ORIGINAL

In the

Supreme Court of the United States

SCOTT HUDGENS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, et al.,

Respondents.

No. 74-773

Washington, D.C.
October 14, 1975

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v.	:	No. 74-773
NATIONAL LABOR RELATIONS BOARD, et al., Respondents.	:	

Washington, D. C.

Tuesday, October 14, 1975

The above-entitled matter came on for argument at 11:07 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:

LAWRENCE M. COHEN, Esq., 233 South Wacker Drive, Suite 7916, Chicago, Illinois 60606; for the Petitioner.

NORTON J. COME, Esq., Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C. 20570; for the Respondent.

LAURENCE GOLD, Esq., 815 16th Street, N.W., Room 808, Washington, D. C. 20006; for Respondent Local 315, Retail and Wholesale Department Store Union, AFL-CIO.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-773, Hudgens against the National Labor Relations Board.

Mr. Cohen, you may proceed when you are ready.

ORAL ARGUMENT OF LAWRENCE M. COHEN, ESQ.,

ON BEHALF OF THE PETITIONER

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

The question that we have in this case is when in a case arising under the National Labor Relations Act do non-employees have the right to picket on private property, in this case the private property of a modern shopping center.

To resolve this question, four decisions of this Court must be reconciled. We have, first of all, the Babcock & Wilcox decision of the Court in 1956, which was a case arising under the National Labor Relations Act and held that non-employees do not have a right to come on private property to engage in organizational activities except where there are no other reasonable alternatives available.

The second case is a Constitutional case arising under the First Amendment, the Logan Valley case in 1968. In that case this Court held that a union may picket on the private property of a shopping center where the center is the functional equivalent of public property, where the picketing

is directly related to the use to which the center is being put, and where there are no other reasonable alternatives or opportunities for the pickets to convey their message to the intended audience.

The third case that has to be reconciled--two cases actually--they were decided at the same day in 1972. First, the Lloyd case, which also arose under the First Amendment, not the Labor Act, where the Court held that Vietnam protesters could not enter upon the private property of a shopping center to handbill because the handbills were not related to the functions of the center, there were other alternatives available, and the center was not the functional equivalent of public property.

Finally, decided the same day as Lloyd, there was the Central Hardware v. Labor Board case, which arose under the Act, not the Constitution, as does this case, in which this Court held that non-employees, organizers, on the parking lot of a large retail store were subject to the Babcock & Wilcox test, that they had no right of entry unless there was an absence of other reasonable alternatives.

In this case we have a situation like Babcock, like Central Hardware, that arises under the National Labor Relations Act, not the Constitution.

Q Mr. Cohen, let me ask you, why does this case arise under the National Labor Relations Act? Your client,

the petitioner, did not employ any of these people. They had no dispute whatever with him.

MR. COHEN: That is correct.

Q Why does it then arise under the National Labor Relations Act?

MR. COHEN: Because the union representing the pickets involved filed a charge against Hudgens, the owner of the center; and under the Labor Act any employer can be subject to a charge. The Board found that the employer's conduct--that Hudgens being an employer, not necessarily the employer of the pickets but nevertheless being an employer, had committed a violation of Section 8(a)(1) by excluding the pickets and that that conduct interfered with the pickets' right for self-organization guaranteed by Section 7 of the Act and therefore was a violation of the Act.

Q Would the Board's reasoning carry over so far that if you did not have a shopping center but had a simple street and your client had a place on one side of the street with a parking lot and another business had a place across the street without a parking lot and the employees across the street wanted to organize that place but they could not find any access, so they said your client's parking lot was the nearest place they could make contact--do you think that the Board would say that your client, even though he had no connection whatever with either the employer or the employees that were in

the dispute would have violated the act?

MR. COHEN: I think the position that the union has taken in this case would support that reasoning.

Q Do you agree with it?

MR. COHEN: No, I do not.

Q So, what would the Board say?

MR. COHEN: The Board would take the position, as I understand it, it depends in the Board's mind really on the type of property that is involved. The Board says the distinguishing feature in this case--

Q The argument would not be that your client, in Justice Rehnquist's example, was not subject to the Act.

MR. COHEN: No.

Q They would say of course he is subject to the Act.

MR. COHEN: That is correct. That is correct. And if my client, to use Justice Rehnquist's example, had a large shopping center, then the Board would make the identical argument it was making here today.

Q But what argument would it make in the example I gave you where it was simply an entirely independeng business premise across the street with a parking lot?

MR. COHEN: They would take the position that if this were a large shopping center, quasi-public property, that the pickets would have a right to come onto that property because

that would be the best location, if you will, where the pickets could engage in their conduct unless there was some other reasonably attractive public place. If there was a nearest quasi-public place, the pickets would have a right to picket there even if it was an employer of some other business.

Q That sounds like an amalgamation of the First Amendment and the National--

MR. COHEN: That is what the Board has got here.

Q But you said that you did not think the Board would hold the employer as having committed an unfair labor practice in Justice Rehnquist's example, that they would say, "Sure, you are an employer, but you just have not violated the act.

MR. COHEN: As I understand the Board's argument, it turns on--

Q They would say he is an employer, nevertheless.

MR. COHEN: That is correct. And the Board says that the difference between the Central Hardware case and this case is the type of property that is involved. If you have what the Board says is quasi-public property, property that is the functional equivalent of municipal property and they would put any large shopping center in that category, then according to the Board, you do not have a Section 7 case, you have a Constitutional case. And if you have a Constitutional case, you first look to whether there is a direct relationship

involved. And, second, you look to whether there is some public site available. If there is no public site available and there is a direct relationship, then the pickets have a right to come onto the property.

The case turned, in other words, on whether you have a large shopping center such as we have here, or whether you have a small shopping center as the Board had in the Nichols case or a single standing store such as Central Hardware. In those cases the Board says you do not have quasi-public property and there is no right to come on unless you can meet the Babcock & Wilcox burden, which is essentially our position.

The union takes the opposite point of view. The union says, "We agree with you. It is not a question here of whether you have a large center or a small center. In any case, the Constitution does not apply." So far we and the union are in agreement. Where the union parts company it says that Babcock only applies to organizational cases; Central Hardware only applies to organizational cases. Where you have picketing, the pickets have an absolute right to come on as long as they are engaged in peaceful primary picket. That is the union's position.

Q Wherever they picket.

MR. COHEN: Wherever they picket, as long as they are in primary picketing, as I understand it.

Q And on whosever property?

MR. COHEN: On whosever property it is. There is an absolute right, according to the union, as I read their brief, to always engage in peaceful primary picketing, even if it is on private property.

Q What case do they cite for that?

MR. COHEN: They cite for that the Steelworkers case which involves Section 8(b)(4) question of where a union was picketing on the private property of a railroad company to appeal to the railroad's employees. That was a violation of Section 8(b)(4) as a secondary boycott. This Court held it was not a secondary boycott.

Q That was a common situs?

MR. COHEN: That was a common situs, yes.

Let me briefly cite the facts in this case in respect of these different arguments I have been discussing, and the facts are generally not in dispute.

Scott Hudgens owns and operates what is called the North DeKalb Shopping Center located in a suburban residential area of Atlanta. It is a modern shopping center. It resembles very much the center that this Court discussed in the Tanner case. Entry is from five different entrances. Three are side streets, primarily residential streets. A full stop is required before entering the center. Two others are off of a highway shortly after a stoplight. They require a slow turn into the center. At each entrance there is a public right of way,

and there is undisputed testimony in the record that pickets could have picketed on that right of way safely and with their picket signs legible to anyone passing by. And it is at page 141 of the appendix.

After you enter the center, you cross a large parking lot and then reach an enclosed mall building. There is a ten-foot wide sidewalk surrounding the mall building and four entrances into the main mall building from the sidewalk. Eighty-five to ninety percent of the customers of the tenant stores use one of those four entrances. There are also some small entrances into individual stores.

