is there a definition in the collective bargaining agreement itself of the areas from which distribution is prohibited -- in which distribution is prohibited?

MR. NASH: Of course the bargaining agreement itself, since 1954, has provided that the company can make rules --

QUESTION: Right.

MR. NASH: -- in order to maintain orderly conditions in the plant. The rules are contained in another document, and the Board found -- as a matter of fact were incorporated by reference in the collective bargaining agreement; and provide that there shall be no distribution of literature, material on company property, period.

QUESTION: Any place.

QUESTION: At any time?

MR. NASH: At any time.

QUESTION: How about the bulletin board, though? Isn't there some argument that that was in part a concession by the company, that they would make this bulletin board available?

MR. NASH: There's no evidence in the record which would indicate that the bulletin board was -- was the consider-

ation given to the union for their waiver of this statutory right of employees. But there is a clause in the collective bargaining agreement which does provide for bulletin board rights for the union.

The facts in this case indicate that since 1954, the IUE has represented the company's employees, and that since that time the company has maintained a rule which is prohibited distribution of literature anywhere on company premises.

The Board in this case found that as a matter of fact the union had waived the right of employees to distribute literature on company property, but found that the right of employees to make that kind of a distribution was so basic to the Act that it could not, in fact, be waived by the collective bargaining agent of the employees.

The Board, however, although it rationalized its decision based upon an earlier decision in Gale Products, declined to apply the Gale Products remedies which had been applied some time earlier and in a number of cases between Gale Products and this case.

In that remedy the Board said that the employer and the union could not agree to a rule which prohibited employees from distributing literature against the interests of that incumbent union, but they could agree to a rule which prohibited employees from distributing literature on behalf of

the union which had presumably waived that right.

The Board, in the case now before you, for the first time it said that that remedy that it had provided before did not make a great deal of sense; and, as a matter of fact, there is nothing in the Act which indicates that the right to dissent from union representation is any more protected than the right to support or defend your collective bargaining agent.

As a consequence, the remedy in this case now before you provided by the Board requires that the company cease and desist from enforcing this rule as to the distribution of any literature for or on behalf of any labor organization, including the incumbent in this case.

The Court of Appeals in the Sixth Circuit upheld the Board's factual finding, as supported by substantial evidence, that there had been a waiver here, but rejected the Board's Gale Products rationale and held that a bargaining representative has the authority to waive on premises distribution rights of employees.

A brief history of the litigation in this area may be of some assistance.

Since 1944 and up into the Gale Products case, the Board held that an employer anti-union could waive the Section 7 rights of employees.

In the Gale Products decision, the Board held, for

the first time, that such a waiver was ineffective, as I explained before, at least as to the distribution of materials against the interests of the union which attempted to waive this right.

Both the Sixth and the Seventh Circuits have disagreed with the Board and have said that the right of management and labor to freely contract is such an important right that that ought to stand, even against the Section 7 rights of employees to distribute literature.

The Fifth and the Eighth Circuits have both agreed with the Board, and have held that the right of employees to distribute literature related to the rejection or retention of a collective bargaining agent is so basic to the Act that it cannot be waived by the union which might, in fact, itself be benefitted by that waiver.

Further, these Courts of Appeals, the Fifth and Eighth Circuits, have indicated that the existence or non-existence of any other alternative means of communication which might or might not be available to the employees is irrelevant.

QUESTION: Like the bulletin board.

MR. NASH: Like the bulletin board, that is correct.

Whereas the Sixth and Seventh Circuits have both indicated that other alternative means of distribution may be relevant in determining whether this rule encompassed now in

a collective bargaining agreement is a valid restriction to Section 7 rights.

QUESTION: And didn't you have a change of mind on part of the Board?

MR. NASH: The Board, I believe, has been consistent in that every case presented to this Court this term has represented a change in position by the Board.

[Laughter.]

QUESTION: Including this one.

MR. NASH: Including this one, yes.

QUESTION: With respect to the union that's involved.

MR. NASH: No, it changed its position back in 1964, in Gale Products, and then in this -- initially, and then in this case changed its position as to the union involved.

QUESTION: Gale Products said you couldn't waive it for other unions.

MR. NASH: That's correct. And then the Board --

QUESTION: But you could for the union involved.

MR. NASH: That's correct, Your Honor.

QUESTION: And now you've said not for the union involved, either.

MR. NASH: That is correct.

QUESTION: Now, does this give us another rule-making versus the adjudicatory question, or is that not presented?

MR. NASH: The issue has not been presented in this case, Your Honor, and it was not litigated and has not been argued in any form below.

I might add, at least relevant to the argument in the last case, the Mason and Hanger case was decided by the Fifth Circuit prior to the commencement of the litigation in this case.

And in that case -- excuse me -- in that case the Fifth Circuit said that this right not to distribute literature was a protected right of employees, but that a union could waive its right as to the distribution of literature for its own internal organizational purposes.

In the Eighth Circuit, the Eighth Circuit's decision in a previous case indicated that the Eighth Circuit felt that employees' rights to distribute literature on behalf of its own collective bargaining agent could not be waived, and the decision in that case preceded the litigation in this case.

So that, to the extent the same kinds of issues might come up in this case, as did in the last one that was argued before you, at least the Eighth Circuit had indicated that there was a feeling that employees' rights in this area couldn't be waived either for or against the incumbent.