A considerable investment has been made in the mall to make it attractive to shoppers, the mall building. It is carpeted. There is piped in music, benches, fountains, drinking fountains, temperature controls, carousel for children. The center has regulations, dress regulations, parking regulations, security regulations which it enforces. The center is closed at certain times of the day to anybody coming through.

There is also a long established and uniformly enforced policy that no one has disputed here forbidding any commercial activity on the mall except at least small booths, kiosks, which are leased out and handled like any other tenant store.

In fact, the center here involved was before this Court in a case in 1974 called Steffel v. Thompson, which

involved the center's exclusion of Vietnam War protesters. It came up on a procedural question rather than on the merits, but that was the identical center and the identical policy we have here today.

The present controversy arose when employees of a warehouse owned by one of the tenants of the center, Butler Shoe Company, went on strike in January, 1971. The pickets who then resulted from that strike--and the picketing occurred at all the nine Butler locations in the Atlanta area, including the one at the center and at the warehouse. Pickets were not employed by Butler in the center. They never sold shoes. They had no contact with anyone in the center. Their only contact with Butler was the fact they were employed by Butler at another location in Atlanta. There was no dispute involving the center. The center employees were unorganized, and there was no attempt to organize them here.

The manager of the shopping center saw the pickets waiting to picket the Butler store inside the center sitting on one of the benches before the Butler store opened. He told them they had to leave. They left. They came back about a half hour later, picketed for about 30 minutes with signs saying But ler warehouse was on strike. They marched up and down at the corner store where the Butler was located, sometimes four abreast, sometimes only two abreast. After about a half hour went by, the manager saw them. He went up to

them, told them to leave, and said if they did not leave, they would be arrested under Georgia criminal trespass law. The pickets left.

Q How far away is that public highway that you mentioned? How much right of way where they could have picketed?

MR. COHEN: Approximately 500 feet from the mall building. And then the pickets were inside approximately 15 feet from the entrance.

Q I gather that the only chance that the customers headed for the Butler store would have seen those signs--

MR. COHEN: If the picketing were put out on the right of way, yes, they would have been 500 feet away. Customers would have seen them as they entered the shopping center.

Q So, it would not have been as effective picketing, I gather, addressed to consumers as it was picketing in front of the store.

MR. COHEN: Certainly in the union's opinion that is correct. The union would say it was diluted because of the distance involved.

Q Would you doubt that?

MR. COHEN: No, I would not.

The Board found a violation here, and after the case then went to the Fifth Circuit, there was a remand as a result of Central Hardware and Lloyd. The Board heard the case again,

found another violation but on a different theory altogether, which I'll discuss, and then the case was in turn appealed to the Fifth Circuit which enforced the Board's order but on a third theory altogether.

So, let me turn, if I could, to the different theories that have been advanced to this Court, and there are four or five of them, and try to explain where I think the parties differ.

First, there is the position of the Board in its initial decision, which is really advocated here today, and adds to the Constitutional test. What the Board says is that where you have a large shopping center, quasi-public property, then Central Hardware and Babcock are irrelevant. But those cases only apply when you have a single standing store or something that is not a functional equivalent.

Where you have a large shopping center, then you apply a Constitutional test. And under the Board's Constitutional test it differs from the statutory test. The Constitutional test as the Board would apply it is say, "First, do you have a direct relationship?" And they would answer that by saying yes, because the picketing is at Butler.

And, second, if you do have a direct relationship, then the burden is on the employer, not on the union as it would be under Babcock, the statutory test, but it is on the employer to show that there is no public place, not just a reasonable

alternative but public place, for the union engaged in its picketing. If the employer cannot show that, then the union has a right to picket on the shopping center if it is a large quasi-public piece of property.

Second, there is the approach--this is a different approach--that the union argues. As I said, they agree with us that their Constitutional test has no bearing here. But they would say that Central Hardware and Babcock apply only to organizational situations, that where you are dealing with a picketing situation, a primary picketing situation, then the union has an absolute right to come onto private property engaged in peaceful primary picketing.

This position has not been accepted by the Board. It was rejected in both this case and the Nichols case, and it was also rejected by the Third Circuit in the Peddie Building case, which involved picketing on industrial power.

There is the position of the Court of Appeals, which is really a blend of these two tests and was urged in this Court by the amicus Chamber of Commerce. What the Court of Appeals said was that neither the statutory test nor the Constitutional test provide the answer, and we need something in between. So, they agreed, except that there ought to be a test of direct relationship, and they agreed there ought to be a test of alternatives, but it was not clear whether they were applying the test of alternatives the Board proposes or the test of

alternatives of Babcock. In any case, what they said was alternatives were met here because there was no real alternative to picketing inside the mall.

Q Do you think they upheld the Board?

MR. COHEN: Yes, they did.

Q On a ground you think that the Board used or not?

MR. COHEN: No, they said, "We are not following the Board's argument." The Board advanced a fourth argument of Republic Aviation, an employee test--

Q Did they remand or did they themselves apply a new test and say it was satisfied?

MR. COHEN: That is right.

Q Is that what a court should do with respect to an administrative--

MR. COHEN: I think that this is assuming an effective argument that they should have remanded it; they applied a new test, and this Court said that on occasion. But we have not argued that here because we think that the test that the Court of Appeals proposed was the wrong test too.

Q Would not Cherry require that it go back to the Board?

MR. COHEN: I think that if the Court of Appeals has said the Board has advanced the wrong test and if the new test--none of the parties has argued, the Board, the union and us did not argue it. It was proposed only by an amicus. And the

proper resolution would have been to send it back to the Board to apply that test, yes.

Q But that is even assuming that the Court of Appeals was right in its theory.

MR. COHEN: That is correct, which we do not agree.

Q And the reason you do not argue Chenery is you say the Court of Appeals was wrong.

MR. COHEN: That is why we are here today, and that is why we have argued--

Q You say the Board was wrong too.

MR. COHEN: Yes. We say the Board was wrong, the union is wrong, and the Court of Appeals is wrong. We take a fourth position. And our position is that we are dealing with a statutory case, whether it is picketing or organizational activity.

Q You just rely on Babcock & Wilcox.

MR. COHEN: Babcock applies to Section 7, where you have any Section 7 case, organizational picketing, and regardless of the type of property involved. We think the lesson of Central Hardware is you apply the statute. The statute is Babcock & Wilcox. You look to whether there is any reasonable alternative to the picketing. If there is not, as we say there is not here, then there is no violation of the Labor Act.

Q Let me begin my question by saying this. Part of this problem--Logan Valley and Lloyd v. Tanner--stems from

Marsh v. Alabama.

MR. COHEN: That is correct.

Q The old-fashioned kind of company town. What if you had a company town here, a Marsh v. Alabama; would you think this was not a Constitutional case?

MR. COHEN: I would say if the case arose under the Constitution and you had a company town, then you would have a different result altogether.

Q No, the company town and the company was the employer like Marsh v. Alabama.

MR. COHEN: Then I think what you have is you apply a Babcock test, but you find no alternative. It is a Grossinger's case. Grossinger's was a resort hotel. Employees tried to organize in the hotel. The Second Circuit got the case and said in that situation the employees had never left Grossinger's, they never have a chance to go out and see anybody else, they are isolated there; there is no real alternative to the union to coming onto the private property to organize. And we say the same thing would be true of picketing. There is no real alternative.

Q And it would still be no more than a statutory case, in your view?

MR. COHEN: But the statutory test and the Constitutional test would yield the same results. I say you apply a statutory test, yes. But the statutory test and the

Constitutional test would both determine in that situation there is no alternative. So, the union would have a right to picket or engage in organizational activity.

Q Could not the test for an unfair labor practice be different from a Constitutional violation?

MR. COHEN: Yes, it is.

Q That is what I thought you were arguing.

MR. COHEN: The test is different but it would yield the same result. The test under the Constitution asks for a direct relationship and it imposes alternatives. I say that the Board is arguing that the alternative test is different from the statutory test. We do not necessarily agree with that. We think the test of alternatives under the statute is not any different from the test of alternatives which is implied in Lloyd and implied in Logan Valley. There is not a more stringent test that the Board proposes. But we do not have to reach that question because in our view what you are dealing with is strictly a statutory test as long as the union has filed charges under the Labor Act.

Q If you have a pure company town situation, the hypothesis is that the company is the equivalent of government.

MR. COHEN: That is correct.

Q That is the theoretical underpinning of Marsh v. Alabama, and then there is no more room for alternatives, is there? There might be room for time and place regulation, but

beyond that there is no room for anything.

MR. COHEN: In a First Amendment case, that is correct.

Q Right.

MR. COHEN: We are not going to proceed under the Constitution. We are going to file a charge under the Labor Act. This Court said in Central Hardware the Labor Act may be broad, it may be less. In that situation, the Labor Act gives you the same protection, except it is an unfair labor practice because under that situation there is no alternative if you cannot meet the Babcock & Wilcox test. So, you end up with the same result.

Q In your position, Mr. Cohen, how do you reason through under the statutory language how this is an unfair labor practice where the employer does not employee any of these people and the dispute is basically between one of his tenants?

MR. COHEN: I do not differ with the Board in the proposition that an employer--that someone besides an employer or the individuals involved could violate the law. I mean, another employer--I mean, there have been cases where the Board has held--let us say that someone who comes and pickets another employer, joins a picket line. He is not employed by the company he is picketing. That employer takes action against him. That is an unfair labor practice.

I would not part with the Board as far as the employer involved here. I think it is a stronger case for us the fact that you do not have--that Hudgens is involved. But I do not think that is what it turns on. What it turns on under the statute is whether there has been an interference with employee rights. And there is not an interference with employee rights if the employees have other alternatives available. Then you look to the employer's property rights.

Q And you are going to get to what you think those are in this case, I guess.

MR. COHEN: Yes. Yes, I am. I wanted to first cover, if I could, briefly why we think the Board's position and the Union's position are wrong, why we think that either a test of quasi-public property as opposed to purely private property, which is the Board's approach, or picketing as opposed to organizational rights--neither of those provides a proper dichotomy for resolving this dispute.

The Board's position we think is wrong mostly because it would give you an illogical situation. You would have someone who had a large private store like Central Hardware, someone who had a small shopping center like the Board had in the Nichols case, a discount store, an industrial park--all of those employers would have one rule, and someone who was in a large shopping center such as Lloyd or Logan Valley presumably or DeKalb Center here would have a different

rule, that you would have one rule for large centers and one rule for small centers. That is not what we think the Act intended. There is not any demarcation in the Act that one type of employer would be able to insulate himself from the same activities that the other employer would be subjected.

If there is anything to be learned from law, it is that size, openness, in cluster with other stores in a modern shopping center do not make the difference. This is exactly what this Court said in Lloyd. That the fact that an employer may choose one particular place for his retail business, one situs, and be a larger store than some other store, that is not what determines Constitutional rights and it is not what determines rights under the Act.

In addition, in our view, Central Hardware did not restrict itself only to certain types of locations. The difference between Logan Valley and Central Hardware was that Logan Valley was not a Section 7 case--Logan Valley was a Section 7 case. And that would apply equally well to large shopping centers as well as small.

Q Logan Valley was not a Section 7 case.

MR. COHEN: Logan Valley was not a Section 7 case; Logan Valley was a Constitutional case.

Q And did not even involve a labor dispute--yes, it did.

MR. COHEN: Yes, it did.

Q Yes, it did.

MR. COHEN: It involved labor picketing.

Q It was Tanner that did not involve a labor--

MR. COHEN: That is correct.

Q But you are not very much interested in having this Court say there was not any violation of the act here because under the act you can only commit an unfair labor practice in these circumstances if so and so, and that these facts do not amount to unfair labor practice. But, nevertheless, if you wanted to, you could go into court and get relief under the First Amendment.

Q It would be a Pyrrhic victory.

MR. COHEN: Of course.

Q You would not like that very much, I do not suppose.

MR. COHEN: Of course.

Q You want us in effect to decide both questions here.

MR. COHEN: I have not asked that because it is really not before the Court in this case.

Q The Board thought it was. It equated what it thought was a Constitutional question.

MR. COHEN: And I think that is where it erred. Let me say this. I think--

Q But you would be very happy, I suppose, if the

Court said the Board misunderstood the Constitutional test; the Constitutional test is narrower than the Board thought it was, and it is no broader than the Labor Act test.

MR. COHEN: Then I think you would reach the result I wish.

Q That is what I say; you would be happy then.

MR. COHEN: That is correct.

Let me just say that on the Constitutional argument, because this is one of the arguments the Board advances, you cannot have a different test under the Constitution than you would under the statute. So, therefore, the test that we apply under the statute has got to be the same as the Constitutional test; it has got to be the narrower test because otherwise you would have conflict.

I think the first question you have is, Can the state courts have any jurisdiction at all in this area? That is a question this Court has never answered. You may never have a Constitutional case like Logan Valley if in fact the state courts are preempted.

Q Logan Valley came up from a state court.

MR. COHEN: But Logan Valley did not meet the preemption question because it had not been presented in the court below. So, the only Justice who met it was Mr. Justice Harlan, who said that he felt it was preempted. It came up again in the Taggart case and again the Court did not answer the

question because they found that the writ had been properly granted, although there was a separate opinion by the Chief Justice and a separate opinion by Mr. Justice Harlan again on the preemption question.

The Georgia Supreme Court in this case has said that they were preempted. They could not give a declaratory judgment, and that is the question that is before this Court on a separate petition for cert. It has not been ruled on.

But there is, first of all, a question we have as to whether the state courts are preempted and, even if they are, whether you have a conflict.

Q Is there any way this particular employer could ever get before the Board?

MR. COHEN: No.

Q He could not possibly ever find out whether the behavior is protected or prohibited?

MR. COHEN: That is why that area may not be preempted, as you said in Ariadne, Mr. Justice White, and as the Chief Justice said on Taggart, because it may be a no-law area. So that if you have a conflict, we would say, because if you want to avoid a no-law area, that may just be the price to pay for having a--in order to provide a remedy for a wrong.

Let me turn, if I could, quickly to the union's argument and then to why we think the Babcock test is met.

The right to picket we submit is--even primary

picketing, even for a peaceful purpose--is not an absolute right. That right has been restricted by the Act; it has been restricted by state law under certain circumstances; the union does not have an absolute right to engage in primary picketing. It has a right only if it meets other conflicting purposes and competing purposes under the Act.

The union's argument that it would have an absolute right to appropriate private property to picket whenever it does would also lead to illogical results. It means the union could come onto private property and picket to obtain recognition, to give an illustration; but it could not come onto that same private property to sign up people on authorization cards to hold a board election.

So, what you would have is a case where a union could proceed to coerce an employer by recognitional picketing as it would have under the union!s view an absolute right to do so, but could not come onto the property to proceed to obtain a board election, which is the preferred course of conduct as this Court said in Linden, this Court said in Gissel Packing.

Taking their point of view,which is what we contend, then we think the question really is, Has the union exhausted any other alternatives to communicating its message besides picketing?--that that has got to be approached like Babcock & Wilcox. Those alternatives here--and there was no evidence put on that the union even tried any alternative. The only evidence

that was put on was by us as to what alternatives had been used by the shopping center to bring people into the center to conduct business with Butler and the other tenants. They consisted of newspaper, radio, television, all the different techniques that the Board and the Courts of Appeals have applied and said are alternatives to communicating with employees.