In arguing its position, the company in this case contends that the mere existence of an agreement between the

employer and the union concerning this distribution right is sufficient reason to change the normal rule, which would prohibit any restriction on the employees' distribution of literature in non-work areas on non-work time.

However, the company doesn't tell us anywhere why the existence of an agreement ought to change the rule.

I'd like to direct my attention to the reasons advanced by the Board and by the courts as to why the existence of this agreement should make no difference.

I believe in dealing with this issue it would be helpful to start by saying that we are not really dealing here with any literal balancing of the right to contract against the employees' right of distribution.

Clearly, employees have the right to distribute literature in non-work areas on non-work time, absent a valid contractual waiver.

The question before this Court is whether the Board may properly find an attempt at such a waiver to be valid, to discuss cases and legal doctrines upholding the right of the unions and management to freely contract really begs the question before this Court.

The whole issue here is whether that right to contract should apply to an attempted waiver of distribution right. If the distribution right can be waived, freedom of contract doctrine stands.

If it shouldn't be, and can't be waived, as the Board has said, then the right to contract can't prevail.

QUESTION: Didn't the Board put some limit on its holding in this case? Didn't it imply, at least, that the no-distribution rule might be valid for circulation of things that were not perhaps Section 7 rights?

MR. NASH: Yes. That's the -- I think, although the Board didn't cite Mason and Hanger, the case that I discussed before in the Fifth Circuit, indicated that the union could waive its right to distribute internal institutional kind of literature. But that -- and the union could validly waive that right, which is its right, the union's right qua union.

But that the union could not waive the employees' right to distribute literature which related to the question of whether the employees wished to continue having this union represent them, some other union, or no union at all.

QUESTION: What precise material was it that initiated this thing? The record seemed to be a little bit vague on that.

MR. NASH: The record is totally unclear on that. There is no indication of what the kind of material is that the union sought to have the employees distribute in this case.

However, the case was tried on the assumption that this

was literature and material which related to this union as the continuing collective bargaining agent of the employees.

QUESTION: Well, where do you get that assumption from, if there weren't any facts to support it? Or where did the parties get that assumption?

MR. NASH: I call your attention to the Appendix, page 109, in which paragraph 7 of the Board's complaint alleges that the respondent, quote, "prohibited employees from distributing literature on behalf of the union."

Paragraph 5 of the answer to the complaint admitted that particular allegation, found in the Appendix on page 116. No exceptions were taken by the --

QUESTION: But literature on behalf of the union might be subject to the Mason and Hanger doctrine, couldn't it?

MR. NASH: No. I contend not, because the trial examiner -- the administrative law judge's decision, then trial examiner's decision in this case based the decision upon the Gale Products rule, and the respondent took no exception to the Board, based upon the kind of literature that may or may not have existed, even though the Mason and Hanger case had been decided by that time; and, furthermore, that violation of the Act would occur without regard to the type of literature, for it is clear that the language here prohibited distribution of campaign type material in non-

working areas and non-working time, the mere existence of that agreement would itself be sufficient to sustain a finding by the Board as an 8(a)(1) violation.

The fact that the rule had not been enforced during that period of time is not determinative. The mere existence of that agreement puts such a burden on Section 7 rights of employees as to itself constitute a violation of the Act.

So that, first of all, I argue that the case was tried on the basis that this was organizational kinds of material, but even if that were not true the rule itself was broad enough to constitute a violation of the Act.

QUESTION: For future cases, is there any way you can explain to me why it wasn't put in the record?

MR. NASH: Why it wasn't put in the record?

QUESTION: Yeah.

MR. NASH: I didn't try the case below, but I suspect that it wasn't in the record because of the way in which this case came up. The union asked the employer if he would not waive this ban on distribution, so that employees could distribute literature. The employer said, no, I won't waive the ban, and the union filed a charge.

For that reason, presumably, the employer never had the literature in his hands, nor did the employees have the literature in their hands, nor is it determined if the union

had any specific literature --

QUESTION: So what are we asked to decide?

MR. NASH: I beg your pardon?

QUESTION: So what are we asked to decide?

MR. NASH: I believe you're asked to decide in this case that the fact that the union and the employer had agreed to a broad ban on distribution of organizational material makes no difference, and that that ban constitutes a Section 8(a)(1) violation by the employer.

QUESTION: So the truth of the matter is that both sides just want us to go the broadest way we can go.

MR. NASH: I don't wish to speak for the respondent, but, yes, that is the Board's position.

QUESTION: Was the charge brought by the union or by an individual employee?

MR. NASH: The charge was brought by the union.

QUESTION: Which had signed the contract.

MR. NASH: Which had signed the contract giving the employer the right to provide rules for in-plant purposes.

We contend in this case that we're not really weighing the right of contract against the right of employees to distribute, but what we really ought to be looking at: is there anything unique about this particular right of employees to distribute this campaign type material; and, secondly, is there anything unique in the relationship between

the union and the employees that it seeks to represent, vis-a-vis this distribution right?

I believe that the Board has found this uniqueness not only in the Section 7 right but in this relationship, a uniqueness which compels, I believe, a conclusion that the Sixth Circuit is wrong and the Board should be sustained in its holding that the employer violated Section 8(a)(1) in this case.