For example, in Central Hardware when that case was remanded back to the Board, one of the things they looked to--I mean, remanded to the Court of Appeals--was had the union tried newspapers, had it tried radio and television, to just appeal to those employees who worked at the Central Hardware store. If that is an effective alternative to appeal to the people working at the Central Hardware Store, it is also an effective alternative to reaching the potential customers of the Butler store. The Butler store in fact is a larger audience. So, if it is effective to reach a small group, why is it not effective for reaching a larger group? No one has ever answered that question.

No one has answered the question of why the union could not have picketed on the right of way here. There was a question asked of a witness, page 141 of the record, "Could the union safely picket on the right of way?"

The witness says, "Absolutely."

"Could someone read the picket signs?"

He said, "Easily"--narrowly but in the record, and

yet everyone said that is just not a correct place because it is too far away.

Q Do you think you might run into secondary problems?

MR. COHEN: No, I do not, and I think that this is a specter--

Q It sounds like you were ready for that question.

MR. COHEN: Yes, because I think this is a red herring in the case. Everyone kept saying if you picket in a common place where there are many tenants, you are always going to have secondary problems.

One of the interesting cases on that that just came up was the Wire Service case.

Q Where you would--

MR. COHEN: But you have more drydock. You have Denver Building Trades which specifically provides guidance--

Q I would think your client would complain more about consumer picketing at the entrance to the entire shopping center than picketing a single employer's establishment.

MR. COHEN: My client would not but many clients would, and I think the illustrative case is the Wire Service case, I was saying. There you had a tenant of a large building--

Q Every tenant in the shopping center would be on the pickets' backs then, I suppose, because they are interfering with everybody's business.

MR. COHEN: But it would not be as disruptive as picketing on the enclosed 30-foot wide island.

Q What do you mean "disruptive"?

MR. COHEN: It would not cause we think as much loss of potential business, if you will.

Q But it is only causing the potential loss of business in one store.

MR. COHEN: Well, that may be.

Q Let us assume it is. Then how do you say that is so disruptive? It certainly disrupts one store.

MR. COHEN: It disrupts one store. It is in an area that is really tantamount almost to a shopping area. It is almost an extension of the store itself. There it is more disruptive, we believe, than it would be picketing on a public right of way. We cannot restrict the public right of way.

Q Is part of your case that this picketing was not related to the purposes of the shopping center?

MR. COHEN: That is not part of our case. It has been advanced by some of the parties; we have not really contended it.

Q Do you concede it or not?

MR. COHEN: We have said that is not really relevant.

Q Tell me how you think it was. If you think it was connected, how does it connect with--

MR. COHEN: I have not argued it is connected because I think that if you--the difference is whether it is connected

because it arose at a different situs. The Chamber has argued here as an amicus on our side that it is not connected because it arose at a different place than where the pickets are. And if you say anything that is directed at a customer at a shopping center, any consumer picketing at a shopping center, at a store, is related, then everything is related. No union is ever going to picket for some purpose that has nothing to do with anybody on the shopping center. So, the directly-related test is superfluous. And I think that is correct. We have not contended any direct relationship test because that is not pertinent to a statutory situation. There it is only Babcock. Babcock does not require that it be directly related.

Q Yes, but it is certainly related for Constitutional purposes.

MR. COHEN: I am not arguing that, yes.

Q That issue is certainly in the Constitutional test.

MR. COHEN: Correct. Correct.

Q For Constitutional purposes, would this be related under Lloyd, or do you know?

MR. COHEN: I would argue the position that the Chamber has adopted, that if there is a directly-related test, it may not have been met here. But I would not argue it with the same vigor that they have argued it because I think it is a position that we do not have to really urge in our situation.

I think it is very hard to make it out that it is not directly related. I would agree with you there.

Unless there are some questions, I would like to reserve the remainder of the time.

Q Let me just ask you about that inquiry on picketing at the highway. If I understood you correctly, you said that they could get their message across by picketing outside where they entered from the main highway.

MR. COHEN: Yes.

Q Might they not run into the local police department who might say that that presented traffic hazards with cars slowing down and people slowing down to try to read signs?

MR. COHEN: I presume that is a possibility. But, first of all, it was never tried here; we do not know. And the testimony in the record is that there was a sufficient public place for the pickets to stand with their picket signs that would not have caused any traffic hazards.

Q Maybe I misunderstood the facts, Mr. Cohen, but I thought you said the public right of way was off the public highway.

MR. COHEN: It was off the public highway; that is correct.

Q So, you would not have quite, would you, at that spot the traffic problem the Chief Justice suggests?

MR. COHEN: That is what I am saying. I think the record here would not indicate that. I suppose the pickets could spill over into the highway and they might be a problem.

Q Do you suggest also that for consumer picketing purposes there were alternatives to having a public place to do it?

MR. COHEN: Yes.

Q Namely, you mean what, the press, radio?

MR. COHEN: Radio, television.

Q Which would be rather expensive, I suppose.

MR. COHEN: But the test is not one of expense. This is where I think the Board and the union are incorrect. They say, "Well, look, that would be expensive or be less convenient or would not be as effective." But their test is not whether you have a most effective area, the most convenient area, the most reasonable place. It is a question of whether you have any other reasonable alternative, and here there were other reasonable alternatives, just like there was for communicating organizing purposes to the employees.

Q Then expense has nothing to do with reasonableness of the alternatives?

MR. COHEN: Oh, sure. If it turned out here that the expense was so prohibitive that the union could not possibly undertake it, yes, that would not be a reasonable alternative. But the testimony is to the opposite. We put on an expert

witness in this case, a friend who was well versed in advertising, and he said that if I had so many dollars to spend, how much I would pay for hypothetical pickets, to reach nine stores in the Atlanta area, which is really picketed, that radio, television, mailing, newspapers, all of these were both more effective and less costly. So, the evidence here is that it was a reasonable alternative.

Q Do you think the Board conceded or has it even indicated how the case would come out under a straight Babcock?

MR. COHEN: The Board has not addressed Babcock. In an identical situation in Nichols where the Board did not ever put on any evidence, it was a small shopping center--the only difference was that it was a small shopping center--the Board argued Logan. The administrative law judge found Logan. It got to the Board. The Board said, "Well, that is not Logan. It is really a Babcock test." They dismissed the charge because they said the general counsel did not carry his burden of proof. And the only difference between that case and this case was that one was a small shopping center and one was a large shopping center, both picketed.

The only difference between Peddie Building and this case was the Board applied Babcock. When after the Board found a Babcock violation, the Third Circuit reversed. That was an industrial park; this was a shopping center. Both picketed.

So, we would say that the result the Third Circuit

reached in Peddie, the result the Board reached in Nichols, would be equally applicable here. You apply Babcock. There is no evidence in the record to show that the union has attempted to exercise reasonable alternatives. The charge ought to be dismissed.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE RESPONDENT NLRB

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

The principle of Babcock, as we see it, is that in striking a balance between property rights and employee rights for purposes of the National Labor Relations Act, accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.

As applied to the facts of Babcock, which involve non-employee union representatives seeking access to wholly private property to solicit employees to join the union, the Court concluded that non-employees could be excluded except where it could be shown that there were no other reasonable means of reaching the employees.

We submit that the facts of this case are different and therefore the accommodation for purposes of the National Labor Relations Act could properly be different. The property

is not wholly private but has assumed, as this Court used the phrase in Central Hardware, some significant degree of functional attributes of public property devoted to public use.

Secondly, access is sought by employees and their purpose is not to solicit for union membership but to appeal through peaceful picketing to customers of their employer's retail store to withhold patronage from that store in support of a lawful economic strike they have against their employer.

Q Mr. Come--

MR. COME: Yes, Your Honor.

Q --what if instead of the shopping center situation that the record here shows you had an employer on one side of the street, another employer on the other, nothing to do with one another, and the union wanted organizational picket of the employer on the south side of the street, but there was no real access there. The employer on the north side of the street had a parking lot. Would the Board say that the union could in effect conscript that employer's property in order to make its representations to the employees of the employer on the south side of the street?

MR. COME: I do not think so, Your Honor, but I know of no case that has arisen before the Board preventing that. But I would submit that the two situations are distinguishable.

Q Why, for purposes of the Act as opposed to the Constitution?

MR. COME: First of all, I think that for purposes of the Act in the situation that you are positing, unlike here where you have a closer interrelationship between the shopping center owner and the store owner, this was not explored in this case because the parties stipulated that Hudgens was an employer and that was as far as the matter went.

Q In my hypothesis both employers would be employers under the Act.

MR. COME: However, if it were necessary to dispose of this case, findings could have been made that Hudgens, in view of the relationship to Butler, not only brought Butler onto this center but, in terms of the lease, the rent that Hudgens was paid was dependent upon the revenue of the Butler store. It could be found that Hudgens was acting as an agent of Butler; under the statutory definition of employer under the Act, it includes anyone who is acting as an agent of an employer either directly or indirectly.

Q How could you find that Hudgens was acting as an agent of Butler unless Butler told Hudgens in effect, "Get out there and stop those pickets"?

MR. COME: The Act also has a very liberal definition of agency which says that the mere fact that there has not been any specific direction or authorization is not controlling. I think that you could have found apparent authority or at least ratification of the acts of Hudgens.

All I want to point out is that I think that the two situations, the hypothetical and this case, are factually distinguishable, and in an appropriate case I would feel confident that the Board would draw the distinction that I am drawing.

Turning to the factors that I have mentioned at the outset, first of all, this is a situation where Hudgens' property interest is substantially attentuated. The shopping center is the kind of property to which the First Amendment would accord a broad right of access.

Q There are two factors, as I understand it. First of all, two factors distinguish this from Babcock & Wilcox. First, that this was quasi-public property.

MR. COME: Yes, Your Honor.

Q Secondly, that this was not organizational picketing but rather consumer picketing.

MR. COME: That is correct, by employees.

Q By employees. Those two factors--

MR. COME: Yes, Your Honor. Yes, Your Honor.

Q --you say distinguishes this case from Babcock & Wilcox.

MR. COME: Yes, Your Honor.

Q Would it be a fair question to ask you that if you had--is it your position on behalf of the Board that Babcock & Wilcox applies only to organizational picketing? If

you had an employer such as was involved in that case whose property was private property but the picketing was of a nature that we find in this case, would the Board say that was a different case from Babcock & Wilcox?

MR. COME: I do not really know the answer to that because you do have the factor that the property is different. In one case it is wholly private and--

Q Do you understand my question?

MR. COME: I understand.

Q Assume the property were the same as in Babcock & Wilcox. If the picketing were as in this case, what rule would the Board apply?

MR. COME: I think that the Nichols case that was alluded to by my adversary would indicate that in that case the Board would have applied Babcock. I am not so sure that on more careful that is necessarily correct. But for the moment, that is the state of the Board's law.

Q Which really means, if you parse it down, that the second factor is not a distinguishing factor, does it not?

MR. COME: The logic of that would lead to that conclusion.

Q That is, in the light of present Board rule.

MR. COME: Yes. However, I must point out that this is a situation where the Board perhaps more than usual is feeling its way because its view of this has had to be

refocused considerably in the light of this Court's decision in Central Hardware and in Lloyd, which are only about three years away.

Q Mr. Come, pursuing the discussion that you and Mr. Justice Stewart have been having, assume in this case that there were no union agreement between the union and the employer with respect to the warehouse employees. And assume further that the union was attempting to organize the warehouse employees. Would your position be the same with respect to picketing at the shopping center of one of the retail outlets of this employer?

MR. COME: Yes, I think it would be.

Q Is that compatible with your responses to Mr. Justice Stewart?

MR. COME: Yes, I think it was. As I understood his question, he gave me the situation where it was purely private property and not quasi-public. I think that on quasi-public a Constitutional test is very, very relevant to determining the proper balance for Section 7 purposes. There may be situations--and I think Central Hardware and Babcock show the situation--where Section 7 may give broader rights than the Constitution would provide. But I submit that it is not reasonable to say that Section 7 would ever accord less protection than the Constitution would afford, given an employer-employee relationship.

Q Mr. Come, just one more question before we leave this line of thinking: As I understand your position, it does not matter whether the activity at the warehouse was organizational activity or a dispute as to wages and working conditions where a union already had a contract.

MR. COME: No, I do not think so, Your Honor. I would say yes, I do not think it makes a difference. I think Logan Valley shows you that because in Logan Valley it was straight organizational. I mean, the union did not represent anybody in the store, the vandalized market. But, nonetheless--

Q Right, but that was one site where the organization was directed against the employees of the store. Here you have an organizational effort at one location. Suppose the organizational effort had been in Seattle, Washington, the same employer. Could the union have posted pickets in front of a store in Atlanta, Georgia with respect to which there was no union organization activity in a shopping center?

MR. COME: As I understand the scope of the protection for mutual aid and the protection that Section 7 gives, fellow employees have a right to appeal to--employees in one segment have a right to appeal to their fellow employees working at other places of the same employer.

I think that this makes it a much easier case, however, and I do not think that we have to answer the case of churlish stranger organizing that Your Honor posits because I

thik that 8(p)(7) of the statute, which regulates organiazational picketing, might enter into the picture and impose some restraints that we do not have to worry about here.

Q Mr. Come, say you have a free-standing store that fronts on a public street and he has a parking lot for the customers behind. Customers may enter from their cars and go in the back door. They can go in off the street, and the employees in that store strike and they picket. They can picket it on the public street, I take it. May they go onto the parking lot and picket right in front of the back door? What are the rules of the Board with respect to that? Is that a Babcock test?

MR. COME: I do not think that it is a Babcock test, and I think you have to make an accommodation--

Q Let us assume there is a gate into the parking lot on the public street and the employees co-ld just as well picket on the public street, but they say, "No, it is much more effective if we come right into the back door," on the employer's parking lot. What is the Board rule there?

MR. COME: The reason I am hesitating is that I do not know of a case that exactly presents that situation. The only ones that I am familiar with are situations where there is either a public sidewalk where you can picket or there is not--

Q Mr. Come, we are familiar with shopping around here with the Sears Roebuck and Lord and Taylor setups where

you have to go up ramps to park, and most people, I gather, most customers, enter those two stores from the parking lots which are elevated a couple of stories above the street.

MR. COME: It would depend upon, as it is here, whether or not there is a wholly public area where that activity can be reasonably carried on.

Q You must know those stores; on Wisconsin Avenue the entrance to Sears Roebuck, you go up these ramps and there are large parking lots in back, and you go in the back way.

MR. COME: I would say in that sort of situation you would probably find that the public places would afford an adequate opportunity. But I think it would depend upon whether they do or do not.

Q I do not care about the answer. What is the rule that would apply? What would be the test, the standard? You say it is not a Babcock test?

MR. COME: In that situation it would be the Babcock test because that is not quasi-public property. That is private property.

Q So, you do say then even though it is the employer's own employees picketing, that they may not use his property to picket him and consumer picket except in conformity with Babcock. If under Babcock they have other reasonable ways of doing it, they cannot go on his property to do it.

MR. COME: Except that where picketing is involved,

the question is also whether there is an alternative public facility where that activity can be carried on. I think it does make a difference as to the kind of activity that you are engaging in. But I do not think that that is this case, because here we have quasi-public property and Lloyd, we submit, makes it clear that the Constitution would have given these employees the right to engage in peaceful picketing at the shopping center in front of Butler's place of business.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. Come.

[A luncheon recess was taken at 12:00 o'clock noon.]

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AFTERNOON SESSION - 1:03 o'clock

MR. CHIEF JUSTICE BURGER: Mr. Come, I think you have some time left.

ORAL ARGUMENT OF NORTON J. COME, ESQ. [Resuming]

MR. COME: Petitioner's counsel in response to a question from Justice Stewart indicated that there could well be congruence between the Constitution and the statute if this were a pure company town such as we had in Marsh v. Alabama. We submit that there is no logical reason why there cannot be such congruence when we have quasi-public property. The difference is, as this Court pointed out in Lloyd, that where you have quasi-public property, you have to satisfy two conditions.