This Court stated, in its Mastro Plastics decision, that employee rights may be waived provided that the selection of the bargaining representative remains free, that the rights of employees to distribute literature either in favor of or in opposition to union representation is essential to the development and the maintenance of an informed judgment on bargaining representation selection.

QUESTION: Or literature against the change.

MR. NASH: Or literature against the change.

QUESTION: Which is apparently what this was.

MR. NASH: I --

QUESTION: Well, it just says "on behalf of", and I notice that the union has filed an amicus brief here -- no, I guess -- they're respondent, aren't they? Favoring the --.

MR. NASH: Any literature, I guess, which could be fairly characterized as going to the issue of choosing,

changing, or eliminating collective bargaining -- eliminating a collective bargaining representative.

But that, the issue on the distribution of that literature is so essential to the purposes of the Act that this is the kind of an employee Section 7 right that cannot be waived. I think the Court has recognized this in its language in the Republic Aviation case, clearly the Fifth Circuit, in the Mid-States Metal Products decision, recognized this fact, that the right to freedom to organize belongs to dissidents as well as to bargaining agents, and limiting its exercise by non-solicitation agreements tends to smother competitive union organizational activity, and accordingly militates against the purposes of the Act.

The Court went on to say: We believe that the individual organizational rights at issue, guaranteed by the Act, are too fundamental to be contracted away.

I might add that the union in its reply brief filed last Friday takes a somewhat different view, but basically comes out the same way.

In that brief they argue that an employee's Section 7 rights may be waived only when that waiver furthers the purposes of the Act. Thus, a union -- thus, the Act encourages industrial peace, and thus the Board and the courts have found that the right to strike can be waived when, as a quid pro quo for that, the union and the employer agree to peaceful

arbitration for the resolution of industrial disputes.

However, the right to select or reject a union is not furthered by waiving the distribution rights of employees, and thus, under this analysis, that right cannot be waived.

I submit that under either analysis, however, the significant or unique type of right with which we are dealing here, the right to distribute literature on these issues, is a right which cannot be waived.

Further, in analysis of the relationship and the interests between the employees whose right is sought to be waived and the union which seeks to waive it, I believe compels affirmance of the Board's conclusion that at least that incumbent collective bargaining agent cannot waive the individual rights of employees.

The kinds of Section 7 rights which the Board and the courts have found to be waivable by a union are those in which the union's interest and the employee's interest may be said to be in harmony, because of the nature of the right involved.

Thus, in the right to strike, as I indicated before, that's an employee right, but clearly the basic strength of a union is closely tied to and dependent upon the continued right of its members to strike. Thus, it's not surprising that the Board and the courts have upheld the right of a union to waive the right to strike.

However, where the union's interest and the employee's interest conflict or may not be in harmony, such a waiver, I submit, and the Board submits, cannot be countenanced.

As the Board said in its General Motors case in 1966: An agreement between a union and an employer, that employees represented by that union could not file a petition to decertify a union during the term of the agreement would not be valid.

The union's interest in its own self-preservation would clearly conflict with the interests of the disenchanted employees who wished to exercise their statutory right to file a decertification petition.

Just as clearly, I submit, the incumbent union should not be allowed to waive the right of employees to distribute literature for or against the representation of that union during the period of the collective bargaining agreement.

QUESTION: You appear to be -- or correct me if I have the wrong impression -- you appear to me to be placing the right to distribute literature on a substantially higher plane than the right to strike.

MR. NASH: No. I -- the right to distribute literature, I believe both the Board and the Fifth and the Eighth Circuits have indicated, is a right basic to the purposes and policies of the ACt. The Act was enacted for

the purpose of protecting employee rights to choose or reject --

QUESTION: Well, isn't the right to strike a pretty vital right?

MR. NASH: The right to strike, I submit, is a vital right, but --

QUESTION: Not as vital as the right to distribute literature, though?

MR. NASH: I think that it is as vital a right, but it's a right of a different character.

QUESTION: But it doesn't go to the selection of a bargaining representative?

MR. NASH: Has nothing to do with the selection of a bargaining representative. The right to strike, I submit, goes -- the right to select the collective bargaining agents goes to the very purposes of the Act. The right to strike, I submit, I submit, is a right of a different character. No. 1, it's the kind of a right which a union is not apt to waive without getting something significant in return.

QUESTION: Well, it does mean that the right to strike is never involved in the problem of getting rid of one union, but the right to distribute literature can be involved, often is involved in getting rid of one union and getting another one; is that it?

MR. NASH: I think as the Court indicated in its Mastro Plastics decision, where the activity of the employer committing an unfair labor practice is so destructive of the collective bargaining relationship, that the right to strike may not be presumed to be waived and may in fact not be waivable at all.

Thus, in the Mastro Plastics case, where the employer dismissed an employee because he sought to campaign in behalf of the incumbent union, where the employer wanted another union, and that employee was dismissed, and there was a strike, both in violation of the no-strike clause in the collective bargaining agreement and arguably in violation of Section 8(b) of the agreement, this Court has held that where that employer action went so to the relationship, the collective bargaining relationship, as to attempt to destroy it, it may well be that the union may not be able to waive the rights of employees in that circumstance.

I submit it's the same kind of a situation here. The right to distribute literature for or on behalf of union representation goes to the very heart of the collective bargaining relationship.

Let me give just a couple of examples.