One, you have to show that the activity is directly related in its purpose to the use of the shopping center and there was no other reasonable opportunity for the pickets to convey their message to their intended audience. If this were a pure company town, you would not have to meet those tests.

Let us show how those tests were met on the facts here. Although the underlying contract dispute involved Butler's warehouse employees, they were engaging in what would normally be privileged as legitimate primary activity in carrying their dispute to their employer's retail store and seeking the aid of their fellow employees working there and of the store's customers.

To be sure, Hudgens owned title to the property but, as this Court recognized in Steelworkers, the fact that title may reside in a third party does not necessarily impair the legitimacy of otherwise primary activity.

Q That was a much different fact situation from this though.

MR. COME: That is true. But in a sense though it was a more difficult case in that it was purely private property. It was the Carrier plant and it was the railroad entrance to that plant which serviced other plants. It was on property owned by the railroad. Here we have quasi-public property.

Q What makes you think this is quasi-public?

MR. COME: It is quasi-public because in all material respects it is like the shopping center in Logan Valley.

Q How much of Logan Valley do you think is left after the Lloyd case?

MR. COME: I think that quite a bit of it is left. It has been narrowed but only in the sense you have to meet the two conditions of relatedness and the showing that there was no other adequate opportunity for conveying the pickets' message. I think that the Court, when you read Central Hardware and Tanner together, draws the distinction that I am drawing between purely private property and a shopping center such as we have here, in Lloyd, and in Logan Valley.

The store picketing was directly related to the use of this shopping center in that the center was designed to attract customers to the stores, and the principal purpose of the pickets was to induce customers to withhold their patronage from the Butler store pending their resolution on the dispute with Butler which Butler, as the employer of both of these employees, the warehouse and the retail stores, was in a position to resolve.

In Lloyd, by contrast, the message on the handbills which protested the Vietnam war was, as the Court pointed out, directed to all members of the public, not solely to the patrons of Lloyd's center or any of its operations. Respondents could have distributed these handbills on any public street or any public sidewalk, in any public park or in any public building in the city of Portland. That is not the situation we have here.

We have a relatedness that would satisfy the Lloyd and the Logan Valley tests.

Secondly, picketing at the entrances to the Butler stores afforded the only reasonable means of conveying the pickets' message to their intended audience. As the court below pointed out, this is not an organizational campaign where it is oftentimes relatively easy to find out who the employees are and appeal to them at their homes. We are appealing here to the patrons of Butler stores whose identity is not readily

apparent until they appear at the store.

Q Mr. Come, what is wrong with the Babcock test in these circumstances? Did the Board indicate whether that test would be satisfied here or not?

MR. COME: You can talk about Babcock on several levels. You can talk of it broadly as an accommodation which I alluded to at the outset. You can talk of it in terms of the facts of Babcock. And when you talk of it in those terms, it does not fit this kind of situation.

Q But the rule was--or is it the Babcock rule?--that if there are other reasonable means of getting their message across, private property rights need not give way.

MR. COME: That is correct, but we do not have pure private property here.

Q All right, just say property rights. I will leave off the word "private." Property rights need not give way.

MR. COME: Yes.

Q I just ask you, if that test were to apply here, would there be other reasonable means of communication or not? And what is wrong with applying that test in a situation like this if there are other reasonable means of doing it?

MR. COME: I submit that there are no other reasonable means of reaching the potential customers of the Butler store--

Q That is not the question I asked you.

MR. COME: --that you are not trying to bring to the store but to turn away from the store.

Q That is not what I asked you. Assume there were other reasonable means.

MR. COME: I think what would be wrong with it is that you would be ending up with a lesser right under Section 7 than the Constitution would give you on this particular property, and I submit that that would make the vindication of the right to picket and strike dependent upon whether you brought suit in a federal court or you brought a charge before the Labor Board, and I submit that that would be--

Q What if the Constitutional right were measured that way? What if that were the Constitutional rule, that property rights need not give way to picketing if there are other reasonable means of getting the message across? What if that were the Constitutional rule? Would you suggest Section 7 ought to go farther?

MR. COME: I think that would be a question as to whether the Board would be right if it were to extend it farther. Section 7 can go further than the Constitution. And I respectfully submit that it is not reasonable to say that it goes less than the Constitution would go, particularly in the situation here where you have the basic rights that Section 7 seeks to protect, the right to engage in peaceful strike and peaceful picketing in support of that right. Section 7 and the

Board's procedures were uniquely designed to deal with that problem, and to force employees to go to the Federal Court and to seek vindication under the Constitution would put the law back to where it was before the Wagner Act was enacted.

Q But the Constitution does not get you anywhere except against governmental action.

MR. COME: That is correct, but--

Q Until or unless Mr. Hudgens here can be equated with government, there are no rights at all under the Constitution.

MR. COME: That is correct and that--

Q Until or unless Mr. Hudgens can be equated with the company town in Marsh v. Alabama, there is no need to talk about anything under the Constitution because it is simply inapplicable.

MR. COME: I think that there is a middle situation.

Q That is what I do not understand. That is what I did not frankly understand in Tanner, and of course you have the Court's opinion.

MR. COME: I had problems too, but I think we have to start with Tanner as a given and having that as a given--

Q No, one really has to start with the Constitution as the given.

MR. COME: That is correct, but this Court interpreted the Constitution in Tanner and I think ended up with a middle

situation which, although is not as much state action as a company town in Marsh v. Alabama, is enough state action to invoke the Constitutional protections provided you can satisiy the relatedness and the inability to make the appeal on public property test. And we believe that on the facts here the Board has satisfied those tests.

Thank you.

Q Mr. Come, are you asking affirmance here on the reasoning of the Court of Appeals or on the Board's reasoning?

MR. COME: I would say on the reasoning of the Court of Appeals. I think that the Board's reasoning is not a model of clarity here. But I think that there's enough in the Board's opinion to indicate that although they expressed themselves perhaps--

Q Do you see any Chenery problem here?

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

Q Why?

MR. COME: Because I think that the Board's opinion indicates that although it said it was applying Babcock, it recognized that a different balance was called for here.

Q So, you do not think that the Court of Appeals' basis in fact is any different from the Board?

MR. COME: Not if the Board had the benefit of the Court of Appeals' opinion; I am quite sure that the Board would have embraced it.

Q That may be so, but Chenery says the Court of Appeals should not invent a new rule and then make the fact finding.

MR. COME: I know that that is the general rule, but there are exceptions, and I think that this is one of those that fits--

Q If there are not any, you mean that we ought to create one.

MR. COME: There are some, Your Honor, particularly where you have--what you have here really is an interpretation of two recent decisions of this Court, and this Court is certainly in the best position to make that interpretation.

Q That is on the rules, not the facts.

MR. COME: What is that?

Q It depends on what the rule is, not the facts.

MR. COME: But if you interpret Lloyd and Central Hardware as the Fifth Circuit did, the Board has made adequate fact findings to fit within that rule.

Q You are now telling us that because you now like what the Court of Appeals did, consider the case as if the Board had already--

MR. COME: Yes, Your Honor, and the law develops that way. The Board learns from the courts of appeals and from this Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gold

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE RESPONDENT RWDSU

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

The petitioner's argument, as I understand it, is that the Babcock & Wilcox test, which we have been discussing, applies across the board no matter how one would denominate the property for Constitutional purposes, whether it would be a purely private, the intermediate public-private type of property at issue in Logan Valley and Lloyd, at least in the Constitutional context that those cases arose, or the purely public private property, if I can call it that, of Marsh and other cases like that.

Q Do you understand that Logan Valley created some intermediate twilight zone kind of situation? I do not think I would have joined the Logan Valley opinion if I had understood it that way. I thought he equated it with Marsh v. Alabama.

MR. GOLD: That was my understanding, Mr. Justice Stewart. We participated in that case. But, as you can appreciate, we try to learn from the subsequent decisions, and the lesson that I believe has to be drawn from the majority opinion is that--

Q Which case?

MR. GOLD: In Lloyd v. Tanner.

Q I was talking about Logan Valley.

MR. GOLD: I agree fully. As I read Logan Valley, it equated the situation in Marsh and the situation in--that was before the Court at that time. I can only read the majority opinion, however, in Lloyd to reach a different result, and that is why there is a very interesting recent case in which Judge Tuttle wrote the opinion which the petitioner cites in his reply brief, migrant workers. It is in 519 Fed. 2nd. Judge Tuttle carves up the area into three different categories of this type and holds that in that case the company town is not completely dead as we had thought but there was one in existence. This is not the rule that I would argue for. I only say that is my understanding of--

Q What you are faced with.

MR. GOLD: Yes.

Q How do you say Lloyd created a different rule from Logan?

MR. GOLD: My understanding, Mr. Justice White, of Marsh is that you do not have to show that the message that you are communicating is one which is directly related to the store in front of which you are standing or to the general shopping center area. I would assume that after Lloyd, if antiwar protesters had appeared in Chickasaw and Chickasaw was still a company town, that they would have had a First Amendment right

to distribute their handbills in Chickasaw just the way the Jehovah's Witness did.

But my understanding of Lloyd is that Lloyd does not overrule Logan Valley but rather states that the property is not as fully dedicated to the public and that there are First Amendment rights which are recognized, but they are narrow. You have to have speech which is directly related to the functions and purposes of the shopping center. And that is why I think, as I understand for Constitutional purposes, there are three different types of property that we are discussing, at least functionally and when we discuss them in terms of First Amendment rights.

But the point I wanted to make is that we accept--

Q But Logan saved those situations where it might be said that the activities being engaged in were not related to the uses to which the shopping center was dedicated.

MR. GOLD: It saved it as an open question.

Q It did not purport to say then that Logan's rationale would apply where the activity was not related.

MR. GOLD: I do not disagree with that.

Q What is the difference between that and Lloyd? Lloyd deals with it but it is not inconsistent.

MR. GOLD: Mr. Justice White, I did not mean to imply that Lloyd was inconsistent with Logan. I meant to imply that there is language in Logan which would have indicated that the

question saved in Logan would receive an affirmative answer when it was posed. That was not the case when the question was finally posed. So, now I was saying to Mr. Justice Stewart I understand there to be a difference between a company town and a shopping center such as Logan or Lloyd for First Amendment purposes.

The question before us here is whether there is three types of property or more when we are dealing with Section 7 and the National Labor Relations Act. Our view of the case is that we start by answering the petitioner on his own premise, which is that all these types of property are the same, the factory in Babcock & Wilcox and the shopping center in this case and in Logan and Central Hardware and Lloyd. And our view is that Babcock & Wilcox teaches that in a situation in which entre is sought for the purpose of communicating with employees about whether or not they should become organized, the act is essentially neutral as to where the activity takes place and that the basic point of Babcock & Wilcox is that the property rights are not absolute, the National Labor Relations Act enacts its own system which displaces private rights on occasion. That had also been the lesson of Republic Aviation. It is the lesson in such cases as Lynn and Letter Carriers v. Austin when you talk about the right of reputation. That what was necessary was to draw the fair inferences out of the statute as to when private property would be displaced.

Q Mr. Come said he did not think there was any other adequate means of communication, but he did not treat the specifics mentioned by Mr. Cohen. Do you have any comment on those alternatives?

MR. GOLD: Yes. We have two basic points that I would make on the alternatives. First, as I was coming to here, we deal not with organizing activity of the type that was at stake in Babcock & Wilcox but with picketing in support of an economic strike at the struck employer's facility.

We know from what this Court has said and from what Section 7 says that Congress did not merely give a right to picket somewhere. It had in mind that employers could continue to operate when they were faced with a strike and that unions would have the countervailing record of peaceful, non-obstucting, non-obstructed picketing at the location in which they would attempt to convince those who were approaching the situs to buy or sell or otherwise contribute to the day to day activities of the employer, that they should not do so, and this is the balance that the act strikes.

And it is our view, first of all, Mr. Chief Justice, that that is a right as a matter of law and that just as this Court--

Q And is to do this kind of picketing at the situs--

MR. GOLD: Right.

Q --the business situs.

MR. GOLD: At the business situs. In the words of the Steelworkers case, at the entrance to the struck facility. That is where you have a fair chance to employ this countervailing method, not somewhere far away where, as even Mr. Cohen acknowledged, if I understand his answer to your question, I believe, the message is diffused and somebody going by with his windows rolled up in Atlanta if it is hot or cold--because it is air conditioned most probably if it is hot--but so that he has some chance to see the sign, see what the message is, and make a determination whether he is going to shop at Butler's or is not going to shop at Butler's. We think that is what Congress had in mind. That is the classic confrontation of struggle in the economic strike. We think that the fair reading of cases such as the Steelworkers case is that this particular place is the preferred place at which to carry on that activity, and we think from cases like American Ship and from Insurance Agents that it is not for the Board or a court to say that there may be some other way to do it, that the union does not need this right, that the employer ought to be safeguarded from it. We think that is the place, and we think the inquiry is, Is this the entranceway? We think that that is a functional question. Is this the place at the site where you have a fair opportunity to get your message to the employer?

And so our first answer, as I have tried to indicate,

is that we believe that in this circumstance you do not apply Babcock & Wilcox, which dealt with quite a different phenomenon and where you have a different statutory matrix and you draw diffefent inferences from the statute, but you deal with the particular Section 7 right that we have here at stake. We think that Congress has spoken with specificity. We think that the only way for Congress's will to be carried out is to say that property rights give way to the extent that it is necessary to allow people to have a fair opportunity to reach those who are approaching the site.

The second and perhaps even more long-winded answer I would have to the question you asked, Mr. Chief Justice, is to say that this Court has never had the opportunity since the Babcock & Wilcox case in 351 US to say what reasonable alternative means are.

Mr. Cohen says that as long as it is theoretically possible with the expenditure of almost infinite resources, at least from the union point of view, to reach people--

Q From the argument you just completed, we never get to the alternative.

MR. GOLD: No. It is our point of view that the basic lesson of Babcock & Wilcox is that you reach an accommodation which works the least destruction to the rights. As we understand the statute, in this situation as opposed to the Babcock & Wilcox situation, the statute is in neutral on where this

activity takes place.

Q It has defined the right and specified it.

MR. GOLD: That is right.

Q And that is to picket at the business site.

MR. GOLD: Right. And we do not think we can be stripped of our right to picket in support of our economic strike at that site, and we do not think that we can be relegated to taking out advertisements and so on if we can afford it.

Q Or even to move away 500 feet, where Mr. Cohen suggests.

MR. GOLD: That is right. And I would point out again, only if I understood him correctly because I am not positive I did, and I know he will have rebuttal time and will speak for himself--I understood him to admit that the message is diffused, it is not the same if one is five hundred thousand feet away at a place where vehicles are entering and so on, especially where you have 60 stores and all the other facts that are here.

Q Could I ask you--a single hardware store with a parking lot behind it, fronting on a public street, entrances in front and back--is it your position that the union would have the right to picket the back door as well as the front on the employer's parking lot?

MR. GOLD: Clearly I think we have the right to picket

in the front; and if customers were also entering in the back and if you had the same type of factual situation here, they were driving onto this lot and we could not reach them, I would give precisely the same answer. That is my position.

Q How about that Sears Roebuck example? You are familiar with that store, are you not?

MR. GOLD: Yes.

Q Or Lord and Taylor. You know how you have to go in there. It is all on private property. You go up ramps and you park, and I gather as many people come in from the parking lot which is elevated into the upper floors as come in from the front of the store. How about that? Could they picket up there?