Under the National Labor Relations Act, under the Board doctrine as it exists today, employees may not file a decertification petition, nor may they file a petition on

behalf of another union, except between the ninetieth and the sixtieth day preceding the termination of the collective bargaining agreement, or after the end of the collective bargaining agreement, if the employer and the union have not, during that sixty-day period, entered into a new agreement.

To hold that a union and an employer may agree that employees can't distribute literature in furtherance of either a decertification campaign or in furtherance of a campaign to change the collective bargaining agent during the term of the collective bargaining agreement takes away significantly from the right and the ability of those employees to file such a petition within that sixty to ninety-day period.

If the union, interested in its own preservation in incumbency, can obtain and enforce such a waiver from the employer and further can enter into a collective bargaining agreement with that employer within the sixty-day period, it can perpetuate itself indefinitely in power, to the detriment of the employees.

The same kind of a situation arises under Section 9(e) of the Act in a de-authorization proceeding, where an election can be held during the term of a collective bargaining agreement to take away the right of the union to make an agreement which requires union membership as a condition of employment, to say that employees can't campaign effectively through distribution in furtherance of that kind

of activity, as the Sixth Circuit's decision in this case would say, I submit again takes away that very important right from employees.

And again --

QUESTION: But what you're talking about here, Mr. Nash, would be pretty well met by the Board's Gale Products remedy, wouldn't it, rather than the expanded version that's been now put forth?

MR. NASH: I believe that that's correct, except that if you accept the Gale Products rationale, which I believe is correct, it doesn't make, as the Board has said, a great deal of sense to say that the employees can campaign against the union, but the rest of the employees in the plant, who may in fact wish to have that union maintained as its collective bargaining agent --

QUESTION: That's not an argument against incumbency.

MR. NASH: It is not an argument against incumbency, but --

QUESTION: It's just the contrary, isn't it?

MR. NASH: -- but it's an argument against the interests of many employees who may in fact wish that union to remain their incumbent.

I think, further, Member Fanning's concurring opinion in this case has some validity, and that is that if the Gale Products rule is in fact correct, that a union can't

waive the right of employees to distribute literature against this interest, then you've taken that out of the rule which the union agreed to, and the union never agreed to a rule which said that you can't campaign before me but you can campaign against me.

And therefore, again, the Board has really divided employees into two different groups, which doesn't make a great deal of sense, under the Act.

So I think if the Gale Products rule is correct, and I believe it to be correct, that it makes a great deal more sense to say that you just can't interfere with this right; union and management, by agreement, can't interfere with this right in any event, on either side of the issue.

I submit further that the employer's argument in this case to the effect that alternative means of communication or alternative avenues of communication ought to be reviewed by the Board and the courts, I think is a red herring.

This Court has said, in the Public Aviation case, in essence, that there is no right, there is no effective alternative means of communication available to employees, leaving out strangers and outsiders for the moment. There is no effective alternative means available to employees to communicate, which would take an otherwise invalid restriction and make it not a violation of Section 8(a)(1) of the

Act.

QUESTION: Were they talking about literature distribution in Republic Aviation?

MR. NASH: The Court, in Republic Aviation, talked in terms of solicitation, but seemed to combine both literature distribution and all solicitation within that term. They were talking about both.

I believe that the best discussion of the Republic Aviation decision can be found in the United Aircraft decision cited in our brief of the Second Circuit, in which it goes into a good bit of detail as to why, as a matter of law, there just is no other effective alternative means of communication available to protect the employee's Section 7 rights.

Where that doctrine has arisen is in the cases of outside union organizers, who are attempting to organize employees. And in those circumstances, where those employees can be prohibited from even going on the employer's premises, this Court has said and the Board has said that where other means of communicating with employees are so difficult that the union can't really effectively get its message to the employees in very limited circumstances, the employer may be required to open his premises to those outsiders.

But nowhere have the Board and the courts said that there are effective alternative means to the employee's ability

to distribute or solicit on the premises during non-working time and in non-working areas.

So I submit that the combination of the very important right involved here, plus the fact that the union's interest may very well, and most likely, will be in conflict with the interests of the employee's right itself, those two things, I think, dictate an affirmance of the Board's award and a reversal of the Sixth Circuit judgment in this case.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. McPherson.

ORAL ARGUMENT OF GEORGE K. McPHERSON, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

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

I hate to take issue with Mr. Nash, but it seems to me that we are faced directly here with freedom of contract under the National Labor Relations Act, as opposed to the right of employees to distribute literature. I think this is the primary issue that is involved in this case.

Before getting into that discussion, I believe that there are several factual situations which should be brought out that have been ignored by general counsel.

First of all, there was no organizational activity going on at any time during the period of the

enforcement of this rule leading to the filing of the unfair labor practice charge.

The literature to be distributed was to be distributed by and on behalf of the incumbent union about an internal union matter. It was in accordance with the waiver, rejected for passing out on company property.

Secondly, the general counsel has totally ignored the fact that employees are totally able to solicit and discuss any matters they so desire on company premises anywhere at any time that does not involve their worktime.

Therefore, we do not have the Republic Aviation situation of a no-distribution and no-solicitation situation.

Additionally, the evidence on the record demonstrated thoroughly that alternate avenues of communication were available, utilized and effective. The evidence demonstrated that through the sixteen-year history between the union and the employer, that employees who wanted to pass out material were able to do so effectively by standing at the plant entrances off of company property to make their distribution.