MR. GOLD: I think it would be an improper and unfair definition of what the entranceway is to say that the only place they could picket would be out where the cars drive in off the public street with all the problems--

Q As I remember that Lord and Taylor thing, you are a block away for the ramp.

MR. GOLD: That is right. And there are walkways around the store as people exit from their cars and walk to the entranceways, and I think that is the entranceway.

Q Have there been any cases on this one? I had not realized that you could picket on the employer's own property if there was some alternative place to picket.

MR. GOLD: I think that is the question that is here. I do not think we know. That is why we are here.

Q You said the right to strike or rather to picket at a particular site was itself defined in the statute. Where is that definition? What statute and what language are you talking about?

MR. GOLD: It is not in haec verba. We draw the understanding out of this Court's opinions, most particularly Steelworkers.

Q I thought you said a moment ago it was defined in the statute.

MR. GOLD: No, I was saying that Section 7 gives the right to strike and picket and that Congress had certain things in mind when it granted that right; and, as this Court has recognized, one of the things it had in mind was that the picketing would take place at the entrance to the struck site. That is exactly what this Court said.

Q That is not what I understood you to say earlier.

MR. GOLD: I apologize if I was not clear. But I did not mean to imply that there is anything in haec verba in the statute. I am saying the statute was enacted against the background of a certain understanding, and that has been the understanding of this Court in cases such as the Steelworkers case.

Q Mr. Gold, do I understand you to say that this

type of picketing would have been valid on the parking lot at Central Hardware?

MR. GOLD: That would be the position that that I would argue for, Your Honor.

Q So, you draw the basic distinction between organizational activity and picketing directed towards the customers of the store?

MR. GOLD: In support of an economic strike, right.

In other words, I am seeking to answer the petitioner's argument on all fours. The petitioner argues that you do not draw the line between different types of property but have one test. I am saying, very well, we accept that, that we are drawing the fair inferences from the statute and in light of Steelworkers and the other cases, we think this is the fairest inference.

Q Your argument would get you in the store too then.

MR. GOLD: No, I do not think--

Q Why not? It is just the employer's property. Just picket inside the front door as the most accurate, most effective way of picketing.

MR. GOLD: No, because I do not think I could stand up here with a straight face and say that--

Q You are standing up here with a straight face just outside the door.

MR. GOLD: I think that is all the difference in the world.

Q There is only a glass door between you.

MR. GOLD: I take it that eventually one could argue to go inside the manager's office or anywhere else. I do not think that that is the fair inference. I do think the fair inference is that the employer could not by his property rights cut off your right to appeal to the customers to use this one weapon that Congress gave you.

Q On your own property?

MR. GOLD: Yes, on your own property.

Q You say the employer's property right must give way if it means that that gives you an effective way of operating.

MR. GOLD: In this instance, yes.

Q So, you would go inside the door too.

MR. GOLD: No, I would not ask to go inside the door.

Q Your time has run out, but I have just one question I would like to ask you. Do you support affirmance on the reasoning of the Court of Appeals?

MR. GOLD: I have a great deal of trouble, given all the changes that I--

Q I gather the answer is no, not completely.

MR. GOLD: Not completely.

Q Secondly, then what do you do with the Chenery

point?

MR. GOLD: On the Chenery point I would say that I would hope that the least that would come out of this case would be that the Court would articulate the standard that we have stated and remand it for a determination.

Q So, if we agree with you, we will have to remand, will we?

MR. GOLD: I would think that would be perfectly appropriate. I apologize; I never got to the second part of my answer to the Chief Justice.

Q We did not let you.

MR. CHIEF JUSTICE BURGER: Mr. Cohen, do you have something further?

REBUTTAL ARGUMENT OF MR. LAWRENCE M. COHEN, ESQ.,

ON BEHALF OF THE PETITIONER

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

The answer I think to the question that was asked of Mr. Gold is that this Court nor the Board nor the courts of appeal have never held what Mr. Gold now seeks, which is the proposition that a union has an absolute right to picket at the entrance to a struck plant. If the union was engaged in secondary activities at a common site, it could be relegated to a reserve gate. If there was a contractual no-strike clause, they could be relegated--not have a right to picket at the

struck plant.

I think the cases that are illustrative and the answer also to some of the hypotheticals asked of Mr. Come, are two board decisions which came out after Lloyd, after Central Hardware, and dealt with the precise type of question we have here, the Nichols case and the Visceglia case. In the Nichols case you had a small shopping center, five stores. They were contiguous stores. There was a parking lot. The union came out to the parking lot of the small stores and picketed 20 feet away from the entrance to one of the five stores to protest unfair labor practices that had been filed against one of the employers.

The Board in its decision said--

Q This is among the cases cited?

MR. COHEN: They are cited in my brief, yes.

Q What was just one of them?

MR. COHEN: Nichols is the first one as reported at 200 NLRB 1130. The Board in its decision said--

Q What was the second one?

MR. COHEN: Visceglia dba Peddie, P-e-d-d-i-e, Building, and that is reported at 203 NLRB, number 27, and it has been enforcement denied by the Third Circuit.

Q Would you spell that first word.

MR. COHEN: V-i-s-c-e-g-l-i-a.

Q Enforcement denied?

MR. COHEN: Enforcement denied. And enforcement was denied because, if I could explain the facts in the Nichols case--the Board in applying the picketing situation involving a store in a small shopping center, said that "As I understand in Central Hardware"--this is the administrative law judge's opinion which was adopted by the Board--"an employer may violate Section 81 by denying a union the right to engage in organizational activities on private property"--and that encompassed picketing here, they said. "That result will follow only if acts are shown to meet the criteria enunciated in Babcock & Wilcox. As the general counsel offered no evidence that would bring the case within Babcock & Wilcox criteria, it follows the complaint must be dismissed."

In Visceglia you had an employer located in a big industrial park. The union came onto the private roads of the industrial park. It was an economic strike against that employer. It picketed at the entrance to that employer's plant. The Board concluded that it was a Babcock & Wilcox case. It said in so many words: "For the reasons expressed in Central Hardware, we find that principles of Babcock & Wilcox, rather than Logan Valley, are applicable."

The Board found that the Babcock test had been met for many of the reasons that Mr. Gold indicated, but the Third Circuit reversed and said that is not Babcock & Wilcox, there are other reasonable alternatives, the Board did not consider

them, besides picketing, and therefore we dismiss the complaint, we find we deny enforcement because Babcock & Wilcox test has been met.

Q Mr. Gold would disagree with at least the first case, would he not?

MR. COHEN: I think he would disagree with both of them because he said there is an absolute right to picket. The point I wanted to make in response to Mr. Gold is that his position has been one that has never been accepted by any court. The Steelworkers case only said that it was not an 8(b)(4) secondary boycott violation. That is all the Court says. So, we do not even have to consider whether there was violence here. That is a matter for state law and for other provisions of the act. It is not a matter for 8(b)(4).

The answer I think is that picketing is one means of communication, not the only means of communication. It may be more effective in the union's mind. It may be more persuasive in many ways.

But it is not, under a Babcock analysis, which is what the Board has been applying, what we would apply in these cases. It is not the only answer.

The only difference between the Nichols case and the Visceglia case and the case that is at bar is the fact that those were smaller properties; they differed in size; they differed because they were clustered in a small--they were not

clustered in a shopping center; they differed in degree of openness. But this Court in Lloyd made it clear that that is a question of degree; it is not a question of principle, that there is difference between those cases and these cases as fundamental principles of law. And I think that is the point we make here today, that Babcock must apply to all types of property, cutting across the line because it is a Section 7 case, that if there is a Constitutional right under Lloyd, that is a different question altogether. And when you apply Babcock, you look to the question of all types of communication, not merely just a question of whether the union can picket at the struck plant.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:40 o'clock p.m. the case was submitted.]

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