Thus, I think we have three highly relevant factors here: One, no organizational activity going on; two, an ability of the employees to discuss and solicit on company property; and, three, an effective use of an alternate means of distribution on company property, i.e., being able to

distribute right at the plant entrance, which they had done for over sixteen years.

QUESTION: You say this is in the record?

MR. McPHERSON: Yes, sir. It is stated in the record.

QUESTION: Do you have in mind, at the moment, just where we'd find that in the Appendix?

If not now, let us know in the morning.

MR. McPHERSON: I think that you can find this in the Appendix at pages 56, 65, 77 and 78, 99 and 103, as to the use of distribution of literature at the gate; as to the full discussion during non-work time in all areas of the plant, I think that is recited in the Appendix at page 127 and 136.

Quite contrary to a red herring situation of alternative means of communication being available, I think that is extremely germane to a consideration of this case. It has been considered germane by the Seventh Circuit when they overruled the Board in Gale Products. It was considered germane by the Sixth Circuit when they overruled the Board in Armco Steel, when they overruled the Board in General Motors, and when they overruled the Board in this case.

It has also been considered, I think, germane by the Board itself in its later determinations in Stoddard-Quirk, as well as in its discussion on Gale Products itself.

Now, what we have is going back to the history of the Board's development of this line, is in 1944 the May Company case basically held that this right was not so fundamental that it could not be waived, and that basically was the status of the law until the 1963 Gale Products case.

In that case, which again involved a total ban against solicitation and a total ban against distribution on company property, the Board followed basically the Republic Aviation theory that because of the ban on distribution of literature and because of the ban on solicitation, with solicitation being shown as being the place uniquely appropriate for employees to discuss their policy, that there was an impediment to the Section 7 rights of the employees here, which had not been overcome.

Now, there was a very strong dissent in the Gale Products case by the chairman, at that time Mr. McCulloch, and by Member Leedom. They pointed out that certainly alternate means of communication were available here, employees were able to discuss matters during -- on company property during their free time, and stated, as such, there should be a waiver capable by the incumbent union.

The majority of the Board, in a footnote, took cognizance of the minority's opinion, particularly as to whether or not they could freely discuss, on company property, matters such as changing or retaining the collective

bargaining agent, and stated that the evidence, to their satisfaction, showed that that was not the case, that these matters could not be discussed.

Secondly, as to alternative means available, the majority in Gale Products found that there was no evidence to this effect, and therefore went with their presumption.

Now, the Seventh Circuit, as I noted earlier, overruled Gale Products, saying that no presumption should stand here, that we are talking really about freedom of contract. And if there are effective alternative means available, then the Section 7 rights of the employees has not been impaired, and freedom of contract should be given full rein. And the validity of the contract procedure should stand, absent a showing of an actual interference in Section 7 rights -- which had not been done in Gale Products, in Armco, nor has it been done here.

In fact, the Board chose, in this case, to totally ignore the alternate means of communication available, used and found effective by the union throughout its sixteen-year history, and chose to rely, instead, simply upon the presumption found in Stoddard-Quirk and Republic Aviation and Peyton Packing.

We would submit that this is totally contrary to the purposes of the National Labor Relations Act, and contrary to the duty of the National Labor Relations Board

to enforce that Act and foster collective bargaining.

I think that the National Labor Relations Act is founded upon the proposition that the union will provide fair representation to the employees it represents.

Otherwise, we could never really go through the bargaining process of the negotiating process of assuming that the union was not going to fulfill its obligation.

Thus, founded upon the principle of fair representation, it would seem to me that the union fulfills its obligation to the employee by bargaining on their behalf and entrenches themselves as the bargaining representative by its performance of its duties under the Act and to the employees it represents in this particular case.

Additionally, it seems to me that you have not only the fair representation aspects --

MR. CHIEF JUSTICE BURGER: We'll resume at that point at ten o'clock tomorrow morning.

[Whereupon, at 3:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., Tuesday, January 15, 1974.]

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	
v.	:	No. 72-1637
THE MAGNAVOX COMPANY OF TENNESSEE, et al., Respondents.	:	

Washington, D. C.,

Tuesday, January 15, 1974.

The above-entitled matter was resumed for argument at 10:07 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:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll resume arguments in No. 72-1637.

Mr. McPherson, I think you have about 22 minutes remaining.

ORAL ARGUMENT OF GEORGE K. McPHERSON, JR., ESQ.,
ON BEHALF OF THE RESPONDENT -- [Resumed]

MR. McPHERSON: Thank you, Mr. Chief Justice.

And may it please the Court:

Yesterday general counsel attempted to categorize or characterize the right to strike as being different from other Section 7 rights guaranteed under the National Labor Relations Act.

I frankly don't think that Section 7 either graduates or categorizes any of the rights under Section 7 into separate categories or characterizations.

I do know, however, that the right to strike is dealt with specifically by the National Labor Relations Act, whereas the right to distribute literature is not.

There is no provision in the Act that, per se, gives the employees right to distribute literature on company property.

It is a right that has arisen inferentially as a means of communication to effectuate Section 7 rights.

As a means of communication, it is therefore not

so unique, or not so fundamental that it cannot, under certain circumstances, be waived.

And, as I mentioned yesterday, on the point of fair representation, the Court's holding in the Mastro case was based upon the premise of fair representation.

That fair representation theory, I think, should extend to the collective bargaining process.

And in this case, particularly when you are looking at the fundamental purpose of the Act being to foster collective bargaining or the principle of freedom of contract, where you have freedom of contract and collective bargaining being engaged in, that process should go without being interfered in, except where absolutely necessary.

I think the Court stated the concern that it would have with undue interference into the collective bargaining process when they talked about conflicting rights in Babcock & Wilcox. There the Court was faced with distribution rights of non-employees as opposed to property rights of employers.

In that particular case this Court held that where there was no necessary conflict, there should not be an abridgement of either right.

I think that is particularly true in the type of case we have here, where we have freedom of contract on one hand versus a means of communication on the other. Which

would lead me into this Court's decision in NuTone, the Steelworkers case.

There the Court was faced with whether or not employers could utilize a means of communication which they prohibited employees from using. And in that case stated that unions and employees are not guaranteed every means of communication simply because the employer may utilize it. But that whether or not an unfair labor practice is committed, whether or not no-distribution or no-solicitation rule should be invalidated, is dependent upon the circumstances of the particular case.

The Court noted in NuTone that there was no showing, just as in this instant case, of any undue influence or interference with the employees' ability to communicate with one another.

It also stated to the Board that alternate means of communication was highly relevant to a consideration as to whether distribution or solicitation rules should be invalidated. And stated that since that issue was not presented to the Board, and no evidence taken on it, the employer's conduct could not be found wanting.

That, basically, is what I think the respondent's position is in this case.

We do not argue, as the Supreme Court pointed out in the NuTone case, that under every factual situation, under

every circumstance that may arise, there may not be an unfair labor practice committed.

What we do say is that the Board should not presume away the freedom of contract of the parties, but should rather look to see if there has in fact been an interference with the communication rights that employees may have under Section 7.

And that was not done here. No analysis was made whatsoever of the alternatives available to employees. Had there been, they would have seen that the evidence on the record clearly established the fact that for sixteen years the union and employees had effectively distributed literature at company gates, that the employees had the right of free discussion and free solicitation on company property, which brings with it the right to sign union cards or to sign petitions to decertify or to start the decertification proceedings.

QUESTION: If that contract provision, if your rule against distribution on company property at non-working time were challenged on its own bottom, it wouldn't stand, would it?

MR. McPHERSON: Mr. Justice White, if it had not been bilaterally agreed to, we would fall within the Republic Aviation theory.

QUESTION: Yes. Yes.

MR. McPHERSON: That is correct.

QUESTION: So that you must rest on the contract.

MR. McPHERSON: That is correct.

QUESTION: And I suppose the contract provision is, in itself, in part invalid -- I mean unenforcible in the sense that it purports to permit the company to waive the rights, if they have any, of some other union.

MR. McPHERSON: I don't think I would agree with that statement. I think the -- I think it gets --

QUESTION: Well, doesn't your rule purport to bar the distribution of literature by anybody.

MR. McPHERSON: By anyone. It would apply equally to the incumbent as to --

QUESTION: Well, how about a non-incumbent union distributing union literature -- anti-union literature or anti-incumbent literature on company property at non-working times?

MR. McPHERSON: They would not be permitted to do so.

QUESTION: Under your rule?

MR. McPHERSON: Under the rule, under the contract waiver.

QUESTION: Well, under the contract, but what if the union -- let's say the union, the non-incumbent union has a spy or it has some friends among the working force, and they

are distributing its literature on company property in non-working time?

MR. McPHERSON: Well, there would be no distribution of literature allowed on company property during non-working time.

QUESTION: Well, I thought that -- isn't that an unfair labor practice?

MR. McPHERSON: Under Republic Aviation that rule would not be valid, unless special circumstances could be shown.

QUESTION: So that you couldn't enforce it against -- you couldn't enforce that, the non-incumbent union could have you on the carpet for an unfair labor practice?

MR. McPHERSON: I think either could have us on the carpet on an unfair labor practice, if there were not the waiver that --

QUESTION: So that really the -- well, the waiver is inoperative with respect to other unions.

MR. McPHERSON: We do not contend that the waiver is inoperative as respect to other unions.

QUESTION: Oh, you mean the way -- it still binds the incumbent union?

MR. McPHERSON: We think that the waiver should apply to all employees.

QUESTION: But the only thing is, it just doesn't

give you any right to exclude the non-incumbent union.

MR. McPHERSON: No, it does. The waiver is fully --

QUESTION: Well, it isn't any legally effective right.

MR. McPHERSON: Well, that, I think, is one of the issues that this Court has to face. The waiver -- I mean the rule, the rule was in effect against all employees for distribution of literature of any kind on company property.

That was what had been waived by the union. That would apply to any employee who is going to distribute, regardless of what --

QUESTION: Well, what would the union say if they -- if they were willing to agree to a company rule that excluded everybody, all unions from --

MR. McPHERSON: That's what this rule is.

QUESTION: Yes. But they suddenly found out that the company's rule against non-incumbent unions wasn't enforcible.

MR. McPHERSON: Well, again, I think that may be what we come up with here, if you go the route of Gale Products.

Now, Gale Products split the employees into two groups.

QUESTION: Well, let's assume Gale Products is still good law, or is good law, just assume that it is good

law, then the company's rule against the non-incumbent is not enforcible.

MR. McPHERSON: That's correct.

QUESTION: And the union didn't get what it thought was bargaining for, perhaps.

MR. McPHERSON: Well, of course, Gale Products was the status of the law at the time the bargain was struck and was the status of the law until the time of this decision. And I would assume that the parties would be presumed to know their rights and the law at the time they're sitting at the bargaining table.

QUESTION: That was in -- Gale was in '54, 1954?

MR. McPHERSON: Gale was in 1963.

QUESTION: But you say for sixteen years they've --

MR. McPHERSON: The first contract was struck in 1955.

QUESTION: When there was -- before Gale?

MR. McPHERSON: Before Gale and at that time we would have been under May Department Store.

QUESTION: Yes. Thank you.

QUESTION: Of course, your position clearly would apply to the dissident member of your union?

MR. McPHERSON: That would be -- that is our interpretation of the rule, that is correct.

QUESTION: So that in effect you have closed his

mouth or his dissident views?

MR. McPHERSON: I disagree with that analogy of the situation, Mr. Justice Blackmun, for the reason that we do have full and complete solicitation rights and discussion rights on company property. I disagree with it also from the standpoint of the fact that for sixteen years the history has shown that the employees have been able to effectively distribute literature at plant entrances and exits, and this, it would seem to me, is what the Board has recognized in Stoddard-Quirk.

In Stoddard-Quirk they talk about the discussion between -- or the distinction between all solicitation or discussion and a written communication, and state in Stoddard-Quirk that a written communication is meant to be of a permanent nature, to be read and re-read at the leisure of the recipient; and its purpose is satisfied so long as it is received.

They even go on to recognize and state, in their decision in Stoddard-Quirk, that plant entrances and exits are in fact an effective means of distributing this literature.

So I do not feel that the dissident's right to voice their opposition to the incumbent union is in any way impaired in this situation.

What we have here really is full discussion by

anyone on any subject that they want within the plant facility, including the ability to pass out union authorization cards and get them signed, or a petition to decertify, as well as the ability to effectively pass out literature of whatever nature they may want at the plant gate.

QUESTION: I am interested in the fact you cited the Machinist case in the Board, but you didn't cite its non-enforcement order in the Eighth Circuit. Do you regard the Machinist case as authority contrary to your position here?

MR. McPHERSON: I do not believe that the Machinist case is totally contrary to the position that we have here.

QUESTION: The facts are somewhat different, it's --

MR. McPHERSON: The facts are considerably different in that case, and the Court there, as you will well recall, discussed, or took the position that there could not be a total waiver of rights in this type of a situation.

Additionally, the Court refused and so noted in its opinion to pass on the question of whether or not distribution of literature could be waived, at a time when the bargaining agent could not be changed.

Which I think throws it into a somewhat different category than what we are really facing here; but I think the Eighth Circuit is generally tending to go in the

direction of the Fifth Circuit, which I think really has a fear that the union will not protect employee rights when there can be a distinction between the union's rights and the employee's rights.

That gets me back to my fair representation premise that I think we must work off of in a collective bargaining context.

QUESTION: May I ask you one other thing: we've talked about whether some right is waivable or not, but it might be that the right would be waivable, a statutory right would be waivable, but it has to be -- it can't be waived by the bargaining agent. And what is the function and purpose of the bargaining agent, an incumbent anyway, I mean I suppose you could say that the right would be waivable by union members or by the personal rights, but that the authority of the bargaining agent just wouldn't reach the waiving the rights of somebody else.

MR. McPHERSON: Well, I would think that the bargaining agent, being chosen as the duly certified bargaining representative of the employees through a duly conducted election by the National Labor Relations Board, the employee has chosen him as his bargaining representative; in other words, he is the alter-ego for the employee.

QUESTION: Well, of course, the dissenters had not.

MR. McPHERSON: Well, Mr. Justice Brennan, I think

that in any case the majority must rule.

QUESTION: Well, what you're saying is that once the majority chooses, then the chosen representative may waive the rights of all, dissenters and those opposing it?

MR. McPHERSON: That is correct. That would be our position. So long as --

QUESTION: So what happens to Republic Aviation and to Gale if we do decide that?

MR. McPHERSON: Well, I think Gale Products would definitely be overruled. But of course the Board itself is deviating from Gale Products, but Republic Aviation, to me, would not be touched.

QUESTION: Why not?

MR. McPHERSON: Because of the bilateral nature and the freedom of contract concept, as opposed to --

QUESTION: Because, I gather, of your basic premise: the bargaining agent can waive for everybody?

MR. McPHERSON: That is correct, and his primary duty to protect the rights of his employees.

QUESTION: I suppose that's really what we have to decide in this case, isn't it?

MR. McPHERSON: I think that is one of the major considerations that has to be given in this case.

QUESTION: Well, that's certainly true with many other areas. He can waive, the bargaining agent can waive the

right to strike for everybody.

MR. McPHERSON: That is correct. Even though some of those may not want to strike.

QUESTION: May not want to, and certainly that's the whole structure and premise and hypothesis upon which the framework of the Act is based, isn't it? Is its majority rule.

MR. McPHERSON: That is absolutely correct, in my opinion, Mr. Justice Stewart.

And I would also point out that this waiver, as was pointed out by this Court in Mastro, should be given effect so long as the selection remains free, and what we are really asking for is for a determination for the Board to make a determination, and not the presumption as to whether or not there has been an interference with that selection.

Now, if freedom to select a bargaining representative were dependent entirely upon the rights of employees to distribute literature, then surely we would not have the NuTone case, surely we would not have Republic Aviation or Babcock & Wilcox.

So what we are asking for is really what I think the Court was looking for in NuTone, when they said: Look at the case and make a determination.

My whole point basically is that freedom of

contract, under the National Labor Relations Act, being one of its primary purposes, is simply too fundamental to that Act to be presumed away, as was done here.

And, as I stated, I don't say that in every circumstance we will not have an unfair labor practice.

QUESTION: Well, I take it, though, if, as I think you said earlier, basically there's a conflict here between two policies in the Act.

MR. McPHERSON: That is correct.

QUESTION: Right. And ordinarily, I gather -- I think that's what we held in the Buffalo Lindon? case, did we not -- conflicts of this kind are for the Board to resolve, didn't we?

MR. McPHERSON: I would say --

QUESTION: And that --

MR. McPHERSON: -- conflicts of this kind is for the Board to resolve, so long as they fulfill their duty in looking at the facts necessary to resolve that question.

QUESTION: But that's the general premise, isn't it, where the conflicts between different policies under the Act, we expect the Board in the first instance to resolve them.

MR. McPHERSON: We expect the Board to resolve them, but we expect them --

QUESTION: Then what's the scope of our review of the resolution?

MR. McPHERSON: I think the scope of the review would be basically the same scope of review that this Court exercised in Babcock & Wilcox and NuTone. And that is whether or not the Board fulfilled its role in that regard by looking at the relevant factors to make that determination.

Now, one other point --

QUESTION: Does that amount to saying that we look for, to see whether that was an error of law?

MR. McPHERSON: I would -- I would not quite categorize it in that term.

QUESTION: It's a broader view than that?

MR. McPHERSON: Yes, sir.

Now, I would say this: one other point that I think is of concern in this case is the Board, in overruling its decision in Gale Products, has gone further in formulating its remedy than it has ever gone before in this area, and much further than it went in the Fifth Circuit or the Eighth Circuit.

In those Circuits, which the Board relies on as supporting their proposition, the remedy there was limited to distribution or solicitation on behalf of any other labor organization other than the incumbent, or distribution or solicitation against any labor organization.

Now, here they have also gone that step, but they

have added the additional step of throwing in all other Section 7 rights, regardless of whether you have the potential split between employee interests and the incumbent union's interest, as seems to be feared by the Fifth Circuit in Mid-States.

In other words, under the Board's remedy, as I have fashioned it in this case, it would apply to a handout announcing a union meeting, it would apply to a reminder to pay union dues, it would apply to an announcement of the filing of a grievance.

QUESTION: Could I ask you: does an incumbent union have some rights independent of the people in the bargaining unit, with respect to the distribution of literature?

For it may be one thing to say that the incumbent union can waive the rights to people in the unit, but if an outside union has rights of its own --

MR. McPHERSON: Mr. Justice White, I would say that if the union can waive some rights of employees, certainly they should be able to waive their own rights. And, as has been pointed out, --

QUESTION; No, not their own rights, I mean the rights of an outside union.

MR. McPHERSON: Are you talking of the incumbent or of the outside union?

QUESTION: The outside union.

MR. McPHERSON: The outside union have the rights, I would say, as defined in the area of solicitation and distribution, as defined by this Court in Babcock & Wilcox.

QUESTION: Now, there shouldn't be any power in the incumbent union to waive those rights.

MR. McPHERSON: Oh, no, sir. No, sir. And there has been no diminishment in the outside union's right, because under that --

QUESTION: Well, your rule, your rule purports to bar them, too.

MR. McPHERSON: It bars them from on-property distribution -- employees from on-property distribution.

QUESTION: You mean you don't bar outsiders with your rule?

MR. McPHERSON: Oh, outsiders would fall under the Babcock & Wilcox rule which says that they may, under any circumstances, be barred to -- off of company property for distribution and solicitation.

QUESTION: At least you can't bar them under your waiver, can you?

MR. McPHERSON: Yes, we could bar them under our waiver, sir.

QUESTION: No, I would think not. If the theory of your waiver is that the incumbent union and the employees

have consented, by virtue of the contract, that's well and good for them, but for a non-employee soliciting for another union, maybe you can bar him under Babcock, --

MR. McPHERSON: Right.

QUESTION: -- but you can't bar him under your waiver.

MR. McPHERSON: Well, there would be no -- I don't think you'd really face that question under the waiver, because of Babcock & Wilcox.

QUESTION: But you bar them because they're strangers to the plant, and strangers to the entire relationship, is that not so?

MR. McPHERSON: That is correct, Mr. Chief Justice. Which is the reason for Babcock & Wilcox.

But if this Court should decide that the presumption of the Fifth Circuit in Mid-States is a very real fear that the union will not fairly represent employees in this type of context, I would hope that this Court would take a very serious look at the remedy that it has purported to follow, which is far in excess of the Fifth Circuit and Eighth Circuit holdings.

Thank you, Mr. Chief Justice.

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

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:29 o'clock, a.m., the case in the above-entitled matter was submitted.]

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